DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-398

Title:	Department of Health and Human Services, et al., Petitioners v. Florida, et al.
Docketed:	September 28, 2011
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Nos.:	(11-11021, 11-11067)
Decision Date:	August 12, 2011

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 28 2011	Petition for a writ of certiorari filed. (Response due October 28, 2011)
Sep 28 2011	Appendix of Department of Health and Human Services, et al. filed.
Oct 7 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for private respondents. VIDED.
Oct 11 2011	Consent to the filing of amicus briefrs, in support of either party or of neither party, received from counsel for the petitioners, the Solicitor General. VIDED.
Oct 11 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for State Respondents, Florida, et al. VIDED.
Oct 14 2011	Brief of respondents, NFIB, Ahlburg, and Brown in response filed.
Oct 17 2011	Brief of State Respondents filed.
Oct 25 2011	Brief amicus curiae of America's Health Insurance Plans filed. VIDED.
Oct 25 2011	Brief amicus curiae of Chamber of Commerce of the United States of America filed. VIDED.
Oct 26 2011	DISTRIBUTED for Conference of November 10, 2011.
Oct 26 2011	Reply of petitioners Department of Health and Human Services, et al. filed. (Distributed)
Oct 27 2011	Brief amici curiae of American Hospital Association et al. filed. (Distributed)
Oct 28 2011	Brief amicus curiae of The California Endowment. filed. (Distributed)
Oct 28 2011	Brief amicus curiae of Western Center for Journalism filed. (Distributed)
Nov 8 2011	Letter of November 8, 2011, from the Solicitor General received. (Distributed)
Nov 14 2011	Petition GRANTED In addition to Question 1 presented by the petition, the parties are directed to brief and argue the following question: "Whether the suit brought by respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act is barred by the Anti-Injunction Act, 26 U. S. C. Sec. 7421(a)." A total of two hours is allotted for oral argument on Question 1. One hour is allotted for oral argument on the additional question.
Nov 15 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party,

received from counsel for the petitioners, the Solicitor General. VIDED.

Nov 16 2011 Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the National Federation of Independent Business, et al. VIDED

Nov 18 2011 Robert A. Long, Esquire, of Washington, D.C., is invited to brief and argue this case, as amicus curiae, in support of the position that the Anti-Injunction Act, 26 U.S.C. 7421(a), bars the suit brought by respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act, 26 U.S.C. 5000A.

Nov 22 2011 Consent to the filing of amicus curiae, briefs in support of either party or neither party, received from counsel for Florida, et al. VIDED

Dec 5 2011 Briefing proposal of the parties and Court-appointed amici curiae filed. VIDED

Dec 6 2011 Motion for leave to intervene filed by Association of American Physicians & Surgeons, Inc., et al.

Dec 7 2011 Letter from counsel for National Federation of Independent Business, et al. regarding Mary Brown received. (Distributed). VIDED

Dec 8 2011 Upon consideration of the letter of December 5, 2011, from the Solicitor General on behalf of the parties and the amici curiae invited to brief and argue these cases, the following briefing schedule is adopted. On the Minimum Coverage Provision issue (No. 11-398), the brief of the Solicitor General, not to exceed 16,500 words, is to be filed on or before Friday, January 6, 2012. The briefs of respondents, not to exceed 16,500 words, are to be filed on or before Monday, February 6, 2012. The reply brief, not to exceed 6,600 words, is to be filed on or before Wednesday, March 7, 2012. On the Anti-Injunction Act issue (No. 11-398), the brief of the Court-appointed amicus curiae is to be filed on or before Friday, January 6, 2012. The briefs of the Solicitor General and respondents are to be filed on or before Monday, February 6, 2012. Reply briefs of the Solicitor General and respondents are to be filed on or before Monday, February 27, 2012. The reply brief of the Court-appointed amicus curiae is to be filed on or before Monday, March 12, 2012. VIDED

Dec 8 2011 On the Severability issue (Nos. 11-393 and 11-400), the briefs of petitioners are to be filed on or before Friday, January 6, 2012. The brief of the Solicitor General is to be filed on or before Friday, January 27, 2012. The brief of the Court-appointed amicus curiae is to be filed on or before Friday, February 17, 2012. Reply briefs of the Solicitor General and petitioners are to be filed on or before Tuesday, March 13, 2012. On the Medicaid issue (No. 11-400), the brief of petitioners is to be filed on or before Tuesday, January 10, 2012. The brief of the Solicitor General is to be filed on or before Friday, February 10, 2012. The reply brief is to be filed on or before Monday, March 12, 2012. Other amici curiae shall file separate briefs on each issue they intend to address. The briefs shall be filed within the time allowed under Rule 37.3(a) of the Rules of this Court, except that amici curiae briefs addressing the Severability issue shall be filed on or before the due date for the brief of the party or Court-appointed amicus curiae whose position the brief is supporting. The parties and amici curiae shall identify on the cover of each brief the issue that is addressed in the brief. Amici curiae shall also identify on the cover of the brief the party or parties supported or whether the brief suggests affirmance or reversal, as required by Rule 37.3(a) of the Rules of this Court. VIDED

Dec 9 2011 Brief amicus curiae of Advocacy for Patients with Chronic Illness, Inc. (Minimum Coverage Provision) filed.

Dec 14 2011 Motion DISTRIBUTED for Conference of January 6, 2012.

Dec 19 2011 SET FOR ARGUMENT ON Monday, March 26, 2012 (Anti-Injunction Act).

Dec 19 2011 SET FOR ARGUMENT ON Tuesday, March 27, 2012 (Minimum Coverage Provision).

Dec 22 2011	Brief amicus curiae of AARP (Minimum Coverage Provision) filed.
Jan 4 2012	Motion for leave to add Dana Grimes and David Klemencic as additional petitioners in No. 11-393 and additional respondents in Nos. 11-398 and 11-400 filed by respondents National Federation of Independent Business, et al. VIDED.
Jan 6 2012	Joint appendix (Minimum Coverage Provision, Anti-Injunction Act, and Severability) filed. VIDED. (Statement of costs filed)
Jan 6 2012	Brief of petitioners Department of Health and Human Services, et al. (Minimum Coverage Provision) filed.
Jan 6 2012	Brief amici curiae of America's Health Insurance Plans and the Blue Cross Blue Shield Association (Severability) filed. VIDED. (Distributed)
Jan 6 2012	Brief of Long, Robert A. Court-appointed amicus curiae (Anti-Injunction Act) filed. (Distributed)
Jan 9 2012	Motion for leave to intervene filed by Association of American Physicians & Surgeons, Inc., et al. DENIED.
Jan 9 2012	Record received from U.S.C.A. for 11th Circuit. (1 box)
Jan 11 2012	CIRCULATED
Jan 11 2012	Brief amici curiae of David R. Riemer and Community Advocates (Minimum Coverage Provision) filed. (Distributed)
Jan 11 2012	Brief amici curiae of American Association of People with Disabilities, et al. (Minimum Coverage Provision) filed. (Distributed)
Jan 11 2012	Brief amici curiae of American Nurses Association, et al. (Minimum Coverage Provision) filed. (Distributed)
Jan 11 2012	Brief amici curiae of NAACP Legal Defense & Educational Fund, Inc., et al. (Minimum Coverage Provision) filed. (Distributed)
Jan 12 2012	Brief amici curiae of The American Cancer Society, et al. filed.(Minimum Coverage Provision) (Distributed)
Jan 12 2012	Brief amici curiae of Constitutional Law and Economics Professors (Minimum Coverage Provision) filed. (Distributed)
Jan 12 2012	Brief amici curiae of Economic Scholars (Minimum Coverage Provision) filed. (Distributed)
Jan 12 2012	Brief amici curiae of Mortimer Caplin and Sheldon Cohen in support of neither party (Anti-Injunction Act) filed. (Distributed)
Jan 12 2012	Brief amici curiae of State Legislators from all Fifty States, et al. (Minimum Coverage Provision) filed. (Distributed)
Jan 12 2012	Record received from U.S.D.C. for Northern District of Florida. (1 box) The remainder of the record is electronic.
Jan 13 2012	Brief amicus curiae of Blue Cross and Blue Shield of Massachusetts, Inc. (Minimum Coverage Provision) filed. (Distributed)
Jan 13 2012	Brief amici curiae of Constitutional Law Scholars (Minimum Coverage Provision) filed. (Distributed)
Jan 13 2012	Brief amici curiae of Maryland, et al. (Minimum Coverage Provision) filed. (Distributed)
Jan 13 2012	Brief amici curiae of 104 Health Law Professors (Minimum Coverage Provision) filed. (Distributed)
Jan 13 2012	Brief amici curiae of Lambda Legal Defense and Education Fund, Inc., et al. (Minimum Coverage Provision) filed. (Distributed)
Jan 13 2012	Brief amici curiae of Senate Majority Leader Harry Reid, et al. (Minimum Coverage

Provision) filed. (Distributed)

Jan 13 2012 Brief amicus curiae of The California Endowment (Minimum Coverage Provision) filed. (Distributed)

Jan 13 2012 Brief amicus curiae of Health Foundation of Greater Cincinnati in support of neither party (Minimum Coverage Provision) filed. (Distributed)

Jan 13 2012 Brief amici curiae of Law Professors Barry Friedman, Matthew Adler, et al. (Minimum Coverage Provision) filed. (Distributed)

Jan 13 2012 Brief amici curiae of National Women's Law Center, et al. (Minimum Coverage Provision) filed. (Distributed)

Jan 13 2012 Brief amicus curiae of California Public Employees' Retirement System (Minimum Coverage Provision) filed. (Distributed)

Jan 13 2012 Brief amicus curiae of Commonwealth of Massachusetts (Minimum Coverage Provision) filed. (Distributed)

Jan 13 2012 Brief amici curiae of American Hospital Association, et al. (Individual Mandate) filed. (Distributed)

Jan 13 2012 Brief amici curiae of Prescription Policy Choices, Professors of Law, and Professors of Health Policy (Minimum Coverage Provision) filed. (Distributed)

Jan 13 2012 Brief amici curiae of Child Advocacy Organizations (Minimum Coverage Provision) filed. (Distributed)

Jan 13 2012 Brief amici curiae of Health Care For All, Inc., et al. (Minimum Coverage Provision) filed. (Distributed)

Jan 13 2012 Brief amici curiae of Jewish Alliance for Law & Social Action, et al. (Minimum Coverage Provision) filed. (Distributed)

Jan 13 2012 Brief amici curiae of Small Business Majority Foundation, Inc., et al. (Minimum Coverage Provision) filed. (Distributed)

Jan 13 2012 Brief amicus curiae of Governor of Washington Christine Gregoire (Minimum Coverage Provision) filed. (Distributed)

Jan 13 2012 Brief amici curiae of Health Care Policy History Scholars (Minimum Coverage Provision) filed. (Distributed)

Jan 13 2012 Brief amici curiae of Tax Law Professors (Anti-Injunction Act) filed. (Distributed)

Jan 13 2012 Brief amicus curiae of Young Invincibles (Minimum Coverage Provision) filed. (Distributed)

Jan 13 2012 Brief amici curiae of Service Employees International Union and Change to Win (Minimum Coverage Provision) filed. (Distributed)

Jan 13 2012 Brief amici curiae of American Federation of Labor and Congress of Industrial Organizations (Minimum Coverage Provision) filed. (Distributed)

Jan 17 2012 Motion for leave to add Dana Grimes and David Klemencic as additional petitioners in No. 11-393 and additional respondents in Nos. 11-398 and 11-400 filed by National Federation of Independent Business, et al. GRANTED. VIDED.

Jan 19 2012 Brief amicus curiae of Citizens' Council for Health Freedom (Minimum Coverage Provision) filed. (Distributed)

Feb 3 2012 Motion for divided argument and enlargement of time for oral argument on the Anti-Injunction Act issue filed by respondents Kathleen Sebelius, Secretary of Health and Human Services, et al., joined by both Court-appointed counsel. VIDED.

Feb 3 2012 Motion for divided argument and enlargement of time for oral argument on the Anti-Injunction Act issue filed by Florida, et al. and National Federation of Independent

Business, et al. VIDED.

Feb 6 2012 Brief of respondents Private Respondents, NFIB, Ahlburg, and Brown (Anti-Injunction Act) filed. (Distributed)

Feb 6 2012 Brief of respondents Private Respondents, NFIB, Ahlburg, and Brown (Minimum Coverage Provision) filed. (Distributed)

Feb 6 2012 Brief of petitioners Department of Health and Human Services, et al. (Anti-Injunction) filed. (Distributed)

Feb 6 2012 Brief of respondents Florida, et al. (Anti-Injunction Act) filed. (Distributed)

Feb 6 2012 Brief of respondents Florida, et al. (Minimum Coverage Provision) filed. (Distributed)

Feb 6 2012 Brief amicus curiae of Missouri (Minimum Coverage) filed. (Distributed)

Feb 7 2012 Brief amicus curiae of Senator Rand Paul (Minimum Coverage Provision) filed. (Distributed)

Feb 7 2012 Brief amicus curiae of Liberty Legal Foundation (Minimum Coverage Provision) filed. (Distributed)

Feb 8 2012 Brief amici curiae of American Center for Law & Justice, et al. (Minimum Coverage Provision) filed. (Distributed)

Feb 8 2012 Brief amici curiae of American Center for Law & Justice, et al. (Anti-Injunction Act) filed. (Distributed)

Feb 8 2012 Brief amici curiae of Thomas More Law Center, et al. (Minimum Coverage Provision) filed. (Distributed)

Feb 8 2012 Brief amicus curiae of Stephen M. Trattner (Minimum Coverage Provision) filed. (Distributed)

Feb 9 2012 Brief amicus curiae of Egon Mittelmann, Esq. (Minimum Coverage Provision) filed. (Distributed)

Feb 9 2012 Brief amicus curiae of Oklahoma (Minimum Coverage Provision) filed. (Distributed)

Feb 9 2012 Brief amici curiae of State Chambers of Commerce and related organizations (Anti-Injunction Act) filed. (Distributed)

Feb 10 2012 Brief amici curiae of Liberty University, Inc., et al. (Minimum Coverage Provision) filed. (Distributed)

Feb 10 2012 Brief amicus curiae of Mountain States Legal Foundation (Minimum Coverage Provision) filed. (Distributed)

Feb 10 2012 Brief amici curiae of Liberty University, Inc., et al. (Anti-Injunction Act) filed. (Distributed)

Feb 10 2012 Brief amici curiae of Authors of The Origins of the Necessary and Proper Clause, et al. (Minimum Coverage Provision) filed. (Distributed)

Feb 10 2012 Brief amici curiae of Cato Institute (Anti-Injunction) (Distributed)

Feb 10 2012 Brief amicus curiae of Landmark Legal Foundation (Minimum Coverage Provision) filed. (Distributed)

Feb 10 2012 Brief amicus curiae of Employer Solutions Staffing Group LLC (Minimum Coverage) filed.

Feb 13 2012 Brief amici curiae of Virginia Delegate Bob Marshall, et al. (Minimum Coverage Provision) filed. (Distributed)

Feb 13 2012 Brief amici curiae of Former U.S. Department of Justice Officials (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amici curiae of Washington Legal Foundation, et al. (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amici curiae of Citizens and Legislators in the Fourteen Health Care Freedom States (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amicus curiae of Institute for Justice filed. (Minimum Coverage) (Distributed)

Feb 13 2012 Brief amici curiae of American Civi lRights Union, et al. (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amicus curiae of American Legislative Exchange Council (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amicus curiae of Commonwealth of Virginia (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amicus curiae of Cato Institute, et al. (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amici curiae of Members of the United States Senate (Minimum Coverage). (Distributed)

Feb 13 2012 Brief amici curiae of Catholic Vote, and Steven J. Willis (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amici curiae of Docs4PatientCare, et al. (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amicus curiae of Center for Fair Administration of Taxes (Anti-Injunction) filed. (Distributed)

Feb 13 2012 Brief amicus curiae of American Catholic Lawyers Association, Inc. (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amicus curiae of Speaker of the House John Boehner (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amici curiae of Association of American Physicians and Surgeons Inc., et al. (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amicus curiae of Foundation for Moral Law (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amicus curiae of Partnership for America (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amici curiae of American College of Pediatricians, et al. (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amicus curiae of Rutherford Institute (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amici curiae of HSA Coalition, Inc., et al. (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amicus curiae of Judicial Watch, Inc. filed. (Minimum Coverage)(Distributed)

Feb 13 2012 Brief amicus curiae of Independent Women's Forum (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amici curiae of Economists (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amici curiae of Single Payer Action, et al. (Minimum Coverage Provision) filed. (Distributed)

Feb 13 2012 Brief amicus curiae of 1851 Center for Constitutional Law (Minimum Coverage Provision) filed. (Distributed)

Feb 13 2012 Brief amicus curiae of Montana Shooting Sports Assn. (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amici curiae of Center for Constitutional Jurisprudence, et al. (Minimum Coverage) filed. (Distributed)

Feb 13 2012 Brief amicus curiae of Tax Foundation (Minimum Coverage Provision) filed. (Distributed)

Feb 13 2012 Brief amicus curiae of Texas Public Policy Foundation filed. (Minimum Coverage) (Distributed)

Feb 13 2012 Brief amicus curiae of Caesar Rodney Institute (Minimum Coverage) filed. (Distributed)

Feb 13 2012	Brief amicus curiae of Project Liberty (Minimum Coverage) filed. (Distributed)
Feb 13 2012	Brief amicus curiae of American Life League (Minimum Coverage) filed. (Distributed)
Feb 21 2012	Upon consideration of the motions pertaining to the allocation of oral argument time, the following allocation of oral argument time is adopted. On the Anti-Injunction Act issue (No. 11-398), the Court-appointed amicus curiae is allotted 40 minutes, the Solicitor General is allotted 30 minutes, and the respondents are allotted 20 minutes On the Minimum Coverage Provision issue (No. 11-398), the Solicitor General is allotted 60 minutes, respondents Florida, et al. are allotted 30 minutes, and respondents National Federation of Independent Business, et al. are allotted 30 minutes. On the Severability issue (Nos. 11-393 and 11-400), the petitioners are allotted 30 minutes, the Solicitor General is allotted 30 minutes, and the Court-appointed amicus curiae is allotted 30 minutes.On the Medicaid issue (No. 11-400), the petitioners are allotted 30 minutes, and the Solicitor General is allotted 30 minutes.
Feb 27 2012	Reply of petitioners Department of Health and Human Services, et al. (Anti-Injunction Act) filed. (Distributed)
Feb 27 2012	Reply of respondents Private Respondents, NFIB, Ahlburg, and Brown (Anti-Injunction Act) filed. (Distributed)
Feb 27 2012	Reply of State Respondents (Anti-Injunction) filed. (Distributed)
Mar 7 2012	Reply of petitioners Department of Health and Human Services, et al. (Minimum Coverage Provision) filed. (Distributed)
Mar 12 2012	Reply of Robert A. Long, Court-appointed amicus curiae supporting vacatur (Anti-Injunction) filed. (Distributed)
Mar 14 2012	Letter from the Solicitor General proposing to lodge 10 copies of the Government Printing Office s Compilation of the Patient Protection and Affordable Care Act. (Distributed)
Mar 17 2012	Motion for leave to intervene filed by David Boyle, and to add questions presented.
Mar 26 2012	Argued. (On the Anti-Injunction Act Issue) For Court-appointed amicus curiae: Robert A. Long, Washington, D. C. For petitioners: Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D. C. For respondents: Gregory G. Katsas, Washington, D. C.
Mar 27 2012	Argued. (On the Minimum Coverage Provision Issue) For petitioners: Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D. C. For respondents Florida, et al.: Paul D. Clement, Washington, D. C. For respondents Nat. Fed. Indep. Business, et al.; Michael A. Carvin, Washington, D. C.
Mar 28 2012	Motion DISTRIBUTED for Conference of April 13, 2012.
Apr 16 2012	Motion for leave to intervene filed by David Boyle DENIED.
Apr 25 2012	Letter received from National Federation of Independent Business (Distributed)
May 7 2012	Motion for reconsideration of motion for leave to intervene, and to add questions presented filed by David Boyle.
May 22 2012	Motion DISTRIBUTED for Conference of June 7, 2012.
Jun 11 2012	Motion of David Boyle for reconsideration of motion for leave to intervene DENIED. VIDED

PETITION FOR WRIT OF CERTIORARI

No. 11-398

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

BETH S. BRINKMANN
Deputy Assistant Attorney General

JOSEPH R. PALMORE
Assistant to the Solicitor General

MARK B. STERN
ALISA B. KLEIN
SAMANTHA L. CHAIFETZ
DANA KAERSVANG
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

GEORGE W. MADISON
General Counsel
Department of the Treasury
Washington, D.C. 20220

WILLIAM B. SCHULTZ
Acting General Counsel

KENNETH Y. CHOE
Deputy General Counsel
Department of Health and Human Services
Washington, D.C. 20201

QUESTIONS PRESENTED

Beginning in 2014, the minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, will require non-exempted individuals to maintain a minimum level of health insurance or pay a tax penalty. 26 U.S.C.A. 5000A. The question presented is:

1. Whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision.

Petitioners also suggest that the Court direct the parties to address the following question:

2. Whether the suit brought by respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act is barred by the Anti-Injunction Act, 26 U.S.C. 7421(a).

PARTIES TO THE PROCEEDING

Petitioners are the United States Department of Health and Human Services, the Secretary of the United States Department of Health and Human Services, the United States Department of the Treasury, the Secretary of the United States Department of Treasury, the United States Department of Labor, and the Secretary of the United States Department of Labor.

Respondents are Kaj Ahlburg; Terry E. Branstad, Governor of the State of Iowa, on behalf of the people of Iowa; Mary Brown; Commonwealth of Pennsylvania, by and through Thomas W. Corbett, Jr., Governor, and William H. Ryan, Jr., Acting Attorney General; National Federation of Independent Business; Bill Schuette, Attorney General of the State of Michigan, on behalf of the people of Michigan, State of Alabama, by and through Luther Strange, Attorney General; State of Alaska, by and through John J. Burns, Attorney General; State of Arizona, by and through Janice K. Brewer, Governor, and Thomas C. Horne, Attorney General; State of Colorado, by and through John W. Suthers, Attorney General; State of Florida, by and through Pam Bondi, Attorney General; State of Georgia, by and through Samuel S. Olens, Attorney General; State of Idaho, by and through Lawrence G. Wasden, Attorney General; State of Indiana, by and through Gregory F. Zoeller, Attorney General; State of Kansas, by and through Derek Schmidt, Attorney General; State of Louisiana, by and through James D. "Buddy" Caldwell, Attorney General; State of Maine, by and through William J. Schneider, Attorney General; State of Mississippi, by and through Haley Barbour, Governor; State of Nebraska, by and through Jon Bruning, Attorney General; State of Nevada, by and through Brian Sandoval, Governor; State

of North Dakota, by and through Wayne Stenejham, Attorney General; State of Ohio, by and through Michael DeWine, Attorney General; State of South Carolina, by and through Alan Wilson, Attorney General; State of South Dakota, by and through Marty J. Jackley, Attorney General; State of Texas, by and through Greg Abbott, Attorney General; State of Utah, by and through Mark L. Shurtleff, Attorney General; State of Washington, by and through Robert M. McKenna, Attorney General; State of Wisconsin, by and through J.B. Van Hollen, Attorney General; State of Wyoming, by and through Matthew H. Mead, Governor.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Constitutional and statutory provisions involved 2
Statement 2
Reasons for granting the petition 12
A. The court of appeals' conclusion that the minimum coverage provision is beyond Congress's Article I power warrants this Court's review 14
1. The decision below misconstrues Congress's Commerce Clause authority and disregards the nature of the health care market 14
2. Congress's taxing power provides independent authority for the enactment of the minimum coverage provision 26
3. The court of appeals' decision conflicts with a decision of the Sixth Circuit and involves a question of fundamental importance 29
B. The Court should address whether the Anti-Injunction Act bars this pre-enforcement challenge to the minimum coverage provision 32
Conclusion 34
Appendix A – Court of appeals decision (Aug. 12, 2011) .. 1a
Appendix B – Order granting summary judgment (Jan. 3, 2011) 274a
Appendix C – District court order (Mar. 3, 2011) 369a
Appendix D – Order on motion to dismiss (Oct. 14, 2010) 394a
Appendix E – Constitutional and statutory provisions 476a

TABLE OF AUTHORITIES

Cases: Page

Baldwin v. *Sebelius*, No. 10-56374, 2011 WL 3524287 (9th Cir. Aug. 12, 2011) 31

Bob Jones Univ. v. *Simon*, 416 U.S. 725 (1974) 33

Burroughs v. *United States*, 290 U.S. 534 (1934) 16

Consolidated Edison Co. v. *NLRB*, 305 U.S. 197 (1938) 20

Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) 29

Enochs v. *Williams Packing & Navigation Co.*, 370 U.S. 1 (1962) 33

Gonzales v. *Raich*, 545 U.S. 1 (2005) ..... *passim*

Helvering v. *Davis*, 301 U.S. 619 (1937) 33

Hodel v. *Indiana*, 452 U.S. 314 (1981) 25

Hodel v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) 16

Kinder v. *Geithner*, No. 1:10-cv-101, 2011 WL 1576721 (E.D. Mo. Apr. 26, 2011), appeal pending, No. 11-1973 (8th Cir. oral argument scheduled for Oct. 20, 2011) 31

Lawrence v. *State Tax Comm'n*, 286 U.S. 276 (1932) 26

Liberty Univ., Inc. v. *Geithner*, No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011) 21, 26, 28, 29, 30, 33

McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 14, 16, 17, 20

Cases—Continued: Page

Mead v. *Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011), appeal pending *sub nom. Seven-Sky* v. *Holder*, No. 11-5047 (D.C. Cir. argued Sept. 23, 2011) 31

NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) 15

Nelson v. *Sears, Roebuck & Co.*, 312 U.S. 359 (1941) 26, 28

New Jersey Physicians, Inc. v. *President of the United States*, No. 10-4600, 2011 WL 3366340 (3d Cir. Aug. 3, 2011) 31

Perez v. *United States*, 402 U.S. 146 (1971) 22

Preseault v. *ICC*, 494 U.S. 1 (1990) 24

Printz v. *United States*, 521 U.S. 898 (1997) 15

Sonzinsky v. *United States*, 300 U.S. 506 (1937) 27, 29

Steward Mach. Co. v. *Davis*, 301 U.S. 548 (1937) 26

Thomas More Law Ctr. v. *Obama*, No. 10-2388, 2011 WL 2556039 (6th Cir. June 29, 2011), petition for cert. pending, No. 11-117 (filed July 26, 2011) .. *passim*

United States v. *Comstock*, 130 S. Ct. 1949 (2010) ... 14, 16

United States v. *Darby*, 312 U.S. 100 (1941) 25

United States v. *Doremus*, 249 U.S. 86 (1919) 27

United States v. *Lopez*, 514 U.S. 549 (1995) 14, 15, 18, 24, 25

United States v. *Morrison*, 529 U.S. 598 (2000) 14, 24

United States v. *Sanchez*, 340 U.S. 42 (1950) 29

United States v. *Sotelo*, 436 U.S. 268 (1978) 28

United States v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) 24

Cases—Continued: Page

United States v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942) 17

Virginia ex rel. Cuccinelli v. *Sebelius*, No. 11-1057, 2011 WL 3925617 (4th Cir. Sept. 8, 2011) 31

Constitution and statutes:

U.S. Const. Art. I 10, 14

§ 8:

Cl. 1 25

Cl. 3 (Commerce Clause) . . . . . *passim*

Cl. 18 (Necessary and Proper Clause) 14

Anti-Injunction Act, 26 U.S.C. 7421(a) 8, 32

Emergency Medical Treatment and Labor Act, 42 U.S.C. 1395dd 7

Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 2

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 2

26 U.S.C. 106 28

26 U.S.C. 162 (2006 & Supp. III 2009) 28

26 U.S.C.A. 36B 3, 27

26 U.S.C.A. 45R 3, 27

26 U.S.C.A. 4980H 3, 27

26 U.S.C.A. 5000A 4, 26, 28

26 U.S.C.A. 5000A(a) 4, 27

26 U.S.C.A. 5000A(b)(2) 5, 26

26 U.S.C.A. 5000A(b)(3) 27

26 U.S.C.A. 5000A(b)(3)(B) 27

Statutes—Continued: Page

26 U.S.C.A. 5000A(c) 26
26 U.S.C.A. 5000A(c)(1) 5
26 U.S.C.A. 5000A(c)(2) 5
26 U.S.C.A. 5000A(e)(2) 5, 26
26 U.S.C.A. 5000A(f) 4
26 U.S.C.A. 5000A(g) 5, 26, 27
42 U.S.C.A. 300gg 4
42 U.S.C.A. 300gg-1(a) 4
42 U.S.C.A. 300gg-3(a) 4
42 U.S.C.A. 1396a(a)(10)(A)(i)(VIII) 3
42 U.S.C.A. 1396d(y)(1) 3, 4
42 U.S.C.A. 18031 3
42 U.S.C.A. 18091(a)(2)(A) 5, 6, 7
42 U.S.C.A. 18091(a)(2)(F) 6, 18
42 U.S.C.A. 18091(a)(2)(I) 7, 10, 24

Miscellaneous:

Matthew Buettgens et al., Urban Inst., *Why the Individual Mandate Matters* (Dec. 2010), www.rwjf.org/files/research/71601.pdf 23

CBO's March 2011 Estimate of the Effects of the Insurance Coverage Provisions Contained in the Patient Protection and Affordable Care Act (Mar. 18, 2011), www.cbo.gov/budget/factsheets/2011b/HealthInsuranceProvisions.pdf 5

Miscellaneous—Continued: Page

Centers for Medicare & Medicaid Servs., *2009 National Health Expenditure Data* (2011), http://www.cms.gov/NationalHealthExpendData/downloads/tables.pdf 6

Congressional Budget Office, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* (June 16, 2010), http://www.cbo.gov/ftpdocs/113xx/doc11379/Eliminate_Individual_Mandate_06_16.pdf 5, 23

Expanding Consumer Choice and Addressing "Adverse Selection" Concerns in Health Insurance: Hearing Before the Joint Economic Comm., 108th Cong., 2d Sess. (2004) 6

47 Million and Counting: Why the Health Care Marketplace Is Broken, Hearing Before the S. Comm. on Finance, 110th Cong., 2d Sess. (2008) 22

H.R. Rep. No. 241, 99th Cong., 1st Sess. Pt. 3 (1985) 7

Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to Nancy Pelosi, Speaker, House of Reps. (Mar. 20, 2010), www.cbo.gov/ftpdocs/113xx/doc11379/amendreconProp.pdf 27

In the Supreme Court of the United States

No. 11-398

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Department of Health and Human Services, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-273a) is not yet reported but is available at 2011 WL 3519178. The district court's opinion on the federal government's motion to dismiss (App. 394a-475a) is reported at 716 F. Supp. 2d 1120. The district court's opinion on the parties' cross-motions for summary judgment (App. 274a-368a) is reported at 780 F. Supp. 2d 1256. The district court's opinion entering a stay of its declaratory judgment (App. 369a-393a) is reported at 780 F. Supp. 2d 1307.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this petition. App. 476a-503a.

STATEMENT

1. Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Affordable Care Act or Act),[1] to address a profound and enduring crisis in the market for health care that accounts for more than 17% of the Nation's gross domestic product. Millions of people do not have health insurance yet actively participate in the health care market. They consume health care services for which they do not pay, and thus shift billions of dollars of health care costs to other market participants. The result is higher insurance premiums that, in turn, make insurance unaffordable to even greater numbers of people. At the same time, insurance companies use restrictive underwriting practices to deny coverage or charge more to millions of people because of pre-existing medical conditions.

a. In the Affordable Care Act, Congress addressed these problems through a comprehensive program of economic regulation and tax measures. The Act includes provisions designed to make affordable health insurance more widely available, to protect consumers from re-

---

[1] Amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

strictive insurance underwriting practices, and to reduce the uncompensated costs of medical care obtained by the uninsured.

First, the Act builds upon the existing nationwide system of employer-based health insurance that is the principal private mechanism for financing health care. The Act establishes new tax incentives for small businesses to purchase health insurance for their employees, 26 U.S.C.A. 45R,[2] and, under certain circumstances, prescribes tax penalties for large employers that do not offer adequate coverage to full-time employees, 26 U.S.C.A. 4980H (employer responsibility provision).

Second, the Act provides for the creation of health insurance exchanges to allow individuals, families, and small businesses to leverage their collective buying power to obtain health insurance at rates that are competitive with those of typical employer group plans. 42 U.S.C.A. 18031.

Third, the Act establishes federal tax credits to assist eligible households with incomes from 133% to 400% of the federal poverty level to purchase insurance through the exchanges. 26 U.S.C.A. 36B. In addition, the Act expands eligibility for Medicaid to cover individuals with income below 133% of the federal poverty level. 42 U.S.C.A. 1396a(a)(10)(A)(i)(VIII). The Act provides that the federal government will pay 100% of the expenditures required to cover these newly eligible Medicaid recipients through 2016. 42 U.S.C.A.1396d(y)(1). The federal government's share will then decline slightly and

---

[2] Because the Affordable Care Act has not yet been codified in the United States Code, this brief will cite to the United States Code Annotated (U.S.C.A.) for ease of reference. All such citations are either to the 2011 Edition or the 2011 Supplement of the U.S.C.A.

level off at 90% in 2020 and beyond—far above the usual federal matching rates under Medicaid. *Ibid.*

Fourth, the Act regulates insurers to prohibit industry practices that have prevented individuals from obtaining and maintaining health insurance. The Act will bar insurers from refusing coverage because of a pre-existing medical condition, 42 U.S.C.A. 300gg-1(a), 300gg-3(a) (the guaranteed-issue provision), thereby guaranteeing insurance to many previously unable to obtain it. The Act also bars insurers from charging higher premiums based on a person's medical history, 42 U.S.C.A. 300gg (the community-rating provision), requiring instead that premiums generally be based on community-wide criteria.

Fifth, the Act amends the Internal Revenue Code to provide that a non-exempted individual who fails to maintain a minimum level of health insurance must pay a tax penalty. 26 U.S.C.A. 5000A (the minimum coverage provision). That insurance requirement, which takes effect in 2014, 26 U.S.C.A. 5000A(a), may be satisfied through enrollment in an employer-sponsored insurance plan; an individual plan, including one offered through a new health insurance exchange; a grandfathered health plan; a government-sponsored program such as Medicare or Medicaid; or similar federally-recognized coverage, 26 U.S.C.A. 5000A(f).

The amount of the tax penalty owed under the minimum coverage provision is calculated as a percentage of household income, subject to a floor and capped at the price of forgone insurance coverage. The penalty is reported on the individual's federal income tax return and is assessed and collected in the same manner as certain other assessable tax penalties under the Internal Revenue Code. Individuals who are not required to file in-

come tax returns for a given year are not required to pay the tax penalty. 26 U.S.C.A. 5000A(b)(2), (c)(1) and (2), (e)(2) and (g).

The Congressional Budget Office (CBO) has projected that, by 2017, the Affordable Care Act will reduce the number of non-elderly individuals without insurance by about 33 million. *CBO's March 2011 Estimate of the Effects of the Insurance Coverage Provisions Contained in the Patient Protection and Affordable Care Act* 1 (Mar. 18, 2011). The CBO has attributed approximately half of the projected decrease in the number of non-elderly uninsured—16 million people—to the minimum coverage provision. CBO, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* 2 (June 16, 2010) (*Eliminating Individual Mandate*).

b. Congress expressly found that the minimum coverage provision "regulates activity that is commercial and economic in nature," namely "how and when health care is paid for, and when health insurance is purchased." 42 U.S.C.A. 18091(a)(2)(A). That assessment reflects a number of realities about the health care market.

First, participation in the market for health care is virtually universal. Nearly everyone obtains health care services at some point, and most do so each year. Moreover, every individual is always at risk of requiring health care, and the need for particularly expensive services is unpredictable. "Most medical expenses for people under 65" result "from the 'bolt-from-the-blue' event of an accident, a stroke, or a complication of pregnancy that we know will happen on average but whose victim we cannot (and they cannot) predict well in advance." *Expanding Consumer Choice and Addressing "Adverse Selection" Concerns in Health Insurance: Hearing Be-*

fore the Joint Economic Comm., 108th Cong., 2d Sess. 32 (2004) (Prof. Mark V. Pauly). Costs can mount rapidly for even the most common medical procedures, making it difficult for all, and impossible for many, to budget for such contingencies.

Because the timing and magnitude of health care expenses are so difficult to predict and thus give rise to an ever-present risk, health insurance is the customary means of financing health care purchases and protecting against the attendant risks. In 2009, payments by private and government insurers constituted 71% of national health care spending. Centers for Medicare & Medicaid Servs., *2009 National Health Expenditure Data*, Tbl. 3 (2011).

Yet millions of Americans do not have health insurance, either public or private, and instead attempt to self-insure. They actively participate in the health care market regardless of their ability to pay. When people "forego health insurance coverage and attempt to self-insure," they typically fail to pay the full cost of the services they consume, and they shift the costs of their uncompensated care—totaling $43 billion in 2008—to health care providers. 42 U.S.C.A. 18091(a)(2)(A) and (F). Congress found that providers in turn pass on a significant portion of those costs "to private insurers, which pass on the cost to families," increasing the average premium for insured families by "over $1,000 a year." 42 U.S.C.A. 18091(a)(2)(F).

This cost-shifting occurs in large part because, unlike in other markets, those who cannot afford to pay for emergency health care from commercial providers receive it anyway. Numerous state legislatures and courts, including those in a number of respondent States, have concluded that hospitals cannot properly

turn away people in need of emergency treatment. See H.R. Rep. No. 241, 99th Cong., 1st Sess. Pt. 3, at 5 (1985); App. 248a (Marcus, J., dissenting). Reflecting the same moral judgment, the federal Emergency Medical Treatment and Labor Act requires hospitals that participate in the Medicare program and offer emergency services to stabilize any patient who arrives with an emergency condition, regardless of whether the person has insurance or otherwise can pay. 42 U.S.C. 1395dd.

In addition to finding that the minimum coverage provision regulates economic activity having a substantial effect on interstate commerce, 42 U.S.C.A. 18091(a)(2)(A), Congress found that the provision is necessary to achieving the goals of the Act's guaranteed-issue and community-rating insurance reforms. Those provisions will require that insurers provide coverage and charge premiums without regard to a person's medical history. Evidence from economists, insurers, and state regulators established that, absent an ongoing requirement to maintain a minimum amount of coverage, that new ability to obtain insurance regardless of medical history, and at rates independent of health status, would enable "many individuals [to] wait to purchase health insurance until they needed care." 42 U.S.C.A. 18091(a)(2)(I). That dynamic would undermine the effective functioning of insurance markets. Accordingly, Congress found the minimum coverage requirement "essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of preexisting conditions can be sold." *Ibid.*

2. Respondents are two individuals, Mary Brown and Kaj Ahlburg; the National Federation of Independ-

ent Business (NFIB), of which Brown is a member; and 26 States. They filed suit in the Northern District of Florida, challenging the constitutionality of several provisions of the Affordable Care Act.

The district court determined that at least one individual respondent, Brown, has standing to challenge the minimum coverage provision because she does not currently have health insurance and must "make financial arrangements now to ensure compliance" with the minimum coverage provision in 2014. App. 292a. The court also held that two respondent States, Idaho and Utah, have standing to challenge the minimum coverage provision because they enacted statutes purporting to exempt their residents from it. App. 293a-295a. The district court also concluded that the Anti-Injunction Act, 26 U.S.C. 7421(a), does not bar this suit. App. 401a-425a.

Addressing the merits, the district court held that the minimum coverage provision is not a valid exercise of Congress's commerce or taxing powers. App. 278a n.4, 296a-350a, 401a-424a. The court rejected, however, the individual respondents' contention that the minimum coverage provision also violates substantive due process, App. 465a-468a, as well as the state respondents' challenges to the Medicaid eligibility expansion, App. 280a-288a, the provisions for establishing health insurance exchanges, App. 452a-455a, and, as applied to them as employers, the employer responsibility provision, App. 445a-451a. The court nonetheless held the entire Act invalid because it concluded that the minimum coverage provision could not be severed from any other provision in the statute. App. 350a-364a. The court stayed its declaratory judgment pending appellate review. App. 387a-392a.

3. a. A divided court of appeals affirmed in part and reversed in part. As a threshold matter, the court held that respondent Brown has standing to challenge the minimum coverage provision, but declined to decide whether the respondent States also have standing to challenge it, calling that a "difficult" question. App. 9a. On the merits, the court rejected the respondent States' challenge to the constitutionality of the expansion of Medicaid eligibility, App. 50a-63a, but held that the minimum coverage provision is not a valid exercise of Congress's commerce power, App. 63a-156a, or taxing power, App. 157a-172a. The court reversed the district court's conclusion that the entire Act is inseverable from the minimum coverage provision and held that the remainder of the Act could stand. App. 172a-186a.

The majority recognized that individuals without insurance participate in the health care market, and that, as a class, they annually consume billions of dollars of health care services for which they do not pay. App. 11a. The majority also recognized that the consumption of such uncompensated health care imposes a substantial burden on interstate commerce: health care providers shift the costs of uncompensated care to insurers, which in turn shift those costs to other consumers in the form of higher premiums. App. 11a-12a.

The majority further acknowledged (as respondents had conceded) that the Commerce Clause would plainly permit Congress to regulate the way people pay for health care services at the time that they obtain such services. App. 118a. The majority took issue only with the timing of the insurance requirement in the minimum coverage provision, declaring that provision invalid because it "does *not* regulate behavior at the point of consumption." *Ibid.* The majority declared that the mini-

mum coverage provision is "overinclusive in *when* it regulates: it conflates those who presently consume health care with those who will not consume health care for many years into the future." App. 119a.

In addition, the majority opined, Congress could have achieved its regulatory objectives without the minimum coverage provision. App. 127a-128a. In the majority's view, other provisions of the Act, such as the guaranteed-issue and community-rating requirements, will significantly reduce the number of uninsured persons and the costs they shift to other market participants. App. 127a-128a. The majority acknowledged Congress's finding that the minimum coverage provision is "essential" to the success of those other provisions. App. 148a (quoting 42 U.S.C.A. 18091a(2)(I)). And it also did not dispute the experience of state regulators, which demonstrated that, in the absence of a minimum-coverage requirement, individuals would often "delay purchasing private insurance until an acute medical need arises," thereby rendering their guaranteed-issue and community-rating reforms ineffective. App. 148a; see App. 230a-231a (Marcus, J., dissenting). The court nonetheless declined to uphold the minimum coverage provision as part of a "broader regulation of the insurance market." App. 148a.

The court of appeals also held that the minimum coverage provision is not a proper exercise of Congress's Article I taxing power. The court acknowledged that the provision amends the Internal Revenue Code to provide that non-exempted individuals who fail to maintain minimum coverage shall pay a penalty that is calculated as a percentage of their household incomes (above a flat dollar amount and below a cap), reported on their individual federal income tax returns, and assessed and col-

lected by the Internal Revenue Service. App. 38a, 44a-45a. And the court did not question projections that the minimum coverage provision will generate billions in revenue each year. App. 168a. The court nonetheless held that Congress's taxing power did not provide a constitutional basis for the provision because the Act uses the term "penalty," not "tax," to describe the assessment. App. 169a.

The court declared the minimum coverage provision severable from the rest of the Act. App. 186a. It concluded that the guaranteed-issue and community-rating provisions were capable of functioning independently and (together with the other provisions of the Act) would sufficiently advance the Act's "basic objective * * * to make health insurance coverage accessible and thereby to reduce the number of uninsured persons." App. 180a-186a.

b. Judge Marcus dissented from the majority's Commerce Clause ruling. His analysis relied in part on the Sixth Circuit's decision in *Thomas More Law Ctr.* v. *Obama*, No. 10-2388, 2011 WL 2556039 (June 29, 2011), petition for cert. pending, No. 11-117 (filed July 26, 2011), and, in particular, on Judge Sutton's concurring opinion in that case. Judge Marcus reasoned that the minimum coverage provision regulates "quintessentially economic conduct"—the timing and method by which individuals pay for health care. App. 189a, 194a-195a. He observed that "substantial numbers of uninsured Americans are currently active participants in the health care services market, and that many of these uninsured currently consume health care services for which they cannot or do not pay." App. 213a. He explained that "[t]his is, in every real and meaningful sense, classic economic *activity*, which, as Congress'

findings tell us, has a profound effect on commerce." *Ibid.*

Judge Marcus further explained that the minimum coverage provision is essential to the Act's guaranteed-issue and community-rating reforms because, without a requirement to obtain insurance, those new protections would allow people to delay the purchase of insurance until they develop acute medical needs. App. 196a, 230a-231a. Judge Marcus therefore reasoned that "Congress had more than 'a rational basis for concluding'" that the requirement was "essential to the success of the Act's concededly valid and quintessentially economic insurer reforms." App. 241a (quoting *Gonzales* v. *Raich*, 545 U.S. 1, 19 (2005)).

REASONS FOR GRANTING THE PETITION

The court of appeals has held unconstitutional a central provision of the Affordable Care Act, which represents the considered judgment of the elected Branches of Government—after years of study and deliberation—on how to address a crisis in the national health care market. That crisis has put the cost of health insurance beyond the reach of millions of Americans, and has denied coverage entirely to millions more. The Act is a comprehensive statute that builds on the system of private and public insurance to finance health care. It utilizes various regulatory and tax measures to reform insurance practices, extend coverage, and address other problems in the health care market.

The Act requires that non-exempted individuals finance their health care consumption through insurance, rather than rely on a combination of attempted self-insurance and the back-stop of care paid for by other market participants. The minimum coverage provision,

like the Act as a whole, thus regulates economic conduct that substantially affects interstate commerce. The provision is also integral to the rules Congress prescribed to end discriminatory insurance practices that deny coverage to, or increase rates for, millions of Americans with preexisting medical conditions. Further, the minimum coverage provision is effectuated by means of a penalty that operates as a tax, payable only by those who are required to file income tax returns and based on their adjusted gross income. For these reasons, the minimum coverage provision is squarely within Congress's power to regulate interstate commerce, lay and collect taxes, and enact legislation that is necessary and proper to effectuate its enumerated powers.

The court of appeals' contrary decision is fundamentally flawed and denies Congress the broad deference it is due in enacting laws to address the Nation's most pressing economic problems and set tax policy. The importance of the decision below—which strikes down "a central piece of a comprehensive economic regulatory scheme enacted by Congress," App. 189a (Marcus, J., dissenting), on a ground that has no basis in the Constitution's text or this Court's precedents—is manifest. Moreover, the court of appeals' conclusion that the minimum coverage provision lies outside Congress's commerce authority directly conflicts with a recent decision of the Sixth Circuit. See *Thomas More Law Ctr.* v. *Obama*, No. 10-2388, 2011 WL 2556039, at *8-*15 (June 29, 2011) (opinion of Martin, J.), *21-*33 (Sutton, J., concurring in the judgment) (*Thomas More*), petition for cert. pending, No. 11-117 (filed July 26, 2011). Review by this Court is plainly warranted.

A. The Court of Appeals' Conclusion That The Minimum Coverage Provision Is Beyond Congress's Article I Power Warrants This Court's Review

1. The decision below misconstrues Congress's Commerce Clause authority and disregards the nature of the health care market

The Constitution confers on Congress the power to "regulate Commerce * * * among the several States." Art. I, § 8, Cl. 3. That power includes the authority to regulate intrastate conduct that has "a substantial effect on interstate commerce." *Gonzales* v. *Raich*, 545 U.S. 1, 17 (2005). In reviewing the validity of Commerce Clause legislation, a court's task "is a modest one." *Id.* at 22. The court "need not determine" whether the regulated conduct, "taken in the aggregate, substantially affect[s] interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Ibid.* (quoting *United States* v. *Lopez*, 514 U.S. 549, 557 (1995)). In addition, by virtue of the Necessary and Proper Clause, Art. I, § 8, Cl. 18, "the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *United States* v. *Comstock*, 130 S. Ct. 1949, 1956 (2010) (quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 413, 418 (1819)). These principles reinforce the "presumption of constitutionality" this Court applies "when examining the scope of Congressional power." *Id.* at 1957 (quoting *United States* v. *Morrison*, 529 U.S. 598, 607 (2000)).

The minimum coverage provision is a valid exercise of Congress's Commerce power. It prescribes a rule that governs the manner in which individuals finance their participation in the health care market, and it does

so through the predominant means of financing in that market—insurance. It directly addresses the consequences of economic conduct that distorts the interstate markets for health care and health insurance—namely the attempt by millions of Americans to self-insure or rely on the back-stop of free care, and the billions of dollars in cost-shifting that conduct produces each year when the uninsured do not pay for the care they inevitably need and receive. See *Lopez*, 514 U.S. at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."). And it is necessary to make effective the insurance market reforms (guaranteed issue and community rating) that all agree Congress has the authority to impose.

Congress's enactment of the minimum coverage provision thus rests upon direct, tangible, and well-documented economic effects on interstate commerce (reflected in specific congressional findings), not effects "so indirect and remote that to embrace them * * * would effectually obliterate the distinction between what is national and what is local." *Lopez*, 514 U.S. at 556-557 (quoting *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). As Judge Sutton recognized, "[n]o one must 'pile inference upon inference,' *Lopez*, 514 U.S. at 567, to recognize that the national regulation of a $2.5 trillion industry, much of it financed through 'health insurance . . . sold by national or regional health insurance companies,' 42 U.S.C. 18091(a)(2)(B), is economic in nature." *Thomas More*, 2011 WL 2556039, at *25 (Sutton, J., concurring in the judgment). The provision does not intrude on the sovereignty of the States; it regulates private conduct, operating on individuals, not States. Cf. *Printz* v. *United States*, 521 U.S. 898, 904-

933 (1997). It addresses a problem individual States have had difficulty solving on their own in the absence of a nationally uniform insurance requirement. App. 231a (Marcus, J., dissenting); see *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 281-282 (1981). It is an integral part of a comprehensive regulatory scheme that the Commerce power plainly authorizes Congress to enact. *Raich*, 545 U.S. at 15-22. And it violates no other substantive constitutional limitation.

Indeed, the court of appeals, like respondents, did not dispute that the Constitution provides Congress with the authority to pursue the ends the minimum coverage provision seeks to achieve. The objection was to the particular means Congress has chosen—the decision to prescribe a general insurance requirement rather than regulating "at the point of consumption" by denying care to (or imposing a financial penalty on) individuals without insurance. App. 118a; App. 207a (Marcus, J., dissenting). But respondents have identified nothing in this Court's precedents that would deny Congress the authority to effectuate its objectives through the means of a minimum coverage provision, one that is appropriate and plainly adapted to Congress's concededly legitimate ends. See *McCulloch*, 17 U.S. (4 Wheat.) at 421. As this Court has repeatedly held, the Constitution "'addresse[s]' the 'choice of means' 'primarily . . . to the judgment of Congress.'" *Comstock*, 130 S. Ct. at 1957 (brackets in original) (quoting *Burroughs* v. *United States*, 290 U.S. 534, 547-548 (1934)); see also *Raich*, 545 U.S. at 36 (Scalia, J., concurring in the judgment) ("[W]here Congress has the authority to enact a regulation of interstate commerce, 'it possesses every power needed to make that regulation effective.'") (quoting

United States v. *Wrightwood Dairy Co.*, 315 U.S. 110, 118-119 (1942)). Accordingly, there is no basis for concluding that the minimum coverage provision exceeds Congress's commerce power.

a. Participation in the health care market is virtually universal, and individuals (including the uninsured) are always at risk of needing unanticipated care. That participation may be paid for (and that risk covered) in one of two ways—either through insurance, or through attempted self-insurance with the back-stop of uncompensated care. *Thomas More*, 2011 WL 2556039, at *29 (Sutton, J., concurring in the judgment). The minimum coverage provision thus regulates the way participants in the health care market finance the services they consume. App. 213a-214a (Marcus, J., dissenting). And it does so in an entirely ordinary and appropriate way; because "health care costs are inevitable, unpredictable, and often staggeringly high," services in the health care market, "unlike other markets, [are] paid for predominantly through the mechanism of insurance." App. 246a (Marcus, J., dissenting); cf. *McCulloch*, 17 U.S. (4 Wheat.) at 409 ("[T]he powers given to the government imply the ordinary means of execution.").

Congress had far more than a rational basis for concluding that the economic conduct it was regulating had a substantial effect on interstate commerce. Individuals without insurance actively participate in the health care market, but they pay only a fraction of the cost of the services they consume. App. 193a-194a, 211a-213a (Marcus, J., dissenting). On average, the uninsured pay only 37% of their health care costs out of pocket, and third parties, such as government programs and charities, pay another 26% on their behalf. App. 193a (Marcus, J., dis-

senting). "The remaining costs are uncompensated—they are borne by health care providers and are passed on in the form of increased premiums to individuals who already participate in the insurance market." App. 193a-194a (Marcus, J., dissenting). In 2008, the uninsured consumed approximately $116 billion in health care services, including $43 billion worth of care for which the providers were not compensated. App. 194a, 212a (Marcus, J., dissenting) (citing 42 U.S.C.A. 18091(a)(2)(F)). Congress found that providers pass some of those costs on to insurers, which pass them on to insured consumers, raising average family premiums by $1000 in 2008. App. 194a (Marcus, J., dissenting) (citing 42 U.S.C.A. 18091(a)(2)(F)). "This cost shifting does not occur in other markets, even those in which we all participate." App. 251a (Marcus, J., dissenting).

b. Respondents contend that the minimum coverage provision is an impermissible means of addressing these substantial effects on interstate commerce because it regulates "inactivity," *e.g.*, States' C.A. Br. 20-21. No court of appeals has accepted that proposition, which lacks any foundation in the Constitution's text or this Court's precedents. See *Lopez*, 514 U.S. at 569-571 (Kennedy, J., concurring) (noting that the Court's commerce cases have rejected "semantic or formalistic categories" in favor of "broad principles of economic practicality"). As Judge Sutton explained in *Thomas More*, "[n]o one is inactive when deciding how to pay for health care, as self-insurance and private insurance are two forms of action for addressing the same risk." 2011 WL 2556039, at *29. Even the majority below was "not persuaded that the formalistic dichotomy of activity and inactivity provides a workable or persuasive enough answer in this case." App. 100a.

The court of appeals nevertheless invalidated the minimum coverage provision, based on a supposed constitutional rule about timing. The court explicitly recognized (and respondents expressly conceded below) that when the uninsured "consume health care, Congress may regulate their activity at the point of consumption." App. 118a; see App. 207a-208a (Marcus, J., dissenting). But the majority then went on to conclude that a requirement to obtain insurance could apply no earlier. App. 115a-119a. The majority thus essentially adopted the position urged by respondents, *i.e.*, that in lieu of the minimum coverage provision, Congress should have addressed the problem of cost-shifting in the interstate health care market by "imposing restrictions or penalties on individuals who attempt to consume health care services without insurance." App. 207a-208a (Marcus, J., dissenting) (quoting States C.A. Br. 31-32).[3]

The court of appeals' reasoning reflects both a serious departure from the appropriate deference due Congress in its choice of means and a basic misunderstanding of the way health insurance works. Even assuming

---

[3] The majority also declared the minimum coverage provision over-inclusive because it "regulates those who have not entered the health care market at all." App. 119a. Congress is permitted to regulate categorically, without making exceptions for atypical individuals. *Raich*, 545 U.S. at 23. Assuming *arguendo* that there are individuals who go "from cradle to grave" without consuming health care, the group is "surely minuscule." App. 216a, 218a (Marcus, J., dissenting) (quoting States C.A. Br. 29). The two individual plaintiffs in this case (Brown and Ahlburg) do not disavow participation in the health care market; they simply state that they have not had health insurance for several years. Resp.'s Mot. for Summ. J. Exh. 25, Paras. 1, 5; *id.* Exh. 26, Paras. 1, 4. The theoretical existence of individuals who never obtain health care would not in any event furnish a basis for invalidating the minimum coverage provision on its face.

that respondents or the court of appeals could identify a preferable regulatory alternative, that would provide no basis to invalidate the one that Congress chose. "The relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power." *Raich*, 545 U.S. at 37 (Scalia, J., concurring in the judgment) (citation omitted); see *McCulloch*, 17 U.S. (4 Wheat.) at 421 ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

In *Thomas More*, Judge Sutton explained why the timing of the minimum coverage provision's application (which the court of appeals here viewed as dispositive) is in fact immaterial from a constitutional perspective. 2011 WL 2556039, at *30. "Requiring insurance today and requiring it at a future point of sale amount to policy differences in degree, not kind, and not the sort of policy differences removed from the political branches by the word 'proper' or for that matter 'necessary' or 'regulate' or 'commerce.'" *Ibid.* Moreover, respondents' preferred scheme "would impose a federal condition (ability to pay) on the consumption of a service bound up in federal commerce (medical care)." *Ibid.* Such a condition "would be at least as coercive as the individual mandate, and arguably more so." *Ibid.*

It has long been settled that the "exertion of federal power" under the Commerce Clause need not "await the disruption of * * * commerce." *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 222 (1938). Instead, "Congress [is] entitled to provide reasonable preventive measures." *Ibid.* The Court applied that principle in *Raich*.

Like respondents here, the plaintiff in that case (a grower of homegrown marijuana for personal medical consumption) claimed that Congress could not regulate her because she was "entirely separated from the market." 545 U.S. at 30 (citation omitted). The Court rejected that artificial limit on Congress's commerce power, see *id.* at 25-33, because "marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market," *id.* at 40 (Scalia, J., concurring in the judgment). The same principle applies here. Because of human susceptibility to disease and accident, we are all "never more than an instant" (*ibid.*) from the "point of consumption" of health care (App. 118a). Nothing in the Commerce Clause requires Congress to withhold federal regulation until that moment. App. 210a (Marcus, J., dissenting) (Commerce Clause does not "requir[e] Congress to wait until the cost-shifting problem materializes for each uninsured person before it may regulate the uninsured as a class."); see *Liberty University, Inc.* v. *Geithner*, No. 10-2347, 2011 WL 3962915, at *41 (4th Cir. Sept. 8, 2011) (Davis, J., dissenting) (*Liberty University*).

Indeed, the court of appeals' focus on the point of "consumption" disregards the economic rationale for insurance, which, by its nature, must be obtained before medical care is needed. "Health insurance is a mechanism for spreading the costs of that medical care across people or over time, from a period when the cost would be overwhelming to periods when costs are more manageable." App. 197a (Marcus, J., dissenting) (quoting C.A. Econ. Scholars Amicus Br. Supporting the Federal Government 12). Common sense, experience, and economic analysis show that a "health insurance market could never survive or even form if people could buy

their insurance on the way to the hospital." *47 Million and Counting: Why the Health Care Marketplace Is Broken: Hearing Before the S. Comm. on Finance*, 110th Cong., 2d Sess. 52 (2008) (Prof. Mark A. Hall).

The court of appeals' exclusive focus on the point of future consumption also ignores the reality that insurance rates are calculated on the basis of the *present* risk that such future expenses will occur. The risk of substantial medical expenses is universal, and few who attempt to self-insure can come close to covering the full expenses they would incur if the risk were to materialize. As a result, the present premiums others pay must cover the risk of the uninsured. The uninsured thus externalize the cost of their present medical risk to others every day, not at some indeterminate future time, and they similarly externalize the cost of maintaining the medical infrastructure that will be available to them when needed. The minimum coverage provision simply ensures that individuals who can afford insurance (and are otherwise non-exempted) will pay for the health care services they consume and the risks to which they are exposed, rather than shift those costs and risks to others, now and in the future. See *Thomas More*, 2011 WL 2556039, at *24 (Sutton, J., concurring in the judgment) ("Faced with $43 billion in uncompensated care, Congress reasonably could require *all* covered individuals to pay for health care now so that money would be available later to pay for *all* care as the need arises.").

The fact that some of the uninsured may not generate uncompensated costs in a particular month or year provides no basis for invalidating the statute. "When Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Raich*, 545 U.S. at 17 (quoting *Perez* v.

United States, 402 U.S. 146, 154 (1971)). Accordingly, Congress was not required to predict, person-by-person, who among the uninsured will receive uncompensated medical services in a given month or year, and it would be infeasible to do so. App. 215a (Marcus, J., dissenting). It is, rather, the very nature of insurance—the customary means of financing health care—to address such risks in the aggregate.

c. Instead of deferring to Congress's policy judgments, the court of appeals majority made its own independent judgment that the minimum coverage provision will not adequately accomplish Congress's objective of reducing cost-shifting because of its exemptions and enforcement mechanisms. App. 151a-152a. That analysis "looks startlingly like strict scrutiny review," App. 218a (Marcus, J., dissenting), even though "[t]he courts do not apply strict scrutiny to commerce clause legislation and require only an 'appropriate' or 'reasonable' 'fit' between means and ends," *Thomas More*, 2011 WL 2556039, at *31 (Sutton, J., concurring in the judgment).

Based on an extensive legislative record, Congress reasonably concluded that the minimum coverage provision will mitigate the problem of cost-shifting in the health care market. Indeed, the CBO has estimated that, without the minimum coverage provision, there would be 16 million more people without insurance in 2019. *Eliminating the Individual Mandate* 2; see Matthew Buettgens, et al., Urban Inst., *Why the Individual Mandate Matters* 1 (Dec. 2010) (concluding that uncompensated care would decline by only $14.7 billion if the Act contained no minimum coverage provision). At the very least, the CBO's analysis demonstrates that Congress's determination that the minimum coverage provision will effectively reduce the number of uninsured in-

dividuals was reasonable. The court of appeals should not have substituted its judgment for that of Congress. See *Thomas More*, 2011 WL 2556039, at *33 (Sutton, J., concurring in the judgment) ("Time assuredly will bring to light the policy strengths and weaknesses of using the [minimum coverage provision] as part of this national legislation, allowing the peoples' political representatives, rather than their judges, to have the primary say over its utility."); see also *Preseault* v. *ICC*, 494 U.S. 1, 18-19 (1990).

d. The minimum coverage provision is also "necessary and proper for the regulation of interstate commerce"—and distinguishable from the statutes in *Lopez* and *Morrison*—because it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Raich*, 545 U.S. at 36 (Scalia, J., concurring in the judgment) (quoting *Lopez*, 514 U.S. at 561); see App. 229a-232a (Marcus, J. dissenting); *Thomas More*, 2011 WL 2556039, at *12-*14 (Martin, J.). "Health care and the means of paying for it are 'quintessentially economic' in a way that possessing guns near schools and domestic violence are not." *Id.* at *25 (Sutton, J., concurring in the judgment) (citing *Lopez*, *supra*, and *Morrison*, *supra*). Moreover, Congress found that the minimum coverage provision was "essential" to the success of the measures it adopted to end insurance discrimination against those with pre-existing conditions. 42 U.S.C.A. 18091(a)(2)(I). Those insurance reforms are unquestionably within Congress's powers under the Commerce Clause. See *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 539-553 (1944). The soundness of Congress's judgment about what was required for its insurance reforms to

succeed is supported by the experience of States that tried—and failed—to effectively end such practices without an insurance requirement. See App. 230a-231a (Marcus, J., dissenting). Indeed, no party to this case has suggested that the guaranteed-issue and community-rating requirements could function effectively without the minimum coverage provision.

The court of appeals thought that the minimum coverage provision could not be upheld as an essential part of a larger regulatory program because that constitutional rationale is inapplicable to "facial" challenges, such as the one at issue in this case and in *Lopez*. App. 144a-145a. *Lopez* itself, however, suggested just the opposite. "Though the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated as 'an essential part of a larger regulatory activity, in which the regulatory scheme could be undercut unless the intrastate activity was regulated.'" *Raich*, 545 U.S. at 36 (Scalia, J., concurring in the judgment) (quoting *Lopez*, 514 U.S. at 561). The court of appeals also stated that *Raich* was "the only instance in which a statute has been sustained by the larger regulatory scheme doctrine," and it perceived that the doctrine was limited to that case's facts, *i.e.*, when "Congress [seeks] to eliminate *all* interstate traffic in [a] commodity." App. 146a. That is doubly incorrect. The Court relied on this doctrine to uphold statutes well before *Raich*, and it did so in a variety of regulatory contexts not involving the prohibition of trade in a commodity. See, *e.g.*, 545 U.S. at 37-38 (Scalia, J., concurring in the judgment) (discussing *United States* v. *Darby*, 312 U.S. 100, 125 (1941)); *Hodel* v. *Indiana*, 452 U.S. 314, 329 n.17 (1981).

2. *Congress's taxing power provides independent authority for the enactment of the minimum coverage provision*

Congress's constitutional power "[t]o lay and collect Taxes, Duties, Imposts and Excises," Art. I, § 8, Cl. 1, provides an independent basis to uphold the Act's minimum coverage provision. The taxing power is "comprehensive," *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 581-582 (1937), and, in "passing on the constitutionality of a tax law," a court is "concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941) (quoting *Lawrence* v. *State Tax Comm'n*, 286 U.S. 276, 280 (1932)).

The "practical operation" of the minimum coverage provision is as a tax. *Nelson*, 312 U.S. at 363; accord *Liberty University*, 2011 WL 3962915, at *16-*22 (Wynn, J., concurring). The provision amends the Internal Revenue Code to provide that a non-exempted individual who fails to maintain a minimum level of coverage shall pay a tax penalty for each month that he fails to maintain that coverage. 26 U.S.C.A. 5000A. The amount of the penalty is calculated as a percentage of household income for federal income tax purposes, subject to a floor and a cap. 26 U.S.C.A. 5000A(c). The penalty is reported on the individual's federal income tax return for the taxable year, and is "assessed and collected in the same manner as" other assessable tax penalties under the Internal Revenue Code. 26 U.S.C.A. 5000A(b)(2) and (g). Individuals who are not required to file income tax returns for a given year are not required to pay the penalty. 26 U.S.C.A. 5000A(e)(2). A taxpayer's responsibility for family members depends on

their status as dependents under the Internal Revenue Code. 26 U.S.C.A. 5000A(a) and (b)(3). Taxpayers filing a joint tax return are jointly liable for the penalty. 26 U.S.C.A. 5000A(b)(3)(B). And the Secretary of the Treasury is empowered to enforce the penalty provision. 26 U.S.C.A. 5000A(g).

It is undisputed that the minimum coverage provision will be "productive of some revenue." *Sonzinsky* v. *United States*, 300 U.S. 506, 514 (1937). The CBO found that it will raise at least $4 billion a year in revenues for the general treasury. See Letter from Douglas Elmendorf, Director, CBO, to Nancy Pelosi, Speaker, House of Reps., Tbl. 4 (Mar. 20, 2010). The provision unquestionably bears "some reasonable relation" to the "raising of revenue," *United States* v. *Doremus*, 249 U.S. 86, 93-94 (1919), and it is therefore within Congress's taxing power.

This conclusion is reinforced by examining the broader statutory context. The minimum coverage provision is just one of numerous ways in which the Affordable Care Act amends the Internal Revenue Code to expand insurance coverage. The Act will provide tax credits for many individuals who purchase coverage through an exchange, see 26 U.S.C.A. 36B, and for eligible small businesses that provide coverage to their employees, 26 U.S.C.A. 45R. Under certain circumstances, it also provides for tax penalties for large employers that do not offer adequate coverage to full-time employees. 26 U.S.C.A. 4980H. Those provisions in turn build upon numerous pre-existing provisions of the Internal Revenue Code related to health insurance coverage.[4]

---

[4] Unlike most other forms of employee compensation, employer payments of health insurance premiums are generally excluded from

Each of those measures is unquestionably a proper exercise of the taxing power, and, in their practical effect, they are equivalent to the minimum coverage provision—they all use the tax code to provide financial incentives that favor health insurance coverage.

Indeed, just as deductions, exemptions, and credits operate to reduce a taxpayer's income tax liability based on the individual circumstances of the taxpayer, the minimum coverage penalty simply has the effect of increasing the taxpayer's total liability on his income tax return based on his own individual circumstances. In its practical operation, the minimum coverage provision is thus the mirror image of statutory provisions of the sort that have long been regarded as within Congress's broad discretion to determine the amount of tax owed, and falls equally within Congress's broad taxing power.

The court of appeals concluded that Congress did not intend to exercise its taxing power in enacting the minimum coverage provision because it referred to the assessment as a "penalty." App. 157a-172a; accord *Thomas More*, 2011 WL 3692915, at *17-*21. There is no such magic words test. See *Liberty University*, 2011 WL 3962915, at *17 (Wynn, J., concurring); see also *United States* v. *Sotelo*, 436 U.S. 268, 275 (1978) (funds owed by operation of Internal Revenue Code had "essential character as taxes" despite statutory label as "penalt[ies]"); *Nelson*, 312 U.S. at 363. Moreover, if Section 5000A can reasonably be interpreted as a valid exercise of the tax power—and it surely can be because it is fully integrated into the Internal Revenue Code, and is an ad-

---

an employee's income for purposes of both federal income tax and payroll taxes. See 26 U.S.C. 106. In addition, employers can deduct such premium payments as business expenses. 26 U.S.C. 162 (2006 & Supp. III 2009).

junct to the income tax—then the courts must adopt that interpretation, even if other interpretations of congressional intent are also reasonable. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The court of appeals noted that the goal of the minimum coverage provision is not to raise revenue, but to reduce the number of people who are uninsured. App. 164a. It is settled, however, that a tax "does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed." *United States* v. *Sanchez*, 340 U.S. 42, 44 (1950); see *Liberty University*, 2011 WL 3962916, at *17-*18 (Wynn, J., concurring). "Every tax is in some measure regulatory" in that "it interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky*, 300 U.S. at 513. So long as a statute is "productive of some revenue," Congress may exercise its taxing powers irrespective of any "collateral inquiry as to the measure of the regulatory effect of a tax." *Id.* at 514.

3. The court of appeals' decision conflicts with a decision of the Sixth Circuit and involves a question of fundamental importance

The court of appeals' conclusion that the minimum coverage provision exceeds Congress's power under the Commerce Clause conflicts with a contrary holding of the Sixth Circuit. See *Thomas More*, 2011 WL 2556039, at *1.[5] Although the Sixth Circuit issued its decision

---

[5] The court of appeals' Commerce Clause holding also conflicts with the views expressed by two members of the Fourth Circuit panel in *Liberty University*. Although that court found a constitutional challenge to the minimum coverage provision barred by the Anti-Injunction

approximately six weeks before the court of appeals' decision in this case, the majority here did not mention the Sixth Circuit's contrary view, much less respond to it.

Writing for himself in *Thomas More*, Judge Martin concluded that "the minimum coverage provision is facially constitutional under the Commerce Clause" because it regulates economic activity—"the financing of health care services, and specifically the practice of self-insuring for the cost of care"—with a substantial effect on interstate commerce—"driving up the cost of health care as well as * * * shifting costs to third parties." 2011 WL 2556039, at *11-*12. Judge Martin further concluded that "even if self-insuring for the cost of health care were not economic activity with a substantial effect on interstate commerce, Congress could still properly regulate the practice because the failure to do so would undercut its regulation of the larger interstate markets in health care delivery and health insurance." *Id.* at *12.

Judge Sutton, concurring in the judgment, concluded that the minimum coverage provision regulates the practice of self-insurance against health risk and observed that "[t]here are two ways to self-insure, and both, when aggregated, substantially affect interstate commerce." *Thomas More*, 2011 WL 2556039, at *24. "One option is to save money so that it is there when the need for health care arises. The other is to save nothing and to rely on something else—good fortune or the good graces

---

Act, see 2011 WL 3962915, at *4-*16, two members of the panel addressed the merits as well. See *id.* at *35-*47 (Davis, J., dissenting) (finding minimum coverage within commerce authority); *id.* at *16 (Wynn, J., concurring) ("I think that [Judge Davis's] position on the Commerce Clause is persuasive.").

of others—when the need arises." *Ibid.* In his view, "Congress reasonably could require *all* covered individuals to pay for health care now so that money would be available later to pay for *all* care as the need arises." *Ibid.*

Judge Sutton also rejected the contention that "the Commerce Clause contain[s] an action/inaction dichotomy that limits congressional power" but, in any event, found the distinction immaterial in this context because "[n]o one is inactive when deciding how to pay for health care, as self-insurance and private insurance are two forms of action for addressing the same risk. Each requires affirmative choices; one is no less active than the other." *Thomas More*, 2011 WL 2556039, at *27, *29. In sum, Judge Sutton concluded that "[i]f Congress has the power to regulate the national healthcare market, as all seem to agree, it is difficult to see why it lacks authority to regulate a unique feature of that market by requiring all to pay now in affordable premiums for what virtually none can pay later in the form of, say, $100,000 (or more) of medical bills prompted by a medical emergency." *Id.* at *30.

This Court's review is warranted to resolve the conflict in the circuits.[6] Review is especially appropriate

---

[6] One other case pending in a court of appeals squarely presents a constitutional challenge to the minimum coverage provision. See *Mead* v. *Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011), appeal pending *sub nom. Seven-Sky* v. *Holder*, No. 11-5047 (D.C. Cir. argued Sept. 23, 2011). In several other cases, courts of appeals have concluded that plaintiffs lacked standing to challenge the minimum coverage provision. See *Virginia ex rel. Cuccinelli* v. *Sebelius*, No. 11-1057, 2011 WL 3925617 (4th Cir. Sept. 8, 2011); *Baldwin* v. *Sebelius*, No. 10-56374, 2011 WL 3524287 (9th Cir. Aug. 12, 2011); *New Jersey Physicians, Inc.* v. *President of the United States*, No. 10-4600, 2011 WL 3366340 (3d Cir. Aug. 3, 2011); see also *Kinder* v. *Geithner*, No. 10-cv-00101, 2011 WL

because the court of appeals "str[uck] down as unconstitutional a central piece of a comprehensive economic regulatory scheme enacted by Congress" to address a matter of grave national importance. App. 189a (Marcus, J., dissenting).

B. The Court Should Address Whether The Anti-Injunction Act Bars This Pre-Enforcement Challenge To The Minimum Coverage Provision

We respectfully suggest that the Court direct the parties to address the applicability of the Anti-Injunction Act, 26 U.S.C. 7421(a), to respondents' challenge to the minimum coverage provision. Subject to certain exceptions, the Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." *Ibid.*

In the district court, the federal government moved to dismiss respondents' challenge to the minimum coverage provision on the ground that the Anti-Injunction Act barred it. The district court declined to dismiss on that basis, see App. 401a-425a, and the federal government did not challenge that ruling on appeal. In a supplemental brief requested by the Fourth Circuit, the federal government explained that it had reconsidered its position on this question and had "concluded that the [Anti-Injunction Act] does not foreclose the exercise of jurisdiction in these cases." Fed. Gov't Supplemental Br. at 2, *Liberty University*, *supra* (No. 10-2347). The govern-

---

1576721 (E.D. Mo. Apr. 26, 2011) (dismissing on standing grounds), appeal pending, No. 11-1973 (8th Cir. oral argument scheduled for Oct. 20, 2011).

ment also set out the legal basis for its position that the Anti-Injunction Act does not apply. See *id.* at 2-9.

The court of appeals in this case did not address the Anti-Injunction Act, but in two other cases circuit courts did so, reaching conflicting results. In *Thomas More*, the Sixth Circuit, consistent with the position of the United States on appeal in that case, unanimously held that "the Anti-Injunction Act d[id] not remove [its] jurisdiction to consider this claim." 2011 WL 2556039, at *8. In *Liberty University*, however, a divided panel of the Fourth Circuit held that the challenge before it was barred by the Anti-Injunction Act. See 2011 WL 3962915, at *4-*16.

The United States continues to believe that the Anti-Injunction Act does not bar these challenges to the minimum coverage provision. But the courts of appeals are now divided on the question. This Court has stated that "the object of [the Anti-Injunction Act] is to withdraw jurisdiction from the state and federal courts." *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962); see *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 749 (1974); but cf. *Helvering* v. *Davis*, 301 U.S. 619, 639-640 (1937) (accepting express waiver of Anti-Injunction Act by the United States). Under these circumstances, we believe the Court should consider the applicability of the Anti-Injunction Act along with the constitutional issues in this case. If, as we anticipate, respondents take the position that the Anti-Injunction Act does not bar this suit, the Court should also consider appointing an amicus to file a brief defending the position that the Anti-Injunction Act does bar this suit, as the majority held in

Liberty University.[7] In the event the Court finds the Anti-Injunction Act inapplicable, it can then decide the constitutional questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

TONY WEST
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

BETH S. BRINKMANN
Deputy Assistant Attorney General

JOSEPH R. PALMORE
Assistant to the Solicitor General

MARK B. STERN
ALISA B. KLEIN
SAMANTHA L. CHAIFETZ
DANA KAERSVANG
Attorneys

GEORGE W. MADISON
General Counsel
Department of the Treasury

WILLIAM B. SCHULTZ
Acting General Counsel

KENNETH Y. CHOE
Deputy General Counsel
Department of Health and Human Services

SEPTEMBER 2011

---

[7] If the Court grants a certiorari petition filed by the plaintiffs in *Liberty University* to challenge the Fourth Circuit's holding in that case, the Court could instead rely on briefing in that case to address the Anti-Injunction Act issue, perhaps appointing an amicus to defend the Fourth Circuit's judgment in that case. The respondents in this case could then file amicus briefs on the Anti-Injunction Act in *Liberty University*.

APPENDIX

No. 11-398

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

BETH S. BRINKMANN
Deputy Assistant Attorney General

JOSEPH R. PALMORE
Assistant to the Solicitor General

MARK B. STERN
ALISA B. KLEIN
SAMANTHA L. CHAIFETZ
DANA KAERSVANG
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

GEORGE W. MADISON
General Counsel
Department of the Treasury
Washington, D.C. 20220

WILLIAM B. SCHULTZ
Acting General Counsel

KENNETH Y. CHOE
Deputy General Counsel
Department of Health and Human Services
Washington, D.C. 20201

TABLE OF CONTENTS

Page

Appendix A — Court of appeals decision (Aug. 12, 2011) 1a

Appendix B — Order granting summary judgment (Jan. 3, 2011) 274a

Appendix C — District court order (Mar. 3, 2011) 369a

Appendix D — Order on motion to dismiss (Oct. 14, 2010) 394a

Appendix E — Constitutional and statutory provisions 476a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 11-11021 & 11-11067
D.C. Docket No. 3:10-cv-00091-RV-EMT

STATE OF FLORIDA, BY AND THROUGH ATTORNEY GENERAL, STATE OF SOUTH CAROLINA, BY AND THROUGH ATTORNEY GENERAL, STATE OF NEBRASKA, BY AND THROUGH ATTORNEY GENERAL, STATE OF TEXAS, BY AND THROUGH ATTORNEY GENERAL, STATE OF UTAH, BY AND THROUGH ATTORNEY GENERAL, ET AL., PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF THE TREASURY, SECRETARY OF THE UNITED STATES DEPARTMENT OF TREASURY, UNITED STATES DEPARTMENT OF LABOR, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, DEFENDANTS-APPELLANTS-CROSS-APPELLEES

[Aug. 12, 2011]

Appeals from the United States District Court
for the Northern District of Florida

Before DUBINA, Chief Judge, and HULL and MARCUS, Circuit Judges.

DUBINA, Chief Judge, and HULL, Circuit Judge:[1]

Soon after Congress passed the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010 ("HCERA"), Pub. L. No. 111-152, 124 Stat. 1029 (2010) (the "Act"), the plaintiffs brought this action challenging the Act's constitutionality. The plaintiffs are 26 states, private individuals Mary Brown and Kaj Ahlburg, and the National Federation of Independent Business ("NFIB") (collectively the "plaintiffs").[2] The defendants are the federal Health and Human Services ("HHS"), Treasury, and Labor Departments and their Secretaries (collectively the "government").

The district court granted summary judgment (1) to the government on the state plaintiffs' claim that the Act's expansion of Medicaid is unconstitutional and (2) to the plaintiffs on their claim that the Act's individual mandate—that individuals purchase and continu-

---

[1] This opinion was written jointly by Judges Dubina and Hull. *Cf. Waters v. Thomas*, 46 F.3d 1506, 1509 (11th Cir. 1995) (authored by Anderson and Carnes, J.J.) (citing *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.) (en banc) (authored by Vance and Anderson, J.J.), *cert. denied*, 479 U.S. 939, 107 S. Ct. 421 (1986)).

[2] The 26 state plaintiffs are Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming.

ously maintain health insurance from private companies[3]—is unconstitutional. The district court concluded that the individual mandate exceeded congressional authority under Article I of the Constitution because it was not enacted pursuant to Congress's tax power and it exceeded Congress's power under the Commerce Clause and the Necessary and Proper Clause. The district court also concluded that the individual mandate provision was not severable from the rest of the Act and declared the entire Act invalid.

The government appeals the district court's ruling that the individual mandate is unconstitutional and its severability holding. The state plaintiffs cross-appeal the district court's ruling on their Medicaid expansion claim. For the reasons that follow, we affirm in part and reverse in part.[4]

INTRODUCTION

Legal issues concerning the constitutionality of a legislative act present important but difficult questions for the courts. Here, that importance and difficulty are heightened because (1) the Act itself is 975 pages in the format published in the Public Laws;[5] (2) the district

---

[3] As explained later, unless the person is covered by a government-funded health program, such as Medicare, Medicaid, and others, the mandate is to purchase insurance from a private insurer.

[4] We review the district court's grant of summary judgment *de novo*. *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 995 (11th Cir. 1998). We review *de novo* a constitutional challenge to a statute. *United States v. Cunningham*, 607 F.3d 1264, 1266 (11th Cir.), *cert. denied*, 131 S. Ct. 482 (2010).

[5] Pub. L. No. 111-148, 124 Stat. 119 (2010), Pub. L. No. 111-152, 124 Stat. 1029 (2010). Some of the sections of the Act have not yet been

court, agreeing with the plaintiffs, held *all* of the Act was unconstitutional; and (3) on appeal, the government argues *all* of the Act is constitutional.

We, as all federal courts, must begin with a presumption of constitutionality, meaning that "we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607, 120 S. Ct. 1740, 1748 (2000).

As an initial matter, to know whether a legislative act is constitutional requires knowing what is in the Act. Accordingly, our task is to figure out what this sweeping and comprehensive Act actually says and does. To do that, we outline the congressional findings that identify the problems the Act addresses, and the Act's legislative response and overall structure, encompassing nine Titles and hundreds of laws on a diverse array of subjects. Next, we set forth in greater depth the contents of the Act's five components most relevant to this appeal: the insurance industry reforms, the new state-run Exchanges, the individual mandate, the employer penalties, and the Medicaid expansion.

After that, we analyze the constitutionality of the Medicaid expansion and explain why we conclude that the Act's Medicaid expansion is constitutional.

We then review the Supreme Court's decisions on Congress's commerce power, discuss the individual mandate—which requires Americans to purchase an expensive product from a private insurance company from birth to death—and explicate how Congress exceeded its

---

codified in the U.S. Code, and for those sections we cite to the future U.S. Code provision, along with the effective date if applicable.

commerce power in enacting its individual mandate. We next outline why Congress's tax power does not provide an alternative constitutional basis for upholding this unprecedented individual mandate. Lastly, because of the Supreme Court's strong presumption of severability and as a matter of judicial restraint, we conclude that the individual mandate is severable from the remainder of the Act. Our opinion is organized as follows:

I. STANDING

II. THE ACT

A. Congressional Findings

B. Overall Structure of Nine Titles

C. Terms and Definitions

D. Health Insurance Reforms

E. Health Benefit Exchanges

F. Individual Mandate

G. Employer Penalty

H. Medicaid Expansion

III. CONSTITUTIONALITY OF MEDICAID EXPANSION

A. History of the Medicaid Program

B. Congress's Power under the Spending Clause

IV. SUPREME COURT'S COMMERCE CLAUSE DECISIONS

V. CONSTITUTIONALITY OF INDIVIDUAL MANDATE UNDER THE COMMERCE POWER

A. First Principles

B. Dichotomies and Nomenclature

C. Unprecedented Nature of the Individual Mandate

D. *Wickard* and Aggregation

E. Broad Scope of Congress's Regulation

F. Government's Proposed Limiting Principles

G. Congressional Findings

H. Areas of Traditional State Concern

I. Essential to a Larger Regulatory Scheme

J. Conclusion

VI. CONSTITUTIONALITY OF INDIVIDUAL MANDATE UNDER THE TAX POWER

A. Repeated Use of the Term "Penalty" in the Individual Mandate

B. Designation of Numerous Other Provisions in the Act as "Taxes"

C. Legislative History of the Individual Mandate

VII. SEVERABILITY

I. STANDING

As a threshold matter, we consider the government's challenge to the plaintiffs' standing to bring this lawsuit. "Article III of the Constitution limits the jurisdiction of federal courts to 'cases' and 'controversies.'" *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1244 (11th Cir. 1998) (citations omitted). As we have explained:

> The case-or-controversy constraint, in turn, imposes a dual limitation on federal courts commonly referred to as "justiciability." Basically, justiciability doctrine seeks to prevent the federal courts from encroaching on the powers of the other branches of government and to ensure that the courts consider only those matters that are presented in an adversarial context. Because the judiciary is unelected and unrepresentative, the Article III case-or-controversy limitation, as embodied injusticiability doctrine, presents an important restriction on the power of the federal courts.

Id. (citations omitted). Indeed, there are "three strands of justiciability doctrine—standing, ripeness, and mootness—that go to the heart of the Article III case or controversy requirement." *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1247 (11th Cir. 2010) (quotation marks and alterations omitted).

As for the first strand, "[i]t is by now axiomatic that a plaintiff must have standing to invoke the jurisdiction of the federal courts." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1266 (11th Cir. 2006). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1304 (1Ith Cir. 2006) (quotation marks omitted). To demonstrate standing, a plaintiff must show that "(1) he has suffered, or imminently will suffer, an injury-in-fact; (2) the injury is fairly traceable to [the statute]; and (3) a favorable judgment is likely to redress the injury." *Harrell*, 608 F.3d at 1253; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61,112 S. Ct. 2130, 2136 (1992). "The plaintiff bears the burden of estab-

lishing each of these elements." *Elend v. Basham*, 471 F.3d 1199, 1206 (11th Cir. 2006). And standing must be established for each claim a plaintiff raises. *See Harrell*, 608 F.3d at 1253–54. "We review standing determinations *de novo*." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005).

In fact, "[s]tanding is a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims." *Id.* at 974 (quotation marks and alteration omitted). And "we are obliged to consider questions of standing regardless of whether the parties have raised them." *Id.* at 975.

Notably, the government does not contest the standing of the individual plaintiffs or of the NFIB to challenge the individual mandate. In fact, the government expressly concedes that one of the individual plaintiffs —Mary Brown—has standing to challenge the individual mandate. *See* Government's Opening Br. at 6 n.1 ("Defendants do not dispute that plaintiff Brown's challenge to the minimum coverage provision is justiciable."). Nor does the government dispute the state plaintiffs' standing to challenge the Medicaid provisions.

The only question raised by the government is whether the state plaintiffs have standing to challenge the individual mandate. The government claims that the state plaintiffs do not have standing because they are impermissibly suing the government as *parens patriae* —or as representatives of their citizens—in violation of the rule articulated in *Massachusetts v. Mellon*, 262 U.S. 447, 485–86, 43 S. Ct. 597, 600 (1923).[6] The state

---

[6] In *Mellon*, the Supreme Court held that states cannot sue the federal government in a representative capacity to protect their citizens

plaintiffs respond that they are not in violation of the *Mellon* rule, but rather have standing to challenge the individual mandate for three independent reasons: first, because the increased enrollment in Medicaid spurred by the individual mandate will cost the states millions of dollars in additional Medicaid funding; second, because they are injured by other provisions of the Act—such as the Medicaid expansion—from which the individual mandate cannot be severed; and finally, because the individual mandate intrudes upon their sovereign interest in enacting and enforcing state statutes that shield their citizens from the requirement to purchase health insurance. States' Opening Br. at 67–69.

Although the question of the state plaintiffs' standing to challenge the individual mandate is an interesting and difficult one, in the posture of this case, it is purely academic and one we need not confront today. The law is abundantly clear that so long as at least one plaintiff has standing to raise each claim—as is the case here—we need not address whether the remaining plaintiffs have standing. *See, e.g.*, *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160, 102 S. Ct. 205, 212 (1981) ("Because we find California has standing, we do not consider the standing of the other plaintiffs."); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9, 97 S. Ct. 555, 562 & n.9 (1977) ("Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain suit."); *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Ed.*, 557 F.3d 1177, 1195 (11th

---

from the operation of an allegedly unconstitutional federal law. 262 U.S. at 485–86, 43 S. Ct. at 600. This has come to be known as the *Mellon* rule.

Cir. 2009) ("Because Balzli has standing to raise those claims, we need not decide whether either of the organizational plaintiffs also has standing to do so."); *Jackson v. Okaloosa Cnty.*, 21 F.3d 1531, 1536 (11th Cir. 1994) ("In order for this court to have jurisdiction over the claims before us, at least one named plaintiff must have standing for each of the claims."); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) ("For each claim, if constitutional and prudential standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim."). Because it is beyond dispute that at least one plaintiff has standing to raise each claim here—the individual plaintiffs and the NFIB have standing to challenge the individual mandate, and the state plaintiffs undeniably have standing to challenge the Medicaid provisions—this case is justiciable, and we are permitted, indeed we are obliged, to address the merits of each. Accordingly, we turn to the constitutionality of the Act.

II. THE ACT

A. Congressional Findings

The congressional findings for the Act, including those relating to the individual mandate, are contained in two pages, now codified in 42 U.S.C. § 18091(a)(1)–(3). Approximately 50 million people are uninsured.[7] The

---

[7] U.S. Census Bureau, P60-238, *Income, Poverty, and Health Insurance Coverage in the United States: 2009* 23 tbl.8 (2010) (*"Census Report"*), *available at* http://www.census.gov/prod/2010pubs/p60-238.pdf. Although the congressional findings do not state the precise number of the uninsured, the parties use the 50 million figure, so we will too.

Copies of the Internet materials cited in this opinion are on file in the Clerk's Office. *See* 11th Cir. R. 36, I.O.P. 10.

congressional findings focus on these uninsureds, health insurance, and health care. *Id.*

1. The Uninsured and Cost-Shifting Problems

The congressional findings state that some individuals make "an economic and financial decision to forego health insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers." *Id.* § 18091(a)(2)(A). In its findings, Congress determined that the decision by the uninsured to forego insurance results in a cost-shifting scenario. *Id.* § 18091(a)(2)(F).

Congress's findings identify a multi-step process that starts with consumption of health care: (1) some uninsured persons consume health care; (2) some fail to pay the full costs; (3) in turn the unpaid costs of that health care—$43 billion in 2008—are shifted to and spread among medical providers; (4) thereafter medical providers, by imposing higher charges, spread and shift the unpaid costs to private insurance companies; (5) then private insurance companies raise premiums for health policies and shift and spread the unpaid costs to already-insured persons; and (6) consequently already-insured persons suffer higher premiums. *Id.* § 18091(a)(2). Also, some uninsured persons continue not to buy coverage because of higher premiums. *Id.*

The findings state that this cost-shifting scenario increases family premiums on average by $1,000 per year. *Id.* § 18091(a)(2)(F). Although not in the findings, the data show the cost-shifting increases individual pre-

miums on average by $368–410 per year.[8] The cost-shifting represents roughly 8% of average premiums.[9]

In its findings, Congress also points out that national health care spending in 2009 was approximately $2.5 trillion, or 17.6% of the national economy.[10] *Id.* § 18091(a)(2)(B). Thus, the $43 billion in shifted costs represents about 1.7% of total health care expenditures. Of that $2.5 trillion in national health care spending in 2009, federal, state, and local governments paid $1.1 trillion, or 44%.[11]

---

[8] Uncompensated care costs translate into "a surcharge of $368 for individual premiums and a surcharge of $1017 for family premiums in 2008." *See* Families USA, *Hidden Health Tax: Americans Pay a Premium* 7 (2009), *available at* http://familiesusa2.org/assets/pdfs/hiddenhealth-tax.pdf (cited by both the plaintiffs and the government).

[9] "[A] 'hidden tax' on health insurance accounts for roughly 8% of the average health insurance premium" and "[t]his cost-shift added, on average, $1,100 to each family premium in 2009 and about $410 to an individual premium." Br. of *Amici Curiae* Am. Ass'n of People with Disabilities, *et al.*, in Support of the Government at 15 (citing Ben Furnas & Peter Harbage, Ctr. for Am. Progress Action Fund, *The Cost Shift from the Uninsured* 1–2 (2009), *available at* http://www.americanprogressaction.org/issues/2009/03/pdf/cost_shift.pdf (calculations based on a 2005 analysis by Families USA)).

[10] *See* Centers for Medicare & Medicaid Services ("CMS"), *National Health Expenditure Web Tables* tbls. 1, 5, 11, *available at* http://www.cms.gov/NationalHealthExpendData/downloads/tables.pdf (derived from calculations).

[11] *See* CMS, *National Health Expenditure Web Tables*, *supra* note 10, at tbl.5. The governments' health care spending in 2009 included $503 billion for Medicare and $374 billion for Medicaid and the Children's Health Insurance Program ("CHIP").

Projected Medicare spending is $723.1 billion in 2016 and $891.4 billion in 2019. CMS, *Nat'l Health Expenditure Projections 2009–2019*

Private insurers still paid for 32% of health care spending in 2009,[12] *id.*, through: (1) primarily private employer-based insurance plans, or (2) the private individual insurance market. The private *employer-based* health system covers 176 million Americans. *Id.* § 18091(a)(2)(D). The private *individual insurance market* covers 24.7 million people.[13] Undisputedly, "[h]ealth insurance and health care services are a significant part of the national economy." *Id.* § 18091(a)(2)(B).

2. $90 Billion Private Underwriting Costs Problem

Congress also recognized that many of the uninsured desire insurance but have been denied coverage or cannot afford it. Its findings emphasize the barriers created by private insurers' underwriting practices and related administrative costs. *Id.* § 18091(a)(2)(J). Private insurers want healthy insureds and try to protect themselves against unhealthy entrants through medical underwriting, especially in the individual market. As a result of medical underwriting, many uninsured Americans—ranging from 9 million to 12.6 million—voluntarily sought health coverage in the individual market but were denied coverage, charged a higher premium, or

---

tbl.2, *available at* http://www.cms.gov/NationalHealthExpendData/Downloads/NHEProjections2009to2019.pdf.

With the Act's Medicaid expansion and other factors, projected Medicaid and CHIP spending is $737.5 billion in 2016 and $896.2 billion in 2019. *Id.*

[12] *See* CMS, *National Health Expenditure Web Tables*, *supra* note 10, at tbl.3 (derived from calculations).

[13] *See Census Report*, *supra* note 7, at 22–25 & 23 tbl.8 (derived from calculations).

offered only limited coverage that excludes a preexisting condition.[14]

In its findings, Congress determined that the "[a]dministrative costs for private health insurance" were $90 billion in 2006, comprising "26 to 30 percent of premiums in the current individual and small group markets." *Id.* The findings state that Congress seeks to create health insurance markets "that do not require underwriting and eliminate its associated administrative costs." *Id.* The Act requires private insurers to allow all applicants to enroll. 42 U.S.C. § 300gg-1(a). Congress stated that the Act, by eliminating underwriting costs, will lower health insurance premiums. *Id.*

3. Congress's Solutions

Given the 50 million uninsured, $43 billion in uncompensated costs, and $90 billion in underwriting costs, Congress determined these problems affect the national economy and interstate commerce. *Id.* § 18091(a)(2). The congressional findings identify what the Act regulates: (1) the "health insurance market," (2) "how and when health care is paid for," and (3) "when health insurance is purchased." *Id.* § 18091(a)(2)(A), (H). The findings also state that the Act's reforms will signifi-

---

[14] HHS, *Coverage Denied: How the Current Health Insurance System Leaves Millions Behind*, http://www.healthreform.gov/reports/denied_coverage/index.html (citing Commonwealth Fund Biennial Health Insurance Survey, 2007); Sara R. Collins, *et al.*, The Commonwealth Fund, *Help on the Horizon: How the Recession Has Left Millions of Workers Without Health Insurance, and How Health Reform Will Bring Relief* xi (2011), *available at* http://www.commonwealthfund.org/~/media/Files/Surveys/2011/1486_Collins_help_on_the_horizon_2010_biennial_survey_report_FINAL_31611.pdf.

cantly reduce the number of the uninsured and will lower health insurance premiums. *Id.* § 18091(a)(2)(F).

To reduce the number of the uninsured, the Act employs five main tools: (1) comprehensive insurance industry reforms which alter private insurers' underwriting practices, guarantee issuance of coverage, overhaul their health insurance products, and restrict their premium pricing structure; (2) creation of state-run "Health Benefit Exchanges" as new marketplaces through which individuals, families, and small employers, now pooled together, can competitively purchase the new insurance products and obtain federal tax credits and subsidies to do so; (3) a mandate that individuals must purchase and continuously maintain health insurance or pay annual penalties; (4) penalties on private employers who do not offer at least some type of health plan to their employees; and (5) the expansion of Medicaid eligibility and subsidies.

The Act's Medicaid expansion alone will cover 9 million of the 50 million uninsured by 2014 and 16 million by 2016.[15] The Act's health insurance reforms remove private insurers' barriers to coverage and restrict their pricing to make coverage accessible to the 9 to 12 million uninsured who were denied coverage or had their preexisting conditions excluded.[16] The Act's new Exchanges, with significant federal tax credits and subsidies, are

---

[15] *CBO's Analysis of the Major Health Care Legislation Enacted in March 2010:* Before the Subcomm. on Health of the H. Comm. on Energy & Commerce 112th Cong. 18 tbl.3 (2011) (Statement of Douglas Elmendorf, Director, Cong. Budget Office) [hereinafter CBO, *Analysis*], *available at* http://www.cbo.gov/ftpdocs/121xx/doc12119/03-30-HealthCareLegislation.pdf.

[16] *See* HHS, *Coverage Denied*, and Collins, *supra* note 14.

predicted to make insurance available to 9 million in 2014 and 22 million by 2016.[17]

Congress's findings state that the Act's multiple provisions, combined together:[18]

> (1) "will add millions of new consumers to the health insurance market" and "will increase the number and share of Americans who are insured";
>
> (2) will reduce the number of the uninsured, will broaden the health insurance risk pool to include additional healthy individuals, will increase economies of scale, and will significantly reduce insurance companies' administrative costs, all of which will lower health insurance premiums;
>
> (3) will build upon and strengthen the private employer-based health insurance system, which already covers "176,000,000 Americans"; and
>
> (4) will achieve "near-universal" coverage of the uninsured.

Id. § 18091(a)(2).

Although the congressional findings summarily refer to "the uninsured," the parties' briefs and the 52 *amici* briefs contain, and indeed rely on, additional data about the uninsured. Before turning to the Act, we review that data.[19]

---

[17] CBO, *Analysis*, *supra* note 15, at tbl.3.

[18] The congressional findings refer six times to the individual mandate "requirement, together with the other provisions of this Act." 42 U.S.C. § 18091(a)(2)(C), (E), (F), (G), (I), (J).

[19] There has been no evidentiary objection by any party to the data and studies cited in the parties' briefs or in any of the *amici* briefs. In fact, at times the parties cite the same data.

4. Data about the Uninsured and Uncompensated Care

So who are the uninsured? As to health care usage, the uninsured do not fall into a single category. Many of the uninsured do not seek health care each year. Of course, many do. In 2007, 57% of the 40 million uninsured that year used some medical services; in 2008, 56% of the 41 million uninsured that year used some medical services.[20]

As to medical services, 50% of uninsured people had routine checkups in the past two years; 68% of uninsured people had routine checkups in the past five years.[21] In 2008, the uninsured made more than 20 million visits to emergency rooms,[22] and 2.1 million were

---

[20] HHS, Agency for Healthcare Research and Quality, Medical Expenditure Panel Survey, Household Component Summary Tables ("MEPS Summary Tables"), Table 1: Total Health Services-Median and Mean Expenses per Person with Expense and Distribution of Expenses by Source of Payment: United States, 2007 & 2008, *available at* http://www.meps.ahrq.gov/mepsweb/data_stats/quick_tables.jsp (follow "Household Component summary tables" hyperlink; then select 2007 or 2008 for "year" and follow the "search" hyperlink; then follow the hyperlink next to "Table 1").

The Medical Expenditure Panel Survey ("MEPS") is a set of large-scale surveys of families and individuals, their medical providers (including doctors, hospitals, and pharmacies), and employers across the United States. It is conducted under the auspices of HHS.

[21] June E. O'Neill & Dave M. O'Neill, *Who Are the Uninsured? An Analysis of America's Uninsured Population, Their Characteristics and Their Health*, EMP'T POLICIES INSTITUTE, 21 tbl.9 (2009), *available at* http://epionline.org/studies/oneill_06-2009.pdf.

[22] Br. of *Amici Curiae* Am. Hosp. Ass'n *et al.* in Support of the Government at 11 (citing Press Release, HHS, New Data Say Uninsured Account for Nearly One-Fifth of Emergency Room Visits (Jul.

hospitalized.[23] The medical care used by each uninsured person cost about $2,000 on average in 2007, and $1,870 on average in 2008.[24]

When the uninsured do seek health care, what happens? Some pay in full. Some partially pay. Some pay nothing. Data show the uninsured paid on average 37% of their health care costs out of pocket in 2007, and 46.01% in 2008,[25] while third parties pay another 26% on their behalf.[26] Not surprisingly, the poorer uninsured, on average, consume more health care for which they do

---

15, 2009), *available at* http://www.hhs.gov/news/press/2009pres/07/20090715b.html).

[23] In 2008, U.S. hospitals reported more than 2.1 million hospitalizations of the uninsured. Office of the Assistant Sec'y for Planning and Evaluation, HHS, *The Value of Health Insurance: Few of the Uninsured Have Adequate Resources to Pay Potential Hospital Bills* 5 (2011), *available at* http://aspe.hhs.gov/health/reports/2011/valueofinsurance/rb.shtml.

[24] MEPS Summary Tables, *supra* note 20. An Economic Scholars' *amici* brief, filed in support of the government, states: "The medical care used by each uninsured person costs about $2000 per year, on average." Br. of *Amici Curiae* Economists in Support of the Government at 16 (citing "Agency for Health Care Quality and Research, Medical Expenditure Panel Survey, Summary Data Tables, Table 1" (*see* MEPS Summary Tables, *supra* note 20); Jack Hadley, *et al.*, "Covering the Uninsured in 2008: Current Costs, Sources of Payment, and Incremental Costs," 27(5) HEALTH AFFAIRS W399-415 (2008)).

In contrast, this same *amici* brief points out: "In 2007, the average person used $6,186 in personal health care services." *Id.* at 11 (citing "Center for Medicare and Medicaid Services, National Health Expenditure Accounts"); *see* CMS, *National Expenditure Web Tables*, *supra* note 10, at tbl.1.

[25] *See* MEPS Summary Tables, *supra* note 20.

[26] *See* Families USA, *Hidden Health Tax*, *supra* note 8, at 2 (cited by both the plaintiffs and the government).

not pay.[27] Even in households at or above the median income level ($41,214) in 2000, the uninsured paid, on average, less than half their medical care costs.[28]

It is also undisputed that people are uninsured for a wide variety of reasons. The uninsured are spread across different income brackets:

(1) less than $25,000: 15.5 million uninsured, or about 31%;

(2) $25,000 to $49,999: 15.3 million uninsured, or about 30%;

(3) $50,000 to $74,999: 9.4 million uninsured, or about 18%;

(4) $75,000 or more: 10.6 million uninsured, or about 21%.[29]

As the data show, many of the uninsured have low to moderate incomes and simply cannot afford insurance. Some of the uninsured can afford insurance and tried to obtain it, but were denied coverage based on health status.[30] Some are voluntarily uninsured and self-finance because they can pay for their medical care or have modest medical care needs. Some may not have considered the issue. There is no one reason why people are

---

[27] Bradley Herring, *The Effect of the Availability of Charity Care to the Uninsured on the Demand for Private Health Insurance*, 24 J. HEALTH ECON. 225, 229–31 (2005).

[28] Herring, *supra* note 27, at 231 ("[T]he median income for all household[s] in the U.S. is roughly 300% of poverty, and the poverty threshold was US$13,738 for a family of three in 2000."); *see id.* at 230 tbl.1.

[29] *See Census Report*, *supra* note 7, at 23 tbl.8.

[30] *See* HHS, *Coverage Denied*, and Collins, *supra* note 14.

uninsured. It is also not surprising, therefore, that Congress has attacked the uninsured problem through multiple reforms and numerous avenues in the Act that we outline later.

Given these identified problems, congressional findings, and data as background, we now turn to Congress's legislative response in the Act.

B. Overall Structure of Nine Titles

The sweeping and comprehensive nature of the Act is evident from its nine Titles:

I. Quality, Affordable Health Care for All Americans

II. Role of Public Programs

III. Improving the Quality and Efficiency of Health Care

IV. Prevention of Chronic Disease and Improving Public Health

V. Health Care Workforce

VI. Transparency and Program Integrity

VII. Improving Access to Innovative Medical Therapies

VIII. Community Living Assistance Services and Supports

IX. Revenue Provisions[31]

The Act's provisions are spread throughout many statutes and different titles in the United States Code. As our Appendix A demonstrates, the Act's nine Titles

---

[31] There is also a tenth Title dedicated to amendments to these nine Titles.

contain hundreds of new laws about hundreds of different areas of health insurance and health care. Appendix A details most parts of the Act with section numbers. Here, we merely list the broad subject matter in each Title.

Title I contains these four components mentioned earlier: (1) the insurance industry reforms; (2) the new state-run Exchanges; (3) the individual mandate; and (4) the employer penalty. Act §§ 1001–1568. Title II shifts the Act's focus to publicly-funded programs designed to provide health care for the uninsured, such as Medicaid, CHIP, and initiatives under the Indian Health Care Improvement Act. *Id.* §§ 2001–2955. Title II contains the Medicaid expansion at issue here. Title II's provisions also create, or expand, other publicly-funded programs. *Id.*

Title III primarily addresses Medicare. *Id.* §§ 3001–3602. Title IV concentrates on prevention of illness. *Id.* §§ 4001–4402. Title V seeks to increase the supply of health care workers through education loans, training grants, and other programs. *Id.* §§ 5001–5701.

Title VI creates new transparency and anti-fraud requirements for physician-owned hospitals participating in Medicare and for nursing facilities participating in Medicare or Medicaid. *Id.* §§ 6001–6801. Title VI includes the Elder Justice Act, designed to eliminate elder abuse, neglect, and exploitation. *Id.*

Title VII extends and expands certain drug discounts in health care facilities serving low-income patients. *Id.* §§ 7001–7103. Title VIII establishes a national, voluntary long-term care insurance program for purchasing community living assistance services and support by

persons with functional limitations. *Id.* §§ 8001–8002. Title IX contains revenue provisions. *Id.* §§ 9001–9023.

We include Appendix A because it documents (1) the breadth and scope of the Act; (2) the multitudinous reforms enacted to reduce the number of the uninsured; (3) the large number and diverse array of new, or expanded, federally-funded programs, grants, studies, commissions, and councils in the Act; (4) the extensive new federal requirements and regulations on myriad subjects; and (5) how many of the Act's provisions on their face operate separately and independently.

We now examine in depth the five parts of the Act largely designed to reduce the number of the uninsured. Because of the Act's comprehensive and complex regulatory scheme, it is critical to examine what the Act actually does and does not do. We start with some terms and definitions.

C. Terms and Definitions

The Act regulates three aspects of health insurance: (1) "markets," the outlets where consumers may purchase insurance products; (2) "plans," the insurance products themselves; and (3) "benefits," the health care services or items covered under an insurance plan.

1. Markets

Given its focus on making health insurance available to the uninsured, the Act recognizes and regulates four markets for health insurance products: (1) the "individual market"; (2) the "small group market"; (3) the "large group market"; and (4) the new Exchanges, to be created and run by each state.

The term "individual market" means "the market for health insurance coverage offered to individuals other than in connection with a group health plan." 42 U.S.C. §§ 300gg-91(e)(1)(A), 18024(a)(2).

The term "group market" means "the health insurance market under which individuals obtain health insurance coverage (directly or through any arrangement) on behalf of themselves (and their dependents) through a group health plan maintained by an employer." *Id.* § 18024(a)(1).

Within the "group market," the Act distinguishes between the "large group market" and the "small group market." The term "large group market" refers to the market under which individuals purchase coverage through a group plan of a "large employer." *Id.* §§ 300gg-91(e)(3), 18024(a)(3). A "large employer" is an employer with over 100 employees. *Id.* §§ 300gg-91(e)(2), 18024(b)(1).

The term "small group market" refers to the market under which individuals purchase coverage through a group plan of a "small employer," or an employer with no more than 100 employees. *Id.* §§ 300gg-91(e)(4), (5), 18024(a)(3), (b)(2).

The term "Exchanges" refers to the health benefit exchanges that each state must create and operate.[32] *Id.* § 18031(b). Companies (profit and nonprofit) participating in the Exchanges will offer insurance for purchase by individuals and employees of small employers. *See id.; id.* § 18042. The uninsured can obtain significant

---

[32] The Act allows a state to opt out of creating and operating an Exchange, in which case the federal government (or a nonprofit contractor) will establish the Exchange. 42 U.S.C. § 18041(c).

federal tax credits and subsidies through the Exchanges. *See* 26 U.S.C. § 36B; 42 U.S.C. § 18071. In 2017, the states will have the option to open the Exchanges to large employers. 42 U.S.C. § 18032(f)(2)(B).

2. "Essential Health Benefits Package" Term

Two key terms in the Act are: (1) "essential health benefits package" and (2) "minimum essential coverage." Although they sound similar, each has a different meaning.

The term "essential health benefits package" refers to the comprehensive benefits package that must be provided by plans in the individual and small group markets by 2014. *Id.* § 300gg-6(a) (effective Jan. 1, 2014); *id.* § 18022(a). The Act does not impose the essential health benefits package on plans offered by large group employers to their employees.

An "essential health benefits package" must: (1) provide coverage for the "essential health benefits" described in § 18022(b); (2) limit the insured's cost-sharing, as provided in § 18022(c); and (3) provide "either the bronze, silver, gold, or platinum level of coverage" described in § 18022(d). *Id.* § 18022(a).

The Act leaves it to HHS to define the term "essential health benefits." *Id.* § 18022(b). However, that definition of "essential health benefits" must include at least these ten services:

(A) Ambulatory patient services.

(B) Emergency services.

(C) Hospitalization.

(D) Maternity and newborn care.

(E) Mental health and substance use disorder services, including behavioral health treatment.

(F) Prescription drugs.

(G) Rehabilitative and habilitative services and devices.

(H) Laboratory services.

(I) Preventive and wellness services and chronic disease management.

(J) Pediatric services, including oral and vision care.

Id. § 18022(b)(1).[33] The bronze, silver, gold, and platinum levels of coverage reflect the levels of cost-sharing (or actuarial value of benefits) in a plan and do not represent the level or type of services. *Id.* § 18022(d)(1)–(2). For example, a bronze plan covers 60% of the benefits' costs, and the insured pays 40% out of pocket; a platinum plan covers 90%, with the insured paying 10%. *Id.* § 18022(d)(1)(A), (D).

3. Individual Mandate's "Minimum Essential Coverage" Term

The Act uses a wholly different term—"minimum essential coverage"—in connection with the individual mandate. "Minimum essential coverage" is the type of *plan* needed to satisfy the individual mandate. A wide variety of health plans are considered "minimum essen-

---

[33] In defining "essential health benefits," HHS must ensure that the scope of essential health benefits is "equal to the scope of benefits provided under a typical employer plan." 42 U.S.C. § 18022(b)(2). HHS must take additional elements into consideration, such as balance among the categories of benefits, discrimination based on age or disability, and the needs of diverse segments of the population. *Id.* § 18022(b)(4).

tial coverage": (1) government-sponsored programs, (2) eligible employer-sponsored health plans, (3) individual market health plans, (4) grandfathered health plans, and (5) health plans that qualify for, and are offered in, a state-run Exchange. 26 U.S.C. § 5000A(a), (f)(1).

Many of these plan types will satisfy the mandate even if they do not have the "essential health benefits package" and regardless of the level of benefits or coverage. The requirement of the "essential health benefits package" is directly tied to some of the insurance product reforms, but not the individual mandate.

We turn to the Act's first component: the insurance reforms.

D. Health Insurance Reforms

To reduce the number of the uninsured, the Act heavily regulates private insurers and reforms their health insurance products. We list examples of the major reforms.

1. **Guaranteed Issue.** Insurers must permit every employer or individual who applies in the individual or group markets to enroll. 42 U.S.C. § 300gg-1(a) (effective Jan. 1, 2014). However, insurers "may restrict enrollment in coverage described [in subsection (a)]

to open or special enrollment periods."[34] *Id.* § 300gg-1(b)(1) (effective Jan. 1, 2014).

2. **Guaranteed renewability.** Insurers in the individual and group markets must renew or continue coverage at the individual or plan sponsor's option in the absence of certain exceptions, such as premium nonpayment, fraud, or the insurer's discontinuation of coverage in the relevant market. *Id.* § 300gg-2(b).

3. **Waiting periods.** Under group health plans, insurers may impose waiting periods of up to 90 days before a potential enrollee is eligible to be covered under the plan. *Id.* §§ 300gg-7 (effective Jan. 1, 2014), 300gg-3(b)(4). The Act places no limits on insurers' waiting periods for applications in the individual market.

4. **Elimination of preexisting conditions limitations.** Insurers may no longer deny or limit coverage due to an individual's preexisting medical conditions. The Act prohibits preexisting condition exclusions for children under 19 within six months of the Act's enactment, and eliminates preexisting condition exclusions for adults beginning in 2014.[35] *Id.* § 300gg-3.

---

[34] The Act directs HHS to promulgate regulations with respect to enrollment periods. 42 U.S.C. § 300gg-1(b)(3) (effective Jan. 1, 2014). Insurers must establish "special enrollment periods for 'qualifying events.'" *Id.* § 300gg-1(b)(2). "Qualifying events" include, for example: (1) "[t]he death of the covered employee"; (2) "[t]he termination (other than by reason of such employee's gross misconduct), or reduction of hours, of the covered employee's employment"; and (3) "[t]he divorce or legal separation of the covered employee from the employee's spouse." 29 U.S.C. § 1163.

[35] For dates effective as to children and then adults, *see* Pub. L. No. 111-148, Title I, § 1255 (formerly § 1253), 124 Stat. 162 (2010) (renumbered § 1255 and amended, Pub. L. No. 111-148, Title X,

5. **Prohibition on health status eligibility rules.** Insurers may not establish eligibility rules based on any of the health status-related factors listed in the Act.[36] *Id.* § 300gg-4 (effective Jan. 1, 2014).

6. **Community rating.** In the individual and small group markets and the Exchanges, insurers may vary premium rates only based on (1) whether the plan covers an individual or a family; (2) "rating area"; (3) age (limited to a 3-to-1 ratio); and (4) tobacco use (limited to a 1.5-to-1 ratio). *Id.* § 300gg(a)(1). Each state must establish one or more rating areas subject to HHS review. *Id.* § 300gg(a)(2)(B). This rule prevents insurers from varying premiums within a geographic area based on gender, health status, or other factors.

---

§ 10103(e), (f)(1), 124 Stat. 895 (2010), and codified in note to 42 U.S.C. § 300gg-3).

[36] Health status-related factors include:

(1) Health status.

(2) Medical condition (including both physical and mental illnesses).

(3) Claims experience.

(4) Receipt of health care.

(5) Medical history.

(6) Genetic information.

(7) Evidence of insurability (including conditions arising out of acts of domestic violence).

(8) Disability.

(9) Any other health status-related factor determined appropriate by the [HHS] Secretary.

42 U.S.C. § 300gg-4(a) (effective Jan. 1, 2014).

7. **Essential health benefits package.** The individual and small group market plans must contain comprehensive coverage known as the "essential health benefits package," defined above. *Id.* §§ 300gg-6(a) (effective Jan. 1, 2014), 18022(a). The Act does not impose this requirement on large group market plans.[37]

8. **Preventive service coverage.** Insurers must provide coverage for certain enumerated preventive health services without any deductibles, copays, or other cost-sharing requirements. *Id.* § 300gg-13(a).

9. **Dependent coverage.** Insurers must allow dependent children to remain on their parents' policies until age 26. *Id.* § 300gg-14(a).

10. **Elimination of annual and lifetime limits.** Insurers may no longer establish lifetime dollar limits on essential health benefits. *Id.* § 300gg-11(a)(1)(A), (b). Insurers may retain annual dollar limits on essential health benefits until 2014.[38] *Id.* § 300gg-11(a).

---

[37] Rather, the large group market is subject to only a few coverage-reform requirements that apply broadly to either *all* insurance plans or group health plans in particular. *See* Amy Monahan & Daniel Schwarcz, *Will Employers Undermine Health Care Reform by Dumping Sick Employees?*, 97 VA. L. REV. 125, 147 (2011).

[38] HHS shall determine what restricted annual limits are permitted on the dollar value of essential health benefits until 2014. 42 U.S.C. § 300gg-11(a)(1), (2). "Subsection (a) shall not be construed to prevent a group health plan or health insurance coverage from placing annual or lifetime per beneficiary limits on specific covered benefits that are not essential health benefits. . . . " *Id.* § 300gg-11(b).

11. Limits on cost-sharing by insureds. "Cost-sharing"[39] includes out-of-pocket "deductibles, coinsurance, copayments, or similar charges" and "qualified medical expenses."[40] *Id.* § 18022(c)(3)(A). Annual cost-sharing limits apply to group health plans, health plans sold in the individual market, and qualified health plans offered through an Exchange.[41] *Id.* §§ 300gg-6(b) (effective Jan. 1, 2014), 18022(a), (c).

12. Deductibles. Deductibles for any plans offered in the small group market are capped at $2,000 for plans covering single individuals and $4,000 for any other plan, adjusted after 2014. *Id.* §§ 300gg-6(b) (effective Jan. 1, 2014), 18022(c)(2). The deductible limits do not apply to individual plans or large group plans. *See id.*

13. Medical loss ratio. Insurers must maintain certain ratios of premium revenue spent on the insureds' medical care versus overhead expenses. *Id.* § 300gg-18(a), (b)(1). In the large group market, insurers must spend 85% of their premium revenue on patient care and no more than 15% on overhead. *Id.* § 300gg-18(a), (b)(1)(A)(i). In the individual and small group markets, insurers must spend 80% of their revenue on patient care and no more than 20% on overhead.

---

[39] "Cost-sharing" does not include "premiums, balance billing amounts for non-network providers, or spending for non-covered services." 42 U.S.C. § 18022(c)(3)(B).

[40] "Qualified medical expense" is defined in 26 U.S.C. § 223(d)(2).

[41] Annual limits on cost-sharing are equal to the current limits on out-of-pocket spending for high-deductible health plans under the Internal Revenue Code (for 2011, $5,950 for self-only coverage and $11,900 for family coverage), adjusted after 2014 by a "premium adjustment percentage." 42 U.S.C. §§ 300gg-6(b) (effective Jan. 1, 2014), 18022(c)(1); 26 U.S.C. § 223(c)(2)(A)(ii), (g); I.R.S. Pub. 969 (2010), at 3.

Id. § 300gg-18(a), (b)(1)(A)(ii). This medical-loss ratio requirement applies to all plans (including grandfathered plans). *Id.* § 300gg-18(a), (b)(1). Insurers must report to HHS their ratio of incurred claims to earned premiums. *Id.* § 300gg-18(a).

14. **Premium increases.** HHS, along with all states, shall annually review "unreasonable" increases in premiums beginning in 2010. *Id.* § 300gg-94(a)(1). Issuers must justify any unreasonable premium increase. *Id.* § 300gg-94(a)(2).

15. **Prohibition on coverage rescissions.** Insurers may not rescind coverage except for fraud or intentional misrepresentation of material fact. *Id.* § 300gg-12.

16. **Single risk pool.** Insurers must consider all individual-market enrollees in their health plans (except enrollees in grandfathered plans) to be members of a single risk pool (whether enrolled privately or through an Exchange). *Id.* § 18032(c)(1). Small group market enrollees must be considered in the same risk pool. *Id.* § 18032(c)(2).

17. **Temporary high risk pool program.** To cover many of the uninsured immediately, the Act directs HHS to establish a "temporary high risk health insurance pool program" to offer coverage to uninsured individuals with preexisting conditions until the prohibition on preexisting condition exclusions for adults becomes effective in 2014. *Id.* § 18001(a). The premiums for persons with a preexisting condition remain what a healthy person would pay. *Id.* §§ 18001(c)(2)(C), 300gg(a)(1). The Act allocates $5 billion to HHS to cover this high-risk pool. When this temporary program ends in 2014, such individuals will be transferred to coverage through an Exchange. *Id.* § 18001(a)–(d), (g).

18. **State regulation maintained.** States will license insurers and enforce both federal and state insurance laws. *Id.* § 18021(a)(1)(C). The Act provides for the continued operation of state regulatory authority, even with respect to interstate "health care choice compacts," which enable qualified health plans to be offered in more than one state.[42] *Id.* § 18053(a).

In addition to reforming health insurance products, the Act requires the creation of Exchanges where the uninsured can buy the new products. We examine this second component of the Act, also designed to make insurance more accessible and affordable and thus reduce the number of the uninsured.

E. Health Benefit Exchanges

1. Establishment of State-Run Exchanges

By January 1, 2014, all states must establish "American Health Benefit Exchanges" and "Small Business Health Options Program Exchanges," which are insurance marketplaces where individuals, families, and small employers can shop for the Act's new insurance products. *Id.* § 18031(b). Consumers can compare prices and buy coverage from one of the Exchange's

---

[42] Health care choice compacts allow qualified health plans to be offered in the individual markets of multiple states, yet such plans will "only be subject to the laws and regulations of the State in which the plan was written or issued." 42 U.S.C. § 18053(a)(1)(A). The issuer of such qualified health plans offered through health care choice compacts "would continue to be subject to market conduct, unfair trade practices, network adequacy, and consumer protection standards . . . of the State in which the purchaser resides" and "would be required to be licensed in each State in which it offers the plan under the compact." *Id.* § 18053(a)(1)(B)(I)–(ii).

issuers. *Id.* § 18031(b), (c). Exchanges centralize information and facilitate the use of the Act's significant federal tax credits and other subsidies to purchase health insurance. *See* 26 U.S.C. § 36B; 42 U.S.C. §§ 18031, 18071, 18081–83. States may create and run the Exchanges through a governmental or nonprofit entity. 42 U.S.C. § 18031(d)(1).

States may establish regional, interstate, or subsidiary Exchanges. *Id.* § 18031(f). The federal government will provide funding until January 1, 2015 to establish Exchanges. *Id.* § 18031(a). Insurers may offer their products inside or outside these Exchanges, or both. *Id.* § 18032(d).

Importantly, the Exchanges draw upon the states' significant experience regulating the health insurance industry. *See id.* § 18041. The Act allows states some flexibility in operations and enforcement, though states must either (1) directly adopt the federal requirements set forth by HHS, or (2) adopt state regulations that effectively implement the federal standards, as determined by HHS. *Id.* § 18041(b). In a subsection entitled, "No interference with State regulatory authority," the Act provides that "[n]othing in this chapter shall be construed to preempt any State law that does not prevent the application of the provisions of this chapter." *Id.* § 18041(d).

2. Qualified Individuals and Employers in the Exchanges

The Act provides that "qualified individuals" and "qualified employers" may purchase insurance through the Exchanges. *Id.* § 18031(d)(2). Although "qualified

individuals" is broadly defined,[43] "qualified employers" are initially limited to small employers, but in 2017, states may allow large employers to participate in their Exchanges. *Id.* § 18032(f)(2)(A), (B). Qualified employers can purchase group plans in or out of Exchanges. *Id.* § 18032(d)(1).

3. Qualified Health Plans in the Exchanges

The Act prescribes the types of plans available in the Exchanges, known as "qualified health plans." *Id.* § 18031(d)(2)(B)(I). A "qualified health plan" is a health plan that: (1) is certified as a qualified health plan in each Exchange through which the plan is offered; (2) provides an "essential health benefits package"; and (3) is offered by an issuer that (a) is licensed and in good standing in each state where it offers coverage, and (b) complies with HHS regulations and any requirements of the Exchange. *Id.* § 18021(a)(1). The issuer must agree, *inter alia*, to offer at least one plan in the "silver" level and one in the "gold" level in each Exchange in which it participates, as described in § 18022(d). *Id.* § 18021(a)(1)(C). The issuer must charge the same premium rate regardless of whether a plan is offered in an Exchange or directly.[44] *Id.*

---

[43] A "qualified individual" is a legal resident who (1) seeks to enroll in a "qualified health plan" in the individual market through the Exchange, and (2) resides in the state that established the Exchange. 42 U.S.C. § 18032(f)(1), (3). Prisoners and illegal aliens may not purchase insurance through Exchanges. *Id.* § 18032(f)(1)(B), (3).

[44] HHS establishes the criteria for certification of insurance plans as "qualified health plans" and develops a rating system to "rate qualified health plans offered through an Exchange in each benefits level on the basis of the relative quality and price." 42 U.S.C. § 18031(c)(1), (3). States must rate each health plan offered in an Exchange (in accor-

4. "Essential Health Benefits Package" and Catastrophic Plans

The "essential health benefits package" is required of all qualified health plans sold in the Exchanges. *Id.* § 18021(a)(1)(B). States may require that a qualified health plan offered in that state cover benefits in addition to "essential health benefits," but the state must defray the costs of additional coverage through payments directly to patients or insurers. *Id.* § 18031(d)(3)(B).

One significant exception to the "essential health benefits package" requirement is the catastrophic plan in the individual market only. In and outside the Exchanges, insurers may offer catastrophic plans which provide no benefits until a certain level of out-of-pocket costs—$5,950 for self-only coverage and $11,900 for family coverage in 2011—are incurred. *Id.* § 18022(e); *see id.* § 18022(c)(1), (e)(1)(B)(i); 26 U.S.C. § 223(c)(2)(A)(ii), (g); I.R.S. Pub. 969 (2010), at 3. The level of out-of-pocket costs is equal to the current limits on out-of-pocket spending for high deductible health plans adjusted after 2014. 42 U.S.C. § 18022(e), (c)(1).

This catastrophic plan exception applies only if the plan: (1) is sold in the individual market; (2) restricts enrollment to those under age 30 *or* certain persons exempted from the individual mandate; (3) provides the essential health benefits coverage *after* the out-of-pocket level is met; and (4) provides coverage for at least three primary care visits. *Id.* § 18022(e)(1), (2).

---

dance with federal standards) and certify health plans as "qualified health plans." *See id.* § 18031(e).

5. Federal Premium Tax Credit

To reduce the number of the uninsured, the Act also establishes considerable federal tax credits for individuals and families (1) with household incomes between 1 and 4 times the federal poverty level; (2) who do not receive health insurance through an employer; and (3) who purchase health insurance through an Exchange.[45] 26 U.S.C. § 36B(a), (b), (c)(1)(A)–(C).

To receive the credit, eligible individuals must enroll in a plan offered through an Exchange and report their income to the Exchange. 42 U.S.C. § 18081(b). If the individual's income level qualifies, the Treasury pays the premium tax credit amount directly to the individual's insurance plan issuer. *Id.* § 18082(c)(2)(A). The individ-

---

[45] Specifically, the amount of the federal tax credit for a given month is an amount equal to the lesser of (1) the monthly premiums for the qualified health plan or plans, offered in the individual market through an Exchange, that cover the taxpayer and the members of the taxpayer's household, *or* (2) the excess of: (a) the monthly premium the taxpayer would be charged for the second lowest-cost silver plan over (b) 1/12 of the taxpayer's yearly household income multiplied by the "applicable percentage," a percentage which ranges from 2.0% to 9.5%, depending on income. 26 U.S.C. § 36B(b)(3)(A)–(C).

An example helps translate. For a family of four with an income of $33,075 per year, assuming that the premium in the second lowest-cost silver plan covering the family is $4,500 per year ($375 per month), the federal tax credit would be $3,177 per year ($264.75 per month). *See* Families USA, *Lower Taxes, Lower Premiums: The New Health Insurance Tax Credit* 8 (2010), *available at* http://www.familiesusa.org/assets/pdfs/health-reform/Premium-Tax-Credits.pdf. Without the federal tax credit, the family pays $375 per month; with the credit, the family pays $110.25 per month, or a total of $1,323, instead of the full $4,500 premium. *Id.* The federal tax credit provides a major incentive for the uninsured (in the individual market) to purchase insurance from a private insurer but through the Exchange.

ual pays only the dollar difference between the premium tax credit and the total premium charged. *Id.* § 18082(c)(2)(B). The credit amount is tied to the cost of the second-cheapest plan in the silver level offered through an Exchange where the individual resides, though the credit may be used for any plan purchased through an Exchange.[46] *See* 26 U.S.C. § 36B(b)(2).

6. Federal Cost-Sharing Subsidies

The Act also provides a variety of federal cost-sharing subsidies to reduce the out-of-pocket expenses for individuals who (1) enroll in a qualified health plan sold through an Exchange in the silver level of coverage,

---

[46] Commentators have explained the operation of the tax credit for households between one and four times the federal poverty level as follows:

> For taxable years after 2013, certain low- and moderate-income individuals who purchase insurance under a health insurance exchange that the states are required to create will receive a refundable credit that subsidizes their purchase of that insurance. . . . According to the Social Security Administration, the current poverty level for a single individual is $10,830; thus a single individual can have household income of as much as $43,320 and still qualify to have his insurance cost subsidized by the government. For a family of four, the current poverty level is $22,050; such a family can have household income as large as $88,200 and still qualify for a subsidy.

Douglas A. Kahn & Jeffrey H. Kahn, *Free Rider: A Justification for Mandatory Medical Insurance Under Health Care Reform*, 109 MICH. L. REV. FIRST IMPRESSIONS 78, 83 (2011).

HHS has since raised the poverty level for 2011 to $22,350 for a family of four and $10,890 for a single individual. 76 Fed. Reg. 3637, 3638 (Jan. 20, 2011). Thus, a single individual can have a household income of as much as $43,560 and still be eligible for a federal tax credit. A family of four can have a household income of as much as $89,400 and still be eligible for a federal tax credit. *See* 42 U.S.C. § 18071(b).

and (2) have a household income between 1 and 4 times the federal poverty level. 42 U.S.C. § 18071.

As noted earlier, the Exchanges, with significant federal tax credits and subsidies, are predicted to make insurance available to 9 million in 2014 and 22 million by 2016.[47] We now turn to the Act's third component: the individual mandate.

F. Individual Mandate

The individual mandate and its penalty are housed entirely in the Internal Revenue Code, in subtitle D, labeled "Miscellaneous Excise Taxes." 26 U.S.C. § 5000A *et seq.* The Act mandates that, after 2013, all "applicable individuals" (1) shall maintain "minimum essential coverage" for themselves and their dependents, or (2) pay a monetary penalty. *Id.* § 5000A(a)–(b). Taxpayers must include the penalty on their annual federal tax return. *Id.* § 5000A(b)(2). Married taxpayers filing a joint return are jointly liable for any penalty. *Id.* § 5000A(b)(3)(B).

---

[47] CBO, *Analysis*, *supra* note 15, at 18 tbl.3. The CBO predicts that by 2019, 24 million will be insured through the Exchanges, with at least four-fifths receiving "federal subsidies to substantially reduce the cost of purchasing health insurance coverage," on average $6,460 per person. *Id.* at 2, 18–19 tbl.3.

The CBO estimates that this 9 million increase in 2014 will be partially offset by a 3 million decrease in individual-market coverage outside the Exchanges. *Id.* The number obtaining coverage in the individual market outside the Exchanges is projected to decrease because the Act incentivizes individuals—through premium tax credits, subsidies, and otherwise—to purchase policies through the Exchanges. Similarly, the 22 million increase in Exchange-based coverage in 2016 will be partially offset by a 5 million decrease in those covered by individual-market policies obtained outside the Exchanges. *Id.*

1. "Minimum Essential Coverage"

At first glance, the term "minimum essential coverage," as used in the Internal Revenue Code, sounds like it refers to a base level of benefits or services. However, the Act uses a different term—the "essential health benefits package" in Title 42—to describe health care benefits and services. 42 U.S.C. § 300gg-6(a) (effective Jan. 1, 2014). In contrast, "minimum essential coverage" refers to a broad array of plan types that will satisfy the individual mandate. 26 U.S.C. § 5000A(f)(1).

An individual can satisfy the mandate's "minimum essential coverage" requirement through: (1) any government-funded health plan such as Medicare Part A, Medicaid, TRICARE, or CHIP; (2) any "eligible employer-sponsored plan"; (3) any health plan in the individual market; (4) any grandfathered health plan; or (5) as a catch-all, "such other health benefits coverage" that is recognized by HHS in coordination with the Treasury. *Id.* The mandate provisions in § 5000A do not specify what benefits must be in that plan. The listed plans, in many instances, satisfy the mandate regardless of the level of benefits or coverage.

2. Government-Sponsored Programs

For example, a variety of government-sponsored programs will satisfy the individual mandate. For individuals 65 or over, enrolling in Medicare Part A will suffice. *Id.* § 5000A(f)(1)(A)(i). Individuals and families may satisfy the mandate by enrolling in Medicaid, if eligible. *Id.* § 5000A(f)(1)(A)(ii). Qualifying children under age 19 can satisfy the mandate by enrolling in CHIP. *Id.* § 5000A(f)(1)(A)(iii). Government-sponsored programs for veterans, active and former military personnel and their families, active Peace Corps volunteers,

and active and retired civilian Defense Department personnel and their dependents satisfy the mandate. *Id.* § 5000A(f)(1)(A)(iv), (v), (vi).

3. Eligible Employer-Sponsored Plans

Individuals may also satisfy the mandate by purchasing coverage through any "eligible employer-sponsored plan." *Id.* § 5000A(f)(1)(B). An "eligible employer-sponsored plan" is a "group health plan or group health insurance coverage" offered "by an employer to the employee," which is defined broadly as: (1) a governmental plan established by the federal, state, or local government for its employees; (2) "any other plan or coverage offered in the small or large group market within a State"; or (3) a grandfathered health plan offered in a group market. *Id.* § 5000A(f)(2). Health plans of large employers satisfy the individual mandate whatever the nature of the benefits offered to the employee.[48]

Whether a "self-insured health plan" of large employers satisfies the mandate is another story.[49] The mandate's § 5000A(f)(2) refers to plans in the "small or large group *market*." *Id.* § 5000A(f)(2). A "self-insured health plan," by definition, is not sold or offered in a

---

[48] Because of these looser restrictions, some commentators have found it surprising that employer-sponsored coverage qualifies as "minimum essential coverage" under the Act. *See* Monahan & Schwarcz, *supra* note 37, at 157 ("Surprisingly, . . . [the Act] appears to define employer-provided coverage as automatically constituting minimum essential coverage for individuals, despite the minimal requirements applicable to such plans.").

[49] The Act defines an "applicable self-insured health plan" to include self-insured plans providing health care coverage where "any portion of such coverage is provided other than through an insurance policy." 26 U.S.C. § 4376(c).

"market." It is thus not clear whether large employers' self-insured plans will constitute "eligible employer-sponsored plans" in § 5000A(f)(2) and thereby satisfy the mandate. It may be that HHS will later recognize "self-insured plans" under the "other coverage" or "grandfathered plan" categories in the mandate's § 5000A(f)(2).

4. Plans in the Individual Market

Individuals can also satisfy the mandate by purchasing insurance in the individual market through Exchanges or directly from issuers. *Id.* § 5000A(f)(1)(C). The Act imposes the "essential health benefits package" requirement on plans sold in the individual and small group markets. 42 U.S.C. § 300gg-6 (effective Jan. 1, 2014). However, in the individual market, insurers can offer catastrophic plans to persons under age 30 or certain persons exempted from the mandate. *Id.* § 18022(e).

5. Grandfathered Plans

An already-insured individual can fulfill the individual mandate by being covered by any "grandfathered health plan," 26 U.S.C. § 5000A(f)(1)(D), which is any group health plan or health insurance coverage in which

an individual was enrolled on March 23, 2010.[50] 42 U.S.C. § 18011(a)(1), (e).

While not subject to many of the Act's product reforms, grandfathered plans must comply with some provisions, among them the extension of dependent coverage until age 26, the medical-loss ratio requirements, and the prohibitions on (1) preexisting condition exclusions, (2) lifetime limits on coverage, (3) excessive waiting periods, and (4) unfair rescissions of coverage. *Id.* § 18011(a)(2)–(4), (e). Under the "interim final regulations" issued by HHS, plans will lose their grandfathered status if they choose to significantly (1) cut or eliminate benefits; (2) increase copayments, deductibles, or out-of-pocket costs for their enrollees; (3) decrease the share of premiums employers contribute for workers in group plans; or (4) decrease annual limits.[51] 45 C.F.R. § 147.140(g).

---

[50] The Act also allows the enrollment of family members and newly hired employees in grandfathered plans without losing the plans' grandfathered status. 42 U.S.C. § 18011(b), (c). Under the "interim final regulations" issued by HHS, "[a] group health plan or group health insurance coverage does not cease to be grandfathered health plan coverage merely because one or more (or even all) individuals enrolled on March 23, 2010 cease to be covered, provided that the plan has continuously covered someone since March 23, 2010 (not necessarily the same person, but at all times at least one person)." 45 C.F.R. § 147.140(a)(1)(i).

[51] *See also* HealthReform.gov, *Fact Sheet: Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans*, http://www.healthreform.gov/newsroom/keeping_the_health_plan_you_have.html; Families USA, *Grandfathered Plans under the Patient Protection and Affordable Care Act* (2010), *available at* http://www.familiesusa.org/assets/pdfs/health-reform/Grandfathered-Plans.pdf.

6. "Other Coverage Recognized" by HHS

The individual mandate even provides a catch-all that leaves open the door to other health coverage. The "minimum essential coverage" requirement may be met by any other coverage that HHS, in coordination with the Treasury, recognizes for purposes of meeting this requirement. 26 U.S.C. § 5000A(f)(1)(E).

7. Exemptions and Exceptions to Individual Mandate

The individual mandate, however, does not apply to eight broad categories of persons, either by virtue of an exemption from the mandate or an exception to the mandate's penalty. The Act carves out these three exemptions from the individual mandate: (1) persons with religious exemptions; (2) aliens not legally present in the country; and (3) incarcerated persons. *Id.* § 5000A(d).

The Act also excepts five additional categories of persons from the individual mandate penalty: (1) individuals whose required annual premium contribution exceeds 8% of their household income for the taxable year;[52] (2) individuals whose household income for the taxable year is below the federal income tax filing threshold in 26 U.S.C. § 6012(a)(1); (3) members of Indian tribes; (4) individuals whose gaps in health insurance coverage last less than three months; and (5) as a catch-all, individuals who, as determined by HHS, have suffered a "hardship" regarding their ability to obtain coverage under a qualified health plan. *Id.* § 5000A(e).

---

[52] The required contribution for coverage means, generally, the amount required to maintain coverage either in an employer-sponsored health plan or in a bronze-level plan offered on an Exchange. *See* 26 U.S.C. § 5000A(e)(1)(A).

8. Calculation of Individual Mandate Penalty

If an applicable individual fails to purchase an insurance plan in one of the many ways allowed, the individual must pay a penalty. *Id.* § 5000A(b)(1). The annual penalty will be either: (1) a flat dollar amount, or (2) a percentage of the individual's income if higher than the flat rate. *Id.* § 5000A(c)(1). However, the percentage-of-income figure is capped at the national average premium amount for bronze-level plans in the Exchanges.[53] *Id.*

The flat dollar penalty amount, which sets the floor, is equal to $95 in 2014, $325 in 2015, and $695 in 2016. *Id.* § 5000A(c)(2)(A), (c)(3)(A)–(C). Beyond 2016, it remains $695, except for inflation adjustments.[54] *Id.* § 5000A(c)(3)(D).

The percentage-of-income number that will apply, if higher than the flat dollar amount, is a set percentage of the taxpayer's income that is in excess of the tax-filing threshold (defined in 26 U.S.C. § 6012(a)(1)).[55] *Id.* § 5000A(c)(2). In any event, the total penalty for the

---

[53] If the individual fails to fulfill the mandate requirement for only certain months as opposed to a full year, the penalty for each month of no coverage is equal to one-twelfth of the greater of these figures. 26 U.S.C. § 5000A(c)(2)-(3).

[54] The flat dollar amount applies to each individual and dependent in the taxpayer's household without minimum essential coverage, but will not exceed three times the flat dollar amount (even if more than three persons are in the household). 26 U.S.C. § 5000A(c)(2)(A). A family's flat dollar penalty in 2016 would not exceed $2,085 ($695 multiplied by 3).

[55] The percentage by which the taxpayer's household income exceeds the filing threshold is phased in over three years: 1% in 2014, 2% in 2015, and 2.5% in 2016 and thereafter. 26 U.S.C. § 5000A(c)(2)(B)(I)–(iii).

taxable year cannot exceed the national average premium of a bronze-level qualified health plan. *Id.* § 5000A(c)(1).

9. Collection of Individual Mandate Penalty

An individual who fails to pay the penalty is not subject to criminal or additional civil penalties. *Id.* § 5000A(g)(2)(A), (B). The IRS's authority to use liens or levies does not apply to the penalty. *Id.* § 5000A(g)(2)(B). No interest accrues on the penalty. The Act contains no enforcement mechanism. *See id.* All the IRS, practically speaking, can do is offset any tax refund owed to the uninsured taxpayer.[56]

We now review the Act's fourth component aimed at reducing the number of the uninsured: the employer penalty.

G. Employer Penalty

The Act imposes a penalty, also housed in the Internal Revenue Code, on certain employers if they do not offer coverage, or offer inadequate coverage, to their employees. *Id.* § 4980H(a), (b). The penalty applies to employers with an average of at least 50 full-time employees. *Id.* § 4980H(a), (b), (c)(2). The employer must pay a penalty if the employer: (1) does not offer its full-time employees the opportunity to enroll in "minimum essential coverage" under an "eligible employer-sponsored plan" as defined in § 5000(A)(f)(2); *or* (2) offers minimum essential coverage (i) that is "unaffordable," or (ii) that consists of a plan whose share of the total cost of benefits is less than 60% (*i.e.*, does not provide "minimum value"); *and* (3) at least one full-time

[56] Of course, the government can always file a civil lawsuit, but the cost of that suit would exceed the modest penalty amount.

employee purchases a qualified health plan through an Exchange and is allowed a premium tax credit or a subsidy. *Id.* § 4980H(a), (c).

The employer penalty is tied to an employer's failure to offer "minimum essential coverage." *Id.* § 4980H(a), (b). Recall that "minimum essential coverage" is not the same thing as the "essential health benefits package." Thus, a large employer may avoid the penalty so long as it offers any plan in the large group market in the state, and the plan is "affordable" and provides "minimum value." *Id.* § 4980H(b)(1), (c)(3).

A small employer's plan, however, must include an "essential health benefits package" and also be "affordable" and provide "minimum value." 42 U.S.C. §§ 300gg-6(a) (effective Jan. 1, 2014), 18022(a)(1)–(3). The Act also provides tax incentives for certain small employers (up to 25 employees) to purchase health insurance for their workers. 26 U.S.C. § 45R.

1. Calculation of Penalty Amount

The penalty amount depends on whether the employee went to the Exchange because the employer's plan (1) was not "minimum essential coverage" or (2) was either "unaffordable" or did not provide "minimum value." The penalty translates to $2,000 to $3,000 per employee annually. *Id.* § 4980H.

An employer that does not offer "minimum essential coverage" to all full-time employees faces a tax penalty of $166.67 per month (one-twelfth of $2,000) for each of its full-time employees, until the employer offers such coverage (subject to an exemption for the first 30 full-time employees). *Id.* § 4980H(a), (c)(1), (c)(2)(D). This particular penalty applies for as long as at least one em-

ployee, eligible for a premium tax credit or a subsidy, enrolls in a qualified health plan through an Exchange. *Id.*

In the "unaffordable coverage"[57] or "no minimum value" scenarios, the employer faces a tax penalty of $250 per month (one-twelfth of $3,000) for each employee who (1) turns down the employer-sponsored plan; (2) purchases a qualified health plan in an Exchange; and (3) is eligible for a federal premium tax credit or subsidy in an Exchange.[58] *Id.* § 4980H(b)(1).

2. Automatic Enrollment

An automatic enrollment requirement applies to employers who (1) have more than 200 employees and (2) elect to offer coverage to their employees. *Id.* § 218a. Such employers must automatically enroll new and current full-time employees, who do not opt out, in one of

---

[57] Employer-sponsored coverage that is not "affordable" is defined as coverage where the employee's required annual contribution to the premium is more than 9.5% of the employee's household income (as defined for purposes of the premium tax credits in the Exchanges). 26 U.S.C. § 36B(c)(2)(C)(i). This percentage of the employee's income is indexed to the per capita growth in premiums for the insurance market as determined by HHS. *Id.* § 36B(c)(2)(C)(iv). Note that the definition of "unaffordable" for the purposes of obtaining a federal tax credit or subsidy is *not* the same standard that is used to determine whether an individual is exempt from the individual mandate because that individual cannot afford coverage. *Compare id.* § 36B(c)(2)(C)(i), *with id.* § 5000A(e)(1).

[58] The employer's penalty, in this instance, does not exceed the maximum penalty for offering no coverage at all. The penalty for any month is capped at an amount equal to the number of full-time employees during the month multiplied by one-twelfth of $2,000, or $166.67 (subject to the exemption for the first 30 full-time employees). *See* 26 U.S.C. § 4980H(b)(2), (c).

the employer's plans. *Id.* The maximum 90-day waiting period rule applies, however. *Id.*; 42 U.S.C. § 300gg-7 (effective Jan. 1, 2014).

3. Temporary Reinsurance Program for Employers' Early Retirees

To reduce the number of the uninsured, the Act provides for immediate coverage for even retired employees 55 years and older who are not yet eligible for Medicare. A federal temporary reinsurance program will reimburse former employers who allow their early retirees and the retirees' dependents and spouses to participate in their employment-based plans. The federal government will reimburse a portion of the plan's cost.[59] 42 U.S.C. § 18002(a)(1), (a)(2)(C).

We turn to the Act's fifth component: the Medicaid expansion, which alone will cover millions of the uninsured.

H. Medicaid Expansion

The Act expands Medicaid eligibility and subsidies by amending 42 U.S.C. § 1396a, the section of the Medicaid Act outlining what states must offer in their coverage plans. The Act imposes these substantive requirements on the states' plans, starting in 2014, unless otherwise noted:

---

[59] The plan shall submit claims for reimbursement to HHS, and HHS shall reimburse the plan for 80% of the costs of claims in excess of $15,000 but not greater than $90,000. 42 U.S.C. § 18002(c)(2). The reimbursements will be available until January 1, 2014. *Id.* § 18002(a)(1). This federally-subsidized temporary program closes the gap between now and 2014, when the Exchanges, with their federal tax credits and subsidies, become operational.

(1) States will be required to cover adults under age 65 (who are not pregnant and not already covered) with incomes up to 133% of the federal poverty level ("FPL"). *Id.* § 1396a(a)(10)(A)(i)(VIII). This is a significant change, because previously the Medicaid Act did not set a baseline income level for mandatory eligibility. Thus, many states currently do not provide Medicaid to childless adults and cover parents only at much lower income levels.

(2) States will be required to provide Medicaid to all children whose families earn up to 133% of the FPL, including children currently covered through separate CHIP programs. *Id.* §§ 1396a(a)(10)(A)(i)(VII), 1396a(*l*)(1)(D), 1396a(*l*)(2)(C). States currently must provide Medicaid to children under age 6 with family income up to 133% of the FPL and children ages 6 through 18 with family income up to 100% of the FPL. *Id.* §§ 1396a(a)(10)(A)(i)(IV), (VI), (VII), 1396a(*l*)(1)(B)–(D), 1396a(*l*)(2)(A)–(C).

(3) States are required to at least maintain existing Medicaid eligibility levels for adults and children (that were in place as of March 23, 2010) until a state's Exchange is fully operational. *Id.* § 1396a(gg)(1). Whereas states previously had the option to raise or lower their eligibility levels, states cannot institute more restrictive eligibility standards until the new policies take place. *Id.*

(4) Children under age 26 who were receiving Medicaid but were "aged out" of foster care will be newly eligible to continue receiving Medicaid. *Id.* § 1396a(a)(10)(A)(i)(IX) (effective Jan. 1, 2014).

(5) The new law will increase Medicaid payments for primary care services provided by primary care doctors to 100% of the Medicare payment rates for 2013 and 2014. *Id.* § 1396a(a)(13)(C). States will receive 100% federal funding for the cost of the increasing payment rates for 2013 and 2014.[60] *Id.* § 1396d(dd).

Having covered the Act's five major components, we examine the two components challenged as unconstitutional: (1) the Medicaid expansion and (2) the individual mandate.

III. CONSTITUTIONALITY OF MEDICAID EXPANSION

The state plaintiffs challenge the district court's grant of summary judgment in favor of the government on the state plaintiffs' claim that the Act's expansion of the Medicaid program, enacted pursuant to the Spending Clause, is unduly coercive under *South Dakota v. Dole*, 483 U.S. 203, 211, 107 S. Ct. 2793, 2798 (1987). For the reasons given below, we conclude that it is not.

A. History of the Medicaid Program

Medicaid is a long-standing partnership between the national and state sovereigns that has been in place for nearly half a century. "In 1965, Congress enacted the Medicaid Act, 42 U.S.C. § 1396 *et seq.*, as Title XIX of the Social Security Act." *Moore ex rel. Moore v. Reese*, 637 F.3d 1220, 1232 (11th Cir. 2011); *see also Harris v. McRae*, 448 U.S. 297, 301, 100 S. Ct. 2671, 2680 (1980). "Medicaid is a jointly financed federal-state cooperative program, designed to help states furnish medical treat-

---

[60] *See also* Julie Stone, *et al.*, Cong. Research Serv., R41210, *Medicaid and the State Children's Health Insurance Program (CHIP) Provisions in the PPACA* 2–4 (2010).

ment to their needy citizens." *Reese*, 637 F.3d at 1232. The Medicaid Act "prescribes substantive requirements governing the scope of each state's program." *Curtis v. Taylor*, 625 F.2d 645, 649 (5th Cir. 1980).[61] "Section 1396a provides that a 'State plan for medical assistance' must meet various guidelines, including the provision of certain categories of care and services." *Reese*, 637 F.3d at 1232 (citing 42 U.S.C. § 1396a). "Some of these categories are discretionary, while others are mandatory for participating states." *Id.* (citing 42 U.S.C. § 1396a(a)(10)).

Under the Act, the Medicaid program serves as a cornerstone for expanded health care coverage. As explained above in Section II(H), the Act expands Medicaid eligibility and provides significant Medicaid subsidies to the impoverished. As a result of the Act's Medicaid expansion, an estimated 9 million of the 50 million uninsured will be covered for health care by 2014 (and 16 million by 2016 and 17 million by 2021).[62]

The federal government will pay 100% of the fees associated with the increased Medicaid eligibility and subsidies beginning in 2014 and until 2016; that percentage will then drop gradually each year until reaching 90% in 2020. 42 U.S.C. § 1396d(y)(1). The federal government will not cover administrative expenses associated with implementing the new Medicaid policies. *See id.* Under 42 U.S.C. § 1396c, a state whose plan does not comply with the requirements under § 1396a will be no-

---

[61] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit issued before the close of business on September 30, 1981.

[62] CBO, *Analysis*, *supra* note 15, at 18 tbl.3.

tified by HHS of its noncompliance, and "further payments will not be made to the State (or, in [HHS's] discretion . . . payments will be limited to categories under or parts of the State plan not affected by such failure), until [HHS] is satisfied that there will no longer be any such failure to comply." *Id.* § 1396c.

B. Congress's Power under the Spending Clause

The Spending Clause provides that "Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1. The Spending Clause permits Congress to "fix the terms on which it shall disburse federal money to the States." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 1539, 67 L. Ed. 2d 694 (1981). "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Id.* at 17, 101 S. Ct. at 1540.

There are four primary restrictions on legislation enacted pursuant to the Spending Clause. First, the exercise of the spending power must be in pursuit of the general welfare. *See Helvering v. Davis*, 301 U.S. 619, 640, 57 S. Ct. 904, 908 (1937). Second, the conditions on the receipt of federal funds must be reasonably related to the legislation's stated goal. *Dole*, 483 U.S. at 207, 107 S. Ct. at 2796. Third, Congress's intent to condition funds on a particular action must be unambiguous and must enable the states to knowingly exercise their choice whether to participate. *Pennhurst*, 451 U.S. at 17, 101 S. Ct. at 1540. Finally, the federal legislation cannot "induce the States to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S.

at 210, 107 S. Ct. at 2798. The state plaintiffs do not contend the Act's Medicaid expansion violates any of these restrictions.[63]

Rather, the state plaintiffs argue that the Medicaid expansion violates an additional limitation on the use of the spending power to encourage state legislation, one that derives not from the spending power alone, but also from the Tenth Amendment's reservation of certain powers to the states. U.S. CONST. amend. X; *see Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 585, 57 S. Ct. 883, 890 (1937); *West Virginia v. HHS*, 289 F.3d 281, 286–87 (4th Cir. 2002). Congress may not employ the spending power in such a way as to "coerce" the states into compliance with the federal objective. *See Dole*, 483 U.S. at 211, 107 S. Ct. at 2798; *Steward Mach.*, 301 U.S. at 589–91, 57 S. Ct. at 892-93; *cf. Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 687, 119 S. Ct. 2219, 2231 (1999) (holding

---

[63] The state plaintiffs suggest that the conditions imposed here violated the second *Dole* restriction because they have no reasonable relationship to the size of the federal inducement. States' Opening Br. at 48, 53. In so arguing, the plaintiffs misinterpret *Dole*. The Supreme Court made clear that the required relationship is between the conditions imposed and "the federal interest in particular national projects or programs," *Dole*, 483 U.S. at 207, 107 S. Ct. at 2796 (quotation marks omitted)—that is, "the purpose of federal spending." *New York v. United States*, 505 U.S. 144, 167, 112 S. Ct. 2408, 2423 (1992). The state plaintiffs mistakenly assert that the required relationship is between the conditions imposed and "the size of the federal inducement." States' Opening Br. at 53. The condition Congress imposes here on the receipt of federal funds—requiring Medicaid coverage of certain newly eligible individuals—is undeniably related to the purpose of the Medicaid Act, which is to "provid[e] federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *McRae*, 448 U.S. at 301, 100 S. Ct. at 2680.

that a state's waiver of its sovereign immunity is not voluntary where Congress has made it a condition of the state's participation in an otherwise lawful activity). This restriction is different from the restrictions stemming from the spending power because it addresses whether the legislation, while perhaps an appropriate use of the spending power, goes beyond the Spending Clause by forcing the states to participate in a federal program. *Cf. Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365 (1997) (holding that Congress may not enact a law pursuant to one of its enumerated powers and then compel state officers to execute those federal laws); *see also Steward Mach.*, 301 U.S. at 585, 57 S. Ct. at 890. That is, the coercion test asks whether the federal scheme removes state choice and compels the state to act because the state, in fact, has no other option.

The coercion doctrine was first discussed at length by the Supreme Court in *Charles C. Steward Machine Co. v. Davis*. In that case, a corporation challenged the imposition of an employment tax under the newly enacted Social Security Act. Addressing the corporation's argument that the federal government improperly coerced states into participation in the Social Security program, the Supreme Court stated:

> The difficulty with the petitioner's contention is that it confuses motive with coercion. Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. In like manner every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The out-

> come of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems. . . . Nothing in the case suggests the exertion of a power akin to undue influence, *if we assume that such a concept can ever be applied with fitness to the relations between state and nation.* Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree, at times, perhaps, of fact.

301 U.S. at 589–90, 57 S. Ct. at 892 (quotation marks and citation omitted) (emphasis added).

This discussion of the coercion doctrine was later revived by the Supreme Court in *South Dakota v. Dole.* In *Dole,* the state of South Dakota challenged 23 U.S.C. § 158, which directed the Secretary of Transportation to withhold a percentage of federal highway funds otherwise allocable to the states if states failed to maintain a minimum drinking-age requirement of 21 years. 483 U.S. at 205, 107 S. Ct. at 2795. The Court noted that Congress may attach conditions on the receipt of federal funds to meet certain policy objectives, including those that Congress could not otherwise meet through direct regulation. *Id.* at 206–07, 107 S. Ct. at 2795–96. After analyzing whether the minimum drinking-age condition met the four restrictions on the Spending Clause discussed above, the Court noted, "Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into com-

pulsion.'" *Id.* at 211, 107 S. Ct. at 2798 (quoting *Steward Mach.*, 301 U.S. at 590, 57 S. Ct. at 892). It further opined:

> When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact. . . .
>
> Here Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States *not merely in theory but in fact.*

Id. (emphasis added). Thus, the Court once again recognized the coercion doctrine, but found no violation.

The limited case law on the doctrine of coercion and the fact that the Supreme Court has never devised a test to apply it has left many circuits with the conclusion that the doctrine, twice recognized by the Supreme Court, is not a viable defense to Spending Clause legislation. *See, e.g.*, *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 278 (5th Cir. 2005) (en banc) ("It goes without saying that, because states have the independent power to lay and collect taxes, they retain the ability to avoid the imposition of unwanted federal regulation simply by rejecting federal funds."); *A.W. v. Jersey City Pub. Schs.*, 341 F.3d 234, 243–44 (3d Cir. 2003) (noting that the state's freedom to tax makes it difficult to find a federal law coercive, even when that law threatens to withhold all federal funding in a particular area); *Kansas v. United States*, 214 F.3d 1196, 1201–02 (10th Cir. 2000) ("The cursory statements in *Steward Machine* and *Dole* mark

the extent of the Supreme Court's discussion of a coercion theory. The Court has never employed the theory to invalidate a funding condition, and federal courts have been similarly reluctant to use it." (footnote omitted)); *id.* at 1202 (observing that the theory is "unclear, suspect, and has little precedent to support its application"); *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997) (noting in a Medicaid expansion case that "to the extent that there is any viability left in the coercion theory, it is not reflected in the facts of this record"); *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989) ("The difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments."); *Oklahoma v. Schweiker*, 655 F.2d 401, 414 (D.C. Cir. 1981) ("The courts are not suited to evaluating whether the states are faced here with an offer they cannot refuse or merely a hard choice. . . . We therefore follow the lead of other courts that have explicitly declined to enter this thicket when similar funding conditions have been at issue.") (pre-*Dole*); *N.H. Dep't of Emp't Sec. v. Marshall*, 616 F.2d 240, 246 (1st Cir. 1980) ("Petitioners argue, however, that this option of the state to refuse to participate in the program is illusory, since the severe financial consequences that would follow such refusal negate any real choice. . . . We do not agree that the carrot has become a club because rewards for conforming have increased. It is not the size of the stakes that controls, but the rules of the game.") (pre-*Dole*).

Even in those circuits that do recognize the coercion doctrine, it has had little success. *See West Virginia v. HHS*, 289 F.3d at 290, 294–95 (rejecting a coercion doc-

trine challenge to previous Medicaid Act amendments on the ground that the Secretary may choose to withhold only some funds); *Jim C. v. United States*, 235 F.3d 1079, 1081–82 (8th Cir. 2000) (en banc) (holding that loss of all federal education funds, in that case amounting to 12% of the state's education budget, was "politically painful" but not coercive). Indeed, our review of the relevant case law indicates that no court has ever struck down a law such as this one as unduly coercive.

There are two cases in which the Supreme Court has struck down a statute because it violated the Tenth Amendment's prohibition on commandeering state legislators and executive officials to perform the federal government's work. While not Spending Clause cases, these cases do give us an understanding of when a law may be considered so coercive as to violate the Tenth Amendment. In *New York v. United States*, the Court struck down as unduly coercive a portion of the Low-Level Radioactive Waste Policy Amendments Act that required states to "take title" to waste created within the state, noting that Congress has ample opportunity to create incentives for states to act the way that Congress desires. 505 U.S. 144, 176–77, 112 S. Ct. 2408, 2428–29 (1992); *see also Printz*, 521 U.S. 898, 117 S. Ct. 2365 (holding, in accord with *New York*, that Congress cannot compel states to enact or administer federal regulatory programs).[64] It is clear from these two cases that Con-

---

[64] The Supreme Court has also briefly discussed coercion in another context. In *Florida Prepaid*, the Court held that federal courts lack jurisdiction over a Lanham Act suit against a state, despite a law purporting to abrogate the states' sovereign immunity under the Lanham Act. 527 U.S. at 691, 119 S. Ct. at 2233. While the holding rested on Eleventh Amendment immunity grounds, Justice Scalia noted: "[W]e think where the constitutionally guaranteed protection of the States'

gress cannot directly compel a state to act, nor can Congress hinge the state's right to regulate in an area that the state has a constitutional right to regulate on the state's participation in a federal program. Either act is clearly unconstitutionally coercive.

If anything can be said of the coercion doctrine in the Spending Clause context, however, it is that it is an amorphous one, honest in theory but complicated in application. But this does not mean that we can cast aside our duty to apply it; indeed, it is a mystery to us why so many of our sister circuits have done so. To say that the coercion doctrine is not viable or does not exist is to ignore Supreme Court precedent, an exercise this Court will not do. As the district court noted, "The reluctance of some circuits to deal with this issue because of the potential legal and factual complexities is not entitled to a great deal of weight, because courts deal every day with the difficult complexities of applying Constitutional principles set forth and defined by the Supreme Court." *Florida ex rel. McCollum v. HHS*, 716 F. Supp. 2d 1120, 1160 (N.D. Fla. 2010).[65] If the government is correct that Congress *should* be able to place any and all condi-

---

sovereign immunity is involved, the point of coercion is automatically passed—and the voluntariness of waiver destroyed— when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity." *Id.* at 687, 119 S. Ct. at 2231.

[65] In *Florida ex rel. McCollum v. HHS*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010), the district court granted in part and denied in part the government's motion to dismiss. In *Florida ex rel. Bondi v. HHS*, No. 3:10-CV-91-RV/EMT, __ F. Supp. 2d __, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011), the district court ruled that (1) the Medicaid expansion did not exceed Congress's Spending Clause powers and (2) the individual mandate is beyond Congress's commerce powers and is inseverable from the rest of the Act.

tions it wants on the money it gives to the states, then the Supreme Court must be the one to say it.

For now, we find it a reasonable conclusion that *Dole* instructs that the Tenth Amendment places certain limitations on congressional spending; namely, that Congress cannot place restrictions so burdensome and threaten the loss of funds so great and important to the state's integral function as a state—funds that the state has come to rely on heavily as part of its everyday service to its citizens—as to compel the state to participate in the "optional" legislation. This is the point where "'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211, 107 S. Ct. at 2798 (quoting *Steward Mach.*, 301 U.S. at 590, 57 S. Ct. at 892).

And so it is not without serious thought and some hesitation that we conclude that the Act's expansion of Medicaid is not unduly coercive under *Dole* and *Steward Machine*. There are several factors, which, for us, are determinative. First, the Medicaid-participating states were warned from the beginning of the Medicaid program that Congress reserved the right to make changes to the program. *See* 42 U.S.C. § 1304 ("The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Congress."); *McRae*, 448 U.S. at 301, 100 S. Ct. at 2680 (noting "[a]lthough participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements" that Congress sees fit to impose). Indeed, Congress has made numerous amendments to the

program since its inception in 1965. 42 U.S.C. § 1396a Note (listing amendments).[66] In each of these previous amendments, the states were given the option to comply with the changes, or lose all or part of their funding. *Id.* § 1396c. None of these amendments has been struck down as unduly coercive.

Second, the federal government will bear nearly all of the costs associated with the expansion. The states will only have to pay incidental administrative costs associated with the expansion until 2016; after which, they will bear an increasing percentage of the cost, capping at 10% in 2020.[67] *Id.* § 1396d(y)(1). If states bear little of the cost of expansion, the idea that states are being

---

[66] The government discusses the various Medicaid expansions at length:

> Congress has amended the Medicaid Act many times since its inception, and, between 1966 and 2000, Medicaid enrollment increased from four million to 33 million recipients. Klemm, *Medicaid Spending: A Brief History*, 22 Health Care Fin. Rev. 106 (Fall 2000). For example, in 1972, Congress required participating states to extend Medicaid to recipients of Supplemental Security Income, thereby significantly expanding Medicaid enrollment. Social Security Act Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329 (1972). In 1989, Congress again expanded enrollment by requiring states to extend Medicaid to pregnant women and children under age six who meet certain income limits. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106 (1989).

Government's Reply Br. at 46–47.

[67] At oral argument, the state plaintiffs expressed a concern that Medicaid costs would be even larger because the individual mandate would greatly increase the number of persons in Medicaid who are currently eligible but for one reason or another do not choose to participate. This argument is not persuasive, however, as to whether the expansions themselves are coercive, because the increase in enrollment would still occur if the mandate were upheld, even if the Medicaid expansions were struck down.

coerced into spending money in an ever-growing program seems to us to be "more rhetoric than fact." *Dole*, 483 U.S. at 211, 107 S. Ct. at 2798.

Third, states have plenty of notice—nearly four years from the date the bill was signed into law—to decide whether they will continue to participate in Medicaid by adopting the expansions or not. This gives states the opportunity to develop new budgets (indeed, Congress allocated the cost of the entire expansion to the federal government initially, with the cost slowly shifting to the states over a period of six years) to deal with the expansion, or to develop a replacement program in their own states if they decide to do so. Fourth, like our sister circuits, we cannot ignore the fact that the states have the power to tax and raise revenue, and therefore can create and fund programs of their own if they do not like Congress's terms. *See Pace*, 403 F.3d at 278; *Jersey City Pub. Schs.*, 341 F.3d at 243–44.

Finally, we note that while the state plaintiffs vociferously argue that states who choose not to participate in the expansion will lose all of their Medicaid funding, nothing in the Medicaid Act states that this is a foregone conclusion. Indeed, the Medicaid Act provides HHS with the discretion to withhold all or merely a portion of funding from a noncompliant state. 42 U.S.C. § 1396c; *see also West Virginia v. HHS*, 289 F.3d at 291–92; *Dole*, 483 U.S. at 211, 107 S. Ct. at 2798 (finding no coercion when "all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs").

Taken together, these factors convince us that the Medicaid-participating states have a real choice—not just in theory but in fact—to participate in the Act's Medicaid expansion. *See Dole*, 483 U.S. at 211, 107 S. Ct. at 2798. Where an entity has a real choice, there can be no coercion. *See Steward Mach.*, 301 U.S. at 590, 57 S. Ct. at 892 (noting that in the absence of undue influence, "the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems").

Accordingly, the district court's grant of summary judgment to the government on the Medicaid expansion issue is affirmed.

We now turn to the constitutionality of the Act's fourth component: the individual mandate. We begin with the relevant constitutional clauses and Supreme Court precedent.

IV. SUPREME COURT'S COMMERCE CLAUSE DECISIONS

Two constitutional provisions govern our analysis of whether Congress acted within its commerce authority in enacting the individual mandate: the Commerce Clause and the Necessary and Proper Clause. U.S. CONST. art. I, § 8, cls. 3, 18.

Seven words in the Commerce Clause—"[t]o regulate Commerce . . . among the several States," *id.* art. I, § 8, cl. 3—have spawned a 200-year debate over the permissible scope of this enumerated power. For many years, the Supreme Court described Congress's commerce power as regulating "traffic"—the "buying and selling, or the interchange of commodities"—and "intercourse" among states, including transportation. *See*

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189–90 (1824). Under this early understanding of the Clause, Congress could not reach commerce that was strictly internal to a state. *See id.* at 194–95 ("The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State.").

Ultimately, in recognition of a modern and integrated national economy and society, the New Deal decisions of the Supreme Court charted an expansive doctrinal path. *See, e.g.*, *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S. Ct. (1937). These Supreme Court decisions adopted a broad view of the Commerce Clause, in tandem with the Necessary and Proper Clause, and permitted Congress to regulate purely local, intrastate economic activities that substantially affect interstate commerce. The "substantial effects" doctrine, along with the related "aggregation" doctrine, expanded the reach of Congress's commerce power exponentially. Nonetheless, the Supreme Court has staunchly maintained that the commerce power contains outer limits which are necessary to preserve the federal-state balance in the Constitution.

We therefore review the principal Commerce Clause precedents that inform our analysis of the difficult question before us. Although extensive, this survey is necessary to understanding the rudiments of the Supreme Court's existing Commerce Clause doctrines that we, as an inferior Article III court, must apply.

A. *Wickard v. Filburn*

One of the early "substantial effects" decisions is *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82 (1942), where the Supreme Court held that Congress's wheat production quotas were constitutional as applied to a plaintiff farmer's home-grown and home-consumed wheat. The Agricultural Adjustment Act of 1938 ("AAA") sought to control the volume of wheat in interstate and foreign commerce by placing acreage limits on farmers. *Id.* at 115, 63 S. Ct. at 84. This scheme was intended to prevent wheat surpluses and shortages, attendant price instability, and obstructions to commerce. *Id.*

Plaintiff Filburn operated a small farm raising wheat. *Id.* at 114, 63 S. Ct. at 84. Filburn sold some of this wheat crop, allocated a portion as feed for livestock and poultry on his farm, used another portion as flour for home consumption, and preserved the remainder for future seedings. *Id.* Although his AAA allotment was only 11.1 acres, Filburn sowed and harvested 23 acres of wheat—11.9 excess acres that the Supreme Court treated as home-consumed wheat.[68] *Id.* at 114–15, 63 S. Ct. at 84. This violation subjected him to a penalty of 49 cents a bushel.[69] *Id.* Filburn sued, claiming that Congress's acreage quotas on his home-consumed wheat exceeded its commerce power because the regulated activities were local in nature and their effects upon in-

---

[68] *See also Gonzales v. Raich*, 545 U.S. 1, 20, 125 S. Ct. 2195, 2207 (2005) (noting that *Wickard* Court treated Filburn's wheat as home-consumed, not part of commercial farming operation).

[69] These penalties were levied regardless of "whether any part of the wheat either within or without the quota, is sold or intended to be sold." *Wickard*, 317 U.S. at 119, 63 S. Ct. at 86.

terstate commerce were "indirect." *Id.* at 119, 63 S. Ct. at 86.

The Supreme Court examined the factors of home-consumed wheat that impinged on interstate commerce—factors which could potentially frustrate Congress's regulatory scheme if not controlled. The Court declared that home-consumed wheat "constitutes the most variable factor in the disappearance of the wheat crop," since "[c]onsumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production." *Id.* at 127, 63 S. Ct. at 90. Filburn's home-consumed wheat therefore "compete[d]" with wheat sold in commerce, since "it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market." *Id.* at 128, 63 S. Ct. at 91.

The *Wickard* Court recognized that "the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices" and "it can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions." *Id.* at 128, 63 S. Ct. at 90–91. Therefore, the objectives of the AAA acreage quotas—"to increase the market price of wheat and to that end to limit the volume thereof that could affect the market"—constituted appropriate regulatory goals. *Id.*

Despite the fact that Congress's commerce power "has been held to have great latitude," *id.* at 120, 63 S. Ct. at 86, the Supreme Court recognized the novelty of its decision, remarking that "there is no decision of this Court that such activities may be regulated where

no part of the product is intended for interstate commerce or intermingled with the subjects thereof." *Id.* at 120, 63 S. Ct. at 86–87. However, the *Wickard* Court concluded that "even if [Filburn's] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Id.* at 125, 63 S. Ct. at 89. The Court declared that "questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce." *Id.* at 120, 63 S. Ct. at 87; *see also id.* at 123–24, 63 S. Ct. at 88 (stating that "the relevance of the economic effects in the application of the Commerce Clause . . . has made the mechanical application of legal formulas no longer feasible").

Even though Filburn's own contribution to wheat demand "may be trivial by itself," this was "not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.* at 127–28, 63 S. Ct. at 90. Since Filburn's home-grown wheat slackened demand for market-based wheat and placed downward pressures on price, "Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices." *Id.* at 128–29, 63 S. Ct. at 91.

The Supreme Court noted that restricting Filburn's acreage could have the effect of forcing Filburn to buy wheat in the market: "It is said, however, that this Act, forcing some farmers into the market to buy what they could provide for themselves, is an unfair promotion of the markets and prices of specializing wheat growers." *Id.* at 129, 63 S. Ct. at 91. Rejecting this, the Supreme Court stated, "It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others." *Id.*

B. *United States v. South-Eastern Underwriters Association*

Although not concerning the "substantial effects" doctrine, the 1944 case *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 64 S. Ct. 1162 (1944), is important to our analysis, as it marked the Supreme Court's first recognition that the insurance business *is commerce*—and where it is conducted across state borders, it constitutes interstate commerce capable of being regulated by Congress.[70] *Id.* at 553, 64

---

[70] Prior to 1944, the Supreme Court consistently upheld the power of the states to regulate insurance. During those early years, Congress had not regulated insurance, but the states had. The operative question concerned whether Congress's power to regulate interstate commerce deprived states of the power to regulate the insurance business themselves. Since Congress had not sought to regulate insurance, an invalidation of the states' statutes would entail that insurance companies could operate without any regulation. The earlier Supreme Court decisions held that insurance is not commerce, thereby skirting any constitutional problem arising from the Constitution's grant of power to Congress to regulate interstate commerce. *See Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868); *see also N.Y. Life Ins. Co. v. Deer Lodge Cnty.*, 231

S. Ct. at 1173. The Supreme Court emphasized the interstate character of insurance business practices, which resulted in a "continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts." *Id.* at 541, 64 S. Ct. at 1167. The defendants' insurances policies "covered not only all kinds of fixed local properties, but also . . . movable goods of all types carried in interstate and foreign commerce by every media of transportation." *Id.* at 542, 64 S. Ct. at 1168.

The *South-Eastern Underwriters* Court rejected the notion that, if any components of the insurance business constitute interstate commerce, the states may not exercise regulatory control over the industry. *Id.* at 548, 64 S. Ct. at 1171. Nevertheless, the Court pronounced that "[n]o commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance." *Id.* at 553, 64 S. Ct. at 1173.

C. ***Heart of Atlanta Motel v. United States***

In another landmark Commerce Clause case, *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 85 S. Ct. 348 (1964), the Supreme Court held that Congress acted within its commerce authority in enacting Title II of the Civil Rights Act of 1964, which prohibited discrimination in public accommodations. The plaintiff owned and operated a 216-room motel whose guests were primarily

---

U.S. 495, 34 S. Ct. 167 (1913); *Hooper v. California*, 155 U.S. 648, 15 S. Ct. 207 (1895).

out-of-state visitors. *Id.* at 243, 85 S. Ct. at 350–51. The motel refused to rent rooms to black patrons. *Id.* at 243, 85 S. Ct. at 351.

The Supreme Court detailed the "overwhelming evidence that discrimination by hotels and motels impedes interstate travel." *Id.* at 253, 85 S. Ct. at 355. The Court noted that it had "long been settled" that transportation of persons in interstate commerce is within Congress's regulatory power, regardless of "whether the transportation is commercial in character." *Id.* at 256, 85 S. Ct. at 357. Additionally, Supreme Court precedents confirmed that "the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof . . . which might have a substantial and harmful effect upon that commerce." *Id.* at 258, 85 S. Ct. at 358. Thus, "Congress may—as it has—prohibit racial discrimination by motels serving travelers, however 'local' their operations may appear." *Id.*

The *Heart of Atlanta Motel* Court acknowledged that "Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination," but the means employed in removing such obstructions are "within the sound and exclusive discretion of the Congress" and are "subject only to one caveat—that the means chosen by it must be reasonably adapted to the end permitted by the Constitution." *Id.* at 261–62, 85 S. Ct. at 360. The means chosen by Congress in Title II clearly met this standard.[71]

---

[71] In *Katzenbach v. McClung*, 379 U.S. 294, 85 S. Ct. 377 (1964), a companion case, the Court also upheld Title II's prohibition on discrim-

D. *United States v. Lopez*

For the next thirty years, the Supreme Court applied an expansive interpretation of Congress's commerce power and upheld a wide variety of statutes. *See, e.g., Preseault v. ICC,* 494 U.S. 1, 110 S. Ct. 914 (1990) (upholding statute amending National Trails System Act in facial challenge); *Hodel v. Va. Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 101 S. Ct. 2352 (1981) (sustaining Surface Mining Control and Reclamation Act in facial challenge); *Perez v. United States,* 402 U.S. 146, 91 S. Ct. 1357 (1971) (sustaining Title II of Consumer Credit Protection Act in as-applied challenge); *Maryland v. Wirtz,* 392 U.S. 183, 88 S. Ct. 2017 (1968) (upholding validity of amendments to Fair Labor Standards Act of 1938 in facial challenge), *overruled on other grounds, Nat'l League of Cities v. Usery,* 426 U.S. 833, 96 S. Ct. 2465 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528, 105 S. Ct. 1005 (1985). These cases reflect a practical need to allow federal regulation of a growing and unified national economy.

In 1995, the Supreme Court decided *United States v. Lopez,* 514 U.S. 549, 115 S. Ct. 1624 (1995), the first Supreme Court decision since the 1930s to rule that Congress had exceeded its commerce power. *Lopez* concerned the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A) (1993). The defendant Alfonso Lopez, a twelfth-grade student, was convicted of carry-

---

ination in restaurants serving food to interstate travelers or serving food that had moved in interstate commerce.

ing a concealed handgun to his Texas school. *Lopez*, 514 U.S. at 551, 115 S. Ct. at 1626.

In a 5-4 opinion, the *Lopez* Court invalidated § 922(q). The *Lopez* Court first observed that the Constitution created a federal government of enumerated, delegated, and thus limited powers. *Id.* at 552, 115 S. Ct. at 1626. Although the Supreme Court's New Deal precedents expanded Congress's commerce power, the *Lopez* Court recognized that "this power is subject to outer limits." *Id.* at 557, 115 S. Ct. at 1628. The *Lopez* Court then enumerated the "three broad categories of activity that Congress may regulate under its commerce power": (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities that substantially affect interstate commerce."[72] *Id.* at 558–59, 115 S. Ct. at 1629–30. After determining that § 922(q) could be sustained only under this third category, the *Lopez* Court identified four factors influencing its analysis of whether gun possession in school zones substantially affects interstate commerce.

First, the *Lopez* Court differentiated between economic and non-economic activity, stressing how prior cases utilizing the substantial effects test to reach intrastate conduct had all involved economic activity. The Supreme Court stated that "Section 922(q) is a criminal statute that by its terms has nothing to do with 'com-

---

[72] The "third *Lopez* prong is the broadest expression of Congress' commerce power." *United States v. Ballinger*, 395 F.3d 1218, 1226 (11th Cir. 2005) (en banc).

merce' or any sort of economic enterprise" and was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561, 115 S. Ct. at 1630–31. The Court opined that "[e]ven *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved *economic activity* in a way that the possession of a gun in a school zone does not." *Id.* at 560, 115 S. Ct. at 1630 (emphasis added). The *Lopez* Court acknowledged that "a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty," yet "so long as [Congress's] enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty.'" *Id.* at 566, 115 S. Ct. at 1633.

Second, the *Lopez* Court found it significant that § 922(q) did not contain a "jurisdictional element" to "ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* at 561, 115 S. Ct. at 1631. Instead, the Act penalized "mere possession" and lacked any requirement that there be "an explicit connection with or effect on interstate commerce."[73] *Id.* at 562, 115 S. Ct. at 1631.

---

[73] In this respect, the *Lopez* Court contrasted the Gun-Free School Zones Act of 1990 with the firearm possession statute at issue in *United States v. Bass*, 404 U.S. 336, 92 S. Ct. 515 (1971). In *Bass*, the Supreme Court construed legislation making it a federal crime for a felon to "receiv[e], posses[s], or transpor[t] *in commerce or affecting commerce* . . . any firearm." *Lopez*, 514 U.S. at 561–62, 115 S. Ct. at 1631 (emphasis added) (quoting former 18 U.S.C. § 1202(a)). The *Lopez* Court stated that "[u]nlike the statute in *Bass*, § 922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm

Third, the Court noted that Congress provided no legislative findings demonstrating the purported nexus between gun possession around schools and its effects on interstate commerce. *Id.* at 562–63, 115 S. Ct. at 1631–32.

Fourth, the *Lopez* Court examined the actual relationship between gun possession in a school zone and its effects on interstate commerce. The government posited three effects: (1) violent crime, even when purely local, generates substantial costs that are spread to the wider populace through insurance; (2) individuals are deterred from traveling to areas beset by violent crime; and (3) guns in schools imperil the learning environment, which in turn adversely impacts national productivity. *Id.* at 563–64, 115 S. Ct. at 1632.

The *Lopez* Court declared that the government's arguments yielded no limiting principles. For example, under the government's proffered "costs of crime" theory, "Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.* at 564, 115 S. Ct. at 1632. Likewise, the "national productivity" rationale afforded no bounds, either. If Congress could employ its Commerce Clause authority to "regulate activities that adversely affect the learning environment, then, *a fortiori*, it also can regulate the educational process directly." *Id.* at 566, 115 S. Ct. at 1633. Indeed, "Congress could regulate any activity that it found was related to the economic productivity of individual citizens," including "marriage, divorce, and child custody." *Id.* at 564, 115 S. Ct. at 1632.

---

possessions that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562, 115 S. Ct. at 1631.

The Supreme Court pronounced that these links were too attenuated to conclude that the regulated activity "substantially affects" interstate commerce: "[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* "To uphold the Government's contentions," the Supreme Court continued, "we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567, 115 S. Ct. at 1634.

Lastly, the *Lopez* Court acknowledged that some of the Supreme Court's precedents gave "great deference to congressional action" but refused to expand the "broad language" of these precedents any further, since "[t]o do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated." *Id.* Such judicial abdication would dissolve the "distinction between what is truly national and what is truly local" and subvert constitutional notions of federalism. *Id.* at 567–68, 115 S. Ct. at 1634.

Although both joined the majority opinion in full, two justices wrote separately and echoed the majority's emphasis on the significance of the federal-state balance in the structure of the Constitution, and the need for judicial intervention when Congress has "tipped the scales too far." *See id.* at 568–83, 115 S. Ct. at 1634–42 (Ken-

nedy, J., concurring);[74] *id.* at 584–602, 115 S. Ct. at 1642–51 (Thomas, J., concurring).[75]

E. ***United States v. Morrison***

In another 5-4 decision, the Supreme Court in *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740 (2000), reapplied the *Lopez* principles and invalidated a section of the Violence Against Women Act of 1994 ("VAWA"),

---

[74] In a concurring opinion, Justice Kennedy explained why he joined the *Lopez* majority opinion in full and what he characterized as its "necessary though limited holding." 514 U.S. at 568, 115 S. Ct. at 1634 (Kennedy, J., concurring). Justice Kennedy noted "the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause," referring to earlier dichotomies that distinguished between "manufacturing and commerce," "direct and indirect effects," and other formalistic categories. *Id.* at 574, 115 S. Ct. at 1637. He stressed that the Supreme Court is "often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines." *Id.* at 579, 115 S. Ct. at 1640.

Justice Kennedy found that § 922(q) "upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required." *Id.* at 580, 115 S. Ct. at 1640. Much like the majority opinion, Justice Kennedy emphasized the far-reaching implications of the government's position: "In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far. If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern." *Id.* Such an interference was present in *Lopez*, as "it is well established that education is a traditional concern of the States." *Id.* Justice Kennedy added that courts have a "duty to recognize meaningful limits on the commerce power of Congress." *Id.*

[75] *See* discussion of Justice Thomas's concurring opinion *infra* note 78.

42 U.S.C. § 13981, which provided a federal civil remedy for victims of gender-motivated violence.[76]

In enacting the VAWA, Congress made specific findings about the relationship between gender-motivated violence and its substantial effects on interstate commerce. Congress declared its objectives were "to protect victims of gender motivated violence" and "to promote public safety, health, and activities affecting interstate commerce."[77] *Id.* § 13981(a).

The *Morrison* Court observed that since the New Deal case of *Jones & Laughlin Steel*, "Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted." *Morrison*, 529 U.S. at 608, 120 S. Ct. at 1748. *Lopez* clarified, however, that "Congress' regulatory authority is not without effective bounds." *Id.*

The Supreme Court stated that "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case." *Id.* at 610, 120 S. Ct. at 1750. The *Morrison* Court pointed out that "[g]ender-motivated crimes of

---

[76] The VAWA provided that a person who "commits a crime of violence motivated by gender . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate." 42 U.S.C. § 13981(c).

[77] The *Morrison* plaintiff was a college student allegedly raped by two football players. 529 U.S. at 602, 120 S. Ct. at 1745–46. The plaintiff filed suit in federal court under § 13981(c). *Id.* at 604, 120 S. Ct. at 1746. The defendant's motion to dismiss argued that Congress lacked authority to enact the VAWA's federal civil remedy provision under either the Commerce Clause or § 5 of the Fourteenth Amendment. *Id.* at 604, 120 S. Ct. at 1746–47.

violence are not, in any sense of the phrase, economic activity." *Id.* at 613, 120 S. Ct. at 1751. "While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases," the Supreme Court reiterated that "our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.*

The Supreme Court next noted that § 13981 contained no jurisdictional element. It commented that another provision of the VAWA, which similarly provided a federal remedy for gender-motivated crime, *did* contain a jurisdictional hook. *Id.* at 613 n.5, 120 S. Ct. at 1752 n.5 (discussing 18 U.S.C. § 2261(a)(1), which at the time applied only to an individual "who travels across a State line or enters or leaves Indian country").

Unlike § 922(q) in *Lopez*, § 13981 was "supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families." *Id.* at 614, 120 S. Ct. at 1752. Nonetheless, the *Morrison* Court stated that congressional findings were not dispositive, echoing *Lopez*'s statement that "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* (alteration in original) (quoting *Lopez*, 514 U.S. at 557 n.2, 115 S. Ct. at 1624 n.2).

The *Morrison* Court determined that "Congress findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers." *Id.* at 615, 120 S. Ct. at 1752. The congressional findings in

Morrison asserted that gender-motivated violence deterred potential victims from interstate travel and employment in interstate business, decreased national productivity, and increased medical costs. *Id.* According to the *Morrison* Court, "[t]he reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce." *Id.* The logical entailment of this "but-for causal chain" of reasoning "would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption." *Id.* at 615, 120 S. Ct. at 1752–53. Such arguments suggested no stopping point, and Congress could thereby exercise powers traditionally reposed in the states.[78] *Id.* at 615–16, 120 S. Ct. at 1753.

---

[78] Although joining the majority opinion in full in both *Lopez* and *Morrison*, Justice Thomas wrote separately in both cases to reject the substantial effects doctrine. In *Morrison*, Justice Thomas wrote "only to express my view that the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases." 529 U.S. at 627, 120 S. Ct. at 1759 (Thomas, J., concurring). Characterizing the substantial effects test as a "rootless and malleable standard," Justice Thomas remarked that the Supreme Court's present Commerce Clause jurisprudence had encouraged the federal government to operate under the misguided belief that the Clause "has virtually no limits." *Id.* Unless the Supreme Court reversed its course, "we will continue to see Congress appropriating state police powers under the guise of regulating commerce." *Id.*

F. *Gonzales v. Raich*

Next came *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195 (2005), where the Supreme Court, in a 6-3 vote, concluded that Congress acted within its commerce power in prohibiting the plaintiffs' wholly intrastate production and possession of marijuana, even though California state law approved the drug's use for medical purposes. The legislation at issue was the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq.*, in which Congress sought to "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances" and "prevent the diversion of drugs from legitimate to illicit channels." *Raich*, 545 U.S. at 12–13, 125 S. Ct. at 2203. Congress consequently "devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *Id.* at 13, 125 S. Ct. at 2203. Under the CSA, marijuana is classified as a "Schedule I" drug, meaning that the manufacture, distribution, or possession of marijuana constitutes a criminal offense. *Id.* at 14, 125 S. Ct. at 2204.

In 1996, California voters passed Proposition 215, which exempted from criminal prosecution physicians who recommend marijuana to a patient for medical purposes, as well as patients and primary caregivers who possess and cultivate marijuana for doctor-approved medical purposes.[79] *Id.* at 5–6, 125 S. Ct. at 2199. The two California plaintiffs, Angel Raich and Diane Monson, suffered from serious medical conditions and used marijuana as medication for several years, as recommended by their physicians. *Id.* at 6–7, 125 S. Ct. at

[79] Proposition 215 is codified as the Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5.

2199–2200. Monson cultivated her own marijuana, while Raich relied upon two caregivers to provide her with locally grown marijuana at no cost. *Id.* at 7, 125 S. Ct. at 2200.

After federal agents seized and destroyed Monson's cannabis plants, the *Raich* plaintiffs sued. *Id.* They acknowledged that the CSA was within Congress's commerce authority and did not contend that any section of the CSA was unconstitutional. *Id.* at 15, 125 S. Ct. at 2204. Instead, they argued solely that the CSA was unconstitutional *as applied to* their manufacture, possession, and consumption of cannabis for personal medical use. *Id.* at 7–8, 125 S. Ct. at 2200.

In rejecting the plaintiffs' "quite limited" as-applied challenge, the *Raich* Court stated that its case law "firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 15, 17, 125 S. Ct. at 2204–05. The Supreme Court emphasized that, in assessing Congress's commerce power, its review was a "modest one": "We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Id.* at 22, 125 S. Ct. at 2208. The *Raich* Court commented that "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class," and it need not "legislate with scientific exactitude." *Id.* at 17, 125 S. Ct. at 2206 (quotation marks omitted). "[W]e have reiterated," the Supreme Court continued, "that when 'a general regulatory statute bears a substantial relation to commerce, the *de mini-*

mis character of individual instances arising under that statute is of no consequence.'" *Id.* (quotation marks omitted) (quoting *Lopez*, 514 U.S. at 558, 115 S. Ct. at 1629).

The Supreme Court found similar regulatory concerns underlying both the CSA in *Raich* and the AAA wheat provisions in *Wickard*. Just as rising market prices could draw wheat grown for home consumption into the interstate market and depress prices, a "parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market." *Id.* at 19, 125 S. Ct. at 2207. In both cases, there was a threat of unwanted commodity diversion that could disrupt Congress's regulatory control over interstate commerce. *Id.*

According to the *Raich* Court, *Wickard* established that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id.* at 18, 125 S. Ct. at 2206. Characterizing the similarities between the plaintiffs' case and *Wickard* as "striking," the *Raich* Court explained that "[i]n both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity." *Id.* at 18–19, 125 S. Ct. at 2206–07.

The *Raich* Court opined that the failure to regulate intrastate production and possession of marijuana would leave a "gaping hole" in the CSA's regulatory scheme:

CSA enforcement would be frustrated by the difficulty in distinguishing between locally cultivated marijuana and out-of-state marijuana, and the marijuana authorized by state law could be diverted into "illicit channels." *Id.* at 22, 125 S. Ct. at 2209. The *Raich* Court rejected the notion that California had "surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market." *Id.* at 30, 125 S. Ct. at 2213. Accordingly, even though the CSA "ensnares some purely intrastate activity," the *Raich* Court "refuse[d] to excise individual components of that larger scheme." *Id.* Instead, "congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity." *Id.* at 28, 125 S. Ct. at 2212.

The *Raich* Court concluded that the statutory challenges in *Lopez* and *Morrison* were "markedly different" from the plaintiffs' statutory challenge to the CSA. *Id.* at 23, 125 S. Ct. at 2209. Whereas the *Raich* plaintiffs sought to "excise individual applications of a concededly valid statutory scheme," the Supreme Court noted that "in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety." *Id.* The *Raich* Court considered this distinction between facial and as-applied challenges "pivotal" because "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Id.* (alteration in original) (quoting *Perez*, 402 U.S. at 154, 91 S. Ct. at 1361). Additionally, since the CSA was a "lengthy and detailed statute creating a comprehensive framework," its statutory scheme was "at the opposite

end of the regulatory spectrum" from the statutes in *Lopez* and *Morrison*. *Id.* at 24, 125 S. Ct. at 2210.

Once again central to the Court's analysis was whether the regulated activities were economic or noneconomic. The *Raich* Court defined "[e]conomics" as referring to "the production, distribution, and consumption of commodities." *Id.* at 25–26, 125 S. Ct. at 2211 (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 720 (1966)). In contrast to the activities regulated in *Lopez* and *Morrison*, the *Raich* Court concluded that "the activities regulated by the CSA are quintessentially economic." *Id.* at 25, 125 S. Ct. at 2211. Indeed, the activities engaged in by the plaintiffs themselves fit the Court's definition of economic, since they involved the production, distribution, and consumption of marijuana.

Concurring in only the *Raich* judgment, Justice Scalia commented that under his understanding of the commerce power, "the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce." *Id.* at 34–35, 125 S. Ct. at 2216 (Scalia, J., concurring).

Justice Scalia cited "two general circumstances" in which the regulation of intrastate activities may be "necessary to and proper for the regulation of interstate commerce." *Id.* at 35, 125 S. Ct. at 2216. First, "the commerce power permits Congress not only to devise rules for the governance of commerce between States but also to facilitate interstate commerce by eliminating

potential obstructions, and to restrict it by eliminating potential stimulants." *Id.* at 35, 125 S. Ct. at 2216. Yet, "[t]his principle is not without limitation," as the cases of *Lopez* and *Morrison* made clear. *Id.* at 35–36, 125 S. Ct. at 2216–17. Second, Justice Scalia submitted that "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Id.* at 37, 125 S. Ct. at 2217. The "relevant question" then becomes "whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power." *Id.*

In addition to relying on these Commerce Clause cases, both parties and the district court conducted a separate analysis of the Necessary and Proper Clause's implications for the Act. We review some foundational principles relating to that Clause, focusing our attention on *United States v. Comstock*, 560 U.S. __, 130 S. Ct. 1949 (2010).

G. Necessary and Proper Clause: *United States v. Comstock*

Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its enumerated power. U.S. CONST. art. I, § 8, cl. 18. The Necessary and Proper Clause is intimately tied to the enumerated power it effectuates. The Supreme Court has recognized that the Necessary and Proper Clause "is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned." *Kansas v. Colorado*, 206 U.S. 46, 88, 27 S. Ct. 655, 663, 51 L. Ed. 956 (1907). It is "merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those

[powers] otherwise granted are included in the grant." *Kinsella v. United States*, 361 U.S. 234, 247, 80 S. Ct. 297, 304 (1960) (alterations in original) (quoting VI WRITINGS OF JAMES MADISON 383 (Gaillard Hunt ed., 1906)). It reaffirms that Congress has the incidental powers necessary to carry its enumerated powers into effect.

The Supreme Court's most definitive statement of the Necessary and Proper Clause's function remains Chief Justice Marshall's articulation in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." 17 U.S. (4 Wheat.) 316, 421 (1819). Thus, when legislating within its enumerated powers, Congress has broad authority: "the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *Comstock*, 560 U.S. at ___, 130 S. Ct. at 1956 (quoting *McCulloch*, 17 U.S. at 413, 418).

As it relates to the commerce power, the Supreme Court has essentially bound up the Necessary and Proper Clause with its substantial effects analysis.[80] As

---

[80] For instance, the Court formulated the question in *Raich* as "whether the power vested in Congress by Article I, § 8, of the Constitution 'to make all Laws which shall be necessary and proper for carrying into Execution' its authority to 'regulate Commerce with foreign Nations, and among the several States' includes the power [asserted]." 545 U.S. at 5, 125 S. Ct. at 2198–99 (alteration omitted). Although

Justice Scalia noted in *Raich*, "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause." 545 U.S. at 34, 125 S. Ct. at 2216 (Scalia, J., concurring).

Comstock represents the Supreme Court's most recent, detailed application of Necessary and Proper Clause doctrine. In *Comstock*, the Supreme Court held that Congress acted pursuant to its Article I powers in enacting a federal civil-commitment statute, 18 U.S.C. § 4248, that authorized the Department of Justice to detain mentally ill, sexually dangerous prisoners beyond the term of their sentences. The majority opinion enumerated five "considerations" that supported the statute's constitutional validity: "(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope." *Comstock*, 560 U.S. at ___, 130 S. Ct. at 1965.

On the breadth of the Necessary and Proper Clause, the *Comstock* Court noted that (1) the federal government is a government of enumerated powers, but (2) is also vested " 'with ample means' " for the execution of those powers. *Id.* (quoting *McCulloch*, 17 U.S. at 408). The Supreme Court must determine whether a federal

---

the *Wickard* Court did not expressly invoke the Necessary and Proper Clause, the *Raich* Court clearly assumed as much. *See id.* at 22, 125 S. Ct. at 2209.

statute "constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Id.* "[T]he relevant inquiry is simply 'whether the means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power' or under other powers that the Constitution grants Congress the authority to implement." *Id.* at ___, 130 S. Ct. at 1957 (quotation marks omitted) (quoting *Raich*, 545 U.S. at 37, 125 S. Ct. at 2217 (Scalia, J., concurring)).

Turning to the second factor—the history of federal involvement—the Supreme Court recognized that, beginning in 1855, persons charged with or convicted of federal offenses could be confined to a federal mental institution for the duration of their sentences. *Id.* at __, 130 S. Ct. at 1959. Since 1949, Congress had also "authorized the postsentence detention of federal prisoners who suffer from a mental illness and who are thereby dangerous." *Id.* at __, 130 S. Ct. at 1961. The Supreme Court observed that "[a]side from its specific focus on sexually dangerous persons, § 4248 is similar to the provisions first enacted in 1949" and therefore represented "a modest addition to a longstanding federal statutory framework, which has been in place since 1855." *Id.*

As to the third factor—reasons for enactment in light of the government's interest—the Supreme Court concluded that "Congress reasonably extended its longstanding civil-commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody, even if doing so detains them beyond the termination of their criminal sentence." *Id.* The federal government: (1) is the custodian of its prisoners and (2) has the power to protect the public from the threats posed by the prisoners in its charge. *Id.*

Turning to the fourth factor—accommodation of state interests—the *Comstock* Court ruled that § 4248 "properly accounts for state interests." *Id.* at __, 130 S. Ct. at 1962. The Supreme Court found persuasive that the statute required the Attorney General (1) to allow (and indeed encourage) the state in which the prisoner was domiciled or tried to take custody and (2) to immediately release the prisoner if the state seeks to assert authority over him.[81] *Id.*

On the fifth and final factor—the statute's narrow scope—the *Comstock* Court found the statute not "too sweeping in its scope" and the link between § 4248 and an enumerated Article I power "not too attenuated." *Id.* at __, 130 S. Ct. at 1963. The Supreme Court concluded that *Lopez*'s admonition that courts should not "pile inference upon inference" did not present any problems with respect to the civil-commitment statute. *Id.* (quoting *Lopez*, 514 U.S. at 567, 115 S. Ct. at 1634). Specifically, the *Comstock* Court discerned that "the same enumerated power that justifies the creation of a federal criminal statute, and that justifies the additional implied federal powers that the dissent considers legitimate, justifies civil commitment under § 4248 as well." *Id.* at __, 130 S. Ct. at 1964. The Supreme Court rejected the

---

[81] The Attorney General must "make all reasonable efforts to cause" the state in which the prisoner is domiciled or tried to "assume responsibility for his custody, care, and treatment." *Comstock*, 560 U.S. at __, 130 S. Ct. at 1954 (quoting 18 U.S.C. § 4248(d)). If the state consents, the prisoner will be released to the appropriate official in that state. *Id.* at __, 130 S. Ct. at 1954–55. If the state declines to take custody, the Attorney General will "place the person for treatment in a suitable facility" until the state assumes the role or until the person no longer poses a sexually dangerous threat. *Id.* at __, 130 S. Ct. at 1955 (quoting 18 U.S.C. § 4248(d)).

notion that "Congress's authority can be no more than one step removed from a specifically enumerated power." *Id.* at __, 130 S. Ct. at 1963.

Lastly, the Supreme Court emphasized that § 4248 had been applied to "only a small fraction of federal prisoners." *Id.* at __, 130 S. Ct. at 1964 (citing evidence that "105 individuals have been subject to § 4248 out of over 188,000 federal inmates"). The Supreme Court concluded that "§ 4248 is a reasonably adapted and narrowly tailored means of pursuing the Government's legitimate interest as a federal custodian in the responsible administration of its prison system" and thus did not endow Congress with a general police power. *Id.* at __, 130 S. Ct. at 1965.

Although concurring in the judgment, Justice Kennedy and Justice Alito[82] did not join the Court's majority opinion. Because Justice Kennedy's concurring opinion

---

[82] Justice Alito wrote separately to express "concern[ ] about the breadth of the Court's language, and the ambiguity of the standard that the Court applies." 560 U.S. at __, 130 S. Ct. at 1968 (Alito, J., concurring) (citation omitted). Justice Alito stressed that "the Necessary and Proper Clause does not give Congress *carte blanche*." *Id.* at __, 130 S. Ct. at 1970. While the word "necessary" need not connote that the means employed by Congress be "absolutely necessary" or "indispensable," "the term requires an 'appropriate' link between a power conferred by the Constitution and the law enacted by Congress." *Id.* It is the Supreme Court's duty, he declared, "to enforce compliance with that limitation." *Id.* Like Justice Kennedy, Justice Alito suggested that the Necessary and Proper Clause context of the case did not warrant an analysis "in which it is merely possible for a court to think of a rational basis on which Congress might have perceived an attenuated link between the powers underlying the federal criminal statutes and the challenged civil commitment provision." *Id.* In *Comstock*, by contrast, the government had demonstrated "a substantial link to Congress' constitutional powers." *Id.*

focuses on Commerce Clause and federalism issues, we provide extended treatment of it here.

Justice Kennedy's primary disagreement with the majority concerned its application of a "means-ends rationality" test. He advised that "[t]he terms 'rationally related' and 'rational basis' must be employed with care, particularly if either is to be used as a stand-alone test." *Id.* at __, 130 S. Ct. at 1966 (Kennedy, J., concurring). Justice Kennedy observed that the phrase "rational basis" is typically employed in Due Process Clause contexts, where the Court adopts a very deferential review of congressional acts. *Id.* Under the *Lee Optical* test applied in such due process settings, the Court merely asks whether "'it might be thought that the particular legislative measure was a rational way to correct'" an evil. *Id.* (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88, 75 S. Ct. 461, (1955)). By contrast, Justice Kennedy asserted, "under the Necessary and Proper Clause, application of a 'rational basis' test should be at least as exacting as it has been in the Commerce Clause cases, if not more so." *Id.*

The Commerce Clause precedents of *Raich*, *Lopez*, and *Hodel* "require a tangible link to commerce, not a mere conceivable rational relation, as in *Lee Optical*." *Id.* at __, 130 S. Ct. at 1967. "The rational basis referred to in the Commerce Clause context is a demonstrated link in fact, based on empirical demonstration." *Id.* Justice Kennedy reiterated *Lopez*'s admonition that "'[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'" *Id.* (quoting *Lopez*, 514 U.S. at 557 n.2, 115 S. Ct. at 1629 n.2). In this regard, "[w]hen the inquiry is whether a federal law has

sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links in the congressional-power chain but on the strength of the chain." *Id.* at __, 130 S. Ct. at 1966.

In summary, these landmark Supreme Court decisions—*Wickard*, *South-Eastern Underwriters*, *Heart of Atlanta Motel*, *Lopez*, *Morrison*, *Raich*, and *Comstock*—together set forth the governing principles and analytical framework we must apply to the commerce power issues presented here.

V. CONSTITUTIONALITY OF INDIVIDUAL MANDATE UNDER THE COMMERCE POWER

With a firm understanding of the Act's provisions, the congressional findings, and the Supreme Court's Commerce Clause precedents, we turn to the central question at hand: whether the individual mandate is beyond the constitutional power granted to Congress under the Commerce Clause and Necessary and Proper Clause.

In this Section, we begin with first principles. We then examine the subject matter the individual mandate seeks to regulate, and whether it can be readily categorized under the classes of activity the Supreme Court has previously identified. We follow with a discussion of the unprecedented nature of the individual mandate. Next, we analyze whether the individual mandate is a valid exercise of Congress's power to regulate activities that substantially affect interstate commerce. In this regard, we appraise whether the government's argument furnishes judicially enforceable limiting principles and address the individual mandate's far-reaching implications for our federalist structure. Lastly, we consider

the government's alternative argument that the individual mandate is an essential part of a larger regulation of economic activity.

We conclude that the individual mandate exceeds Congress's commerce power.

A. First Principles

As the Supreme Court has observed, "The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the 'powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.'" *City of Boerne v. Flores*, 521 U.S. 507, 516, 117 S. Ct. 2157, 2162 (1997) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L. Ed. 60 (1803)). The judiciary is called upon not only to interpret the laws, but at times to enforce the Constitution's limits on the power of Congress, even when that power is used to address an intractable problem.

In enforcing these limits, we recognize that the Constitution established a federal government that is "'acknowledged by all to be one of enumerated powers.'" *Comstock*, 560 U.S. at __, 130 S. Ct. at 1956 (quoting *McCulloch*, 17 U.S. at 405). In describing this constitutional structure, the Supreme Court has emphasized James Madison's exposition in The Federalist No. 45: "'The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'" *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S. Ct. 2395, 2399 (1991) (quoting THE FEDERALIST NO. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961)); *see also Lopez*, 514 U.S. at 552, 115 S. Ct. at 1626 (quoting same). In that same essay, Madi-

son noted that the commerce power was one such enumerated power: "The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained." THE FEDERALIST NO. 45, at 289 (James Madison) (E.H. Scott ed., 1898). The commerce power has since come to dominate federal legislation.

The power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed." *Gibbons*, 22 U.S. at 196. As the Supreme Court instructs us, "The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere." *Katzenbach v. McClung*, 379 U.S. 294, 305, 85 S. Ct. 377, 384 (1964). In fact, if the object of congressional legislation falls within the sphere contemplated by the Commerce Clause, "[t]hat power is plenary and may be exerted to protect interstate commerce no matter what the source of the dangers which threaten it." *Jones & Laughlin Steel Corp.*, 301 U.S. at 37, 57 S. Ct. at 624 (citation and quotation marks omitted).

It is because of the breadth and depth of this power that even when the Supreme Court has blessed Congress's most expansive invocations of the Commerce Clause, it has done so with a word of warning: "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is

local and create a completely centralized government." *Id.* It is this dualistic nature of the Commerce Clause power—necessarily broad yet potentially dangerous to the fundamental structure of our government—that has led the Court to adopt a flexible approach to its application, one that is often difficult to apply. As Chief Justice Hughes noted,

> Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those [who] seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion.

Santa Cruz Fruit Packing Co. v. NLRB., 303 U.S. 453, 467, 58 S. Ct. 656, 660 (1938); *see also Lopez*, 514 U.S. at 566, 115 S. Ct. at 1633 ("But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty.'").

Thus, it is not surprising that *Lopez* begins not with categories or substantial effects tests, but rather "first principles," reaffirming the "constitutionally mandated division of authority [that] 'was adopted by the Framers to ensure protection of our fundamental liberties.'" 514 U.S. at 553, 115 S. Ct. at 1626 (citing *Gregory*, 501 U.S. at 458, 111 S. Ct. at 2400). While the substantial growth and development of Congress's power under the Com-

merce Clause has been well-documented, the Court has often reiterated that the power therein granted remains "subject to outer limits." *Id.* at 557, 115 S. Ct. at 1628. When Congress oversteps those outer limits, the Constitution requires judicial engagement, not judicial abdication.

The Supreme Court has placed two broad limitations on congressional power under the Commerce Clause. First, Congress's regulation must accommodate the Constitution's federalist structure and preserve "a distinction between what is truly national and what is truly local." *Id.* at 567–68, 115 S. Ct. at 1634. Second, the Court has repeatedly warned that courts may not interpret the Commerce Clause in a way that would grant to Congress a general police power, "which the Founders denied the National Government and reposed in the States." *Morrison*, 529 U.S. at 618, 120 S. Ct. at 1754; *see also Lopez*, 514 U.S. at 584, 115 S. Ct. at 1642 (Thomas, J., concurring) ("[W]e *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power.").

Therefore, in determining if a congressional action is within the limits of the Commerce Clause, we must look not only to the action itself but also its implications for our constitutional structure. *See Lopez*, 514 U.S. at 563–68, 115 S. Ct. at 1632–34. While these structural limitations are often discussed in terms of federalism, their ultimate goal is the protection of individual liberty. *See Bond v. United States*, 564 U.S. __, __, 131 S. Ct. 2355, 2363 (2011) ("Federalism secures the freedom of the individual."); *New York v. United States*, 505 U.S. at

181, 112 S. Ct. at 2431 ("The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities. . . . To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.").

With this at stake, we examine whether Congress legislated within its constitutional boundaries in enacting the individual mandate.[83] We begin this analysis with a "presumption of constitutionality," meaning that "we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *Morrison*, 529 U.S. at 607, 120 S. Ct. at 1748.

B. Dichotomies and Nomenclature

The parties contend that the answer to the question of the individual mandate's constitutionality is straightforward. The government emphasizes that Congress intended to regulate the health insurance and health care markets to ameliorate the cost-shifting problem created by individuals who forego insurance yet at some time in the future seek health care for which they cannot pay. 42 U.S.C. § 18091(a)(1)(A), (H). One of the tools Congress employed to solve that problem is an economic mandate requiring Americans to purchase and continuously maintain health insurance. The government argues that the individual mandate is constitutional because it regulates "quintessentially economic" activity

---

[83] As a preliminary matter, we note that the parties appear to agree that if the individual mandate is to be sustained, it must be under the third category of activities that Congress may regulate under its commerce power: *i.e.*, "those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 559, 115 S. Ct. at 1630.

related to an industry of near universal participation, whereas the regulations in *Lopez* and *Morrison* touched on criminal conduct, which is not "in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613, 120 S. Ct. at 1751. The government submits that Congress has mandated only how Americans finance their inevitable health care needs.

The plaintiffs respond that the plain text of the Constitution and Supreme Court precedent support the conclusion that "activity" is a prerequisite to valid congressional regulation under the commerce power. The plaintiffs stress that Congress's authority is to "regulate" commerce, not to compel individuals to *enter into* commerce so that the federal government may regulate them. The plaintiffs point out that by choosing not to purchase insurance, the uninsured are outside the stream of commerce. Indeed, the nature of the conduct is marked by the *absence* of a commercial transaction. Since they are not engaged in commerce, or activities associated with commerce, they cannot be regulated pursuant to the Commerce Clause. The plaintiffs emphasize that, in 220 years of constitutional history, Congress has never exercised its commerce power in this manner.

Whereas the parties and many commentators have focused on this distinction between activity and inactivity, we find it useful only to a point. Beginning with the plain language of the text, the Commerce Clause gives Congress the power to "regulate Commerce." U.S. CONST. art. I, § 8, cl. 3. The power to regulate commerce, of course, presupposes that something exists to regulate. In its first comprehensive discussion of the Commerce Clause, the Supreme Court in *Gibbons* at-

tempted to define commerce, stating, "Commerce, undoubtedly, is traffic, but it is something more: it is *intercourse.* It describes the commercial intercourse between nations, and parts of nations, in all its branches, and *is regulated by prescribing rules for carrying on that intercourse.*" *Gibbons*, 22 U.S. at 189–90 (emphasis added). The nature of Chief Justice Marshall's formulation presaged the Supreme Court's tendency to describe commerce in very general terms, since an attempt to formulate a precise and all-encompassing definition would prove impractical.

However, the Supreme Court has always described the commerce power as operating on already existing or ongoing activity. The *Gibbons* Court stated, "If Congress has the power to regulate it, that power must be exercised whenever the subject *exists.* If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State." *Id.* at 195 (emphasis added). In its recent cases, the Supreme Court has continued to articulate Congress's commerce authority in terms of "activity." In *Lopez*, the Court identified "three broad *categories of activity* that Congress may regulate under its commerce power" and concluded that "possession of a gun in a local school zone is in no sense an *economic activity.*" 514 U.S. at 558, 567, 115 S. Ct. at 1629, 1634 (emphasis added); *see also Raich*, 545 U.S. at 26, 125 S. Ct. at 2211 ("[T]he CSA is a statute that directly regulates *economic, commercial activity.*" (emphasis added)); *Morrison*, 529 U.S. at 611, 120 S. Ct. at 1750 ("*Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate *activity* based upon the *activity's* substantial effects on interstate com-

merce, the *activity* in question has been some sort of *economic endeavor.*" (emphasis added)).

As our extensive discussion of the Supreme Court's precedent reveals, Commerce Clause cases run the gamut of possible regulation. But the diverse fact patterns of *Wickard*, *South-Eastern Underwriters*, *Heart of Atlanta Motel*, *Lopez*, *Morrison*, and *Raich* share at least one commonality: they all involved attempts by Congress to regulate preexisting, freely chosen classes of activities.

Nevertheless, we are not persuaded that the formalistic dichotomy of activity and inactivity provides a workable or persuasive enough answer in this case. Although the Supreme Court's Commerce Clause cases frequently speak in activity-laden terms, the Court has never expressly held that activity is a precondition for Congress's ability to regulate commerce—perhaps, in part, because it has never been faced with the type of regulation at issue here.

We therefore must refine our understanding of the nature of the individual mandate and the subject matter it seeks to regulate. The uninsured have made a decision, either consciously or by default, to direct their financial resources to some other item or need than health insurance. Congress described "the activity" it sought to regulate as "economic and financial *decisions* about how and when health care is paid for, and when health insurance is purchased." 42 U.S.C. § 18091(a)(2)(A) (emphasis added). It deemed such decisions as activity that is "commercial and economic in nature." *Id.* Congress linked the individual mandate to this decision: "In the absence of th[is] requirement, some individuals would make an economic and financial decision to forego health

insurance coverage and attempt to self-insure. . . . " *Id.*

That Congress casts the individual mandate as regulating economic activity is not surprising. In *Morrison*, the Supreme Court acknowledged that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." 529 U.S. at 613, 120 S. Ct. at 1751. *Raich* confirmed the continued viability of this distinction between economic and noneconomic activity in assessing Congress's commerce authority. *See* 545 U.S. at 25–26, 125 S. Ct. at 2210–11.

The parties here disagree about where the individual mandate falls within this "economic versus noneconomic activity" framework. On one hand, a decision not to purchase insurance and to self-insure for health care is a financial decision that has more of an economic patina than the gun possession in *Lopez* or the gender-motivated violence in *Morrison*. But whether such an economic decision constitutes economic *activity* as previously conceptualized by the Supreme Court is not so clear, nor do we find this sort of categorical thinking particularly helpful in assessing the constitutionality of such an unprecedented congressional action. After all, in choosing not to purchase health insurance, the individuals regulated by the individual mandate are hardly involved in the "production, distribution, and consumption of commodities," which was the broad definition of economics provided by the *Raich* Court.[84] 545 U.S. at

---

[84] The fact that conduct may be said to have economic *effects* does not, by that fact alone, render the conduct "economic activity," at least as defined by the Supreme Court. *Lopez* and *Morrison* make this observation apparent. Even the fact that conduct in some way *relates* to com-

25, 125 S. Ct. at 2211 (citation and quotation marks omitted). Rather, to the extent the uninsured can be said to be "active," their activity consists of the *absence* of such behavior, at least with respect to health insurance.[85] Simply put, the individual mandate cannot be neatly classified under either the "economic activity" or "non-economic activity" headings.

This confirms the wisdom in the conclusion that the Court's attempts throughout history to define by "semantic or formalistic categories those activities that were commerce and those that were not" are doomed to fail. *Lopez*, 514 U.S. at 569, 115 S. Ct. at 1635 (Kennedy, J., concurring). *Compare United States v. E.C. Knight Co.*, 156 U.S. 1, 13, 15 S. Ct. 249, 254 (1895) (approving manufacturing-commerce dichotomy), *with Standard Oil Co. v. United States*, 221 U.S. 1, 68–69, 31 S. Ct. 502, 519 (1911) (declaring manufacturing-commerce dichotomy "unsound"). *See also Lopez*, 514 U.S. at 572, 115 S. Ct. at 1636 (Kennedy, J., concurring) (noting "the Court's recognition of the importance of a practical conception of the commerce power"); *Wickard*, 317 U.S. at 120, 63 S. Ct. at 87 (stating that "questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' "); *Swift & Co. v. United States*, 196 U.S. 375, 398, 25 S. Ct. 276, 280

---

merce does not, by itself, convert that conduct into economic activity. Indeed, the regulated activity in *Lopez* (firearm possession) directly related to an article of commerce (the firearm being possessed). The Supreme Court has emphasized that the relevant inquiry is the *link* between the regulated activity and its effects on interstate commerce.

[85] The government correctly notes that many of the uninsured do actively consume health care, even though they are not participants in the health insurance market. We address this point at length later.

(1905) (observing that "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business"). Yet, confusing though these dichotomies and doctrinal vacillations have been, they appear animated by one overarching goal: to provide courts with meaningful, judicially administrable limiting principles by which to assess Congress's exercise of its Commerce Clause power.

Properly formulated, we perceive the question before us to be whether the federal government can issue a mandate that Americans purchase and maintain health insurance from a private company for the entirety of their lives.[86] These types of purchasing decisions are legion. Every day, Americans decide what products to buy, where to invest or save, and how to pay for future contingencies such as their retirement, their children's education, and their health care. The government contends that embedded in the Commerce Clause is the power to override these ordinary decisions and redirect those funds to other purposes. Under this theory, because Americans have money to spend and must inevitably make decisions on where to spend it, the Commerce Clause gives Congress the power to direct and compel an individual's spending in order to further its overarching regulatory goals, such as reducing the number of uninsureds and the amount of uncompensated health care.

---

[86] Whether one describes the regulated individual's decision as the financing of health care, self-insurance, or risk retention, the congressional mandate is to acquire and continuously maintain health coverage. And unless the person is covered by a government-financed health program, the mandate is to purchase insurance from a private insurer.

In answering whether the federal government may exercise this asserted power to issue a mandate for Americans to purchase health insurance from private companies, we next examine a number of issues: (1) the unprecedented nature of the individual mandate; (2) whether Congress's exercise of its commerce authority affords sufficient and meaningful limiting principles; and (3) the far-reaching implications for our federalist structure.

C. Unprecedented Nature of the Individual Mandate

Both parties have cited extensively to previous Supreme Court opinions defining the scope of the Commerce Clause. Economic mandates such as the one contained in the Act are so unprecedented, however, that the government has been unable, either in its briefs or at oral argument, to point this Court to Supreme Court precedent that addresses their constitutionality. Nor does our independent review reveal such a precedent.

The Supreme Court has sustained Congress's authority to regulate steamboat traffic, *Gibbons*, 22 U.S. 1; trafficking of lottery tickets across state lines, *The Lottery Case*, 188 U.S. 321, 23 S. Ct. 321 (1903); and carrying a woman across state lines for "immoral purposes," *Hoke v. United States*, 227 U.S. 308, 320, 33 S. Ct. 281, 283 (1913). Through the Commerce Clause, Congress may prevent the interstate transportation of liquor, *United States v. Simpson*, 252 U.S. 465, 40 S. Ct. 364 (1920); punish an automobile thief who crosses state lines, *Brooks v. United States*, 267 U.S. 432, 45 S. Ct. 345, 69 L. Ed. 699 (1925); and prevent diseased herds of cattle from bringing their contagion from Georgia to Florida, *Thornton v. United States*, 271 U.S. 414, 46 S. Ct. 585 (1926).

In the modern era, the Commerce Clause has been used to regulate labor practices, *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S. Ct. 615; impose minimum working conditions, *Darby*, 312 U.S. 100, 61 S. Ct. 451; limit the production of wheat for home consumption, *Wickard*, 317 U.S. 111, 63 S. Ct. 82; regulate the terms of insurance contracts, *South-Eastern Underwriters*, 322 U.S. 533, 64 S. Ct. 1162; prevent discrimination in hotel accommodations, *Heart of Atlanta Motel*, 379 U.S. 241, 85 S. Ct. 348, and restaurant services, *Katzenbach*, 379 U.S. 294, 85 S. Ct. 377; and prevent the home production of marijuana for medical purposes, *Raich*, 545 U.S. 1, 125 S. Ct. 2195. What the Court has never done is interpret the Commerce Clause to allow Congress to dictate the financial decisions of Americans through an economic mandate.

Both the Congressional Budget Office ("CBO") and the Congressional Research Service ("CRS") have commented on the unprecedented nature of the individual mandate. When the idea of an individual mandate to purchase health insurance was first floated in 1994, the CBO stated that a "mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action." SPEC. STUDIES DIV., CONG. BUDGET OFFICE, THE BUDGETARY TREATMENT OF AN INDIVIDUAL MANDATE TO BUY HEALTH INSURANCE 1 (1994) [HEREINAFTER CBO MANDATE MEMO]. The CBO observed that Congress "has never required people to buy any good or service as a condition of lawful residence in the United States," noting that "mandates typically apply to people as parties to economic transactions, rather than as members of society." *Id.* at 1–2. Meanwhile, in reviewing the present legislation in 2009, the CRS warned:

> Despite the breadth of powers that have been exercised under the Commerce Clause, it is unclear whether the clause would provide a solid constitutional foundation for legislation containing a requirement to have health insurance. Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service.

JENNIFER STAMAN & CYNTHIA BROUGHER, CONG. RESEARCH SERV., R. 40725, REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS 3 (2009).

The fact that Congress has never before exercised this supposed authority is telling. As the Supreme Court has noted, "the utter lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power." *Printz*, 521 U.S. at 907–08, 117 S. Ct. at 2371; *see also Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. __, __, 131 S. Ct. 1632, 1641 (2011) ("Lack of historical precedent can indicate a constitutional infirmity."); *Alden v. Maine*, 527 U.S. 706, 743–44, 119 S. Ct. 2240, 2261 (1999). Few powers, if any, could be more attractive to Congress than compelling the purchase of certain products. Yet even if we focus on the modern era, when congressional power under the Commerce Clause has been at its height, Congress still has not asserted this authority. Even in the face of a Great Depression, a World War, a Cold War, recessions, oil shocks, inflation, and unemployment, Congress never sought to require the purchase of wheat

or war bonds, force a higher savings rate or greater consumption of American goods, or require every American to purchase a more fuel efficient vehicle.[87] *See Printz*, 521 U.S. at 905, 117 S. Ct. at 2370 ("[I]f . . . earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.").

Traditionally, Congress has sought to encourage commercial activity it favors while discouraging what it does not. This is instructive. Not only have prior congressional actions not asserted the power now claimed, they "contain some indication of precisely the opposite assumption." *Id.* at 910, 117 S. Ct. at 2372. Instead of requiring action, Congress has sought to encourage it. The instances of such encouragement are ubiquitous, but the example of flood insurance provides a particularly relevant illustration of how the individual mandate departs from conventional exercises of congressional power.

In passing the National Flood Insurance Act of 1968, Congress recognized that "from time to time flood disasters have created personal hardships and economic distress which have required unforeseen disaster relief measures and have placed an increasing burden on the Nation's resources." 42 U.S.C. § 4001(a)(1). Despite considerable expenditures on public programs designed to prevent floods, those programs had "not been sufficient to protect adequately against growing exposure to future flood losses." *Id.* § 4001(a)(2). In response to this problem, however, Congress did not require everyone who owns a house in a flood plain to purchase flood in-

---

[87] Compare the lack of legislation compelling activity to the long history of Congress forbidding activity.

surance. In fact, Congress did not even require anyone who chooses to build a new house in a flood plain to buy insurance. Rather, Congress created a series of incentives designed to encourage voluntary purchase of flood insurance. These incentives included requiring flood insurance before the home owner could receive federal financial assistance or federally regulated loans. *See id.* § 4012a(a), (b)(1).

Without an "individual mandate," the flood insurance program has largely been a failure. *See* Bryant J. Spann, Note, *Going Down for the Third Time: Senator Kerry's Reform Bill Could Save the Drowning National Flood Insurance Program*, 28 GA. L. REV. 593, 597 (1994) ("One of the most astounding facts to surface from the Midwestern flood of 1993 was that so few homeowners eligible for flood insurance actually had it. Of the states impacted by the flood, Illinois had the highest percentage of eligible households covered, with 8.7%."). One key reason for this low participation is not surprising. "Disaster relief, as a political issue, is almost invincible. No politician wants to be on record as opposing disaster relief, particularly for his or her own constituents." *Id.* at 602. People living in a flood plain know that even if they do not have insurance, they can count on the virtually guaranteed availability of federal funds.[88] Nevertheless, despite the unpredictability of flooding, the inevitability that floods will strike flood plains, and the cost shifting inherent in uninsured property owners seeking disaster relief funds, Congress has

---

[88] Compare this with the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd, which ensures public access to emergency medical services without regard to one's ability to pay.

never taken the obvious and expedient step of invoking the power the government now argues it has and forcing all property owners in flood plains to purchase insurance.[89]

Contrast flood insurance with the very few instances of activity in which Congress has compelled Americans to engage solely as a consequence of being citizens living in the United States. Given the attractiveness of the power to compel behavior in order to solve important problems, we find it illuminating that Americans have, historically, been subject only to a limited set of personal mandates: serving on juries, registering for the draft, filing tax returns, and responding to the census. These mandates are in the nature of duties owed to the government attendant to citizenship, and they contain clear foundations in the constitutional text.[90] Additionally, all these mandates involve a citizen directly interacting with the government, whereas the individual mandate requires an individual to enter into a compulsory contract with a private company. In these respects, the individual mandate is a sharp departure from all prior exercises of federal power.

---

[89] The contrast with the individual mandate is even more stark when we consider that property owners in flood plains have actually entered the housing market.

[90] *See, e.g.*, U.S. CONST. art. I, § 2 ("[An] Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct."); *id.* art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes"); *id.* art. I, § 8, cl. 12 (providing Congress with power "[t]o raise and support Armies"); *id.* art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.").

The draft is an excellent example of this sort of duty, particularly as it is one upon which the Supreme Court has spoken. In the *Selective Draft Law Cases*, the Supreme Court reviewed challenges to the draft instituted in 1917 upon the entry of the United States into World War I. 245 U.S. 366, 38 S. Ct. 159 (1918). The Court rejected these challenges on several grounds, primarily based on the long history of the draft both in the United States and other nations. *Id.* at 379–87, 38 S. Ct. at 162–64. But it also pointed to the relationship between citizens and government: "It may not be doubted that the very [c]onception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it." *Id.* at 378, 38 S. Ct. at 161.

It is striking by comparison how very different this economic mandate is from the draft. First, it does not represent the solution to a duty owed to the government as a condition of citizenship. Moreover, unlike the draft, it has no basis in the history of our nation, much less a long and storied one. Until Congress passed the Act, the power to regulate commerce had not included the authority to issue an economic mandate. Now Congress seeks not only the power to reach a new class of "activity"—financial decisions whose effects are felt some time in the future—but it wishes to do so through a heretofore untested power: an economic mandate.

Having established the unprecedented nature of the individual mandate and the lack of any Supreme Court case addressing this issue, we are left to apply some basic Commerce Clause principles derived largely from *Wickard*, *Lopez*, *Morrison*, and *Raich*.

D. *Wickard* and Aggregation

It is not surprising that *Wickard*, which the *Lopez* Court considered "perhaps the most far reaching example of Commerce Clause authority over intrastate activity,"[91] 514 U.S. at 560, 115 S. Ct. at 1630, provides perhaps the best perspective on an economic mandate. Congress's restrictions on Roscoe Filburn's wheat acreage potentially forced him to purchase wheat on the open market. In doing so, Congress was able to artificially inflate the price of wheat by simultaneously decreasing supply and increasing demand. But *Wickard* is striking not for its similarity to our present case, but in how different it is. Although *Wickard* represents the zenith of Congress's powers under the Commerce Clause, the wheat regulation therein is remarkably less intrusive than the individual mandate.

Despite the fact that Filburn was a commercial farmer[92] and thus far more amenable to Congress's commerce power than an ordinary citizen, the legislative act did not require him to purchase more wheat. Instead, Filburn had any number of other options open to him. He could have decided to make do with the amount of wheat he was allowed to grow. He could have redirected his efforts to agricultural endeavors that required less

---

[91] Some have argued that *Raich* now represents the high-water mark of Congress's commerce authority. We discuss *Raich* in more detail below.

[92] In enacting the Agricultural Adjustment Act at issue in *Wickard*, Congress apparently sought to avoid reaching subsistence farmers whose production did not leave surplus for sale. Thus, it exempted small farms from the quota. *See Wickard*, 317 U.S. at 130 n.30, 63 S. Ct. at 92 n.30. In other words, Congress's regulation only applied to suppliers operating in the stream of commerce, even though some of those market suppliers also consumed a portion of wheat at home.

wheat. He could have even ceased part of his farming operations. The wheat-acreage regulation imposed by Congress, even though it lies at the outer bounds of the commerce power, was a limitation—not a mandate—and left Filburn with a choice. The Act's economic mandate to purchase insurance, on the contrary, leaves no choice and is more far-reaching.

Although this distinction appears, at first blush, to implicate liberty concerns not at issue on appeal,[93] in truth it strikes at the heart of whether Congress has acted within its enumerated power. Individuals subjected to this economic mandate have not made a voluntary choice to enter the stream of commerce, but instead are having that choice imposed upon them by the federal government. This suggests that they are removed from the traditional subjects of Congress's commerce authority, in the same manner that the regulated actors in *Lopez* and *Morrison* were removed from the traditional subjects of Congress's commerce authority by virtue of the noneconomic cast of their activity.

This departure from commerce power norms is made all the more salient when we consider principles of aggregation, the chief addition of *Wickard* to the Commerce Clause canon. Aggregation may suffice to bring otherwise non-regulable, "trivial" instances of intrastate activity within Congress's reach if the cumulative effect of this class of activity (*i.e.*, the intrastate activity "taken together with that of many others similarly situated") substantially affects interstate commerce. *Wickard*, 317 U.S. at 127–28, 63 S. Ct. at 90. Aggregation is a doctrine

---

[93] Among other counts, the district court dismissed the plaintiffs' substantive due process challenge under the Fifth Amendment. *Florida v. HHS*, 716 F. Supp. 2d at 1161–62. That ruling is not on appeal.

that allows Congress to apply an otherwise valid regulation to a class of intrastate activity it might not be able to reach in isolation.[94]

In *Morrison* and *Lopez*, the Supreme Court declined to apply aggregation to the noneconomic activity at issue, reasoning that "in every case where we have sustained federal regulation under the aggregation principle in [*Wickard*], the regulated activity was of an apparent commercial character." *Morrison*, 529 U.S. at 611 n.4, 120 S. Ct. at 1750 n.4. The Court thereby resisted "additional expansion" of the substantial effects and aggregation doctrines. *Lopez*, 514 U.S. at 567, 115 S. Ct. at 1634.

The question before us is whether Congress may regulate individuals outside the stream of commerce, on the theory that those "economic and financial decisions" to avoid commerce *themselves* substantially affect interstate commerce. Applying aggregation principles to an individual's decision not to purchase a product would expand the substantial effects doctrine to one of unlimited scope. Given the economic reality of our national marketplace, any person's decision not to purchase a good would, when aggregated, substantially affect interstate commerce in that good.[95] From a doctrinal stand

---

[94] Although not made explicit in *Wickard*, the courts have come to recognize aggregation as flowing from Congress's powers to enact laws necessary and proper to effectuate its power under the Commerce Clause. *See, e.g.*, *Raich*, 545 U.S. at 22, 125 S. Ct. at 2209; *id.* at 34, 125 S. Ct. at 2216 (Scalia, J., concurring); *Katzenbach*, 379 U.S. at 301–302, 85 S. Ct. at 382.

[95] Perhaps we can conceive of a purely intrastate good that is wholly insulated from the interstate market and, therefore, whose purchase Congress may not mandate even under the government's sweeping ex-

point, we see no way to cabin the government's theory only to decisions not to purchase *health insurance*. If an individual's mere decision not to purchase insurance were subject to *Wickard*'s aggregation principle, we are unable to conceive of *any* product whose purchase Congress could not mandate under this line of argument.[96] Although any decision not to purchase a good or service entails commercial consequences, this does not warrant the facile conclusion that Congress may therefore regulate these decisions pursuant to the Commerce Clause. *See id.* at 580, 115 S. Ct. at 1640 (Kennedy, J., concurring) ("In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.").

Thus, even assuming that decisions *not* to buy insurance substantially affect interstate commerce, that fact alone hardly renders them a suitable subject for regulation. *See, e.g.*, *Morrison*, 529 U.S. at 617, 120 S. Ct. at 1754 ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct *based solely on that conduct's aggregate effect on interstate commerce.*" (emphasis added)). Instead,

---

tension of *Wickard*'s aggregation principle. To the extent such hypothetical goods exist, their number is vanishingly small.

[96] The CBO suggested the possibility of this perilous course when it warned that an individual mandate to buy health insurance could "open the door to a mandate-issuing government taking control of virtually any resource allocation decision that would otherwise be left to the private sector. . . . In the extreme, a command economy, in which the President and the Congress dictated how much each individual and family spent on all goods and services, could be instituted without any change in total federal receipts or outlays." CBO MANDATE MEMO, *supra* p.115, at 9.

what matters is the regulated subject matter's connection to interstate commerce. That nexus is lacking here. It is immaterial whether we perceive Congress to be regulating inactivity or a financial decision to forego insurance. Under any framing, the regulated conduct is defined by the *absence* of both commerce or even the "the production, distribution, and consumption of commodities"—the broad definition of economics in *Raich*. 545 U.S. at 25, 125 S. Ct. at 2211. To connect this conduct to interstate commerce would require a "but-for causal chain" that the Supreme Court has rejected, as it would allow Congress to regulate anything. *Morrison*, 529 U.S. at 615, 120 S. Ct. at 1752.

E. Broad Scope of Congress's Regulation

The scope of Congress's regulation also affects the constitutional inquiry. Indisputably, the health insurance and health care industries involve, and substantially affect, interstate commerce, and Congress can regulate broadly in both those realms. Nonetheless, Congress, in exercising its commerce authority, must be careful not to sweep too broadly by including within the ambit of its regulation activities that bear an insufficient nexus with interstate commerce. *See Morrison*, 529 U.S. at 613 & n.5, 120 S. Ct. at 1751–52 & n.5 (distinguishing invalidated statute from analogous statute requiring explicit interstate nexus); *Lopez*, 514 U.S. at 561–62, 115 S. Ct. at 1631 (same).

In this regard, the individual mandate's attempt to reduce the number of the uninsured and correct the cost-shifting problem is woefully overinclusive. The language of the mandate is not tied to those who do not pay for a portion of their health care (*i.e.*, the cost-shifters). It is not even tied to those who consume health care.

Rather, the language of the mandate is unlimited, and covers even those who do not enter the health care market at all. Although overinclusiveness may not be fatal for constitutional purposes, the Supreme Court has indicated that it is a factor to be added to the constitutional equation.

For example, in *Lopez* the vast majority of the regulated behavior (firearm possession) *did* possess an interstate character.[97] However, the Supreme Court ultimately found this fact insufficient to save the statute. Rather, the Supreme Court commented that an interstate-tying element in the statute itself "would ensure, through case-by-case inquiry, that the [activity] in ques-

---

[97] A staggering proportion of the firearms in America have been transported across state lines, and thus the possessions at issue in *Lopez* likely *did* have a sufficient nexus to interstate commerce—and thus, were within Congress's regulatory authority. In the wake of *Lopez*, many defendants challenged their prosecutions under the felons-with-firearms statute—18 U.S.C. § 1202(a), later recodified as 18 U.S.C. § 922(g)—that the Supreme Court distinguished from § 922(q) by virtue of its jurisdictional element. In one such case, the government's own expert witness testified that 95% of the firearms in the United States were transported across state lines. *See* Brent E. Newton, *Felons, Firearms, and Federalism: Reconsidering* Scarborough *in Light of* Lopez, 3 J. APP. PRAC. & PROCESS 671, 681–82 & n.53 (2001).

Instructively, Congress took its cue from the Supreme Court after *Lopez* and amended the Gun-Free School Zones Act to require an explicit interstate nexus on an individualized basis. Specifically, Congress added a jurisdictional element to ensure that the charged individual's particular firearm had moved in interstate or foreign commerce (or otherwise affected such commerce). *See* 18 U.S.C. § 922(q)(2)(A) ("It shall be unlawful for any individual knowingly to possess a firearm *that has moved in or that otherwise affects interstate or foreign commerce* at a place that the individual knows, or has reasonable cause to believe, is a school zone." (emphasis added)).

tion affects interstate commerce."[98] *Lopez*, 514 U.S. at 561, 115 S. Ct. at 1631.

Here, the decision to forego insurance similarly lacks an established interstate tie or any "case-by-case inquiry." *See id.* Aside from the categories of exempted individuals, the individual mandate is applied across-the-board without regard to whether the regulated individuals receive, or have ever received, uncompensated care —or, indeed, seek any care at all, either now or in the future.[99] Thus, the Act contains no language "which might limit its reach to a discrete set of [activities] that additionally have an explicit connection with or effect on interstate commerce." *See id.* at 562, 115 S. Ct. at 1631.

The individual mandate sweeps too broadly in another way. Because the Supreme Court's prior Commerce Clause cases all deal with already-existing activity—not the mere *possibility* of *future* activity (in this case, health care consumption) that could implicate interstate commerce—the Court never had to address any temporal aspects of congressional regulation. However, the premise of the government's position—that most people will, *at some point in the future*, consume health care—reveals that the individual mandate is even fur-

---

[98] The *Lopez* Court never stated that such an element was *required*, and nor do we. However, it is clearly a relevant constitutional factor that the Supreme Court instructs us to consider. The government's argument ignores it completely.

[99] Although health care consumption is pervasive, the plaintiffs correctly note that participation in the market for health care is far less inevitable than participation in markets for basic necessities like food or clothing.

ther removed from traditional exercises of Congress's commerce power.[100]

It is true that Congress may, in some instances, regulate individuals who are consuming health care but not themselves causing the cost-shifting problem. *Cf. Raich*, 545 U.S. at 17, 125 S. Ct. at 2206 ("We have never required Congress to legislate with scientific exactitude."); *id.* at 22, 125 S. Ct. at 2209 ("That the regulation ensnares some purely intrastate activity is of no moment."). As the plaintiffs acknowledged at oral argument, when the uninsured actually enter the stream of commerce and consume health care, Congress may regulate their activity at the point of consumption.

But the individual mandate does *not* regulate behavior at the point of consumption. Indeed, the language of the individual mandate does not truly regulate

---

[100] The dissent attempts to sidestep the temporal leap problem by citing *Consolidated Edison Co. v. NLRB* for the proposition that Congress may take "reasonable preventive measures" to avoid future disruptions to interstate commerce. 305 U.S. 197, 222, 59 S. Ct. 206, 213 (1938). *Consolidated Edison*, of course, is wholly inapposite to this case, since Congress was regulating the labor practices of *utility companies* (1) fully engaged in the stream of commerce and (2) *presently* supplying economic services to instrumentalities of interstate commerce, such as railroads and steamships. *Id.* at 220–22, 59 S. Ct. at 213. Even so, the dissent's argument proves far too much. After all, by the dissent's reasoning, Congress could clearly reach the gun possession at issue in *Lopez*, since firearms are (1) objects of everyday commercial transactions and (2) are daily used to disrupt interstate commerce. *See Lopez*, 514 U.S. at 602–03, 115 S. Ct. at 1651 (Stevens, J., dissenting) ("Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity."). Indeed, Antonio Lopez himself was paid $40 to traffic the gun for which he was charged under § 922(q). *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1995).

"how and when health care is paid for." 42 U.S.C. § 18091(a)(2)(A). It does not even require those who consume health care to pay for it with insurance when doing so. Instead, the language of the individual mandate in fact regulates a related, but different, subject matter: "when health insurance is purchased." *Id.* If an individual's participation in the health care market is uncertain, their participation in the insurance market is even more so.

In sum, the individual mandate is breathtaking in its expansive scope. It regulates those who have not entered the health care market at all. It regulates those who have entered the health care market, but have not entered the insurance market (and have no intention of doing so). It is overinclusive in *when* it regulates: it conflates those who presently consume health care with those who will not consume health care for many years into the future. The government's position amounts to an argument that the mere fact of an individual's existence substantially affects interstate commerce, and therefore Congress may regulate them at every point of their life. This theory affords no limiting principles in which to confine Congress's enumerated power.

F. Government's Proposed Limiting Principles

"We pause to consider the implications of the Government's arguments." *Lopez*, 514 U.S. at 564, 115 S. Ct. at 1632. The government clearly appreciates the far-reaching implications of the individual mandate. The government has struggled to avoid the conclusion that Congress may order Americans' other economic decisions through the use of economic mandates. At oral argument, the government's counsel specifically disclaimed the argument that Congress could compel a per-

son to purchase insurance solely on the basis of his financial decision to spend his money elsewhere. Rather, the government seems to view an economic mandate as an emergency tool of sorts, for use in extreme and unique situations and only to the extent the underlying regulated conduct meets a number of fact-based criteria.

The government submits that health care and health insurance are factually unique and not susceptible of replication due to: (1) the inevitability of health care need; (2) the unpredictability of need; (3) the high costs of health care; (4) the federal requirement that hospitals treat, until stabilized, individuals with emergency medical conditions, regardless of their ability to pay;[101] (5) and associated cost-shifting.

The first problem with the government's proposed limiting factors is their lack of *constitutional* relevance.[102] These five factual criteria comprising the gov

---

[101] *See* EMTALA, 42 U.S.C. § 1395dd. In this regard, the plaintiffs point out that the government's contention amounts to a bootstrapping argument. Under the government's theory, Congress can enlarge its own powers under the Commerce Clause by legislating a market externality into existence, and then claiming an extra-constitutional fix is required.

[102] The Supreme Court has rejected similar calls for a reprieve from Commerce Clause restraints based upon the ostensible uniqueness or gravity of the problem being regulated. For instance, Justice Breyer's dissent in *Lopez* attempted to deflect the majority's focus on limiting principles—specifically, its statement that upholding § 922(q) would enable the federal government to "regulate any activity that it found was related to the economic productivity of individual citizens," 514 U.S. at 564, 115 S. Ct. at 1632—by arguing that § 922(q) "is aimed at curbing a *particularly acute threat* " and that "guns and education are incompatible" in a "*special way*." *Id.* at 624, 115 S. Ct. at 1661 (Breyer, J., dissenting) (emphasis added). The dissent further opined that gun possession in schools embodied "*the rare case* . . . [when] a statute strikes

ernment's "uniqueness" argument are not limiting principles rooted in any constitutional understanding of the commerce power. Rather, they are *ad hoc* factors that—fortuitously—happen to apply to the health insurance and health care industries. They speak more to the complexity of the problem being regulated than the regulated decision's relation to interstate commerce. They are not limiting principles, but limiting circumstances.

Apparently recognizing that these factors appear in many subjects worthy of regulation, the government acknowledged at oral argument that the mere presence of many of these factors is not sufficient. Presented with three examples of industries characterized by some or all of these market deficiencies—elder care, other types of insurance, and the energy market—the government argued that an economic mandate in these three settings is distinguishable.

However, virtually all forms of insurance entail decisions about timing and planning for unpredictable events with high associated costs—insurance protecting against loss of life, disability from employment, business interruption, theft, flood, tornado, and other natural disasters, long-term nursing care requirements, and burial costs. Under the government's proposed limiting principles, there is no reason why Congress could not similarly compel Americans to insure against any number of

---

at conduct that (when considered in the abstract) seems so removed from commerce, but which (practically speaking) has so significant an impact upon commerce." *Id.* at 624, 115 S. Ct. at 1662 (emphasis added). The majority dismissed these "suggested limitations," however, characterizing them as "devoid of substance." *Id.* at 564, 115 S. Ct. at 1632 (majority opinion).

unforeseeable but serious risks.[103] High costs and cost-shifting in premiums are simply not limited to hospital care, but occur when individuals are disabled, cannot work, experience an accident, need nursing care, die, and myriad other insurance-related contingencies.

This gives rise to a second fatal problem with the government's proposed limits: administrability. We are at a loss as to how such fact-based criteria can serve as the sort of "judicially enforceable" limitations on the commerce power that the Supreme Court has repeatedly emphasized as necessary to that *enumerated* power. *Lopez*, 514 U.S. at 566, 115 S. Ct. at 1633; *see also Morrison*, 529 U.S. at 608 n.3, 120 S. Ct. at 1749 n.3 (rejecting dissent's "remarkable theory that the commerce power is without judicially enforceable boundaries"). We are loath to invalidate an act of Congress, and do so only after extensive circumspection. But the role that the Court would take were we to adopt the position of the government is far more troublesome. Were we to adopt the "limiting principles" proffered by the government, courts would sit in judgment over every economic mandate issued by Congress, determining whether the level of participation in the underlying market, the amount of cost-shifting, the unpredictability of need, or

---

[103] The government essentially argues that anyone creates a cost-shifting risk by virtue of being alive, since they may one day be injured or sick and seek care that they do not pay for. Therefore Congress can compel the purchase of health insurance, from birth to death, to protect against such risks. This expansive theory could justify the compelled purchase of innumerable forms of insurance, however. To give but one example, Congress could undoubtedly require every American to purchase liability insurance, lest the consequences of their negligence or inattention lead to unfunded costs (medical and otherwise) passed on to others in the future.

the strength of the moral imperative were enough to justify the mandate.

But the commerce power does not admit such limitations; rather it "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons*, 22 U.S. at 196. If Congress may compel individuals to purchase health insurance from a private company, it may similarly compel the purchase of other products from private industry, regardless of the "unique conditions" the government cites as warrant for Congress's regulation here. *See* Government's Opening Br. at 19.

Moreover, the government's insistence that we defer to Congress's fact findings underscores the lack of any judicially enforceable stopping point to the government's "uniqueness" argument. Presumably, a future Congress similarly would be able to articulate a unique problem requiring a legislative fix that entailed compelling Americans to purchase a certain product from a private company. The government apparently seeks to set the terms of the limiting principles courts should apply, and then asks that we defer to Congress's judgment about whether those conditions have been met. The Supreme Court has firmly rejected such calls for judicial abdication in the Commerce Clause realm. *See Lopez*, 514 U.S. at 557 n.2, 115 S. Ct. at 1629 n.2 ("'[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.'" (quoting *Heart of Atlanta Motel*, 379 U.S. at 273, 85 S. Ct. at 366 (Black, J., concurring))).

At root, the government's uniqueness argument relies upon a convenient sleight of hand to deflect attention from the central issue in the case: what is the nature of the conduct being regulated by the individual mandate, and may Congress reach it? Because an individual's decision to forego purchasing a product is so incongruent with the "activities" previously reached by Congress's commerce power, the government attempts to limit the individual mandate's far-reaching implications. Accordingly, the government adroitly and narrowly re-defines the regulated activity as the uninsured's health care *consumption* and attendant *cost-shifting,* or the *timing and method of payment* for such consumption.[104]

The government's reluctance to define the conduct being regulated as the decision to forego insurance is understandable. After all, if the decision to forego purchasing a product is deemed "economic activity" (merely because it is inevitable that an individual in the future will consume in a related market), then decisions *not* to purchase a product would be subject to the sweeping doctrine of aggregation, and such no-purchase decisions of all Americans would fall within the federal commerce power. Consequently, the government could no longer fall back on "uniqueness" as a limiting factor, since Con-

---

[104] The dissent adopts the government's position. *See* Dissenting Op. at 227 (describing "the relevant conduct targeted by Congress" as "the uncompensated consumption of health care services by the uninsured"); *id.* at 235 (stating that "many of the[ ] uninsured currently consume health care services for which they cannot or do not pay" and "[t]his is, in every real and meaningful sense, classic economic *activity* "); *id.* at 214 ("In other words, the individual mandate is the means Congress adopted to regulate the *timing* and *method* of individuals' payment for the consumption of health care services.").

gress could enact purchase mandates no matter how pedestrian the relevant product market.

As an inferior court, we may not craft new dichotomies—"uniqueness" versus "non-uniqueness," or "cost-shifting" versus "non-cost-shifting"—not recognized by Supreme Court doctrine. To do so would require us to fabricate out of whole cloth a five-factor test that lacks any antecedent in the Supreme Court's Commerce Clause jurisprudence. Thus, not only do the "uniqueness" factors lack judicial administrability, present Commerce Clause doctrine prohibits inferior courts, like us, from applying them anyway.

Ultimately, the government's struggle to articulate cognizable, judicially administrable limiting principles only reiterates the conclusion we reach today: there are none.

G. Congressional Findings

This brings us to the congressional findings. *See* 42 U.S.C. § 18091(a)(1)–(3). We look to congressional findings to help us "evaluate the legislative judgment that the activity in question substantially affected interstate commerce." *Lopez*, 514 U.S. at 549, 115 S. Ct. at 1632.

Here, tracking the language of Supreme Court decisions, the congressional findings begin with the statement that the individual insurance mandate "is commercial and economic in nature" and "substantially affects interstate commerce." 42 U.S.C. § 18091(a)(1). Of course, the relevant inquiry is not whether the regulation itself substantially affects interstate commerce but rather whether *the underlying activity* being regulated substantially affects interstate commerce.

Later on, the findings do ground the individual mandate in Congress's effort to address this multi-step cost-shifting scenario: (1) some uninsureds consume health care; (2) in turn, some of them do not pay their full medical costs and instead shift them to medical providers; (3) medical providers thereafter shift these costs to "private insurers"; and (4) private insurers then shift them to insureds through higher premiums.[105] *Id.* § 18091(a)(2). The average annual premium increase is $1,000 for insured families, *id.*, and $400 for individuals.[106] The findings state that the mandate will reduce the number of the uninsured and the $43 billion cost-shifting and thereby "lower health insurance premiums."[107] *Id.* § 18091(a)(2)(F).

Of course, "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Morrison*, 529 U.S. at 614, 120 S. Ct. at 1752. Rather, the Supreme Court has

---

[105] The parties and *amici* use the shorthand terms "cost-shifting," "cost-shifters," or "free-riders" to describe these problems.

[106] *See* Families USA, *supra* note 8.

[107] Experts debate whether the Act will accomplish its premium-lowering objective. According to even the CBO, "Under PPACA and the Reconciliation Act, premiums for health insurance in the individual market will be somewhat higher than they would otherwise be . . . mostly because the average insurance policy in that market will cover a larger share of enrollees' costs for health care and provide a slightly wider range of benefits." CONG. BUDGET OFFICE, AN ANALYSIS OF HEALTH INSURANCE PREMIUMS UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT 8 (2009).

The CBO estimates the Act will cause costs for health insurance in the individual market to rise by 27% to 30% over current levels in 2016, due to the broadened coverage achieved by the insurance market reforms. *Id.* at 6. For the purpose of our analysis, however, we accept the congressional finding that cost-shifters lead to higher premiums.

insisted that courts examine congressional findings regarding substantial effects. *See Lopez*, 514 U.S. at 557 n.2, 115 S. Ct. at 1629 n.2 ("'[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'" (quoting *Hodel*, 452 U.S. at 311, 101 S. Ct. at 2391 (Rehnquist, J., concurring))).

As a preliminary matter, we recount what the record reveals regarding the cost-shifting effects of the uninsured. To the extent the data show anything, the data demonstrate that the cost-shifters are largely persons who either (1) are exempted from the mandate, (2) are excepted from the mandate penalty, or (3) are now covered by the Act's Medicaid expansion.

For example, illegal aliens and other nonresidents are cost-shifters ($8.1 billion, or 18.9% of the $43 billion),[108] but they are exempted from the individual mandate entirely. 26 U.S.C. § 5000A(d)(3). Low-income persons are the largest segment of cost-shifters ($15 billion, or 34.8% of the $43 billion),[109] but they are covered by the Act's Medicaid expansion or excepted from the mandate penalty. *Id.* § 5000A(e)(1), (2) (excepting individuals (1) whose premium contribution exceeds 8% of household income *or* (2) whose household income is below the specified income tax filing threshold). Previously, the uninsured with preexisting health conditions sought, but were denied, coverage and ended up in the

---

[108] *See* Br. of *Amici Curiae* Economists in Support of Plaintiffs at 11 & app. A (summarizing their calculations based on the MEPS data set).

[109] *See* Br. of *Amici Curiae* Economists in Support of Plaintiffs at 11 & app. A (summarizing their calculations based on the MEPS data set).

past cost-shifting pool ($8.7 billion, or 20.1%).[110] However, the Act's insurance reforms now guarantee them coverage and move them out of the future cost-shifting pool. Already-insured persons who do not pay their out-of-pocket costs (such as co-payments and deductibles) are cost-shifters ($3.3 billion, or 7.6%),[111] but they are already covered by insurance without the mandate. In addition, the cost-shifter uninsureds who cannot pay the average $2,000 medical bill also cannot pay the average $4,500 premium,[112] yielding another disconnect.

In reality, the primary persons regulated by the individual mandate are not cost-shifters but *healthy individuals* who forego purchasing insurance. The Act confirms as much. To help private insurers, the congressional findings acknowledge that the individual mandate seeks to "broaden the health insurance risk pool to include healthy individuals," to "minimize adverse selection,"[113] to increase "the size of purchasing pools,"

---

[110] *See* Br. of *Amici Curiae* Economists in Support of Plaintiffs at 11 & app. A (summarizing their calculations based on the MEPS data set).

[111] *See* Br. of *Amici Curiae* Economists in Support of Plaintiffs at 11 & app. A (summarizing their calculations based on the MEPS data set).

[112] As noted earlier, the uninsureds' average medical care costs were $2,000 in 2007 and $1,870 in 2008. Some uninsureds incur a larger expense, some a smaller expense, and some no expense at all. We use the average cited in the Brief of the *Amici Curiae* Economists in Support of the Government, at 16, which is based on the MEPS tables. The CBO estimates that in 2016 the annual premium for a bronze level plan, even in the Exchanges, will average $4,500–5,000 for individuals and $12,000–12,500 for a family policy. Letter from Douglas Elmendorf, Director, Cong. Budget Office, to Olympia Snowe, U.S. Senator (Jan. 11, 2010), *available at* http://www.cbo.gov/ftpdocs/108xx/doc10884/01-11-Premiums_for_Bronze_Plan.pdf.

[113] Distinguished economists have filed helpful briefs on both sides of the case. While they disagree on some things, they agree about the

and to promote "economies of scale." 42 U.S.C. § 18091(a)(2)(I), (J). The individual mandate forces healthy and voluntarily uninsured individuals to purchase insurance from private insurers and pay premiums *now* in order to subsidize the private insurers' costs in covering more unhealthy individuals under the Act's reforms. Congress sought to mitigate its reforms' regulatory costs on private insurers[114] by compelling healthy Americans *outside the insurance market* to enter the private insurance market and buy the insurers' products. This starkly evinces how the Act is forcing market entry by those outside the market.

Nevertheless, we need not, and do not, rely on the factual disparity between the persons regulated by the individual mandate and the cost-shifting problem. After all, courts "need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce *in fact*, but only whether a '*rational basis*' exists for so concluding."[115] *Raich*, 545 U.S. at

---

theory of adverse selection. They agree some relatively healthy people refrain from, or opt out of, buying health insurance more often than people who are unhealthy or sick seek insurance. This results in a smaller and less healthy pool of insured persons for private insurance companies. Br. of *Amici Curiae* Economists in Support of the Government at 17–18; Br. of *Amici Curiae* Economists in Support of Plaintiffs at 13–16.

[114] As explained above, the Act requires private insurers (1) to cover the unhealthy and (2) to *price that coverage*, not on actuarial risks or basic economic pricing decisions, but on community-rated premiums without regard to health status. 42 U.S.C. § 300gg-1(a).

[115] Notably, the *Lopez* Court recognized the same "rational basis" level of review as *Raich*. *See Lopez*, 514 U.S. at 557, 115 S. Ct. at 1629 (stating that, since the New Deal, the Supreme Court has "undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce"). *Raich* did not

22, 125 S. Ct. at 2208 (emphasis added). The government would have this be the end of the constitutional inquiry.

But the government skips important analytical steps. Rational basis review is not triggered by the mere fact of Congress's invocation of Article I power; rather, the Supreme Court has applied rational basis review to a more specific question under the Commerce Clause: whether Congress has a "rational basis" for concluding that the regulated "activities, *when taken in the aggregate,* substantially affect interstate commerce."[116] *Id.* (emphasis added). As discussed in subsection D, *supra,* courts must initially assess whether the subject matter targeted by the regulation is suitable for aggregation in the first place. Relatedly, courts, in the rational basis inquiry, must also examine whether the link between the regulated activity and interstate commerce is too attenuated, lest there be no discernible stopping point to Con-

---

adopt a more deferential review of congressional legislation than prior cases, as the Supreme Court itself acknowledged. *See* 545 U.S. at 22, 125 S. Ct. at 2208 (collecting cases).

[116] Every case the *Raich* Court cited for rational basis review is a substantial effects case. *See* 545 U.S. at 22, 125 S. Ct. at 2208 (citing *Lopez,* 514 U.S. at 557, 115 S. Ct. 1624; *Hodel,* 452 U.S. at 276–80, 101 S. Ct. 2352; *Perez,* 402 U.S. at 155–56, 91 S. Ct. 1357; *Katzenbach,* 379 U.S. at 299–301, 85 S. Ct. 377; *Heart of Atlanta Motel,* 379 U.S. at 252–53, 85 S. Ct. 348). In such contexts, courts will accord significant deference to Congress's assessment of whether an activity's cumulative effect on interstate commerce is "substantial" or some lesser quantum. This is an altogether separate question from (1) whether a regulated activity is amenable to aggregation analysis at all and (2) the extent of the inferential leap needed to connect the regulated activity to the effects on interstate commerce.

gress's commerce power.[117] *See Lopez*, 514 U.S. at 562–68, 115 S. Ct. at 1630–34.

The wholesale deference the government would have us apply here cannot be squared with the Supreme Court's decisions in *Morrison* and *Lopez*. Here, "Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that [courts] have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers." *Morrison*, 529 U.S. at 615, 120 S. Ct. at 1752. It is highly instructive that the *Lopez* and *Morrison* Courts rejected a similar cost-shifting theory now propounded by the government. In examining the actual relationship between gun possession and interstate commerce, the *Lopez* Court refused to accept what it referred to as the government's "cost of crime" theory. 514 U.S. at 564, 115 S. Ct. at 1632. It did so despite the government's argument that the "costs of violent crime are substantial, and, *through the mechanism of insurance, those*

---

[117] *Compare Raich*, 545 U.S. at 22, 125 S. Ct. at 2209 ("[W]e have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA."), *Heart of Atlanta Motel*, 379 U.S. at 253, 85 S. Ct. at 355 (referring to "overwhelming evidence that discrimination by hotels and motels impedes interstate travel"), *and Wickard*, 317 U.S. at 128, 63 S. Ct. at 91 ("[A] factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions."), *with Morrison*, 529 U.S. at 615, 120 S. Ct. at 1752 (rejecting the government's invitation "to follow the but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce"), *and Lopez*, 514 U.S. at 564, 115 S. Ct. at 1632 ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.").

costs are spread throughout the population." *Id.* at 563–64, 115 S. Ct. at 1632 (emphasis added).

Similarly, in *Morrison* the Supreme Court considered a stockpile[118] of congressional findings attesting to the link between domestic violence and medical costs frequently borne by third parties. *See, e.g.*, 529 U.S. at 629–36, 120 S. Ct at 1760–64 (Souter, J., dissenting); *see also id.* at 632, 120 S. Ct. at 1762 ("'Over 1 million women in the United States seek medical assistance each year for injuries sustained [from] their husbands or other partners.'" (quoting S. Rep. No. 101-545, at 37 (1990))); *id.* ("'[E]stimates suggest that we spend $5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence.'" (quoting S. Rep. No. 103-138, at 41 (1993))).

In *Morrison*, the Supreme Court also recounted Congress's express finding that gender-motivated violence substantially affected interstate commerce "'by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, *increasing medical and other costs*, and decreasing the supply of and the demand for interstate products.'" *Id.* at 615, 120 S. Ct. at 1752 (majority opinion) (emphasis added) (quoting H.R. Conf. Rep.

---

[118] In *Morrison*, "[t]he congressional findings that accompanied VAWA were so voluminous that they were removed from the text of the statute and placed in a conference report to avoid cluttering the United States Code." Melissa Irr, Note, United States v. Morrison: *An Analysis of the Diminished Effect of Congressional Findings in Commerce Clause Jurisprudence and a Criticism of the Abandonment of the Rational Basis Test*, 62 U. PITT. L. REV. 815, 824 (2001).

No. 103-711, at 385 (1994)). The *Morrison* Court did not dispute the above figures about medical costs, but instead considered them largely extraneous to the threshold question of whether the subject matter of the regulation had a sufficient nexus to interstate commerce. *See id.* at 617, 120 S. Ct. at 1754.

In both *Lopez* and *Morrison*, the Supreme Court determined that the government's cost-shifting argument provided too attenuated a link to Congress's commerce power. Under such a cost-shifting theory, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign." *Lopez*, 514 U.S. at 564, 115 S. Ct. at 1632.

For example, we harbor few doubts that an individual's decisions about "marriage, divorce, and child custody," if aggregated, would have substantial effects on interstate commerce. *See id.* at 564, 115 S. Ct. at 1632. Yet, the mere fact of an activity's substantial effects on interstate commerce does not thereby render that activity an appropriate subject for Congress's plenary commerce authority. Such a holding would require the Supreme Court to overturn *Lopez* and *Morrison*.

We see no reason why the inferential leaps in this case are any less attenuated than those in *Lopez* and *Morrison*. The cost-shifting accompanying the criminal acts of violence at issue in *Lopez* and *Morrison*—hospital bills borne by third parties, property damage and insurance consequences, law enforcement expenditures and incarceration costs—is at least as apparent as the multi-step cost-shifting scenario associated with the medically uninsured. Meanwhile, in all three cases, the regulated conduct giving rise to the cost-shifting is di-

vorced from a commercial transaction or the "production, distribution, and consumption of commodities." *Raich*, 545 U.S. at 26, 125 S. Ct. at 2211.

At best, we can say that the uninsured *may*, at some point in the *unforeseeable future*, create that cost-shifting consequence. Yet this readily leads to a scenario where we must "pile inference upon inference" to sustain Congress's legislation, a practice the Supreme Court admonishes us to avoid. *See Lopez*, 514 U.S. at 567, 115 S. Ct. at 1634. If anything, the temporal aspects present here, but not in *Lopez* or *Morrison*, render the regulated "activity" even *further* remote.[119]

---

[119] The dissent identifies an economic effect—cost-shifting—and essentially defines that as the activity being regulated. But the dissent's conflation of activity and effect is sheer question begging. It is no wonder, then, that the dissent makes the breathtaking assertion that there is not even a single inferential step needed to link the regulated activity here to an impact on commerce. As the dissent frames the issue, there is no lack of nexus between the regulated activity and its effects on interstate commerce because they are one and the same!

To the extent the dissent describes the conduct being regulated as the uncompensated consumption of health care services, the language of the mandate refers only to insurance and contains no reference to health care services, much less how health care services are consumed or paid for. The dissent can find no inferential leap because it has assumed away the very problem in this case, effectively treating the mandate as operating at the point of consumption. Under the dissent's reframing of the issue, the VAWA's civil-remedy provision in *Morrison* could be regarded as regulating the "consumption of health care services," because such consumption inevitably and empirically flows from gender-motivated violence.

We next explain how the individual mandate impairs important federalism concerns.

H. Areas of Traditional State Concern

Before examining the states' traditional role in regulating insurance and health care, we fully recognize that Congress has the power under the Commerce Clause to regulate broadly in those arenas. In fact, Congress has legislated expansively and constitutionally in the fields of insurance and health care. *See, e.g.*, Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936 (1996); Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), Pub. L. No. 99-272, 100 Stat. 82 (1986); Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. 93-406, 88 Stat. 829 (1974); Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965) (establishing Medicare and Medicaid); Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938). It is clear that Congress has enacted comprehensive legislation regarding health insurance and health care. The Act is another such example. Yet, the narrow constitutional question here is whether one provision—§ 5000A—in that massive regulation goes too far.

For the individual mandate to be sustained, it must be enacted pursuant to a valid exercise of Article I power. It simply will not suffice to say that, because Congress has regulated broadly in a field, it may regulate in any fashion it pleases. The Constitution supplies Congress with various tools to effectuate its legislative power, but it also denies others. In assessing Congress's exercise of power, courts recognize that the *structural* limits embedded in the Constitution are of

equal dignity to the express prohibitions—and may even be a more prevalent source of limitation. *See, e.g., Comstock*, 560 U.S. at __, 130 S. Ct. at 1968 (Kennedy, J., concurring) (rejecting notion that "the Constitution's express prohibitions" are "the only, *or even the principal*, constraints on the exercise of congressional power" (emphasis added)).[120]

The Supreme Court's Commerce Clause jurisprudence emphasizes that, in assessing the constitutionality of Congress's exercise of its commerce authority, a relevant factor is whether a particular federal regulation trenches on an area of traditional state concern. *See Morrison*, 529 U.S. at 611, 613, 615–16, 120 S. Ct. at 1750–51, 1753; *Lopez*, 514 U.S. at 561 n.3, 564–68, 115 S. Ct. at 1631 n.3, 1632–34. The Supreme Court has expressed concern that "Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority." *Morrison*, 529 U.S. at 615, 120 S. Ct. at 1752; *see also Raich*, 545 U.S. at 35–36, 125 S. Ct. at 2216–17 (Scalia, J., concurring); *Lopez*, 514 U.S. at 557, 567–68, 115 S. Ct. at 1628–29, 1634; *id.* at 577, 115 S. Ct. at 1638–39 (Ken-

---

[120] The Supreme Court reminds us that "the federal structure serves to grant and delimit the prerogatives and responsibilities of the States and the National Government vis-à-vis one another" and "action that exceeds the National Government's enumerated powers undermines the sovereign interests of States." *Bond*, 564 U.S. at __, __, 131 S. Ct. at 2364, 2366; *see also Gregory*, 501 U.S. at 458, 111 S. Ct. at 2399 ("This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.").

nedy, J., concurring) (stating that if Congress were to assume control over areas of traditional state concern, "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power" (citation omitted)). Coupled with this consideration, the Supreme Court recognizes that the Constitution "withhold[s] from Congress a plenary police power." *Lopez*, 514 U.S. at 566, 115 S. Ct. at 1633; *see also Morrison*, 529 U.S. at 618–19, 120 S. Ct. at 1754; *cf. Comstock*, 560 U.S. at __, 130 S. Ct. at 1964; *id.* at __, 130 S. Ct. at 1967 (Kennedy, J., concurring) (stating that the police power "belongs to the States and the States alone").

In addition, whether the regulated subject matter is an area of traditional state concern impacts three of the five *Comstock* factors pertinent to a Necessary and Proper Clause analysis: (1) whether there is a long history of federal involvement in this arena, (2) whether the statute accommodates or supplants state interests, and (3) the statute's narrow scope. 560 U.S. at __, 130 S. Ct. at 1965.

With these principles in mind, we examine whether insurance and health care qualify as areas of traditional state concern. Prior to the Supreme Court's 1944 decision in *South-Eastern Underwriters*, "the States enjoyed a virtually exclusive domain over the insurance industry." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539, 98 S. Ct. 2923, 2928 (1978). Thus, *South-Eastern Underwriters* was "widely perceived as a threat to state power to tax and regulate the insurance

industry." *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 499–500, 113 S. Ct. 2202, 2207 (1993); *see also Cantor v. Detroit Edison Co.*, 428 U.S. 579, 608 n.4, 96 S. Ct. 3110, 3126 n.4 (1976) (Blackmun, J., concurring) ("Congress' expressed concern [was that the result in *South-Eastern Underwriters*] would 'greatly impair or nullify the regulation of insurance by the States,' bringing to a halt their 'experimentation and investigation in the area.'"). "To allay those fears, Congress moved quickly to restore *the supremacy of the States in the realm of insurance regulation.*" *Fabe*, 508 U.S. at 500, 113 S. Ct. at 2207 (emphasis added).

In 1945, a year after *South-Eastern Underwriters*, Congress passed the McCarran-Ferguson Act, 59 Stat. 33, ch. 20, 15 U.S.C. §§ 1011–1015.[121] The McCarran-Ferguson Act preserved state regulatory control over insurance, which was largely considered by Congress to be a "local matter." *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653, 101 S. Ct. 2070, 2075 (1981) (quoting H.R. Rep. No. 143, at 2 (1945)). The passage of the McCarran-Ferguson Act signaled Congress's recognition of the states' historical role in regulating insurance within their boundaries—and its unwillingness to supplant their vital function as a source of experimentation. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429, 66 S. Ct. 1142, 1155 (1946) ("Obviously Con-

---

[121] The McCarran-Ferguson Act states: (1) "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business," 15 U.S.C. § 1012(a), and (2) "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance," *id.* § 1012(b).

gress' purpose [in passing the McCarran-Ferguson Act] was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance."); *see also Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 179, 105 S. Ct. 2545, 2556 (1985) (O'Connor, J., concurring) ("The business of insurance is also of uniquely local concern. . . . [and] historically ha[s] been regulated by the States in recognition of the critical part [it] play[s] in securing the financial well-being of local citizens and businesses." (citations omitted)). Our Circuit has reached a similar conclusion. *Blue Cross & Blue Shield v. Nielsen*, 116 F.3d 1406, 1413 (11th Cir. 1997) ("Adjustment of the rights and interests of insurers, health care providers, and insureds is a subject matter that falls squarely within the zone of traditional state regulatory concerns.").

Thus, insurance qualifies as an area of traditional state regulation. This recognition counsels caution, and supplies reviewing courts with even greater cause for doubt when faced with an unprecedented economic mandate of dubious constitutional status. *Cf. Lopez*, 514 U.S. at 583, 115 S. Ct. at 1641 (Kennedy, J., concurring) ("The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term.").

The health care industry also falls within the sphere of traditional state regulation. A state's role in safeguarding the health of its citizens is a quintessential component of its sovereign powers. The Supreme Court has declared that the "structure and limitations of feder-

alism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales v. Oregon*, 546 U.S. 243, 270, 126 S. Ct. 904, 923, 163 L. Ed. 2d 748 (2006) (quotation marks and citation omitted). Numerous Supreme Court decisions have identified the regulation of health matters as a core facet of a state's police powers. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 715, 120 S. Ct. 2480, 2489 (2000) ("It is a traditional exercise of the States' police powers to protect the health and safety of their citizens." (quotation marks and citation omitted)); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569, 111 S. Ct. 2456, 2462 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals."); *Head v. N.M. Bd. of Exam'rs in Optometry*, 374 U.S. 424, 428, 83 S. Ct. 1759, 1762 (1963) ("[T]he statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power."); *Barsky v. Bd. of Regents*, 347 U.S. 442, 449, 74 S. Ct. 650, 654 (1954) ("It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power."); *Jacobson v. Massachusetts*, 197 U.S. 11, 25, 25 S. Ct. 358, 360 (1905) ("According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."); *see also Raich*, 545 U.S. at 42, 125 S. Ct. at 2221 (O'Connor, J., dissenting) ("This case exemplifies the role of States as laboratories. The States' core police powers have always in-

cluded authority to define criminal law and to protect the health, safety, and welfare of their citizens.").[122]

Although the states and the federal government both play indispensable roles in regulating matters of health, modern Supreme Court precedents have confirmed the view that the health of a state's citizens is predominantly a state-based concern: "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719, 105 S. Ct. 2371, 2378 (1985). The Supreme Court similarly has stated that the narrower category of "health care" is an area of traditional state concern. *See, e.g., Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387, 122 S. Ct. 2151, 2171 (2002) (referring to "'the field of health care'" as "'a subject of traditional state regulation'" (quoting *Pegram v. Herdrich*, 530 U.S. 211, 237, 120 S. Ct. 2143, 2158 (2000))); *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661, 115 S. Ct. 1671, 1680 (1995) ("[G]eneral health care regulation . . . historically has been a matter of local concern.").

Here, it is undisputed that the individual mandate supersedes a multitude of the states' policy choices in these key areas of traditional state concern. Congress's

---

[122] *Gibbons*, which represents one of the Supreme Court's earliest articulations of the states' reserved police powers, also provides insight into the traditionally local nature of health laws. In *Gibbons*, Chief Justice Marshall remarked that "[i]nspection laws, quarantine laws, *health laws of every description*, as well as laws for regulating the internal commerce of a State" together "form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves." 22 U.S. at 203 (emphasis added).

encroachment upon these areas of traditional state concern is yet another factor that weighs in the plaintiffs' favor, and strengthens the inference that the individual mandate exceeds constitutional boundaries. The inference is particularly compelling here, where Congress has used an economic mandate to compel Americans to purchase and continuously maintain insurance from a private company.

We recognize the argument that, if states can issue economic mandates, Congress should be able to do so as well. Yes, some states have exercised their general police power to require their citizens to buy certain products—most pertinently, for our purposes, health insurance itself.[123] But if anything, this gives us greater constitutional concern, not less. Indeed, if the federal government possesses the asserted power to compel individuals to purchase insurance from a private company forever, it may impose such a mandate on individuals in states that have elected *not* to employ their police power in this manner.[124] After all, if and when Congress

---

[123] *See, e.g.*, MASS. GEN. LAWS ch. 111M § 2 (Massachusetts law requiring residents 18 years and older to "obtain and maintain creditable coverage so long as it is deemed affordable"); N.J. STAT. ANN. § 26:15-2 (New Jersey law requiring residents 18 years and younger to "obtain and maintain health care coverage that provides hospital and medical benefits").

[124] Some states have even passed legislation providing that their citizens may *not* be required to obtain or maintain health insurance. *See, e.g.*, Utah Code Ann. § 63M-1-2505.5; Va. Code Ann. § 38.2-3430.1:1; *see also* ARIZ. CONST. Art. XXVII, § 2 ("A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system."). The American Legislative Exchange Council, a nonprofit membership association of state legislators, filed a helpful *amicus* brief documenting the diverse array of policies implemented by states to provide their citizens with health coverage.

actually operates within its enumerated commerce power, Congress, by virtue of the Supremacy Clause, may ultimately supplant the states. When this occurs, a state is no longer permitted to tailor its policymaking goals to the specific needs of its citizenry. This is precisely why it is critical that courts preserve constitutional boundaries and ensure that Congress only operates within the proper scope of its enumerated commerce power.

In sum, the fact that Congress has enacted this insurance mandate in an area of traditional state concern is a factor that strengthens the inference of a constitutional violation. When this federalism factor is added to the numerous indicia of constitutional infirmity delineated above, we must conclude that the individual mandate cannot be sustained as a valid exercise of Congress's power to regulate activities that substantially affect interstate commerce.

We do not reach this conclusion lightly, and we recognize that "[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *Morrison*, 529 U.S. at 607, 120 S. Ct. at 1748. But we believe a compelling showing has been made here, and "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Lopez*, 514 U.S. at 578, 115 S. Ct. at 1639 (Kennedy, J., concurring) (citations omitted).

See Br. of *Amicus Curiae* American Legislative Exchange Council in Support of Plaintiffs at 21–28.

I. Essential to a Larger Regulatory Scheme

We lastly consider the government's separate contention that the individual mandate is a necessary and proper exercise of Congress's commerce power because it is essential to Congress's broader regulation of the insurance and health care markets.

The government's argument derives from a Commerce Clause doctrine of recent vintage. In 1995, the *Lopez* Court commented that the Gun-Free School Zones Act was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561, 115 S. Ct. at 1631 (majority opinion). Ten years later in *Raich*, although plainly operating within the economic-noneconomic rubric adopted in *Lopez* and *Morrison*, the Supreme Court adverted to the "essential part of a larger regulation of economic activity" language in *Lopez* as a further reason to sustain Congress's action.[125] However, several features of the individual mandate materially distinguish this case from *Raich* and demonstrate why the government's "essential to a broader regulation of commerce" argument fails here.

First, the Supreme Court has implied that the "larger regulatory scheme" doctrine primarily implicates

---

[125] In a concurring opinion, Justice Scalia stated that "Congress may regulate even *noneconomic local activity* if that regulation is a necessary part of a more general regulation of interstate commerce." *Raich*, 545 U.S. at 37, 125 S. Ct. at 2217 (Scalia, J., concurring) (emphasis added). As noted earlier, however, the majority opinion in *Raich* described the regulated activity as "the production, distribution, and consumption of commodities" and thus "quintessentially economic." *Id.* at 26, 125 S. Ct. at 2211 (majority opinion).

as-applied challenges as opposed to the facial challenge at issue here. For instance, the Supreme Court has employed the "larger regulatory scheme" doctrine when a plaintiff asserts that, although Congress's statute is a permissible regulation within its commerce power, the statute cannot be validly applied to his particular intrastate activity. *Raich*, 545 U.S. at 15, 23–24, 125 S. Ct. at 2204, 2209–10. In such an instance, the Supreme Court may determine that the failure to reach a plaintiff's intrastate activities would undermine Congress's efforts to police the interstate market. *Id.* at 28, 125 S. Ct. at 2212. However, the Supreme Court has to date never sustained a statute on the basis of the "larger regulatory scheme" doctrine in a facial challenge, where plaintiffs contend that the entire class of activity is outside the reach of congressional power.[126]

On this facial versus as-applied point, the *Raich* Court declared that "the statutory challenges at issue in [*Lopez* and *Morrison*] were markedly different from the challenge respondents pursue in the case at hand. Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particu-

---

[126] Although the *Lopez* Court was the first to *recognize* the "larger regulatory scheme" doctrine, it is arguable whether they actually *applied* it, in any real sense, in that case. Rather, the Supreme Court summarily stated that § 922(q) did not implicate that doctrine at all and "cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561, 115 S. Ct. at 1631. Here, it would strain credulity to suggest that the plaintiffs' conduct "arises out of or is connected with a commercial transaction," since the very nature of their conduct is marked by the *absence* of a commercial transaction.

lar statute or provision fell outside Congress' commerce power in its entirety." *Id.* at 23, 125 S. Ct. at 2209. The Court deemed this facial versus as-applied distinction "pivotal," as "we have often reiterated that '[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.'" *Id.* (quoting *Perez*, 402 U.S. at 154, 91 S. Ct. at 1361). The plaintiffs here, of course, are not asking for courts to excise, as trivial, individual instances of a class—rather, the plaintiffs contend the mandate to purchase insurance from a private company falls outside of Congress's commerce power in its entirety.

But even accepting that this larger regulatory scheme doctrine fully applies in facial challenges, the government's argument still fails here. To see why, we discuss how the Supreme Court utilized the doctrine in the as-applied setting of *Raich*, the only instance in which a statute has been sustained by the larger regulatory scheme doctrine. The Supreme Court in *Raich* observed that, in enacting the CSA, "Congress devised a *closed regulatory system* making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *Id.* at 13, 125 S. Ct. at 2203 (emphasis added). By classifying marijuana as a Schedule I drug, Congress sought to eliminate *all* interstate traffic in the commodity. The Supreme Court concluded that "the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market *in their entirety*." *Id.* at 19, 125 S. Ct. at 2207 (emphasis added).

Additionally, the fungible nature of the commodity—*i.e.*, the inability to distinguish intrastate marijuana from interstate marijuana—also undermined Congress's ability to enforce its concededly valid total CSA ban on commercial transactions in the interstate market. The *Raich* Court stated that "[g]iven the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a *gaping hole* in the CSA."[127] *Id.* at 22, 125 S. Ct. at 2209 (ci-

---

[127] The "gaping hole" identified by the Supreme Court was thrown into sharp relief by the *Raich* plaintiffs' lack of limiting principles. If Congress could not reach intrastate marijuana used for medical purposes, the *Raich* Court reasoned that it must also be true that intrastate marijuana used for *recreational* purposes could not be regulated either. 545 U.S. at 28, 125 S. Ct. at 2212. And if Congress could not reach intrastate marijuana authorized by state law, neither could it reach intrastate marijuana unauthorized by state law. *Id.* Moreover, if Congress could not reach intrastate marijuana when it is authorized by state law, then Congress's ability to police the interstate marijuana market would be wholly contingent on state decisions about whether or not to authorize marijuana use. Congress would effectively be at the mercy of states, even though "state action cannot circumscribe Congress' plenary commerce power." *Id.* at 29, 125 S. Ct. at 2213. It is easy to see how the *Raich* plaintiffs' arguments threatened to completely undermine the CSA's regulation of the interstate marijuana market, not to mention "turn the Supremacy Clause on its head." *Id.* at 29 n.38, 125 S. Ct. at 2213 n.38.

This stands in marked contrast with the case before us, where neither state law nor the plaintiffs' uninsured status undermine the ability of Congress to enforce its regulation of interstate commerce. Even without the mandate, the integrity of all other statutory provisions is main-

tation omitted) (emphasis added). Consequently, the *Raich* Court determined that Congress's regulation was justified by the possibility that the plaintiffs' intrastate activities could frustrate or impede a validly enacted congressional statute regulating interstate commerce.

In this case, the government contends that the individual mandate is essential to its broader regulation of the insurance market. For example, the government submits that Congress's insurance industry reforms—specifically, its community-rating and guaranteed-issue reforms—will encourage individuals to delay purchasing private insurance until an acute medical need arises. Therefore, the government argues that unless the individual mandate forces individuals into the private insurance pool before they get sick or injured, Congress's insurance industry reforms will be unsustainable by the private insurance companies. The government emphasizes that the congressional findings state that the individual mandate "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." 42 U.S.C. § 18091(a)(2)(I).

We first note the truism that the mere placement of a particular regulation in a broader regulatory scheme does not, *ipso facto*, somehow render that regulation *essential* to that scheme. It would be nonsensical to suggest that, in announcing its "larger regulatory scheme" doctrine, the Supreme Court gave Congress *carte blanche* to enact unconstitutional regulations so long as such enactments were part of a broader, comprehensive

---

tained, and Congress's ability to enforce the Act is in no way jeopardized.

regulatory scheme. We do not construe the Supreme Court's "larger regulatory scheme" doctrine as a magic words test, where Congress's statement that a regulation is "essential" thereby immunizes its enactment from constitutional inquiry. Such a reading would eviscerate the Constitution's enumeration of powers and vest Congress with a general police power.

Ultimately, we conclude that the Supreme Court's "larger regulatory scheme" doctrine embodies an observation put forth in the New Deal case of *Jones & Laughlin Steel Corp.*: "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that *their control is essential or appropriate to protect that commerce from burdens and obstructions*, Congress cannot be denied the power to exercise that control." 301 U.S. at 37, 57 S. Ct. at 624 (emphasis added). Justice Scalia's concurring opinion in *Raich* suggests a similar interpretation. There, he stated that the "larger regulatory scheme" statement in *Lopez* "referred to those cases permitting the regulation of intrastate activities 'which *in a substantial way* interfere with or obstruct the exercise of the granted power.'" *Raich*, 545 U.S. at 36, 125 S. Ct. at 2217 (Scalia, J., concurring) (emphasis added) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119, 62 S. Ct. 523, 526 (1942)). In other words, the Necessary and Proper Clause enables Congress in some instances to reach intrastate activities that markedly burden or obstruct Congress's ability to regulate interstate commerce.

In *Raich*, the plaintiffs' intrastate activities—growing and consuming marijuana—obstructed and burdened Congress's total CSA ban on interstate marijuana

traffic, both because the fungible nature of marijuana frustrated Congress's ability to police the interstate market and because evidence indicated that intrastate marijuana is often diverted into the interstate market. Yet it is evident that the conduct regulated by the individual mandate—an individual's decision not to purchase health insurance and the concomitant absence of a commercial transaction—in no way "burdens" or "obstructs" Congress's ability to enforce its regulation of the insurance industry. Congress's statutory reforms of health insurance products—such as guaranteed issue and community rating—do not reference or make their implementation in any way dependent on the individual mandate.

The individual mandate does not remove an obstacle to Congress's regulation of insurance companies. An individual's uninsured status in no way interferes with Congress's ability to regulate insurance companies. The uninsured and the individual mandate also do not prevent insurance companies' regulatory compliance with the Act's insurance reforms. At best, the individual mandate is designed *not* to enable the execution of the Act's regulations, but to counteract the significant regulatory costs on insurance companies and adverse consequences stemming from the fully executed reforms. That may be a relevant political consideration, but it does not convert an unconstitutional regulation (of an individual's decision to forego purchasing an expensive product) into a constitutional means to ameliorate adverse cost consequences on private insurance companies

engendered by Congress's broader regulatory reform of their health insurance products.[128]

The government's assertion that the individual mandate is "essential" to Congress's broader economic regulation is further undermined by components of the Act itself. In *Raich*, Congress devised a "closed regulatory system," *id.* at 13, 125 S. Ct. at 2203, designed to eliminate *all* interstate marijuana traffic. Here, by contrast, Congress itself carved out eight broad exemptions and exceptions to the individual mandate (and its penalty) that impair its scope and functionality. *See* 26 U.S.C. § 5000A(d)-(e). Even if the individual mandate remained intact, the "adverse selection" problem identified by Congress would persist not only with respect to these eight broad exemptions, but also with respect to *those healthy persons who choose to pay the mandate penalty.* Those who pay the penalty one year instead of purchasing insurance may still get sick the next year and *then* decide to purchase insurance, for which they could not be denied.

Additionally, Congress has hamstrung its own efforts to ensure compliance with the mandate by opting for toothless enforcement mechanisms. Eschewing the

---

[128] The government argues that Congress has broad authority to select the means by which it enforces its comprehensive regulatory scheme. But this hardly entails that Congress may choose any and all means whatsoever. Indeed, Congress might have employed other unconstitutional means to render its community-rating and guaranteed-issue reforms more "effective." For example, it might order unreasonable searches and seizures of corporate documents to ensure that insurance companies were not discriminating against applicants with preexisting conditions. Surely this action would not cease being a Fourth Amendment violation merely because it is deemed essential to a broader regulatory scheme.

IRS's traditional enforcement tools, the Act waives all criminal penalties for noncompliance and prevents the IRS from using liens or levies to collect the penalty. *Id.* § 5000A(g)(2). Thus, to the extent the uninsureds' ability to delay insurance purchases would leave a "gaping hole" in Congress's efforts to reform the insurance market, Congress has seen fit to bore the hole itself.

J. Conclusion

For these reasons, we conclude that the individual mandate contained in the Act exceeds Congress's enumerated commerce power. This conclusion is limited in scope. The power that Congress has wielded via the Commerce Clause for the life of this country remains undiminished. Congress may regulate commercial actors. It may forbid certain commercial activity. It may enact hundreds of new laws and federally-funded programs, as it has elected to do in this massive 975-page Act. But what Congress cannot do under the Commerce Clause is mandate that individuals enter into contracts with private insurance companies for the purchase of an expensive product from the time they are born until the time they die.

It cannot be denied that the individual mandate is an unprecedented exercise of congressional power. As the CBO observed, Congress "has never required people to buy any good or service as a condition of lawful residence in the United States." CBO MANDATE MEMO, *supra* p.115, at 1. Never before has Congress sought to *regulate* commerce by compelling non-market participants to *enter into* commerce so that Congress may regulate them. The statutory language of the mandate is not tied to health care consumption—past, present, or in the future. Rather, the mandate is to buy insurance now

and forever. The individual mandate does not wait for market entry.

Because the Commerce Clause is an enumerated power, the Supreme Court's decisions all emphasize the need for judicially enforceable limitations on its exercise. The individual mandate embodies no such limitations, at least none recognized by extant Commerce Clause doctrine. If an individual's decision *not* to purchase an expensive product is subject to the sweeping doctrine of aggregation, then that purchase decision will almost always substantially affect interstate commerce. The government's five factual elements of "uniqueness," proposed as constitutional limiting principles, are nowhere to be found in Supreme Court precedent. Rather, they are *ad hoc*, devoid of constitutional substance, incapable of judicial administration—and, consequently, illusory. The government's fact-based criteria would lead to expansive involvement by the courts in congressional legislation, requiring us to sit in judgment over when the situation is serious enough to justify an economic mandate.

This lack of limiting principles also implicates two overarching considerations within the Supreme Court's Commerce Clause jurisprudence: (1) preserving the federal-state balance and (2) withholding from Congress a general police power. *Morrison*, 529 U.S. at 617–19, 120 S. Ct. at 1754; *Lopez*, 514 U.S. at 566–68, 115 S. Ct. at 1633–34; *Jones & Laughlin Steel Corp.*, 301 U.S. at 30, 57 S. Ct. at 621. These concerns undergird the Constitution's dual sovereignty structure, ensuring that the federal government remains a government of enumerated powers.

As demonstrated at length throughout our opinion, Congress has broad power to deal with the problems of the uninsured, and it wielded that power pervasively in this comprehensive and sweeping Act. As to the individual mandate provision, however, Congress exceeded its enumerated commerce power. The structure of the Constitution interposes obstacles by design, in order to prevent the arrogation of power by one branch or one sovereign. *See Gregory*, 501 U.S. at 458, 111 S. Ct. at 2400 ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."). We cannot ignore these structural limits on the Commerce Clause because of the seriousness and intractability of the problem Congress sought to resolve in the Act.

The Supreme Court has often found itself forced to strike down congressional enactments even when the law is designed to address particularly difficult and universally acknowledged problems. For instance, in *Clinton v. City of New York*, 524 U.S. 417, 118 S. Ct. 2091 (1998), the Supreme Court addressed a problem of Congress's own creation—deficit spending. The Line Item Veto Act was "of first importance, for it seems undeniable the Act will tend to restrain persistent excessive spending." *Id.* at 449, 118 S. Ct. at 2108 (Kennedy, J., concurring). The problem the act addressed was momentous: "A nation cannot plunder its own treasury without putting its Constitution and its survival in peril." *Id.*

Nevertheless, the Supreme Court invalidated the Line Item Veto Act, recognizing that the Constitution establishes restraints on the power of Congress to act, even in regards to the mechanism by which it withholds or allocates funding. The fact that constitutional tools sometimes "prove insufficient[ ] cannot validate an otherwise unconstitutional device" because "[t]he Constitution's structure requires a stability which transcends the convenience of the moment." *Id.* at 453, 118 S. Ct. at 2110; *see also New York v. United States*, 505 U.S. at 178, 112 S. Ct. at 2429 (noting that "[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority" to supersede its constitutionally imposed boundaries); *INS v. Chadha*, 462 U.S. 919, 958–59, 103 S. Ct. 2764, 2788 (1983) ("In purely practical terms, it is obviously easier for action to be taken by one House without submission to the President; but it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency.").

In the same way, the difficulties posed by the insurance market and health care cannot justify extra-constitutional legislation. *See Printz*, 521 U.S. at 935, 117 S. Ct. at 2385 ("It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such [federal] commands are fundamentally incompatible with our constitutional system of dual sovereignty.").

The federal government's assertion of power, under the Commerce Clause, to issue an economic mandate for Americans to purchase insurance from a private company for the entire duration of their lives is unprece-

dented, lacks cognizable limits, and imperils our federalist structure. We recognize that "[t]hese are not precise formulations, and in the nature of things they cannot be." *Lopez*, 514 U.S. at 567, 115 S. Ct. at 1634. That an economic mandate to purchase insurance from a private company is an expedient solution to pressing public needs is not sufficient. As the Supreme Court counseled in *New York v. United States*,

> The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

505 U.S. at 187, 112 S. Ct. at 2434. Although courts must give due consideration to the policy choices of the political branches, the judiciary owes its ultimate deference to the Constitution.[129]

---

[129] We are at a loss as to why the dissent spends a considerable portion of its opinion on the Fifth and Tenth Amendments. As mentioned earlier, the district court dismissed the plaintiffs' Fifth Amendment claim. *Florida v. HHS*, 716 F.Supp. 2d at 1161–62. That ruling is not on appeal.

Furthermore, the plaintiffs' briefs on appeal raise no free-standing Tenth Amendment claim *as to the individual mandate*. Although the state plaintiffs' brief makes a single passing reference to the Tenth Amendment in the introduction, *see* States' Opening Br. at 3, the fact remains that the Tenth Amendment is not once cited or argued in the state plaintiffs' *individual mandate* discussion. *See* States' Opening Br. at 19–47. The private plaintiffs' brief also makes a single passing reference to the Tenth Amendment, but only in relation to how prin-

VI. CONSTITUTIONALITY OF INDIVIDUAL MANDATE UNDER THE TAX POWER

The government claims in the alternative that the individual mandate is a tax validly enacted pursuant to the Taxing and Spending Clause. The Clause provides in relevant part that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. 1, § 8, cl. 1. The government claims that the taxing power is comprehensive and plenary, and the fact that the individual mandate also has a concededly regulatory purpose is irrelevant, because "a tax 'does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed.'" Government's Opening Br. at 50 (quoting *United States v. Sanchez*, 340 U.S. 42, 44, 71 S. Ct. 108, 110 (1950)). The government claims that as long as a statute is "productive of some revenue," Congress may enact it under its taxing power. *Id.* (quoting *Sonzinsky v. United States*, 300 U.S. 506, 514, 57 S. Ct. 554, 556 (1937)). Furthermore, the government contends our review is limited because

---

ciples of federalism inform a Necessary and Proper Clause analysis. *See* Private Plaintiffs' Br. at 46.

Accordingly, we cannot consider a free-standing Tenth Amendment claim. *See, e.g., Tanner Adver. Grp., L.L.C. v. Fayette Cnty.*, 451 F.3d 777, 785 (11th Cir. 2006) ("'The law is by now well settled in this Circuit that a legal claim or argument that has not been briefed before the court is deemed abandoned and its merits will not be addressed.'" (quoting *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004)) (brackets omitted)); *United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003) (finding issue waived, despite "four passing references" in Appellant's brief, because "a party seeking to raise a claim or issue on appeal must plainly and prominently so indicate").

"the constitutional restraints on taxing are few" and "[t]he remedy for excessive taxation is in the hands of Congress, not the courts." *United States v. Kahriger*, 345 U.S. 22, 28, 73 S. Ct. 510, 513 (1953), *overruled on other grounds by Marchetti v. United States*, 390 U.S. 39, 88 S. Ct. 697 (1968); *see also Kahriger*, 345 U.S. at 31, 73 S. Ct. at 515 ("Unless there are provisions, extraneous to any tax need, courts are without authority to limit the exercise of the taxing power."). Like every other court that has addressed this claim, we remain unpersuaded.

It is not surprising to us that all of the federal courts, which have otherwise reached sharply divergent conclusions on the constitutionality of the individual mandate, have spoken on this issue with clarion uniformity. Beginning with the district court in this case, all have found, without exception, that the individual mandate operates as a regulatory penalty, not a tax. *Florida v. HHS*, 716 F. Supp. 2d at 1143–44 ("I conclude that the individual mandate penalty is not a 'tax.' It is (as the Act itself says) a penalty."); *U.S. Citizens Ass'n v. Sebelius*, 754 F. Supp. 2d 903, 909 (N.D. Ohio 2010) (concluding that the individual mandate is a penalty, "agree[ing] with the thoughtful and careful analysis of Judge Vinson"); *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 629 (W.D. Va. 2010) ("After considering the prevailing case law, I conclude that the better characterization of the exactions imposed under the Act for violations of the employer and individual coverage provisions is that of regulatory penalties, not taxes."); *Virginia v. Sebelius*, 728 F. Supp. 2d 768, 782–88 (E.D. Va. 2010) (concluding that the individual mandate "is, in form and substance, a penalty as opposed to a tax"); *Goudy-Bachman v. HHS*, 764 F. Supp. 2d 684, 695

(M.D. Pa. 2011) ("The court finds that the individual mandate itself is not a tax. . . ."); *Mead v. Holder*, 766 F. Supp. 2d 16, 41 (D.D.C. 2011) ("[T]he Court concludes that Congress did not intend [the individual mandate] to operate as a tax, and therefore Defendants cannot rely on the General Welfare Clause as authority for its enactment.").

For good reason. The breadth of the taxing power, well noted by the government and its *amici*, fails to resolve the question we face: whether the individual mandate is a tax in the first place. The plain language of the statute and well-settled principles of statutory construction overwhelmingly establish that the individual mandate is not a tax, but rather a penalty. The legislative history of the Act further supports this conclusion. And as the Supreme Court has repeatedly recognized, there is a firm distinction between a tax and a penalty. *See, e.g., United States. v. La Franca*, 282 U.S. 568, 572, 51 S. Ct. 278, 280 (1931) ("The two words are not interchangeable one for the other.").

The government would have us ignore all of this and instead hold that any provision found in the Internal Revenue Code that will produce revenue may be characterized as a tax. This we are unwilling to do.

A. Repeated Use of the Term "Penalty" in the Individual Mandate

"As in any case involving statutory construction, we begin with the plain language of the statute." *Hemispherx Biopharma, Inc. v. Johannesburg Consol. Invs.*, 553 F.3d 1351, 1362 (11th Cir. 2008) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056 (1980)). The plain language of the individual mandate is clear that the individ-

ual mandate is not a tax, but rather, as the statute itself repeatedly states, a "penalty" imposed on an individual for failing to maintain a minimum level of health insurance coverage in any month beginning in 2014. Title 26 U.S.C. § 5000A(a) requires "[a]n applicable individual" to "ensure that the individual . . . is covered under minimum essential coverage." 26 U.S.C. § 5000A(a). In order to enforce this requirement, Congress stated that "[i]f a taxpayer who is an applicable individual . . . fails to meet the requirement of subsection (a) for 1 or more months, then . . . there is hereby imposed on the taxpayer a *penalty* with respect to such failures." *Id.* § 5000A(b)(1) (emphasis added).

Nor could we construe Congress's choice of language as a careless one-time invocation of the word "penalty," because the remainder of the relevant provisions in § 5000A uses the same term over and over again, without exception and without ever describing the penalty as a "tax." *See, e.g.*, *id.* § 5000A(b)(3)(B) (individual "with respect to whom a *penalty* is imposed by this section" who files joint tax return "shall [along with individual's spouse] be jointly liable for such *penalty*" (emphasis added)); *id.* § 5000A(c)(1) (describing "[t]he amount of the *penalty* imposed by this section on any taxpayer for any taxable year" (emphasis added)); *id.* § 5000A(c)(2) (describing "the monthly *penalty* amount with respect to any taxpayer" (emphasis added)); *id.* § 5000A(g)(1) ("The *penalty* provided by this section shall be paid upon notice and demand by the Secretary . . . ." (emphasis added)); *id.* § 5000A(g)(2)(A) (providing that taxpayer "shall not be subject to any criminal prosecution or penalty" for failure "to timely pay any *penalty* imposed by this section" (emphasis added)); *id.* § 5000A(g)(2)(B) (providing that the Secretary shall not

"file notice of lien" or "levy" on "any property of a taxpayer by reason of any failure to pay the *penalty* imposed by this section" (emphasis added)).

Thus, the text of the individual mandate unambiguously provides that it imposes a *penalty*. The penalty encourages compliance with the Act's requirement to obtain "minimum essential coverage" by imposing a monetary sanction on conduct that violates that requirement. The text is not unclear and was carefully selected to denote a specific meaning. As the Supreme Court most recently recognized in *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 116 S. Ct. 2106 (1996), "'[a] tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.'" *Id.* at 224, 116 S. Ct. at 2113 (quoting *La Franca*, 282 U.S. at 572, 51 S. Ct. at 280). The Court further expounded upon *La Franca*: "We take *La Franca*'s statement of the distinction [between a tax and penalty] to be sufficient for the decision of this case; if the concept of penalty means anything, it means punishment for an unlawful act or omission. . . . " *Id.; see also Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 779–80, 114 S. Ct. 1937, 1946 (1994) ("Whereas fines, penalties, and forfeitures are readily characterized as sanctions, taxes are typically different because they are usually motivated by revenue-raising, rather than punitive, purposes."). It is clear that the terms "tax" and "penalty" "are not interchangeable one for the other. . . . and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *La Franca*, 282 U.S. at 572, 51 S. Ct. at 280.

B. Designation of Numerous Other Provisions in the Act as "Taxes"

We add the truism that Congress knows full well how to enact a tax when it chooses to do so. And the Act contains several provisions that are unmistakably taxes. The point is amply made by simply looking at four different provisions: (1) an Excise Tax on Medical Device Manufacturers, 26 U.S.C. § 4191(a) ("There is hereby imposed on the sale of any taxable medical device by the manufacturer, producer, or importer a *tax* equal to 2.3 percent of the price for which so sold." (emphasis added)); (2) an Excise Tax on High Cost Employer-Sponsored Health Coverage, *id.* § 4980I(a)(1)-(2) (if an employee receives "excess benefit," as defined in the statute, from employer-sponsored health coverage, "there is hereby imposed a *tax* equal to 40 percent of the excess benefit" (emphasis added)); (3) an Additional Hospital Insurance Tax for High-Income Taxpayers, amending *id.* § 3101(b) (as part of Federal Insurance Contributions Act, providing that "there is hereby imposed on the income of every individual a *tax* equal to 1.45 percent of the wages . . . received by him with respect to employment" (emphasis added));[130] and (4) an Excise Tax on Indoor Tanning Services, *id.* § 5000B(a) ("There is hereby imposed on any indoor tanning service a *tax* equal to 10 percent of the amount paid for such

---

[130] Indeed, this provision, which takes effect in 2013, is a 0.9% flat tax increase on an individual's wages, applicable to those earning annual wages over $200,000 ($250,000 in the case of a jointly-filed return, or $125,000 in the case of a married taxpayer filing a separate tax return). Act §§ 9015(a)(1), 10906(a), (c); HCERA, Pub. L. No. 111–152, § 1402(b)(1)(A), (3), 124 Stat. 1029, 1063 (2010), to be codified in 26 U.S.C. § 3101(b) (effective Jan. 1, 2013).

service . . . whether paid by insurance or otherwise" (emphasis added)).

It is an unremarkable matter of statutory construction that we presume Congress did not indiscriminately use the term "tax" in some provisions but not in others. *See Duncan v. Walker*, 533 U.S. 167, 173, 121 S. Ct. 2120, 2125 (2001) ("It is well settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quotation marks and alteration omitted)). We have little difficulty concluding that Congress intended § 5000A to operate as a penalty.

The very nature of congressional findings about the individual mandate further amplifies that Congress designed and intended to design a penalty for the failure to comply and not a tax. The source of the power, asserted by Congress, to create the mandate is directly pegged to the Commerce Clause. *See, e.g.*, 42 U.S.C. § 18091(a)(1) ("The individual responsibility requirement provided for in this section . . . is commercial and economic in nature, and substantially affects interstate commerce. . . . "); *id.* § 18091(a)(2)(B) ("Health insurance and health care services are a significant part of the national economy. . . . Private health insurance spending . . . pays for medical supplies, drugs, and equipment that are shipped in interstate commerce. Since most health insurance is sold by national or regional health insurance companies, health insurance is sold in interstate commerce and claims payments flow through interstate commerce.").

Indeed, the findings make clear that the goal of the individual mandate is not to raise revenue for the public fisc, but rather to, among other things, reduce the number of the uninsured and to create what Congress perceived to be effective health insurance markets that make health insurance more widely available. *Id.* § 18091(a)(2)(C)-(I); *see also id.* § 18091(a)(2)(J) ("The requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.").

The argument that Congress need not employ the label of "tax" or expressly invoke the Taxing and Spending Clause in order to enact a valid tax is surely true, insofar as it goes. *See Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144, 68 S. Ct. 421, 424 (1948) ("[T]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."). The problem with the claim, however, is not that Congress simply failed to use the term "tax," or declined to invoke the Taxing and Spending Clause when explaining the constitutional basis for enacting the individual mandate. Rather, Congress repeatedly told us that the individual mandate is a "penalty" and expressly invoked its Commerce Clause power as the foundation for the mandate. The two are not the same thing. Ultimately, we are hard pressed to construe the statute in a manner that would require us to ignore the plain text of the statute, the words repeatedly employed by Congress, well-settled principles of statutory construction, and well-settled law emphasizing the substantive distinction between a tax and a penalty.

C. Legislative History of the Individual Mandate

Even if the text were unclear—although it is not—and we were to resort to an examination of the legislative history, we would still find more of the same thing: Congress intended to impose a penalty for the failure to maintain health insurance.

Prior to the passage of the Act, earlier bills in both houses of Congress proposed an individual mandate accompanied by a "tax," as the district court noted. *See Florida v. HHS*, 716 F. Supp. 2d at 1134. Thus, for example, Section 401 of the "America's Affordable Choices Act of 2009," H.R. 3200, 111th Cong. (2009), which was introduced in the House of Representatives on July 14, 2009, provided that "there is hereby imposed a tax" on "any individual who does not meet the requirements of [maintaining minimum health insurance coverage] at any time during the taxable year." A later version of the House bill, the "Affordable Health Care for America Act," H.R. 3962, 111th Cong. § 501 (2009), passed the House of Representatives on November 7, 2009, and similarly referred to the individual mandate's enforcement mechanism as a "tax." On the Senate side, the "America's Healthy Future Act," a precursor to the Act, also used the term "tax." *See* S. 1796, 111th Cong. § 1301 (2009) ("If an applicable individual fails to [maintain minimum health insurance coverage] there is hereby imposed a tax. . . . ").

Notably, however, the final version of the Act abandoned the term "tax" in favor of the term "penalty." This is no mere semantic distinction, as "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded

in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43, 107 S. Ct. 1207, 1218 (1987) (emphasis added) (quotation marks omitted).

The government relies on different pieces of the legislative history, particularly the statements of individual legislators, speaking both for and against the Act, who at various times referred to the individual mandate as a "tax." *See* Government's Opening Br. at 54 (citing 156 Cong. Rec. H1854, H1882 (daily ed. Mar. 21, 2010) (statement of Rep. Miller); 156 Cong. Rec. H1824, H1826 (daily ed. Mar. 21, 2010) (statement of Rep. Slaughter); 155 Cong. Rec. S13,751, S13,753 (daily ed. Dec. 22, 2009) (statement of Sen. Leahy); 155 Cong. Rec. S13,558, S13,581–82 (daily ed. Dec. 20, 2009) (statement of Sen. Baucus); 155 Cong. Rec. S12,768 (daily ed. Dec. 9, 2009) (statement of Sen. Grassley)). These assorted statements of individual legislators are of precious little value, because they are in conflict with the plain text of the statute and with more reliable indicators of congressional intent. *See Huff v. DeKalb Cnty., Ga.*, 516 F.3d 1273, 1280 (11th Cir. 2008) ("'The best evidence of [legislative] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.'" (alteration in original) (quoting *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98–99, 111 S. Ct. 1138, 1147 (1991))).

The government argues nevertheless that the individual mandate is still "a tax in both administration and effect." Government's Opening Br. at 54. It claims that in "passing on the constitutionality of a tax law," we should be "concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Id.* (quoting *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363, 61 S. Ct. 586, 588 (1941)). That the individual mandate will produce some revenue and will be enforced by the Internal Revenue Service is enough, they say, to transmute the individual mandate's penalty provision into a tax.

We remain unpersuaded. Even on the government's own terms, the individual mandate does not in "practical operation" act as a tax. *See Nelson*, 312 U.S. at 363, 61 S. Ct. at 588. The government specifically claims that the individual mandate has the character of a tax because it will produce revenue. This argument—which relies on undisputed projections by the CBO that the individual mandate will generate some four to five billion dollars in annual revenue by the end of this decade[131]—does little to address the distinction between a penalty and a tax. This is because "[c]riminal fines, civil penalties, civil forfeitures, and taxes all share certain features: They generate government revenues, impose fiscal burdens on individuals, and deter certain behavior." *Kurth Ranch*, 511 U.S. at 778, 114 S. Ct. at 1945. The Supreme Court has thus recognized, as indeed we must, that in our world of less than perfect com-

---

[131] CBO, *Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act* 3 (rev. Apr. 30, 2010) [hereinafter CBO, *Payments*], *available at* http://www.cbo.gov/ftpdocs/113xx/doc11379/Individual_Mandate_ Penalties-04-30.pdf.

pliance, penalties generate revenue just as surely as taxes.

Nor does the amount of projected revenue that will be collected under the individual mandate—a significant sum, to be sure—render the mandate a tax. The Supreme Court has never understood the *amount* of revenue generated by a statutory provision to have definitional value. In *Sonzinsky*, the Court considered a converse of the situation we face here, where a provision imposing a "$200 annual license tax" on firearms dealers was challenged as "not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms." 300 U.S. at 511–12, 57 S. Ct. at 554–55. The tax was "productive of some revenue," but not much. *Id.* at 514 & n.1, 57 S. Ct. at 556 & n.1 (observing that 27 dealers paid the tax in 1934, and 22 paid in 1935). That did not stop the Supreme Court from upholding the provision as a tax. The Supreme Court later interpreted *Sonzinsky* as standing for the proposition that "a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed," and that proposition "applies even though *the revenue obtained is obviously negligible.*" *Sanchez*, 340 U.S. at 44, 71 S. Ct. at 110 (emphasis added).

While the government views these cases as supportive of its argument, because they demonstrate the breadth of Congress's taxing power, the cases merely hold "that an Act of Congress which *on its face* purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed." *Sonzinsky*, 300 U.S. at 513, 57 S. Ct. at 556 (emphasis added). Thus, once Congress

has expressly and unmistakably indicated that a provision is a tax, courts will not "[i]nquir[e] into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it." *Id.* at 513–14, 57 S. Ct. at 556. But that is not this case. Here we confront a statute that is not "on its face" a tax, but rather a penalty. What's more, the district court correctly noted that the government lacks any case precedent squarely on point. *Florida v. HHS*, 716 F. Supp. 2d at 1140.

Even ignoring Congress's deliberate choice of the term "penalty," the individual mandate on its face imposes a monetary sanction on an individual who "fails to meet the requirement" to maintain "minimum essential coverage." 26 U.S.C. § 5000A(b)(1). As we see it, such an exaction appears in every important respect to be "punishment for an unlawful act or omission," which defines the very "concept of penalty." *CF & I Fabricators*, 518 U.S. at 224, 116 S. Ct. at 2113; *see also Virginia v. Sebelius*, 728 F. Supp. 2d at 786 ("The only revenue generated under the [individual mandate] is incidental to a citizen's failure to obey the law by requiring the minimum level of insurance coverage. The resulting revenue is 'extraneous to any tax need.'" (quoting *Kahriger*, 345 U.S. at 31, 73 S. Ct. at 515)).

The government also suggests that the individual mandate operates as a tax because it is housed in the Internal Revenue Code and is collected through taxpayers' annual returns. It is true that the individual mandate is located under the section of the Code titled "Miscellaneous Excise Taxes." Yet the Code itself makes clear that Congress's choice of where to place a provision in the Internal Revenue Code has no interpretive

value: "No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title. . . ." 26 U.S.C. § 7806(b); *see also Florida v. HHS*, 716 F. Supp. 2d at 1137 (citing same).

More significantly, not every provision in the Internal Revenue Code is a tax. Indeed, Congress placed in Chapter 68 of the Internal Revenue Code a panoply of civil *penalties*, running the gamut from broadly applicable (filing frivolous tax returns[132] or making unreasonable erroneous claims for a tax refund or credit[133]) to highly industry-specific (tampering with or failing to maintain security requirements for mechanical dye injection systems,[134] or selling or reselling adulterated diesel fuel that violates environmental standards[135]). In addition, the mandate's penalty is not treated like a tax because, as noted above, the IRS may not place liens, or

---

[132] *See* 26 U.S.C. § 6702(a) (imposing "penalty of $5,000" on person who files "what purports to be a return of a tax imposed by this title" which either lacks "information on which the substantial correctness of the self-assessment may be judged" or "contains information that on its face indicates that the self-assessment is substantially incorrect").

[133] *See* 26 U.S.C. § 6676(a) ("If a claim for refund or credit with respect to income tax . . . is made for an excessive amount, unless it is shown that the claim for such excessive amount has a reasonable basis, the person making such claim shall be liable for a penalty in an amount equal to 20 percent of the excessive amount.").

[134] *See* 26 U.S.C. § 6715A(a)(1) ("If any person tampers with a mechanical dye injection system used to indelibly dye fuel . . . such person shall pay a penalty in addition to the tax (if any)."). The penalty is the greater of $25,000 or $10 for each gallon of fuel involved. *Id.* § 6715A(b)(1).

[135] *See* 26 U.S.C. § 6720A (imposing "penalty of $10,000" for each violation, "in addition to the tax on such [fuel]").

levy or initiate criminal prosecution or impose any interest or criminal sanctions. All the IRS, practically speaking, may do is to offset the penalty against a tax refund. 26 U.S.C. § 5000A(g)(2)(A)-(B).

Although it is irrelevant for our purposes precisely where in the Internal Revenue Code Congress decided to place the individual mandate, *id.* § 7806(b), we observe that other chapters of the Internal Revenue Code include *penalty* provisions as well. *See, e.g., id.* § 5761(a) (imposing "a penalty of $1,000" on any person—primarily manufacturers, importers, and retailers—who willfully fails to comply with a variety of statutory duties and taxes under Chapter 52 of the Internal Revenue Code related to tobacco products and cigarettes). And Chapter 75 of the Internal Revenue Code sets forth criminal penalties, which permit courts to impose substantial fines. *Id.* § 7206 (providing that those who commit tax fraud in a variety of ways "shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution"). While the entire list of penalties in the Internal Revenue Code is far too long to exhaust here, it is apparent that the placement of the individual mandate in the Internal Revenue Code is far from sufficient to convert the individual mandate into a "tax" and has limited value, if any at all, in determining whether the individual mandate is a tax or a penalty.

After careful review of the statute, we conclude that the individual mandate is a civil regulatory penalty and not a tax. As a regulatory penalty, the individual mandate must therefore find justification in a different enu-

merated power. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393, 60 S. Ct. 907, 912 (1940) ("Congress may impose penalties in aid of the exercise of any of its enumerated powers."); *Virginia v. Sebelius*, 728 F. Supp. 2d at 788; *Florida v. HHS*, 716 F. Supp. 2d at 1143–44.

The individual mandate as written cannot be supported by the tax power.

VII. SEVERABILITY

We now turn to whether the individual mandate, found in 26 U.S.C. § 5000A, can be severed from the remainder of the 975-page Act.

A. Governing Principles

In analyzing this question, we start with the settled premise that severability is fundamentally rooted in a respect for separation of powers and notions of judicial restraint. *See Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329–30, 126 S. Ct. 961, 967–68 (2006). Courts must "strive to salvage" acts of Congress by severing any constitutionally infirm provisions "while leaving the remainder intact." *Id.* at 329, 126 S. Ct. at 967-68. "[T]he presumption is in favor of severability." *Regan v. Time, Inc.*, 468 U.S. 641, 653, 104 S. Ct. 3262, 3269 (1984).

In the overwhelming majority of cases, the Supreme Court has opted to sever the constitutionally defective provision from the remainder of the statute. *See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. ___, ___, 130 S. Ct. 3138 (2010) (holding tenure provision severable from Sarbanes-Oxley Act); *New York v. United States*, 505 U.S. at 186–187, 112 S. Ct. at 2434 (holding take-title provision severable from Low-

Level Radioactive Waste Policy Amendments Act of 1985); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-97, 107 S. Ct. 1476, 1479–86 (1987) (holding legislative veto provision severable from Airline Deregulation Act of 1978); *Chadha*, 462 U.S. at 931–35, 103 S. Ct. at 2774-76 (holding legislative veto provision severable from Immigration and Nationality Act); *Buckley v. Valeo*, 424 U.S. 1, 108–09, 96 S. Ct. 612, 677 (1976) (holding campaign expenditure limits severable from public financing provisions in Federal Election Campaign Act of 1971).[136]

Indeed, in the Commerce Clause context, the Supreme Court struck down an important provision of a statute and left the remainder of the statute intact. In *Morrison*, the Court invalidated only one provision—the civil remedies provision for victims of gender-based violence. *Morrison*, 529 U.S. at 605, 627, 120 S. Ct. at 1747, 1759. The Supreme Court did not invalidate the entire VAWA—or the omnibus Violent Crime Control and Law Enforcement Act of 1994, of which it was part—even though the text of the two bills did not contain a severability clause.

As these cases amply demonstrate, the Supreme Court has declined to invalidate more of a statute than is absolutely necessary. Rather, "when confronting a constitutional flaw in a statute, we try to limit the solu-

---

[136] The paucity of case law supporting the plaintiffs' severability position is underscored by the lack of citation to any modern case where the Supreme Court found a legislative act inseverable. Indeed, the most recent such case cited by the plaintiffs was decided over 75 years ago, before modern severability law had even been established. *See* Private Plaintiffs' Br. at 59–62 (citing *R.R. Ret. Bd. v. Alton R. Co.*, 295 U.S. 330, 55 S. Ct. 758 (1935); *Williams v. Standard Oil Co.*, 278 U.S. 235, 49 S. Ct. 115 (1929); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 15 S. Ct. 912 (1895), *superseded by* U.S. CONST. amend. XVI).

tion to the problem." *Ayotte*, 546 U.S. at 328, 126 S. Ct. at 967. Because "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people," courts should "act cautiously" and "refrain from invalidating more of the statute than is necessary." *Regan*, 468 U.S. at 652, 104 S. Ct. at 3269.

The Supreme Court's test for severability is "well-established": "Unless it is *evident* that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is *fully operative as a law.*" *Alaska Airlines*, 480 U.S. at 684, 107 S. Ct. at 1480 (quotation marks omitted) (emphasis added). As the Supreme Court remarked in *Chadha*, divining legislative intent in the absence of a severability or non-severability clause can be an "elusive" enterprise. 462 U.S. at 932, 103 S. Ct. at 2774.

B. Wholesale Invalidation

Applying these principles, we conclude that the district court erred in its decision to invalidate the entire Act. Excising the individual mandate from the Act does not prevent the remaining provisions from being "fully operative as a law." As our exhaustive review of the Act's myriad provisions in Appendix A demonstrates, the lion's share of the Act has nothing to do with private insurance, much less the mandate that individuals buy insurance. While such wholly unrelated provisions are too numerous to bear repeating, representative examples include provisions establishing reasonable break time for nursing mothers, 29 U.S.C. § 207(r); epidemiology-laboratory capacity grants, 42 U.S.C. § 300hh-31; an HHS study on urban Medicare-dependent hospitals, *id.* § 1395ww note; restoration of funding for abstinence

education, *id.* § 710; and an excise tax on indoor tanning salons, 26 U.S.C. § 5000B.

In invalidating the entire Act, the district court placed undue emphasis on the Act's lack of a severability clause. *See Florida ex rel. Bondi v. HHS*, No. 3:10-CV-91-RV/EMT, ___ F. Supp. 2d ___, 2011 WL 285683, at *35–36 (N.D. Fla. Jan. 31, 2011). Supreme Court precedent confirms that the "ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States v. Jackson*, 390 U.S. 570, 585 n.27, 88 S. Ct. 1209, 1218 n.27 (1968). Rather, "Congress' silence is just that—silence—and does not raise a presumption against severability." *Alaska Airlines*, 480 U.S. at 686, 107 S. Ct. at 1481.

Nevertheless, the district court emphasized that an early version of Congress's health reform bill did contain a severability clause. Congress's failure to include such a clause in the final bill, the district court reasoned, "can be viewed as strong evidence that Congress recognized the Act could not operate *as intended* without the individual mandate." *Florida v. HHS*, 2011 WL 285683, at *36. The district court pushes this inference too far.

First, both the Senate and House legislative drafting manuals state that, in light of Supreme Court precedent in favor of severability, severability clauses are unnecessary unless they specifically state that all or some portions of a statute should *not* be severed. *See* Office of Legislative Counsel, U.S. Senate, *Legislative Drafting Manual*, § 131 (Feb. 1997) (providing that "a severability clause is unnecessary" but distinguishing a "nonseverability clause," which "provides that if a specific portion of an Act is declared invalid, the whole Act or some portion of the Act shall be invalid"); Office of Legislative

Counsel, U.S. House of Representatives, *House Legislative Counsel's Manual on Drafting Style*, § 328 (Nov. 1995) (stating that "a severability clause is unnecessary unless it provides in detail which related provisions are to fall, and which are not to fall, if a specified key provision is held invalid").

Second, the clause present in one early version of the Act was a general severability clause, not a non-severability clause. *See* H.R. Rep. No 111–299, pt. 3, at 17 § 155 (2009), *reprinted in* 2010 U.S.C.C.A.N. 474, 537 ("If any provision of this Act . . . is held to be unconstitutional, the remainder of the provisions of this Act . . . shall not be affected."). Thus, according to Congress's own drafting manuals, the severability clause was unnecessary, and its removal should not be read as any indicator of legislative intent *against* severability. Rather, the removal of the severability clause, in short, has no probative impact on the severability question before us.

In light of the stand-alone nature of hundreds of the Act's provisions and their manifest lack of connection to the individual mandate, the plaintiffs have not met the heavy burden needed to rebut the presumption of severability. We therefore conclude that the district court erred in its wholesale invalidation of the Act.

C. Severability of Individual Mandate from Two Insurance Reforms

The severability inquiry is not so summarily answered, however, with respect to two of the private insurance industry reforms.[137] The two reforms are: guar-

---

[137] For ease of discussion, we refer to those two provisions collectively as the "two reforms."

anteed issue, 42 U.S.C. § 300gg-1 (effective Jan. 1, 2014); and the prohibition on preexisting condition exclusions, *id.* § 300gg-3.

Our pause over the severability of these two reforms is due to the fact that the congressional findings speak in broad, general terms except in one place that states, as noted earlier, that the individual mandate "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of preexisting conditions can be sold." *Id.* § 18091(a)(2)(I). The findings in that paragraph add that if there were no mandate, "many individuals would wait to purchase health insurance until they needed care."[138] *Id.*

As discussed earlier, a significant number of the uninsured with preexisting conditions voluntarily tried to buy insurance but were denied coverage or had those conditions excluded, resulting in uncompensated health care consumption and cost-shifting. Congress also found that insurers' $90 billion in underwriting costs in identi-

---

[138] Section 18091(a)(2)(I) provides, in its entirety:

> Under sections 2704 and 2705 of the Public Health Service Act (as added by section 1201 of this Act) [to be codified in 42 U.S.C. §§ 300gg-3, 300gg-4], if there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.

42 U.S.C. § 18091(a)(2)(I).

fying unhealthy entrants represented 26% to 30% of premium costs. *Id.* § 18091(a)(2)(J). The two reforms reduce the number of the uninsured and underwriting costs by guaranteeing issue and prohibiting preexisting condition exclusions. To benefit consumers, Congress has improved health insurance products and required insurers to cover consumers who need their products the most.

It is not uncommon that government regulations beneficial to consumers impose additional costs on the industry regulated. These two reforms obviously have significant negative effects on the business costs of insurers because they require insurers to accept unhealthy entrants, raising insurers' costs. The individual mandate, in part, seeks to mitigate the reforms' costs on insurers by requiring the healthy to buy insurance and pay premiums to insurers to subsidize the insurers' costs in covering the unhealthy. Further, if there were no mandate, the argument goes, the healthy people can wait until they are sick to obtain insurance, knowing they could not then be turned away.[139]

In this regard, our severability concern is not over whether the two reforms can "fully operate as a law." They can. Rather, our severability concern is only whether "it is evident" that Congress "would not have

---

[139] When a medical need arises, individuals cannot literally purchase insurance on the way to the hospital. Rather, the Act permits insurers to restrict enrollment to a specific open or special enrollment period. 42 U.S.C. § 300gg-1(b) (effective Jan. 1, 2014). Individuals therefore must wait for an enrollment period. And once an individual applies for insurance, the Act allows up to a 90-day waiting period for group coverage eligibility. *Id.* § 300gg-7 (effective Jan. 1, 2014). We can find no limit in the Act on the waiting period insurers can have in the individual market.

enacted" the two insurance reforms *without* the individual mandate. *Alaska Airlines*, 480 U.S. at 684, 107 S. Ct. at 1480.

At the outset, we note that Congress could easily have included in the Act a non-severability clause stating that the individual mandate should not be severed from the two reforms. Under the legislative drafting manuals, the one instance in which a severability clause is important is where "it provides in detail which related provisions are to fall, and which are not to fall, if a specified key provision is held invalid." Office of Legislative Counsel, U.S. House of Representatives, *House Legislative Counsel's Manual on Drafting Style*, § 328; *accord* Office of Legislative Counsel, U.S. Senate, *Legislative Drafting Manual*, § 131. Congress did not include any such non-severability clause in the Act, however.

It is also telling that none of the insurance reforms, including even guaranteed issue and coverage of preexisting conditions, contain any cross-reference to the individual mandate or make their implementation dependent on the mandate's continued existence. *See United States v. Booker*, 543 U.S. 220, 260, 125 S. Ct. 738, 765 (2005) (stating that 18 U.S.C. § 3742(e) "contains critical cross-references to the (now-excised) § 3553(b)(1) and consequently must be severed and excised for similar reasons"); *Alaska Airlines*, 480 U.S. at 688–89, 107 S. Ct. at 1482 ("Congress did not link specifically the operation of the first-hire provisions to the issuance of regulations."). Indeed, § 300gg-3's prohibition on preexisting condition exclusions was implemented in 2010 with respect to enrollees under 19, despite the individual mandate not taking effect until 2014. This is a far cry from cases where the Supreme Court has ruled provi-

sions inseverable because it would require courts to engage in quasi-legislative functions in order to preserve the provisions. *See, e.g.*, ***Randall v. Sorrell***, 548 U.S. 230, 262, 126 S. Ct. 2479, 2500 (2006) (declining to sever Vermont's campaign finance contribution limits because doing so "would require [the Court] to write words into the statute"); *see also Free Enter. Fund*, 561 U.S. at ___, 130 S. Ct. at 3162 (cautioning courts against "blue-pencil[ing]").

"[T]he remedial question we must ask" is "which alternative adheres more closely to Congress' original objective" in passing the Act: (1) the Act without the individual mandate but otherwise intact; or (2) the Act without the individual mandate and also without these two insurance reforms. *See Booker*, 543 U.S. at 263, 125 S. Ct. at 766–67.

As discussed earlier, a basic objective of the Act is to make health insurance coverage accessible and thereby to reduce the number of uninsured persons. *See, e.g.*, 42 U.S.C. § 18091(a)(2) (stating the Act will "increase the number and share of Americans who are insured" and "significantly reduc[e] the number of the uninsured"). Undoubtedly, the two reforms seek to achieve those objectives. All other things being equal, then, a version of the Act that contains these two reforms would hew more closely to Congress's likely intent than one that lacks them.

But without the individual mandate, not all things are equal. We must therefore look to the consequences of the individual mandate's absence on the two reforms. *See Booker*, 543 U.S. at 260, 125 S. Ct. at 765 (considering whether excision of one part of statute would "pose a critical problem"); *Regan*, 468 U.S. at 653, 104 S. Ct. at

3269 (asking whether "the policies Congress sought to advance by enacting § 504 can be effectuated even though the purpose requirement is unenforceable"). In doing so, several factors loom large.

First, the Act retains many other provisions that help to accomplish some of the same objectives as the individual mandate. *See Booker*, 543 U.S. at 264, 125 S. Ct. at 767 ("The system remaining after excision, while lacking the mandatory features that Congress enacted, retains other features that help to further these objectives."); *New York v. United States*, 505 U.S. at 186, 112 S. Ct. at 2434 ("Common sense suggests that where Congress has enacted a statutory scheme for an obvious purpose, and where Congress has included a series of provisions operating as incentives to achieve that purpose, the invalidation of one of the incentives should not ordinarily cause Congress' overall intent to be frustrated.").

For example, Congress included other provisions in the Act, apart from and independent of the individual mandate, that also serve to reduce the number of the uninsured by encouraging or facilitating persons (including the healthy) to purchase insurance coverage. These include: (1) the extensive health insurance reforms; (2) the new Exchanges; (3) federal premium tax credits, 26 U.S.C. § 36B; (4) federal cost-sharing subsidies, 42 U.S.C. § 18071; (5) the requirement that Exchanges establish an Internet website to provide consumers with information on insurers' plans, *id.* § 18031(d)(4)(D); (6) the requirement that employers offer insurance or pay a penalty, 26 U.S.C. § 4980H; and (7) the requirement that certain large employers automatically enroll new and current employees in an employer-sponsored

plan unless the employee opts out, 29 U.S.C. § 218A, just to name a few.

Second, the individual mandate has a comparatively limited field of operation vis-à-vis the number of the uninsured. In *Alaska Airlines*, the Supreme Court found that the unconstitutional legislative veto provision of the Airline Deregulation Act (permitting Congress to veto the Labor Secretary's implementing regulations) was severable because, among other things, the statute left "little of substance to be subject to a veto." 480 U.S. at 687, 107 S. Ct. at 1481. The Supreme Court noted the "ancillary nature" of the Labor Secretary's obligations and the "limited substantive discretion" afforded the Secretary.[140] *Id.* at 688, 107 S. Ct. at 1482. Thus, the limited field of operation of an unconstitutional statutory provision furnishes evidence that Congress likely would have enacted the statute without it. *Cf. Booker*, 543 U.S. at 249, 125 S. Ct. at 759 (considering whether "the scheme that Congress created" would be "so transform[ed] . . . that Congress likely would not have intended the Act as so modified to stand").

---

[140] The Supreme Court stated:

> With this subsidiary role allotted to the Secretary, the veto provision could affect only the relatively insignificant actions he might take in connection with the duty-to-hire program. There is thus little reason to believe that Congress contemplated the possibility of vetoing any of these actions and one can infer that Congress would have been satisfied with the duty-to-hire provisions even without preserving the opportunity to veto the DOL's regulations.

Alaska Airlines, 480 U.S. at 688, 107 S. Ct. at 1482 (footnote omitted).

Here, as explained above, the operation of the individual mandate is limited by its three exemptions, its five exceptions to the penalty, and its stripping the IRS of tax liens, interests, or penalties and leaving virtually no enforcement mechanism. Even with the mandate, a healthy individual can pay a penalty and wait until becoming sick to purchase insurance.

Further, the individual mandate's operation and effectiveness are limited by the fact that, although the individual mandate requires individuals to obtain insurance coverage, the mandate itself does not require them to obtain the "essential health benefits package" or, indeed, any particular level of benefits at all. Although the chosen term "minimum essential coverage" appears to suggest otherwise, when the lofty veneer of the term is stripped away, one finds that the actual "coverage" the individual mandate deems "essential" is nothing more than coverage "essential" to satisfying the individual mandate.

The multiple features of the individual mandate all serve to weaken the mandate's practical influence on the two insurance product reforms.[141] They also weaken our ability to say that Congress considered the individual mandate's existence to be a *sine qua non* for passage of these two reforms. There is tension, at least, in the proposition that a mandate engineered to be so porous and toothless is such a linchpin of the Act's insurance

---

[141] Studies by the CBO bear this out. Even with the individual mandate, the CBO estimates that in 2016, there will still be more than 21 million non-elderly persons who remain uninsured, the majority of whom will not be subject to the penalty. *See* CBO, *Payments*, *supra* note 131, at 1.

product reforms that they were clearly not intended to exist in its absence.

We are not unmindful of Congress's findings about the individual mandate. But in the end, they do not tip the scale away from the presumption of severability. As observed above, the findings in § 18091(a)(2) track the language of the Supreme Court's Commerce Clause decisions. But the severability inquiry is separate, and very different, from the constitutional analysis. The congressional language respecting Congress's constitutional authority does not govern, and is not particularly relevant to, the different question of severability (which focuses on whether Congress would have enacted the Act's *other insurance market reforms* without the individual mandate).

An example makes the point. Section 18091(a)(2)(H) of the same congressional findings provides:

> Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), the Public Health Service Act (42 U.S.C. 201 et seq.), and this Act, the Federal Government has a significant role in regulating health insurance. The requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market.

42 U.S.C. § 18091(a)(2)(H). By its text, § 18091(a)(2)(H) states that the individual mandate is essential to "this larger regulation of economic activity"—that is, "regulating health insurance," which it does through ERISA and the Public Health Service Act. If applied to severability, this would mean that Congress intended the individual mandate to be "essential" to, and thus insev-

erable from, ERISA (enacted in 1974) and the entire Public Health Service Act (or at least all parts of those statutes that regulate health insurance). This is an absurd result for which no party argues.[142]

These congressional findings do not address the one question that is relevant to our severability analysis: whether Congress would not have enacted the two reforms *but for* the individual mandate. Just because the invalidation of the individual mandate may render these provisions *less desirable*, it does not ineluctably follow that Congress would find the two reforms *so* undesirable without the mandate as to prefer not enacting them at all. The fact that one provision may have an impact on another provision is not enough to warrant the inference that the provisions are inseverable. This is particularly true here because the reforms of health insurance help consumers who need it the most.

In light of all these factors, we are not persuaded that it is *evident* (as opposed to possible or reasonable) that Congress would not have enacted the two reforms in the absence of the individual mandate.[143] In so con

---

[142] A second illustration of the danger in relying too much on these statements in isolation is that the same congressional findings also state—not once, but six times—that the individual mandate operates "*together with the other provisions of this Act*" to reduce the number of the uninsured, lower health insurance premiums, improve financial security for families, minimize adverse selection, and reduce administrative costs. *See* 42 U.S.C. § 18091(a)(2)(C), (E), (F), (G), (I), (J) (emphasis added). Congress itself states that *all* the provisions of the Act operate together to achieve its goals. On this reasoning, the entire Act would be invalidated along with the individual mandate. As discussed above, this conclusion is invalid.

[143] While we discuss the two reforms specifically, our conclusion—that the individual mandate is severable—is the same as to the other

cluding, we are mindful of our duty to "refrain from invalidating more of the statute than is necessary."[144] *Regan*, 468 U.S. at 652, 104 S. Ct. at 3269; *see also Booker*, 543 U.S. at 258–59, 125 S. Ct. at 764 ("[W]e must retain those portions of the Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute." (quotation marks and citations omitted)). And where it is not evident Congress would not have enacted a constitutional provision without one that is unconstitutional, we must allow any further—and perhaps even necessary—alterations of the Act to be rendered by Congress as part of that branch's legislative and political prerogative. *See Free Enter. Fund*, 561 U.S. at ___, 130 S. Ct. at 3162 ("[S]uch editorial freedom—far more extensive than our holding today—belongs to the Legislature, not the Judiciary. Congress of course remains free to pursue any of these options going forward."). We therefore sever the individual mandate from the remaining sections of the Act.

---

insurance product reforms, such as community rating and discrimination based on health status.

[144] We acknowledge that the government, in arguing for the individual mandate's constitutionality, stated summarily that the individual mandate cannot be severed from the Act's guaranteed issue and community rating provisions because the individual mandate "is integral to those sections that . . . provide that insurers must extend coverage and set premiums without regard to pre-existing medical conditions." Government's Reply Br. at 58. But as explained above, whether a statutory provision is "integral" or "essential" to other provisions for Commerce Clause analytical purposes is a question distinct from severability. And in any event, the touchstone of severability analysis is legislative intent, not arguments made during litigation.

VIII. CONCLUSION

We first conclude that the Act's Medicaid expansion is constitutional. Existing Supreme Court precedent does not establish that Congress's inducements are unconstitutionally coercive, especially when the federal government will bear nearly all the costs of the program's amplified enrollments.

Next, the individual mandate was enacted as a regulatory penalty, not a revenue-raising tax, and cannot be sustained as an exercise of Congress's power under the Taxing and Spending Clause. The mandate is denominated as a penalty in the Act itself, and the legislative history and relevant case law confirm this reading of its function.

Further, the individual mandate exceeds Congress's enumerated commerce power and is unconstitutional. This economic mandate represents a wholly novel and potentially unbounded assertion of congressional authority: the ability to compel Americans to purchase an expensive health insurance product they have elected not to buy, and to make them re-purchase that insurance product every month for their entire lives. We have not found any generally applicable, judicially enforceable limiting principle that would permit us to uphold the mandate without obliterating the boundaries inherent in the system of enumerated congressional powers. "Uniqueness" is not a constitutional principle in any antecedent Supreme Court decision. The individual mandate also finds no refuge in the aggregation doctrine, for decisions to *abstain* from the purchase of a product or

service, whatever their cumulative effect, lack a sufficient nexus to commerce.[145]

The individual mandate, however, can be severed from the remainder of the Act's myriad reforms. The presumption of severability is rooted in notions of judicial restraint and respect for the separation of powers in our constitutional system. The Act's other provisions remain legally operative after the mandate's excision, and the high burden needed under Supreme Court precedent to rebut the presumption of severability has not been met.

Accordingly, we affirm in part and reverse in part the judgment of the district court.

AFFIRMED in part and REVERSED in part.

---

[145] Our respected dissenting colleague says that the majority: (1) "has ignored the broad power of Congress"; (2) "has ignored the Supreme Court's expansive reading of the Commerce Clause"; (3) "presume[s] to sit as a superlegislature"; (4) "misapprehends the role of a reviewing court"; and (5) ignores that "as nonelected judicial officers, we are not afforded the opportunity to rewrite statutes we don't like." *See* Dissenting Op. at 208–209, 243. We do not respond to these contentions, especially given (1) our extensive and exceedingly careful review of the Act, Supreme Court precedent, and the parties' arguments, and (2) our holding that the Act, despite significant challenges to this massive and sweeping federal regulation and spending, falls within the ambit and prerogative of Congress's broad commerce power, except for one section, § 5000A. We do, however, refuse to abdicate our constitutional duty when Congress has acted beyond its enumerated Commerce Clause power in mandating that Americans, from cradle to grave, purchase an insurance product from a private company.

MARCUS, Circuit Judge, concurring in part and dissenting in part[1]:

Today this Court strikes down as unconstitutional a central piece of a comprehensive economic regulatory scheme enacted by Congress. The majority concludes that Congress does not have the commerce power to require uninsured Americans to obtain health insurance or otherwise pay a financial penalty. The majority does so even though the individual mandate was designed and intended to regulate quintessentially economic conduct in order to ameliorate two large, national problems: first, the substantial cost shifting that occurs when uninsured individuals consume health care services—as virtually all of them will, and many do each year—for which they cannot pay; and, second, the unavailability of health insurance for those who need it most—those with preexisting conditions and lengthy medical histories.

In the process of striking down the mandate, the majority has ignored many years of Commerce Clause doctrine developed by the Supreme Court. It has ignored the broad power of Congress, in the words of Chief Justice Marshall, "to prescribe the rule by which commerce is to be governed." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824). It has ignored the undeniable fact that Congress' commerce power has grown exponentially over the past two centuries, and is now generally accepted as having afforded Congress the authority to create rules regulating large areas of our national economy. It has ignored the Supreme Court's expansive reading of the Commerce Clause that has provided the very foundation on which Congress already extensively

---

[1] I concur only in Parts I (standing), III (Medicaid expansion), and VI (taxing power) of the majority opinion.

regulates both health insurance and health care services. And it has ignored the long-accepted instruction that we review the constitutionality of an exercise of commerce power not through the lens of formal, categorical distinctions, but rather through a pragmatic one, recognizing, as Justice Holmes put it over one hundred years ago, that "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905).

The approach taken by the majority has also disregarded the powerful admonitions that acts of Congress are to be examined with a heavy presumption of constitutionality, that the task at hand must be approached with caution, restraint, and great humility, and that we may not lightly conclude that an act of Congress exceeds its enumerated powers. The circumspection this task requires is underscored by recognizing, in the words of Justice Kennedy, the long and difficult "history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the Founders knew to the single, national market still emergent in our own era." *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring).

The plaintiffs and, indeed, the majority have conceded, as they must, that Congress has the commerce power to impose precisely the *same* mandate compelling the *same* class of uninsured individuals to obtain the *same* kind of insurance, or otherwise pay a penalty, as a necessary condition to receiving health care services, at the time the uninsured seek these services. Nevertheless, the plaintiffs argue that Congress cannot do now what it plainly can do later. In other words, Congress

must wait until each component transaction underlying the cost-shifting problem occurs, causing huge increases in costs both for those who have health care insurance and for health care providers, before it may constitutionally act. I can find nothing in logic or law that so circumscribes Congress' commerce power and yields so anomalous a result.

Although it is surely true that there is no Supreme Court decision squarely on point dictating the result that the individual mandate is within the commerce power of Congress, the rationale embodied in the Court's Commerce Clause decisions over more than 75 years makes clear that this legislation falls within Congress' interstate commerce power. These decisions instruct us to ask whether the target of the regulation is economic in nature and whether Congress had a rational basis to conclude that the regulated conduct has a substantial effect on interstate commerce. It cannot be denied that Congress has promulgated a rule by which to comprehensively regulate the timing and means of payment for the virtually inevitable consumption of health care services. Nor can it be denied that the consumption of health care services by the uninsured has a very substantial impact on interstate commerce—the shifting of substantial costs from those who do not pay to those who do and to the providers who offer care. I therefore respectfully dissent from the majority's opinion insofar as it strikes down the individual mandate.

I.

A.

A considerable portion of the American population—estimated at 50 million—lacks any form of health care insurance.[2] The individual mandate was designed to ameliorate twin problems related to the uninsured as a class: (1) huge cost shifting from the uninsured, who often don't pay for their health care services, to those with health insurance and to health care providers; and (2) the inability of many uninsured individuals to obtain much-needed health insurance coverage because they are effectively blacklisted on account of their pre-existing conditions or medical histories. Congress sought to address these problems by requiring non-exempted individuals to pay a penalty, or "shared responsibility payment," on their tax returns for any month, beginning in 2014, in which they fail to maintain "minimum essential coverage." 26 U.S.C.

---

[2] In 2009, the total number of uninsured was estimated at 50.7 million, or about 16.7% of the total population. U.S. Census Bureau, U.S. Dep't of Commerce, Income, Poverty, and Health Insurance Coverage in the United States: 2009, at 23 tbl.8 (2010), *available at* http://www.census.gov/prod/2010pubs/p60-238.pdf. What's more, the population of uninsured is not confined to those with low incomes. The Census Bureau found that the estimated income brackets for the uninsured are as follows:

(1) less than $25,000: 15.5 million uninsured, about 26.6% of the total population in this income bracket;

(2) $25,000 to $49,999: 15.3 million, about 21.4%;

(3) $50,000 to $74,999: 9.4 million, about 16.0%;

(4) $75,000 or more: 10.6 million, about 9.1%.

Id.

§ 5000A(a)-(b). And while remaining uninsured is not an option under the Act (at least to avoid paying a penalty), individuals are offered a variety of choices when it comes to satisfying the individual mandate's "minimum essential coverage" requirement. Many insurance plans will satisfy the individual mandate. These plans fall into five general categories, some of which are further divided into subcategories: (1) government-sponsored programs; (2) eligible employer-sponsored plans; (3) plans purchased on the individual market; (4) grandfathered health plans; or (5) any "other coverage" recognized by the Secretary of Health and Human Services ("HHS") in coordination with the Secretary of the Treasury. *Id.* § 5000A(f)(1).

As for the first problem Congress sought to address, it is undeniable that, despite lacking health insurance, the uninsured are still substantial participants in the market for health care services. And when the uninsured do seek medical care, they often fail to pay all or even most of their costs. On average—and these figures are not disputed—the uninsured pay only 37% of their health care costs out of pocket, while third parties pay another 26% on their behalf.[3] The remaining costs are uncompensated— they are borne by health care provid-

---

[3] These figures come from a study cited by both the plaintiffs and the government: Families USA, Hidden Health Tax: Americans Pay a Premium 2 (2009) [hereinafter Hidden Health Tax], *available at* http://familiesusa2.org/assets/pdfs/hidden-health-tax.pdf. And again, the problem of uncompensated care is not confined to those of limited means. Even in households at or above the median income, people without health insurance pay, on average, less than half the cost of the medical care they consume. *See* Bradley Herring, *The Effect of the Availability of Charity Care to the Uninsured on the Demand for Private Health Insurance*, 24 J. Health Econ. 225, 229–31 (2005).

ers and are passed on in the form of increased premiums to individuals who already participate in the insurance market.

Congress' findings reflect its determination that this problem—the uncompensated consumption of health care services by the uninsured—has *national* economic consequences that require a *national* solution through comprehensive federal regulation. *See* 42 U.S.C. § 18091. As part of the empirical foundation for the individual mandate, Congress quantified the costs associated with the free-riding and cost-shifting problems that result from the provision of uncompensated health care to the uninsured:

> The cost of providing uncompensated care to the uninsured was *$43,000,000,000 [$43 billion] in 2008.* To pay for this cost, health care providers pass on the cost to private insurers, which pass on the cost to families. This cost-shifting increases family premiums by on average *over $1,000 a year.* By significantly reducing the number of the uninsured, the [individual mandate], together with the other provisions of this Act, will lower health insurance premiums.

Id. § 18091(a)(2)(F) (emphases added).

The Act thus seeks to regulate the payment for health care consumption through the mechanism of health insurance. As Congress found, the individual mandate "regulates activity that is commercial and economic in nature: economic and financial decisions about *how and when health care is paid for,* and when health insurance is purchased." *Id.* § 18091(a)(2)(A) (emphasis added). In other words, the individual mandate is the means Congress adopted to regulate the *timing* and

method of individuals' payment for the consumption of health care services.

As for the second problem of millions of uninsured individuals' being unable to obtain health insurance, Congress sought to dramatically reform the health insurance market by regulating the insurers themselves. The Act bars insurers from using many of the tools they had previously employed to protect themselves against the large costs imposed by high-risk individuals. Thus, insurers may no longer deny coverage or charge higher premiums because of an individual's pre-existing conditions or medical history. *Id.* §§ 300gg(a)(1), 300gg-3(a), 300gg-4(a); Act § 2702(a) (to be codified at 42 U.S.C. § 300gg-1(a)). Under the "community rating" provision, insurers may only vary premiums based on (i) whether the plan covers an individual or a family, (ii) rating area, (iii) age, and (iv) tobacco use. 42 U.S.C. § 300gg(a)(1). And under the "guaranteed issue" provisions, insurers must accept every employer or individual who applies for coverage through the individual or group markets. Act § 2702(a) (to be codified at 42 U.S.C. § 300gg-1(a)). Notably, insurers may no longer offer plans that limit or exclude benefits for individuals' pre-existing conditions, 42 U.S.C. § 300gg-3(a), nor may they refuse to cover individuals on the basis of (i) health status, (ii) medical condition (including both physical and mental illnesses), (iii) claims experience, (iv) receipt of health care, (v) medical history, (vi) genetic information, (vii) evidence of insurability (including conditions arising out of acts of domestic violence), (viii) disability, or (ix) any other health status factor recognized by the Secretary of HHS, *id.* § 300gg-4(a).

Congress determined that the individual mandate was *essential* to the effective implementation of the Act's insurer regulations—that is, "to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." *Id.* § 18091(a)(2)(I). Congress further found that waiting until the uninsured actually consume health care services before regulating them would effectively be a day late and a dollar short. *See id.* ("[I]f there were no [individual mandate], many individuals would wait to purchase health insurance until they needed care."); *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 634–35 (W.D. Va. 2010) ("As Congress stated in its findings, the individual coverage provision is 'essential' to th[e] larger regulatory scheme because without it, individuals would postpone [acquiring] health insurance until they need substantial care, at which point the Act would obligate insurers to cover them at the same cost as everyone else. This would increase the cost of health insurance and decrease the number of insured individuals—precisely the harms that Congress sought to address. . . ."); Gov't Br. at 19 (citing testimony before Congress that a "health insurance market could never survive or even form if people could buy their insurance on the way to the hospital" (internal quotation marks omitted)).

Congress also made findings supporting the proposition that the markets for health insurance and health care services are deeply and inextricably bound together and indicated clearly that it sought to regulate across them both. Congress understood that health insurance and health care consumption are linked as a factual matter. Health insurance is the means by which most of our

national health care costs are paid for; in 2009, private and government insurance financed approximately 75% of health care spending. Gov't Br. at 9 (citing non-disputed data from the Centers for Medicare and Medicaid Services ("CMS")). Moreover, Congress expressly connected the increased participation in the health insurance market that it expected to result from the individual mandate with "increasing the supply of, and demand for, health care services." 42 U.S.C. § 18091(a)(2)(C). On a more basic level, Congress also understood that "[h]ealth insurance is not bought for its own sake; it is bought to pay for medical expenses." Gov't Br. at 39 (citing M. Moshe Porat et al., *Market Insurance Versus Self Insurance: The Tax-Differential Treatment and Its Social Cost*, 58 J. Risk & Ins. 657, 668 (1991); Martin S. Feldstein, *The Welfare Loss of Excess Health Insurance*, 81 J. Pol. Econ. 251, 253 (1973) [hereinafter Welfare Loss] ("Health insurance is purchased not as a final consumption good but as a means of paying for the future stochastic purchases of health services.")); *see also* Brief for Econ. Scholars as Amici Curiae Supporting the Government ("Gov't Econ. Br.") at 12 ("Medical care is the set of services that make one healthier, or prevent deterioration in health. Health insurance is a mechanism for spreading the costs of that medical care across people or over time, from a period when the cost would be overwhelming to periods when costs are more manageable.").

B.

1.

Congress' commerce power to regulate is, as Chief Justice Marshall taught us almost two hundred years ago, the power "to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons*, 22 U.S. at 196. It is precisely this power to prescribe rules governing commerce that Congress lawfully exercised in enacting the individual mandate.

It is clear that Congress' rule-making power extends to both the health insurance and health care markets, areas of commerce that Congress has long regulated and regulated heavily. First, the parties all agree (as they must) that Congress' commerce power lawfully extends to the regulation of insurance in general, as the Supreme Court concluded more than 60 years ago in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 552–53 (1944). Indeed, Congress expressly relied on this proposition in enacting the individual mandate. *See* 42 U.S.C. § 18091(a)(3) (citing *South-Eastern Underwriters* as a basis for Congress' authority to regulate insurance under the Commerce Clause).[4]

---

[4] In response to *South-Eastern Underwriters*, Congress enacted the McCarran-Ferguson Act, which provides that state laws regulating insurance will not be "invalidate[d], impair[ed], or supersede[d]" by federal law, unless the federal law "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). But this enactment in no way affects or diminishes the Court's clear holding in *South-Eastern Underwriters* that Congress may, concurrently with the states, regulate the business of insurance under the Commerce Clause. What's more, Congress has

Second, in light of Congress' undeniable power under the Commerce Clause to regulate the business of insurance generally, it follows—and again there is no dispute—that Congress may also regulate health insurance in particular, which is, after all, a subset of the insurance market. *See* Charles Fried, Written Testimony Before the Senate Judiciary Committee Hearing on "The Constitutionality of the Affordable Care Act" 1 (Feb. 2, 2011), *available at* http://judiciary.senate.gov/pdf/11-02%20Fried%20Testimony.pdf. In fact, Congress has extensively exercised its commerce power to regulate the health insurance market for many years, long before the Act was passed. For example, Congress enacted the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829 (1974), which is a massive piece of legislation regulating the operation of employee benefit plans, including retirement plans, pension plans, and employer-provided *health insurance* plans. Congress expressly pegged the broad scope of ERISA's coverage to its Commerce Clause power. 29 U.S.C. § 1001(b) ("It is hereby declared to be the policy of this chapter to protect interstate commerce. . . ."); *see also id.* § 1003(a). Among

---

hardly abdicated its role in regulating the insurance business. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 311 (1999) (holding that federal RICO statute—which is itself grounded in the Commerce Clause—may be applied to insurers because it is not precluded by the McCarran-Ferguson Act); *id.* at 308 ("We reject any suggestion that Congress intended to cede the field of insurance regulation to the States. . . . "). Rather, the McCarran-Ferguson Act sought "to protect state regulation primarily against *inadvertent* federal intrusion—say, through enactment of a federal statute that describes an affected activity in broad, general terms, of which the insurance business happens to constitute one part." *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 39 (1996).

other things, the regulatory provisions in Title I of ERISA, 29 U.S.C. § 1001 *et seq.*, set forth "uniform minimum standards to ensure that employee benefit plans are established and maintained in a fair and financially sound manner." U.S. Dep't of Labor, Health Benefits, Retirement Standards, and Workers' Compensation: Employee Benefit Plans, http://www.dol.gov/compliance/guide/erisa.htm (last visited Aug. 10, 2011). Title I of ERISA governs "most private sector employee benefit plans," with the most significant exceptions being "plans established or maintained by government entities or churches." *Id.*; *see also Williams v. Wright*, 927 F.2d 1540, 1545 (11th Cir. 1991) (concluding that ERISA regulates even "plans covering only a single employee").

Congressional efforts to regulate health insurance did not end with ERISA. Congress passed the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), Pub. L. No. 99-272, 100 Stat. 82 (1986), which contains a wide variety of provisions relating to health care and health insurance. As for health insurance, the most significant reforms were amendments to ERISA, which added "continuation coverage" provisions that allow employees to continue receiving employer-sponsored health insurance for a period following the end of their employment in order to prevent gaps in health insurance coverage. 29 U.S.C. §§ 1161, 1162. And in the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936 (1996), Congress amended the Public Health Service Act to add insurance portability provisions that prohibit group health plans—including ERISA plans—from discriminating against individual participants and beneficiaries based on health status, that require insur-

ers to offer coverage to small businesses, and that limit pre-existing condition exclusions. *See* 29 U.S.C. §§ 1181–1183.

Under its commerce power, Congress has also repeatedly regulated the content of private health insurers' policies. *See, e.g.*, Mental Health Parity Act of 1996, Pub. L. No. 104-204, § 702, 110 Stat. 2874, 2944 (1996) (regulating limits on mental health benefits); Newborns' and Mothers' Health Protection Act of 1996, Pub. L. No. 104-204, § 603, 110 Stat. 2874, 2935 (1996) (requiring maternity coverage to provide at least a 48-hour hospital stay); Women's Health and Cancer Rights Act of 1998, Pub. L. No. 105-277, § 902, 112 Stat. 2681, 2681–436 (1998) (requiring certain plans to offer benefits related to mastectomies); Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, Pub. L. No. 110-343, § 512, 122 Stat. 3765, 3881 (2008) (providing for parity between mental health/substance abuse disorder benefits and medical/surgical benefits).

Third, it is equally clear that Congress' power under the Commerce Clause likewise extends to the regulation of the provision and consumption of health care services. Indeed, for many years, Congress has substantially regulated both health care providers and the commodities that those providers may use. As far back as 1946, Congress enacted the Hospital Survey and Construction Act (also known as the "Hill-Burton Act"), Pub. L. No. 79-725, 60 Stat. 1040 (1946), which appropriated funds for the construction of new hospitals in the post-World War II economy. The Hill-Burton Act required hospitals receiving federal construction or renovation funds to provide care to "all persons residing in the territorial area" and to provide a "reasonable

volume" of free care to indigent patients. *See* 42 U.S.C. § 291c(e).

The requirement that hospitals provide free care was strengthened and broadened, when, as part of COBRA, Congress enacted the Emergency Medical Treatment and Active Labor Act ("EMTALA"). COBRA, Pub. L. No. 99-272, § 9121, 100 Stat. 82, 164 (1986). EMTALA requires all hospitals that receive Medicare funds to screen and stabilize, if possible, any patient who comes in with an "emergency medical condition." 42 U.S.C. § 1395dd(a)-(b); *see also Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 250–51 (1999) (per curiam). EMTALA also restricts the ability of hospitals to transfer a patient until he is stable or a medical determination is made that transfer is necessary. 42 U.S.C. § 1395dd(c). EMTALA's provisions are backed by both civil fines and a private cause of action for those harmed by a hospital's failure to comply. *Id.* § 1395dd(d).

Congress has also regulated health care providers (and, as mentioned, health care insurers) through HIPAA. The definition of "health care provider" under HIPAA is extraordinarily broad, covering any "person or organization who furnishes, bills, or is paid for health care in the normal course of business." 45 C.F.R. § 160.103. And in 2009, Congress expanded HIPAA's coverage even further to include "business associates" of health care providers and health insurers. *See* Health Information Technology for Economic and Clinical Health Act, Pub. L. No. 111-5, §§ 13401, 13404, 123 Stat. 115, 260, 264 (2009); 45 C.F.R. § 160.103. In addition to the insurance portability provisions, HIPAA includes a number of privacy provisions that "govern[ ] the use and disclosure of protected health information" by health

care providers and health insurers, *Sneed v. Pan Am. Hosp.*, 370 F. App'x. 47, 50 (11th Cir. 2010) (per curiam) (unpublished), as well as protect the privacy of employees' health information against inquiries by their employers. HIPAA even regulates what information health care providers may communicate to one another. *See generally* 45 C.F.R. §§ 164.102–164.534; 42 U.S.C. § 1320d-2. HIPAA also requires health care providers to follow several administrative requirements, including the development of physical and technical privacy safeguards and employee training. *See* 45 C.F.R. §§ 164.308, 164.310, 164.312.

Fourth, Congress has extensively regulated under its commerce power the commodities used in the health care services market, most notably drugs and medical devices. For example, in the Food, Drug, and Cosmetics Act, Congress delegated to the Food and Drug Administration the authority to screen and approve drugs and medical devices for use in commerce, and to regulate their continued use once approved. *See, e.g.*, 21 U.S.C. §§ 351, 352, 355(a), 360c, 360e, 360j(e).

Fifth, the majority and all the parties also agree that Congress' commerce power extends to the regulation of the *price* to be paid for the consumption of health care services. Medicare is the most pervasive example. Since 1983, the Medicare program has set the fees it pays to hospitals through a prospective payment system that assigns a fixed amount to each service provided rather than reimbursing hospitals for their actual costs. *See United States v. Whiteside*, 285 F.3d 1345, 1346 (11th Cir. 2002). In 1989, Congress also set a federally determined fee schedule for Medicare payments to physicians. Omnibus Budget Reconciliation Act of 1989,

Pub. L. No. 101-239, § 6102, 103 Stat. 2106, 2169 (1989). In this way, Congress directly sets the prices for health care services paid for under Medicare.[5]

Beyond Congress' already substantial regulation of the price of health care services through Medicare and Medicaid, under controlling precedent Congress may lawfully regulate prices for all manner of health care consumption, however wise or unwise that regulation may be. In fact, the Supreme Court has said that Congress may regulate or even fix prices in interstate markets, either directly or by engaging in the "stimulation of commerce" through regulation. *Wickard v. Filburn*, 317 U.S. 111, 128 (1942) ("It is well established . . . that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices."); *accord Gonzales v. Raich*, 545 U.S. 1, 18–19 (2005); *see also Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 394, 60 S. Ct. 907, 84 L. Ed. 1263 (1940) (holding that Congress could not only regulate price, but could also attach "other conditions to the flow of a commodity in interstate [commerce]"); *id.* ("To regulate the price

---

[5] While Medicaid prices are not as directly regulated at the federal level, Congress has legislated in a number of ways that affect the prices to be paid to health care providers and others under the Medicaid program. Most notable is the Medicaid Drug Rebate Program, created by the Omnibus Budget Reconciliation Act of 1990. The program provides that, if drug companies want their products to be covered by Medicaid, they must provide detailed price information to, and enter into a national rebate agreement with, the Secretary of HHS. 42 U.S.C. § 1396r-8. Congress has thus regulated prescription drug prices under Medicaid by requiring drug companies to provide discounts to states—in the form of rebates—for their Medicaid drug purchases. *See generally Iowa Dep't of Human Servs. v. Ctrs. for Medicare & Medicaid Servs.*, 576 F.3d 885, 886–87 (8th Cir. 2009).

for . . . transactions is to regulate commerce itself, and not alone its antecedent conditions or its ultimate consequences." (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 326 (1936) (Cardozo, J., dissenting in part and concurring in the judgment in part))).

Sixth, and perhaps most significantly, Congress' commerce power includes the power to prescribe rules cutting across the two linked markets of health insurance and health care services. Both the congressional intent to link the two and the empirical relation between the purchase of health insurance and the consumption of health care services are clear. Accordingly, in determining whether Congress has lawfully exercised its commerce power, courts must examine "the entire transaction, of which [the] contract [for insurance] is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce." *South-Eastern Underwriters*, 322 U.S. at 547. I am hard pressed to see how the relevant "chain of events" here does not include the substantial consumption of health care services by the uninsured.

2.

The plaintiffs assert, nevertheless, that in enacting the individual mandate Congress was limited to regulating a single industry at a single point in time—in other words, it could only look at the health insurance market standing alone. In the plaintiffs' view, Congress could not mandate the purchase of insurance as a means of ameliorating a national problem arising in the related but distinct market for health care services. The majority appears to have adopted this view, concluding that the relevant conduct targeted by Congress is not the uncompensated consumption of health care services by

the uninsured, but rather only the decision to forego health insurance. Maj. Op. at 126, 136. This approach is wooden, formalistic, and myopic. The plaintiffs and the majority would view the uninsured in a freeze-framed still, captured, like a photograph, in a single moment in time. They contend that Congress cannot constitutionally regulate the uninsured as a class at that single moment, because at that moment any particular uninsured individual may be healthy, may be sitting in his living room, or may be doing nothing at all. The only way the plaintiffs and the majority can round even the first base of their argument against the mandate is by excluding from Congress' purview, for no principled reason that I can discern, the cost-shifting problems that arise in the health care services market.

This blinkered approach cannot readily be squared with the well-settled principle that, in reviewing whether Congress has acted within its enumerated powers, courts must look at the nature of the problem Congress sought to address, based on economic and practical realities. *See Swift & Co.*, 196 U.S. at 398 ("[C]ommerce among the states is not a technical legal conception, but a practical one, drawn from the course of business."); *Wickard*, 317 U.S. at 123–24 ("[R]ecognition of the relevance of the economic effects in the application of the Commerce Clause . . . has made the mechanical application of legal formulas no longer feasible."); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41–42 (1937) (observing that "interstate commerce itself is a practical conception"); *N. Am. Co. v. SEC*, 327 U.S. 686, (1946) ("Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. To deal with it effectively, Congress must be able to act in terms of economic and financial realities." (citation

omitted)); *Lopez*, 514 U.S. at 571, 574 (Kennedy, J., concurring) (favoring a pragmatic approach to Congress' commerce power grounded in "broad principles of economic practicality" and a "practical conception of commercial regulation"); *Raich*, 545 U.S. at 25 n.35. When the individual mandate is viewed through a more pragmatic and less stilted lens, it is clear that Congress has addressed a substantial economic problem: the uninsured get sick or injured, seek health care services they cannot afford, and shift these unpaid costs onto others.

Moreover, despite their contention that Congress is limited to regulating in a single industry, the plaintiffs nevertheless concede that Congress may use its rulemaking power to regulate the *market for health insurance* as a vehicle or means to address the cost-shifting problems arising in the *market for health care services*. They have conceded, both in their briefs and at oral argument, that Congress may constitutionally regulate the consumption of health care services by the uninsured at the *time* they actually seek medical care. The plaintiffs acknowledge—as does the majority—that Congress may constitutionally require the uninsured to obtain health care insurance on the hospital doorstep, or that Congress may otherwise impose a penalty on those who attempt to consume health care services without insurance. States Br. at 31–32 ("Supreme Court precedent allows Congress to regulate [the practice of consuming health care services without insurance]—for example, by imposing restrictions or penalties on individuals who attempt to consume health care services without insurance."); Maj. Op. at 129–130 ("[W]hen the uninsured actually enter the stream of commerce and consume health care, Congress may regulate their activity at the point of consumption."); *see also Florida ex rel. Bondi v.*

U.S. Dep't of Health & Human Servs., No. 3:10-cv-91-RV/EMT, 2011 WL 285683, at *26 (N.D. Fla. Jan. 31, 2011) ("Congress plainly has the power to regulate [the uninsured] . . . at the time that they initially seek medical care[ ], a fact with which the plaintiffs agree.").[6] Thus, all of the parties agree that, at the time of health care consumption, Congress may lawfully cut across a distinct market and impose a financial penalty designed to compel the uninsured to obtain health insurance. And Congress may do so even where the uninsured would otherwise voluntarily choose to finance the consumption of health care services out of pocket, without buying insurance.

If the plaintiffs had argued that Congress cannot constitutionally force anyone to buy health insurance at any time as a means of paying for health care, they at least would have evinced the virtue of consistency. But instead, the plaintiffs' concession undermines their claim that Congress has exceeded its rule-making power by regulating in one industry to address a problem found in another, at least where the two industries are so closely bound together. After all, even at the point of consum-

---

[6] At oral argument, counsel for the state plaintiffs was explicitly asked whether, at the point of health care consumption, Congress "could compel an individual who doesn't have health insurance to either pay a penalty or obtain insurance at that time," to which counsel responded that "[i]n the health care market, at the time of consumption, yes." And at the district court hearing on the government's motion to dismiss, counsel for the plaintiffs made a similar concession. In response to the district court's question, "Well, the government could impose this penalty at the point of service at the doctor's office or the hospital and say, if you do not have insurance, you are subject to a penalty?," counsel for the plaintiffs responded, "I believe the government would be able to do it, Your Honor." RE 334–35.

ing *health care services*, individuals may wish to remain "inactive" in the *health insurance* market. But the plaintiffs and the majority concede that Congress may nevertheless compel individuals at that point to purchase a private insurance product.

Despite this concession, the plaintiffs contend that the regulation of commerce necessarily presupposes a pre-existing voluntary activity to be regulated. The plaintiffs' activity/inactivity dichotomy, however, is nowhere to be found in the text of the Commerce Clause, nor in the jurisprudence surrounding it. The language of the Commerce Clause itself draws no distinction between activity and inactivity. The seven operative words speak broadly about Congress' power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The power to regulate is the power "to prescribe the rule by which commerce is to be governed." *Gibbons*, 22 U.S. at 196. And while the power of Congress is limited to specific objects, it is "plenary as to those objects." *Id.* at 197. Creating an artificial doctrinal distinction between activity and inactivity is thus novel and unprecedented, resembling the categorical limits on Congress' commerce power the Supreme Court swept away long ago.

The plaintiffs claim, nevertheless, that the individual mandate exceeds Congress' commerce power because it improperly conscripts uninsured individuals—who are presently *inactive* in the health *insurance* market—to unwillingly enter the stream of commerce to purchase health insurance they would not otherwise choose to buy. The plaintiffs and the majority would have Congress wait at the water's edge until the uninsured literally enter the emergency room. In other words, they

say, Congress may not legislate prophylactically, but instead must wait until the cost-shifting problem has boiled over, causing huge increases in costs for those who have health care insurance (through increased premiums), and for those who provide health care services.

At bottom, the plaintiffs' argument seems to boil down only to a temporal question: can Congress, under the Commerce Clause, regulate how and when health care services are paid for by requiring individuals—virtually all of whom will consume health care services and most of whom have done so already—to pay *now* for those services through the mechanism of health insurance? As I see it, the answer to whether Congress can make this temporal jump under its Commerce Clause power is yes.

There is no doctrinal basis for requiring Congress to wait until the cost-shifting problem materializes for each uninsured person before it may regulate the uninsured as a class. The majority's imposition of a strict temporal requirement that congressional regulation only apply to individuals who first engage in specific market transactions in the health care services market is at war with the idea that Congress may adopt "reasonable preventive measures" to avoid *future* disruptions of interstate commerce. *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 222 (1938) ("[I]t cannot be maintained that the exertion of federal power must await the disruption of [interstate or foreign] commerce."); *see also Katzenbach v. McClung*, 379 U.S. 294, 301 (1964) (quoting same, and noting that "Congress was not required to await the total dislocation of commerce"); *Stevens v. United States*, 440 F.2d 144, 152 (6th Cir. 1971) ("It is not necessary for Congress to await the total dislocation of commerce be-

fore it may provide reasonable preventive measures for the protection of commerce." (citing *Katzenbach*, 379 U.S. at 301)), *limited on other grounds by United States v. Bass*, 404 U.S. 336 (1971); *NLRB v. Sunshine Mining Co.*, 110 F.2d 780, 784 (9th Cir. 1940). In *Consolidated Edison*, the Supreme Court explained that, through the National Labor Relations Act—which regulates labor practices—"Congress did not attempt to deal with particular instances" in which interstate commerce was disrupted, concluding that Congress did not need to wait until labor practices actually disrupted interstate commerce before it could regulate.[7] 305 U.S. at 222. In other words, Congress may lawfully regulate present conduct to prevent future disruptions of interstate commerce from occurring.

What's more, and even more basic, here the disruption of interstate commerce is *already* occurring. The majority inexplicably claims that the individual mandate regulates "the mere *possibility* of *future* activity," Maj. Op. at 129, but as we speak, the uninsured are consuming health care services in large numbers and shifting costs onto others. By ignoring the close relationship between the health insurance and health care services markets, the plaintiffs and the majority seek to avoid

---

[7] The majority opinion misapprehends this point. *See* Maj. Op. at 129 n.100. *Consolidated Edison* is cited along with *Katzenbach* to make this simple point: Congress need not wait until an economic problem has erupted and the national economy is disrupted before it may act prophylactically, under its commerce power, to address an obvious and apparent economic problem. That *Consolidated Edison* specifically involved the regulation of labor practices or that *Katzenbach* (along with *Heart of Atlanta*) specifically involved the regulation of innkeepers and restaurateurs is beside the point. This principle of Commerce Clause jurisprudence is general, and it remains binding law.

the hard fact that the uninsured as a class are actively consuming substantial quantities of health care services *now*—not just next week, next month, or next year. The uninsured make more than 20 million visits to emergency rooms each year; 68% of the uninsured had routine checkups in the past five years; and 50% had one in the past two years.[8] *See* U.S. Dep't of HHS, New Data Say Uninsured Account for Nearly One-Fifth of Emergency Room Visits (July 15, 2009), *available at* http://www.hhs.gov/news/press/2009pres/07/20090715b.html; June E. O'Neill & Dave M. O'Neill, Emp't Policies Inst., Who Are the Uninsured? An Analysis of America's Uninsured Population, Their Characteristics and Their Health 20–21 & tbl.9 (2009), *available at* http://epionline.org/studies/oneill_06-2009.pdf; *see also* Hidden Health Tax, *supra*, at 2 (observing that the uninsured consumed $116 billion worth of health care services in 2008); Gov't Econ. Br. at 10 ("57 percent of the 40 million people uninsured in all of 2007 used medical services *that year*." (emphasis added)); NFIB Br. at 5 (citing same 57% statistic). In addition, there were more than two million hospitalizations—not just emergency room visits, but actual admissions to a hospital—of the uninsured in 2008 alone. U.S. Dep't of HHS, ASPE Research Brief, The Value of Health Insurance: Few of the Uninsured Have Adequate Resources To Pay Potential Hospital Bills 5 (2011), *available at* http://aspe.hhs.gov/health/reports/2011/valueofinsurance/rb.pdf.

---

[8] The plaintiffs do not contest the validity of these data. Indeed, at oral argument, counsel for the state plaintiffs conceded that these visits to the emergency room constitute economic activity that Congress may lawfully regulate.

In light of these undisputed figures, there can be little question that substantial numbers of uninsured Americans are currently active participants in the health care services market, and that many of these uninsured currently consume health care services for which they cannot or do not pay. This is, in every real and meaningful sense, classic economic *activity*, which, as Congress' findings tell us, has a profound effect on commerce. *See Thomas More Law Ctr. v. Obama*, ___ F.3d ___, 2011 WL 2556039, at *24 (6th Cir. June 29, 2011) (Sutton, J., concurring) ("No matter how you slice the relevant market—as obtaining health care, as paying for health care, as insuring for health care—all of these activities affect interstate commerce, in a substantial way.").[9] Once the artificial barrier drawn between the health insurance and health care services markets breaks down, the plaintiffs' inactivity argument collapses. And there can be no doubt that Congress rationally linked the two markets. Its very findings accompanying the mandate detail at length the impact that going uninsured has on the broader availability of health insurance *and* on the costs associated with the consumption of health care services. *See* 42 U.S.C. § 18091(a)(2). I observe again that "[h]ealth insurance is purchased not as a final consumption good but as a means of paying for the future stochastic purchase of health care services."

---

[9] Contrary to the majority's assertion, *see* Maj. Op. at 147 n.119, the conduct being regulated by Congress is the *consumption* of health care services by the uninsured. And it is the very act of consuming health care services by those who do not pay for them that has the natural and probable effect of shifting costs to those who do—what occurs when I consume a good, and leave you with the bill. In every real sense, the *conduct* being regulated is analytically and conceptually distinct from its *effects* on interstate commerce.

Welfare Loss, *supra*, at 253. And virtually all of us will have the misfortune of having to consume health care services at some unknown point for some unknown malady and at some uncertain price. Each of us remains susceptible to sudden and unpredictable injury. No one can opt out of illness, disability, and death. These, we all must accept, are facts of life. Thus, even if I were to accept the plaintiffs' distinction between activity and inactivity, the facts undermine the distinction here. The inevitable consumption of health care services by the uninsured is sufficient activity to subject them to congressional regulation.

3.

The plaintiffs and the majority also object to the mandate on different grounds—that it is "overinclusive" insofar as it applies to: "those who do not enter the health care market at all" ("non-consumers"), and those who consume health care services but pay for their services in full and thus do not shift costs ("non-cost-shifters"). Maj. Op. at 127.

The majority understates the point when it acknowledges that "overinclusiveness may not be fatal for constitutional purposes." *Id.* Indeed, the Supreme Court has made it abundantly clear that Congress is not required to "legislate with scientific exactitude." *Raich*, 545 U.S. at 17. Rather, "[w]hen Congress decides that the *total incidence* of a practice poses a threat to a national market, it may regulate the *entire class*." *Id.* (emphases added) (internal quotation marks omitted). As Justice Holmes put it in *Westfall v. United States*, 274 U.S. 256 (1927), "when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented [Congress] may do so." *Id.* at

259. There is simply no requirement under the Commerce Clause that Congress choose the least restrictive means at its disposal to accomplish its legitimate objectives. Nor is there a requirement that Congress target only those uninsured individuals who will consume health care services at a particular point in time or just those who will be unable to pay for the health care services they consume. Congress concluded that the "total incidence" of health care consumption by the uninsured threatened the *national* health insurance and health care services markets. It was free to regulate the "entire class" of the uninsured.[10]

Moreover, even if I were to accept the notion that Congress, in regulating commerce, was obliged to somehow draw the class more narrowly, the subclass of "non-

---

[10] The Court in *Raich* specifically approved of Congress' legislating across a broad class when "enforcement difficulties" would attend drawing the class more narrowly. *Raich*, 545 U.S. at 22. The Court said, "[g]iven the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA." *Id.* (citation and footnote omitted). When it may be difficult to distinguish between categories of conduct, especially when the categories are fluid, Congress may enlarge the regulated class. Here, too, Congress may broadly regulate uninsured individuals because it may be difficult to distinguish between cost-shifters and non-cost-shifters. And the categories are fluid—a non-consumer or non-cost-shifter today may become a cost- shifter tomorrow, especially if a catastrophic injury befalls him. Moreover, the majority concedes that Congress may regulate *all* of the uninsured—cost-shifters and non-cost-shifters alike—at the point of consumption. *See* Maj. Op. at 129–130. Thus, by the majority's own lights, Congress' inclusion of non-cost-shifters within the mandate's reach does not create a constitutional infirmity.

consumers"—those individuals who will never enter the health care services market at all—is surely minuscule. The plaintiffs emphasize that it is "not strictly true" that everyone will participate in the health care services market. States Br. at 30. But the only elaboration the plaintiffs offer on this point is that some individuals will not participate because of "religious scruples" or the vaguely-put "individual circumstances." *Id.* As for the first, it does not get the plaintiffs very far, because religious groups that opt out of the health care services or health insurance markets may also seek exemption from the individual mandate. 26 U.S.C. § 5000A(d)(2). And as for "individual circumstances," presumably what the plaintiffs mean is that a few individuals either will fortuitously avoid ill health altogether, or—more likely—will fail to consume health care services due to an immediately fatal accident or the like. I am unable to draw a relevant constitutional distinction between the *virtual* inevitability of health care consumption and the absolute, 100% inevitability of health care consumption. There is less of a chance that an individual will go through his entire life without ever consuming health care services than there is that he will win the Irish Sweepstakes at the very moment he is struck by lightning. Nor are there more than a minuscule number of Americans who could afford to take on the financial risk of a personal medical catastrophe out of their own pockets. Yet, on the basis of these slight mathematical possibilities would the majority bring down the individual mandate and all that may fall with it.

Congress has wide regulatory latitude to address "the extent of financial risk-taking in the health care services market," Gov't Reply Br. at 15, which in its view is "a threat to a national market," *Raich*, 545 U.S. at 17.

The fact that an exceedingly small set of individuals may go their whole lives without consuming health care services or can afford to go it alone poses no obstacle to Congress' ability under the Commerce Clause to regulate the uninsured as a class.

Similarly, a group of economists who filed an amicus brief in support of the plaintiffs object to the individual mandate by disputing the substantiality of the cost-shifting impact the mandate seeks to address. First, they claim that the individual mandate targets the young and healthy and that the annual costs of uncompensated care for *those* individuals is much less than $43 billion. *See* Brief for Economists as Amici Curiae Supporting the Plaintiffs ("Plaintiffs Econ. Br.") at 3, 10, 13. The point is unpersuasive, because it conflates the scope of the individual mandate with its relative benefits for different population groups. The individual mandate applies to all non-exempted individuals, 26 U.S.C. § 5000A(a), and while the young and healthy may benefit less than other groups from having health insurance, "[i]t is of the essence of regulation that it lays a restraining hand on the selfinterest of the regulated and that advantages from the regulation commonly fall to others," *Wickard*, 317 U.S. at 129. Balancing different groups' competing economic interests is not a constitutional concern for the courts to calibrate, but rather is "wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process." *Id.* Moreover, the argument that the mandate targets the young and healthy and that, therefore, this Court should only look at the economic impact on interstate commerce of *those* individuals is not even consistent with the plaintiffs' own suggestion that the individ-

ual mandate regulates "*everyone* at *every* moment of their lives, from cradle to grave." States Br. at 29.

The economists also suggest that even if we look at the $43 billion figure as a whole, that amount is less than 1.8% of overall annual health care spending (which Congress found was $2.5 trillion, or 17.6% of the national economy, in 2009, 42 U.S.C. § 18091(a)(2)(B)), and, therefore, the "alleged cost-shifting problem" is relatively modest and fails to justify the individual mandate. Plaintiffs Econ. Br. at 9–10. The argument is unconvincing. It would be novel indeed to examine whether a problem "substantially affects" interstate commerce by comparing the economic impact of the problem to the total size of the regulated market. The argument would also lead to the perverse conclusion that Congress has *less* regulatory power the larger the national market at issue. But in any event, there can be no doubt that $43 billion is a substantial amount by any accounting. Even the economists (as well as the district court) recognize that the amount is "not insignificant." Plaintiffs Econ. Br. at 10; *accord Florida*, 2011 WL 285683, at *26 (noting that $43 billion "is clearly a large amount of money"). In this connection, I am reminded of the comment often attributed to the late Illinois Senator Everett McKinley Dirksen: "A billion here, a billion there, and pretty soon you're talking about real money."

Relying heavily on the economists' brief, the majority goes even further and subjects Congress' findings to an analysis that looks startlingly like strict scrutiny review. The majority engages in a breakdown of who among the uninsured are responsible for the $43 billion, presumably in order to show that the mandate will not be the most efficacious means of ameliorating the cost-shifting

problem. *See* Maj. Op. at 139–41. For instance, the majority claims that low-income individuals and illegal aliens (or other nonresidents) together are responsible for around half of the total cost shifting, yet are exempted from either the mandate or its penalty. *Id.* at 139–40. But even on the majority's own terms, a substantial number of cost-shifters are *not* exempted from the mandate or its penalty, and there was nothing irrational about Congress' decision to subject to the mandate those individuals who could reasonably afford health insurance in the first place.

More fundamentally, however, as I see it, the majority's searching inquiry throughout its opinion into whether the individual mandate fully solves the problems Congress aimed to solve, or whether there may have been more efficacious ways to do so, probes far beyond the proper scope of a court's Commerce Clause review. The majority suggests any number of changes to the legislation that would, it claims, improve it. Thus, for example, the majority offers that Congress should have legislated with a finer scalpel by inserting some element in the statute calling for a "case-by-case inquiry" of each regulated individual's conduct. *Id.* at 126 (internal quotation marks omitted). And the majority would have the IRS enforce the mandate more aggressively. *See id.* at 166; *id.* at 202 (describing the mandate as "porous and toothless").

Quite simply, the majority would presume to sit as a superlegislature, offering ways in which Congress could have legislated more efficaciously or more narrowly. This approach ignores the wide regulatory latitude afforded to Congress, under its Commerce Clause power, to address what *in its view* are substantial problems,

and it misapprehends the role of a reviewing court. As nonelected judicial officers, we are not afforded the opportunity to rewrite statutes we don't like, or to craft a legislative response more sharply than the legislative branch of government has chosen. What we are obliged to do is to determine whether the congressional enactment falls within the boundaries of Art. 1, § 8, cl. 3. In examining the constitutionality of legislation grounded in Congress' commerce power, "[w]e need not determine whether [the regulated] activities, taken in the aggregate, substantially affect interstate commerce *in fact*." *Raich*, 545 U.S. at 22 (emphasis added). Rather, all we need to do—indeed, all we are *permitted* to do—is determine "whether a 'rational basis' exists for so concluding." *Id.* The courts are not called upon to judge the wisdom or efficacy of the challenged statutory scheme. *See, e.g., id.* at 9 ("The question before us, however, is not whether it is wise to enforce the statute in these circumstances."); *Wickard*, 317 U.S. at 129 ("And with the wisdom, workability, or fairness[] of the plan of regulation we have nothing to do."). As Justice Cardozo put it, "[w]hether wisdom or unwisdom resides in the scheme of [the statute at issue], it is not for us to say. The answer to such inquiries must come from Congress, not the courts." *Helvering v. Davis*, 301 U.S. 619, 644, 57 S. Ct. 904 (1937); *see also Thomas More Law Ctr.*, 2011 WL 2556039, at *33 (Sutton, J., concurring) ("Time assuredly will bring to light the policy strengths and weaknesses of using the individual mandate as part of this national legislation, allowing the peoples' political representatives, *rather than their judges*, to have the primary say over its utility." (emphasis added)).

The majority says, nevertheless, that we are compelled to approach the individual mandate with "caution" and with "greater cause for doubt," Maj. Op. at 152, because insurance and health care are "areas of traditional state concern," *id.* at 150. While it is true that insurance and health care are, generally speaking, areas of traditional state regulation, this observation in no way undermines Congress' commerce power to regulate concurrently in these areas. The sheer size of the programs Congress has created underscores the extensiveness of its regulation of the health insurance and health care industries. "In 2010, 47.5 million people were covered by Medicare. . . ." 2011 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds 4 (2011), *available at* http://www.cms.gov/ReportsTrustFunds/downloads/tr2011.pdf. Medicaid is similarly massive. As of December 2008, approximately 44.8 million people were covered by Medicaid. The Kaiser Commission on Medicaid and the Uninsured, Medicaid Enrollment in 50 States 1 (2010), *available at* http://www.kff.org/medicaid/upload/7606-05.pdf. And as the government points out, Medicare and Medicaid accounted for roughly $750 billion of federal spending in 2009 alone. Gov't Br. at 10. It would surely come as a great shock to Congress, or, for that matter, to the 47.5 million people covered by Medicare, the 44.8 million people covered by Medicaid, and the overwhelming number of employers, health insurers, and health care providers regulated by ERISA, COBRA, and HIPAA, to learn that, because the health care industry also "falls within the sphere of traditional state regulation," Maj. Op. at 153, Congress was somehow skating on thin constitutional ice when it enacted these laws.

4.

In the course of its opinion, the majority also attaches great significance to the unprecedented nature of the legislation before us. It is surely true that, as the district court concluded, the individual mandate is a novel exercise of Congress' Commerce Clause power. *Florida*, 2011 WL 285683, at *20–21. But the mere fact of its novelty does not yield its unconstitutionality. *See Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1252 (11th Cir. 2008) (upholding, under the Commerce and Necessary and Proper Clauses, the constitutionality of the Graves Amendment, 49 U.S.C. § 30106, even though it was a "novel" statute employing the "relatively novel" theory that the rental car market should be protected "by deregulating it"). Every new proposal is in some way unprecedented before it is tried. And to draw the line against any new congressional enactment simply because of its novelty ignores the lessons found in the Supreme Court's Commerce Clause cases. For example, in *Wickard* the Court squarely recognized that the case presented an unprecedented expansion of the Commerce Clause power before then embracing that expansion. 317 U.S. at 120 ("Even today, when this power has been held to have great latitude, there is no decision of this Court that such activities ["local" activities such as production, manufacturing, and mining] may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof."). The truth is that any ruling this Court issues on the individual mandate's constitutionality is necessarily a departure from existing case law because the legislation and the issues presented are new. That the Supreme Court has never before upheld

a regulation of this kind can hardly be decisive; it has never rejected one either.

Indeed, when measured against the kinds of sweeping changes we have seen in the past, the individual mandate is far from a cataclysmic expansion of Congress' commerce power. Even the briefest examination of the growth of Congress' commerce power over the past 75 years makes the point. Facing the practical realities of an emergent, highly integrated national economy, the Supreme Court abandoned the categorical and formalistic distinctions that it had erected initially, in favor of a pragmatic view of commerce drawn from the course of business. The Court had previously held that broad categories of economic life, such as agriculture, insurance, labor, manufacturing, mining, and production were *antecedent* to commerce itself, which was once viewed as being limited to the *movement* of the fruits of those antecedent activities in and among the states. But a more pragmatic view began to take hold by the mid-1930s. The Court's earlier restrictive view of commerce did not survive the New Deal-era cases, where the Supreme Court swiftly brought all of these categories within the lawful ambit of Congress' commerce power. *See, e.g.*, *Jones & Laughlin Steel*, 301 U.S. at 40 ("It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved."); *United States v. Darby*, 312 U.S. 100, 115–17 (1941) ("[W]e conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress."); *Wickard*, 317 U.S. at 124–25 ("Whether the subject of the regulation in question was 'production,'

'consumption,' or 'marketing' [of wheat] is . . . not material for purposes of deciding the question of federal power before us. . . . [E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce. . . ."); *South-Eastern Underwriters*, 322 U.S. at 553 ("No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance.").

The Court did not stop there. It expanded the scope of Congress' commerce power from the regulation of the "intercourse" of goods moving across borders to the regulation of wholly *intrastate* conduct that substantially affected interstate commerce. *See Darby*, 312 U.S. at 119–20 & n.3. Indeed, *Wickard* involved a jump arguably far greater than the one we face today. In order to regulate price, Congress could penalize conduct—Filburn's growing wheat above a fixed quota for his own personal consumption—absent *any* indicia that Filburn would *ever* enter into the interstate wheat market. Justice Jackson, writing for the Court, recognized this as a novel exercise of the commerce power. *Wickard*, 317 U.S. at 120. The Court held that Congress could nonetheless regulate the price of wheat by restricting its production, even on a small farm where it was grown purely for personal consumption. And, according to the Court, if the regulation had the natural and probable effect of "*forcing* some farmers into the market to buy what they could provide for themselves" absent the regulation, so be it. *Id.* at 129 (emphasis added).

In *Wickard*, the Court expanded Congress' commerce power further still, concluding that the impact or effect on interstate commerce is not measured case by case, or person by person, but rather in an *aggregated* way. *Id.* at 127–28. That Filburn's "own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, *taken together with that of many others similarly situated*, is far from trivial." *Id.* (emphasis added); *see also Darby*, 312 U.S. at 123 ("[Congress] recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great."); *NLRB v. Fainblatt*, 306 U.S. 601, 606 (1939) ("The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small."). Building upon earlier inklings of an aggregation principle found in *Darby* and *Fainblatt*, the Court firmly established that Congress may regulate classes of local activities that, only in the aggregate, have a substantial effect on interstate commerce.[11]

In a pair of notable civil rights cases, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. (1964), and *Katzenbach*, 379 U.S. 294, the Supreme Court continued to read the Commerce Clause in an expansive way. The

---

[11] The majority attempts to skirt the breadth of the aggregation principle by claiming that an "individual's mere decision not to purchase insurance" is not subject to aggregation. Maj. Op. at 125. But again, the majority has shot at the wrong target. Congress is regulating the uninsured's uncompensated consumption of health care services. And under *Wickard* and *Raich*, we are instructed to measure the effect on interstate commerce not case-by-case or person-by-person, but rather in the aggregate and taken as a whole.

Court upheld nondiscrimination legislation, grounded in the Commerce Clause, that required hoteliers and restaurateurs to enter into economic transactions with racial minorities (indeed, with individuals of any race, color, religion, or national origin) on the same terms as any other patrons (or exit their respective businesses altogether). The Court underscored that "the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce." *Heart of Atlanta*, 379 U.S. at 258, 85 S. Ct. 348. The Court concluded that, having entered the stream of commerce, these sellers could be forced by Congress to engage in economic transactions into which they would not otherwise enter.

The plaintiffs are quick to point out, however, that the Commerce Clause has not simply expanded unabated. In rejecting the constitutionality of the individual mandate, the plaintiffs and the majority rely heavily upon *Lopez*, 514 U.S. 549, and *United States v. Morrison*, 529 U.S. 598 (2000), the only two Supreme Court cases in the past 75 years to hold that an act of Congress exceeded its commerce power. Neither *Lopez*, where the Court struck down a statute criminalizing the possession of a firearm within 1000 feet of a school, nor *Morrison*, where the Court struck down a statute creating a federal civil remedy for victims of gender- motivated felonious acts of violence, answers the question we face today.

Indeed, in *Raich*, 545 U.S. 1, decided five years after *Morrison*, the Supreme Court reaffirmed the vitality of *Wickard*, and specifically applied its holding in a challenge to the constitutionality of the Controlled Substances Act ("CSA"). The Court emphatically distinguished *Lopez* and *Morrison*, observing that the statutes at issue in those cases were singular prohibitions regulating wholly noneconomic criminal behavior. The CSA, on the other hand, was characterized as "a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of 'controlled substances.'" *Raich*, 545 U.S. at 24. The Court found that, "[u]nlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic." *Id.* at 25.

Thus, much as in *Raich*, while *Lopez* and *Morrison* remind us that there are discernible limits on Congress' commerce power, the limits drawn in those two cases are of limited help in this one. As a panel of this Circuit recently stated, "*Raich* makes clear that when a statute regulates economic or commercial activity, *Lopez* and *Morrison* are inapposite." *Garcia*, 540 F.3d at 1252. Indeed, when "we are not . . . dealing with a single-subject statute whose single subject is itself non-economic (e.g., possession of a gun in a school zone or gender-motivated violence)," *Morrison* and *Lopez* have little applicability and instead "*Raich* guides our analysis." *United States v. Maxwell* ("*Maxwell II*"), 446 F.3d 1210, 1216 n.6 (11th Cir. 2006); *see also United States v. Paige*, 604 F.3d 1268, 1273 (11th Cir. 2010) (per curiam). *Lopez* and *Morrison* each involved an effort to regulate *noneconomic* activity (criminal conduct); in neither instance did Congress seek to broadly regulate an *entire*

industry; and, unlike in this case, the criminal conduct regulated in those cases was only linked to interstate commerce in a highly attenuated fashion that required piling inference upon inference. Whatever problems there may be with the constitutionality of the individual mandate, they cannot be found in *Lopez* or *Morrison*. *See* Part II.A, *infra*.

The historical growth of Congress' commerce power powerfully suggests that, contrary to the arguments advanced by the plaintiffs, upholding the individual mandate would be far from a cosmic expansion of the boundaries of the Commerce Clause. These past expansions have not been random, accidental, or in any way contrary to first principles or an original understanding of the Constitution. As the Supreme Court has observed, "[t]he Federal Government undertakes activities today that would have been unimaginable to the Framers." *United States v. Comstock*, ___ U.S. ___ (2010) (quoting *New York v. United States*, 505 U.S. 144 (1992)). Indeed, the Framers purposely drafted "a Constitution capable of such resilience through time." *Id.*; *see also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (describing the Constitution as a document "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs").

The long and short of it is that Congress has promulgated a rule (the individual mandate) by which to comprehensively regulate the timing and means of payment for the virtually inevitable consumption of health care services, and to thereby regulate commerce. The individual mandate was enacted as part of a broad scheme to regulate health insurance and health care services, industries already heavily regulated by Congress. Con-

gress made express legislative findings detailing the *economic* problems it saw, and how the mandate would ameliorate those problems. And the substantial impact on interstate commerce cannot be denied. Article 1, § 8, cl. 3 requires no more than this.

C.

The individual mandate is also a valid means under the Necessary and Proper Clause to further the regulatory end of the Act's insurance reforms. "It has been long recognized that Congress has the power to pass laws or regulations necessary and proper to carrying out [its] commerce clause power." *United States v. Ambert*, 561 F.3d 1202, 1211 (11th Cir. 2009). Under the Necessary and Proper Clause, Congress is empowered "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing [Art. 1, § 8] Powers." U.S. Const. art. 1, § 8, cl. 18. Both the Supreme Court and this Circuit have said that "in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is *rationally related* to the implementation of a constitutionally enumerated power." *Comstock*, 130 S. Ct. at 1956 (emphasis added); *United States v. Belfast*, 611 F.3d 783, 804 (11th Cir. 2010).

The constitutionality of the "end"—that is, the Act's insurer regulations—is both clear and unchallenged, as even the district court recognized. *Florida*, ___ F. Supp. 2d at ___, 2011 WL 285683, at *32 ("[T]he end of regulating the health care insurance industry (including preventing insurers from excluding or charging higher rates to people with pre-existing conditions) is

clearly legitimate and within the scope of the constitution." (internal quotation marks omitted)). Once it has identified a legitimate and constitutional end, Congress has an expansive choice of means. As Chief Justice Marshall enduringly articulated "[i]n language that has come to define the scope of the Necessary and Proper Clause," *Comstock*, 130 S. Ct. at 1956:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

McCulloch, 17 U.S. at 421. In addition, Chief Justice Marshall broadly defined the term "necessary." It does not mean "absolutely necessary," but rather only "convenient, or useful" or "conducive" to the "beneficial exercise" of one or more of Congress' enumerated powers. *Comstock*, 130 S. Ct. at 1956 (quoting *McCulloch*, 17 U.S. at 413, 414, 418).

It is clear under this expansive definition of "necessary," the validity of which was recently reaffirmed by the Supreme Court in *Comstock*, that requiring the purchase of health insurance is "convenient," "useful," or "conducive" to effectively implementing the Act's insurer regulations. As the states that tried to effectuate guaranteed issue and community rating reforms without some form of individual mandate attest, trying to do the former without the latter simply does not work. *See, e.g.*, Brief for Am. Ass'n of People with Disabilities et al. as Amici Curiae Supporting the Government at 5–6 ("Kentucky, Maine, New Hampshire, New Jersey, New York, Vermont, and Washington enacted legislation that required insurers to guarantee issue to all consumers in

the individual market, but did not have a minimum coverage provision. . . . All seven states suffered from sky-rocketing insurance premium costs, reductions in individuals with coverage, and reductions in insurance products and providers." (footnote omitted)); Brief for Governor of Wash. as Amicus Curiae Supporting the Government at 2 ("Washington knows firsthand the necessity of universal coverage because of the problems it experienced when it eliminated barriers to insurance coverage, like preexisting condition restrictions, without also imposing a minimum coverage requirement."); Brief for Law Professors as Amici Curiae Supporting the Government at 17 ("[A]fter Kentucky enacted reform, all but two insurers (one State-run) abandoned the State.").[12] In this light, the individual mandate is "necessary" to the end of regulating insurers' underwriting practices without running insurers out of business entirely—a point the district court recognized. *Florida*, 2011 WL 285683, at *33 ("The defendants have asserted again and again that the individual mandate is absolutely 'necessary' and 'essential' for the Act to operate as it was intended by Congress. I accept that it is.").

---

[12] During a hearing before the House Ways and Means Committee, an economist stated that "imposition of *community-rated premiums* and *guaranteed* issue on a market of competing private health insurers will inexorably drive that market into extinction, unless these two features are coupled with . . . a *mandate on individual[s] to be insured*." *Health Reform in the 21st Century: Insurance Market Reforms: Hearing Before the H. Comm. on Ways and Means*, 111th Cong. 13 (2009) (statement of Dr. Uwe Reinhardt, Professor, Princeton University). In other words, without a mandate, these two insurer reforms would result in adverse selection, increased premiums, decreased enrollment, and fleeing insurers—in short, the insurance market would "implode." *See id.* at 13 n.4.

The plaintiffs also claim that the individual mandate exceeds Congress' power because it is not "proper"—that is, because it is inconsistent with "the letter and the spirit of the constitution." *McCulloch*, 17 U.S. at 421. I have little doubt that the individual mandate is also "proper." It violates no other provision of the Constitution.[13] *Cf. Comstock*, 130 S. Ct. at 1957 ("[T]he present statute's validity under provisions of the Constitution other than the Necessary and Proper Clause is an issue that is not before us. . . . [Therefore], the relevant inquiry is simply whether the means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power. . . . " (internal quotation marks omitted)). And the mandate is undoubtedly "rationally related" to the end of effectuating the Act's guaranteed issue and community rating reforms. *Id.* at 1956; *Belfast*, 611 F.3d at 804. The mandate arguably renders the insurer regulations practically and economically feasible. Congress found that without the mandate, "many individuals would wait to purchase health insurance until they needed care," 42 U.S.C. § 18091(a)(2)(I)—that is, until they were sick, which would impose enormous costs on insurers and drive them out of the market. And having observed the failed experience of those states that tried to enact insurer reforms without an individual mandate, Congress rationally concluded that one way to prevent this problem was to require that non-exempted individuals enter the insurance risk pool. The Necessary and Proper Clause requires nothing more.

---

[13] I address the plaintiffs' suggestions that the individual mandate violates the Fifth or Tenth Amendments in Part II.B, *infra*.

II.

More fundamentally, the plaintiffs have offered two arguments that, they say, undermine the government's position that Congress' commerce power can justify prescribing a rule that compels an individual to buy health insurance. First, they argue that if Congress has the constitutional authority to enact the individual mandate, then there is virtually no limit on its authority, and Art. 1, § 8, cl. 3 of the Constitution (whether standing alone or in concert with the Necessary and Proper Clause) would be transformed into a grant of general police power. Second, they offer, although largely implicitly, that the individual mandate really infringes upon notions of individual liberty and popular sovereignty found either in the Fifth or Tenth Amendments to the Constitution. I take up each argument in turn.

A.

1.

Perhaps at the heart of the plaintiffs' objection to the mandate—adopted by the majority opinion in conclusion, if not in reasoning[14]—is the notion that allowing the

[14] The majority comes perilously close to abandoning the central foundation—the dichotomy between activity and inactivity—on which the plaintiffs and the district court rely for their position that upholding the individual mandate would convert the Commerce Clause into an unlimited general police power. *See* Maj. Op. at ___ ("[W]e are not persuaded that the formalistic dichotomy of activity and inactivity provides a workable or persuasive enough answer in this case."). As I understand the position taken by the plaintiffs and the district court, it is this: if the Commerce Clause affords Congress the power to conscript the unwilling uninsured to enter the stream of commerce and buy insurance, then Congress could also conscript any American to buy any private product at a time and under circumstances not of his own choosing. In other words, the plaintiffs say, the individual mandate extends

individual mandate to stand will convert Congress' commerce power into a plenary federal police power, admitting of no limits and knowing of no bounds. The parade of horribles said to follow ineluctably from upholding the individual mandate includes the federal government's ability to compel us to purchase and consume broccoli, buy General Motors vehicles, and exercise three times a week. However, acknowledging the constitutionality of the individual mandate portends no such impending doom.

At the outset, there is always a danger in evaluating the constitutionality of legislation actually before us solely on the basis of conjecture about what the future may hold. The plaintiffs' heavy reliance on "floodgate fears" and a "parade of dreadfuls calls to mind wise counsel: 'Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom.'" *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 194 n.16 (1999) (quoting Robert Bork, The Tempting of America: The Political Seduction of the Law 169 (1990)). Federal courts may only be called on to resolve ripe controversies, and it is difficult and hazardous for courts to prejudge the next case or the one after that in a vacuum, devoid of a factually devel-

---

the Commerce Clause beyond its outer limits precisely because it allows the government to conscript the *inactive* and unwilling. Without drawing the distinction between activity and inactivity, I am at a loss to understand the argument that sustaining the individual mandate would transmute the limited power contained in Art. 1, § 8, cl. 3 of the Constitution into an unlimited general police power. For reasons that remain inexplicable to me, the majority opinion seems to suggest that the individual mandate is a "bridge too far"—in the words of the district court—not because it conscripts the inactive, but rather for some inchoate reason stated at the highest order of abstraction.

oped record sharpened in the crucible of the adversarial process. *See Baker v. Carr*, 369 U.S. 186, 204 (1962) ("[C]oncrete adverseness . . . sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions[.]"). As courts of limited jurisdiction, we ought not lose sight of the legislation before us, viewed in the context of the discrete issues and facts presented. I have little doubt that the federal courts will be fully capable of addressing future problems raised in future cases in the fullness of time.

But a more basic answer is this: upholding the individual mandate leaves fully intact all of the existing limitations drawn around Congress' Commerce Clause power. To begin with, Congress is limited by the constitutional text and Supreme Court doctrine largely to prescribing rules regulating *economic* behavior that has a *substantial* effect on interstate commerce. These powerful limits afford no problem in this case, because Congress has undeniably prescribed a rule (the individual mandate) to regulate economic behavior (consumption of health care services by the uninsured) that has a powerful impact on how, when, and by whom payment is made for health care services. Indeed, the conduct regulated by the Act is even more "quintessentially economic" in nature than the cultivation, possession, and personal use of controlled substances, *see Raich*, 545 U.S. at 25, or the cultivation of wheat for personal consumption, *see Wickard*, 317 U.S. at 119, 63 S. Ct. 82.

In *Lopez* and *Morrison*, the Supreme Court began to flesh out some of the outer limits surrounding Art. I, § 8, cl. 3. Chief Justice Rehnquist, writing for the Court in both instances, posited a series of "significant consid-

erations," none of which pose any problem in this case. *See Morrison*, 529 U.S. at 609–12. First, he observed that the regulated conduct at issue in *Lopez* and *Morrison* was plainly of a noneconomic nature—again, the possession of a handgun within 1000 feet of a school in *Lopez*, and gender-motivated felonious acts of violence in *Morrison*. *See id.* at 610 ("[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case."). Here, in sharp contrast, Congress has prescribed a rule governing purely economic behavior. As I've noted already, the Act addresses an economic problem of enormous dimension—$43 billion of annual cost shifting from the uninsured to insured individuals and health care providers, 42 U.S.C. § 18091(a)(2)(F)—by prescribing an economic rule governing the timing and method of payment for health care services. In short, the first problem identified in *Lopez* and *Morrison*—that the statutes reached purely intrastate, noneconomic behavior—is not found in this case, and thus the mandate does not, at least for this reason, penetrate beyond the outer limits of Congress' Commerce Clause power.

A second powerful consideration identified by the Court in both *Lopez* and *Morrison* was that the *nexus* between the criminal conduct regulated by the legislation and its impact—even if taken in the aggregate—on interstate commerce was remote and wholly attenuated, and on its own terms provided no limiting principle surrounding the exercise of Congress' commerce power. In both *Lopez* and *Morrison*, the government relied on a lengthy inferential chain of causal reasoning in order to show that the criminal conduct regulated had a substantial effect on interstate commerce. In *Lopez*—where Congress had made no factual findings regarding the

effects upon interstate commerce of gun possession in a school zone—the government had to argue, among other things, that the possession of firearms near schools had the natural effect of disrupting the educational process, and that this disruption, over time, would in turn lower the economic productivity of our citizens, causing an adverse effect on the national economy. *See Lopez*, 514 U.S. at 563–64. It's no surprise, then, that the Court found the critical link to interstate commerce wanting, and concluded that if this chain of reasoning were an acceptable means of bridging the gap between the regulated conduct and commerce, precious little would fall outside the ambit of Congress' commerce power. *Id.* at 564. By the same token, in *Morrison*, the Court found wanting Congress' chain of reasoning—that felonious acts of violence against women would, inter alia, cause lost hours in the workplace and drive up hospital costs and insurance premiums, which in turn would have an adverse effect on the national economy. *See Morrison*, 529 U.S. at 615. The problem remained the same as in *Lopez*, even though in *Morrison*, Congress had sought to draw the causal inferences itself through express factual findings. Again, the causal reasoning that was required to link the regulated criminal conduct to interstate commerce was lengthy and attenuated. And again, the very method of reasoning offered by Congress afforded no limitations on its commerce power. *Id.* at 615–16.

In this case, no such complex and attenuated causal story is necessary to locate the regulated conduct's nexus with interstate commerce. Here, the substantial effect on commerce occurs directly and immediately when the uninsured consume health care services in large numbers, do not pay for them in full or maybe

even at all, and thereby shift powerful economic costs onto insured individuals and health care providers (as Congress found they do). The nexus between the regulated conduct and interstate commerce could not be more direct. I am at a loss to find even a single "inferential leap[]," Maj. Op. at ___, required to link them. Moreover, Congress unambiguously and in considerable detail drew the connection between the regulated conduct and its substantial effect on interstate commerce through extensive findings of fact. *See* 42 U.S.C. § 18091. Contrary to the majority's claim, here there is no need "to pile inference upon inference," *Lopez*, 514 U.S. at 567, to draw the critical nexus, and, therefore, we face no unlimited exercise of congressional power for that reason.

Moreover, in sharp contrast to *Lopez* and *Morrison*, we are confronted today with a comprehensive economic statute, not a one-off, criminal prohibition. *See Raich*, 545 U.S. at 23–24 (drawing a sharp distinction between "brief, single-subject statute[s]" divorced from a larger regulatory scheme and "lengthy and detailed statute[s] creating a comprehensive framework for regulating" an entire market). The individual mandate is "an essential part of a larger regulation of economic activity," without which "the regulatory scheme would be undercut," *Lopez*, 514 U.S. at 561, and the Supreme Court has endorsed the constitutionality of such comprehensive, economic regulatory schemes, *Raich*, 545 U.S. at 24–25; *see also Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981) ("A complex regulatory program such as established by the [Surface Mining] Act can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the chal-

lenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test."); *Raich*, 545 U.S. at 36 (Scalia, J., concurring in the judgment) ("Though the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated as 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" (quoting *Lopez*, 514 U.S. at 561)). And, according to Eleventh Circuit precedent, "where Congress comprehensively regulates economic activity, it may constitutionally regulate intrastate activity, whether economic or not, so long as the inability to do so would undermine Congress's ability to implement effectively the overlying economic regulatory scheme." *Maxwell II*, 446 F.3d at 1215 (footnote omitted).

The majority, in an effort to distance itself from this precedent, suggests that, because *Raich* involved an as-applied challenge, the inquiry into whether challenged legislation is an "essential part of a larger regulation of economic activity" is only appropriate in as-applied challenges, as opposed to facial ones. Maj. Op. at ___-___. In other words, the majority seems to be saying that, because "the Supreme Court has to date never sustained a statute on the basis of the 'larger regulatory scheme' doctrine in a facial challenge," *id.* at ___, it is irrelevant to the question of the individual mandate's constitutionality that the mandate is an essential part of a larger economic regulatory scheme. There is no doctrinal basis for this view. In *Lopez* itself, the Court applied this principle in the context of a *facial* challenge. In *Raich*, the Court plainly recognized that, unlike the challenge it faced, the challenges to the con-

stitutionality of the Gun-Free School Zones Act in *Lopez*, and, for that matter, to Title III of the Violence Against Women Act in *Morrison*, were facial challenges. Justice Stevens, writing for the majority in *Raich*, said: "Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its *entirety*," the very definition of a facial challenge. *Raich*, 545 U.S. at 23 (emphasis added). Indeed, Justice Thomas, dissenting, likewise expressly recognized that "[i]n *Lopez* and *Morrison*, the parties asserted facial challenges." *Id.* at 71, 125 S. Ct. 2195 (Thomas, J., dissenting). And of course in *Lopez*, the Court, for the first time, *applied* this very doctrine, explaining that *even though* the Gun-Free School Zones Act targeted purely local, noneconomic behavior, the Court could have upheld it nonetheless if it had been an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. Moreover, a panel of this Court has recently explained in binding precedent that "what distinguished *Raich* from *Morrison* and *Lopez* . . . was the comprehensiveness of the economic component of the regulation," *Maxwell II*, 446 F.3d at 1214—not whether the challenge was facial or as-applied.

Furthermore, the majority's view that the individual mandate is not an essential part of the Act's concededly economic regulatory scheme, *see* Maj. Op. at ___-___, cannot be squared with the economic realities of the health insurance business or the legislative realities of the Act. Nor can this view be squared with the contrary judgment reached by Congress on this very point. Thus,

for example, the majority appears to simply cast aside Congress' finding that the individual mandate "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." 42 U.S.C. § 18091(a)(2)(I). In *Maxwell II*, we explained that "courts have only a limited role in second-guessing" Congress' judgments about whether leaving a class of conduct outside of federal control would "undercut[ ] Congress's unquestioned authority to regulate the broader interstate market." 446 F.3d at 1215 (internal quotation marks omitted). Faced with evidence that the insurance industry would collapse if the Act's guaranteed issue and community rating provisions were implemented without the individual mandate, Congress had more than "a rational basis for concluding," *Raich*, 545 U.S. at 19, 125 S. Ct. 2195, that the individual mandate was essential to the success of the Act's concededly valid and quintessentially economic insurer reforms.[15] In short,

---

[15] Although the majority seems to take comfort in only striking down the individual mandate, *see* Maj. Op. at ___ n.145, all of the parties have agreed that the individual mandate is so essential to the principal insurer reforms that, at least for severability purposes, the guaranteed issue and community rating provisions necessarily rise and fall with the individual mandate, Gov't Reply Br. at 58 ("As plaintiffs note, the federal government acknowledged below [and continues to acknowledge] that the guaranteed-issue and community-rating provisions due to take effect in 2014 . . . cannot be severed from the minimum coverage requirement. The requirement is integral to those sections that go into effect along with it in 2014 and provide that insurers must extend coverage and set premiums without regard to pre-existing medical conditions. . . ."); States Br. at 63 (stating that the individual mandate cannot be severed from "the core, interrelated health insurance reforms"); NFIB Br. at 60–61 (stating that the mandate and the

the real and substantial limits on the commerce power set forth by the Supreme Court in *Lopez* and *Morrison* would be left wholly intact if we were to uphold the individual mandate.

Because the impact on interstate commerce of the conduct that Congress sought to regulate through the individual mandate is so clear and immediate, this case is readily distinguishable from many of the plaintiffs' suggested hypothetical horribles, which suffer from the inference-piling reasoning condemned in *Lopez* and *Morrison*. Thus, for example, in arguing that Congress could force us to purchase broccoli, the plaintiffs necessarily reason as follows: everyone is a participant in the food market; if people buy more broccoli, they will eat more broccoli; eating more broccoli will, in the long run, improve people's health; this, in turn, will improve overall worker productivity, thus affecting our national economy. Such reasoning violates the cautionary note that "under the Government's 'national productivity' reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens. . . . Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Lopez*, 514 U.S. at 564. By contrast, the economic problem that Congress sought to address through the individual mandate does not depend on any remote or long-term effects on economic productivity stemming from individuals' health care choices; indeed, the man-

---

principal insurer provisions "truly are the heart of the Act," and highlighting the government's concession that the mandate and the insurer reforms "must stand or fall together" (internal quotation marks omitted)).

date does not compel individuals to seek health care at all, much less any particular form of it. Instead, Congress rationally found that the uninsured's inevitable, substantial, and often uncompensated consumption of health care services—of any form—*in and of itself* substantially affects the national economy.

2.

Moreover, this case does not open the floodgates to an unbounded Commerce Clause power because the particular factual circumstances are truly unique, and not susceptible to replication elsewhere. This factual uniqueness would render any holding in this case limited. I add the unremarkable observation that the holding of every case is bounded by the peculiar fact pattern arising therein. *See Licciardello v. Lovelady*, 544 F.3d 1280, 1288 n.8 (11th Cir. 2008) ("Our holding, as always, is limited to the facts before us."); *see also United States v. Hunter*, 172 F.3d 1307, 1310 (11th Cir. 1999) (Carnes, J., concurring) ("The holdings of a prior decision can reach only as far as the facts and circumstances presented to the Court in the case which produced that decision.").

The health care services market is characterized by five relevant factors, which, when taken in concert, uniquely converge to create a truly *sui generis* problem: (1) the unavoidable need that virtually all of us have to consume medical care; (2) the unpredictability of that need; (3) the high costs associated with the consumption of health care services; (4) the inability of providers to refuse to provide care in emergency situations; and, largely as a result of the previous four factors, (5) the very significant cost shifting that underlies the way

medical care is paid for in this country. Gov't Econ. Br. at 1.

These are not just five fortuitous descriptors of the health care market, elevated to artificial constitutional significance. Over the last 75 years the Supreme Court has emphatically and repeatedly counseled a pragmatic approach to Commerce Clause analysis, grounded in a "practical" conception of commercial regulation, "drawn from the course of business." *Swift & Co.*, 196 U.S. at 398; *accord Raich*, 545 U.S. at 25 n.35, 125 S. Ct. 2195; *Lopez*, 514 U.S. at 571, 574 (Kennedy, J., concurring); *Wickard*, 317 U.S. at 123–24; *Jones & Laughlin Steel*, 301 U.S. at 41–42. Legislation enacted pursuant to Congress' Commerce Clause power cannot be evaluated in a vacuum, but only in light of the peculiar problems Congress sought to address, what Congress chose to regulate, how Congress chose to regulate, and the connection between the regulated conduct and the problem Congress sought to resolve. Courts must always engage in the "hard work" of "identify[ing] objective markers for confining the analysis in Commerce Clause cases." *Raich*, 545 U.S. at 47 (O'Connor, J., dissenting). Far from being "*ad hoc* " and "illusory," Maj. Op. at ___, these factual criteria are relevant descriptors, drawn from the course of business, of the economic realities Congress confronted. They are, therefore, precisely what the Court has instructed us to consider in the Commerce Clause analysis. And given these unique characteristics of the health care market and the peculiar way these characteristics converge, the individual mandate was part of a practical solution to the cost-shifting problem Congress sought to address.

The first and most basic of these factors is that no individual can opt out of the health care services market, and thus virtually everyone will consume health care services. Individual participation in the health care services market is properly, therefore, a question of *when* and *how* individuals will consume and pay for such services, not *whether* they will consume them. The plaintiffs are correct that there are other markets that, if defined broadly enough, no one may opt out of, such as the markets for food, transportation, and shelter. But the hypothetical mandates—that Congress can force individuals to buy broccoli, GM cars, or homes—do not follow. Neither those markets nor their hypothetical mandates resemble the market and mandate here.

In the first place, unlike the needs for food, transportation, and shelter—which are always present and have largely predictable costs—illness and injury are wholly unpredictable. Individuals who never intend to consume health care, unlike those who never intend to purchase GM cars or broccoli or a home, will nonetheless do so because of accidents, illnesses, and all the vagaries to which one's health is subject. Indeed, the economists concluded that even the most sophisticated methods of predicting medical spending can explain only 25–35% of the variation in the costs incurred by different individuals; "the vast bulk of [medical] spending needs cannot be forecast in advance." Gov't Econ. Br. at 10–11.

In addition, while the costs associated with obtaining food, transportation, and shelter are susceptible to budgeting, this is not the case for health care, which can be so expensive that most everyone must have some access to funds beyond their own resources in order to afford them. *Id.* at 11–12 (explaining that unpredicted medical

costs can eclipse the financial assets of "all but the very well-to-do"); *see also* Gov't Reply Br. at 15 ("The 'frequency, timing and magnitude' of a given individual's demand for health care are unknowable." (quoting Jennifer Prah Ruger, *The Moral Foundations of Health Insurance*, 100 Q.J. Med. 53, 54–55 (2007))). Moreover, there are lower cost alternatives to purchasing a house or a car, such as renting an apartment, leasing an automobile, or relying on public transportation. There are no realistic alternatives or less expensive substitutes for treating cancer, a heart attack, or a stroke, or for performing a needed organ transplant or hip replacement. Even routine medical procedures, such as MRIs, CT scans, colonoscopies, mammograms, and childbirth, cost more than many Americans can afford. Gov't Econ. Br. at 11. This is not to say that individuals may not budget and plan as best they can for their health care costs, as many surely do, but the combination of uncertain timing, unpredictable malady, and potentially astronomical cost can nonetheless leave individuals wholly unable to pay for the health care services they consume. Indeed, Congress found that "62 percent of all personal bankruptcies are caused in part by medical expenses." 42 U.S.C. § 18091(a)(2)(G).

Largely because of these first three factors—that health care costs are inevitable, unpredictable, and often staggeringly high—the health care services market, unlike other markets, is paid for predominantly through the mechanism of insurance.[16] Gov't Br. at 9 (citing

---

[16] The unpredictability and wide variation in health care costs demonstrate why the majority's comparison of average health care costs to the average insurance premium misses the point. Maj. Op. at ___. Individuals pay $4500 in insurance premiums not to avoid the $2000

CMS data that payments by private and government insurers comprise 75% of national health care spending). Insurance is thus already intimately linked to the health care services market. People do not similarly insure against the risk that they will need food or shelter, because these needs are apparent and predictable, and people can reliably budget for them. Although the purchase of a car or a home may often be too expensive for many individuals to afford out of pocket, it would be fanciful indeed to suggest that individuals would insure against the sudden and unpredictable purchase of a home or automobile. The plaintiffs admit that "[r]egulations are 'plainly adapted' if they invoke 'the ordinary means of execution.'" NFIB Br. at 42 (quoting *McCulloch*, 17 U.S. at 409, 421). Insurance is the "ordinary means" of paying for health care services. Thus, a mandate to purchase insurance is more appropriately suited to address the problems of non-payment and cost shifting in the health care services market than it would be to address problems in other markets that do not similarly rely on insurance as the primary method of payment.

The fourth important factor distinguishing the health care market from all other markets—and peculiarly contributing to the cost shifting that Congress sought to address through the mandate—is the fact that individuals may consume health care services without regard to their ability to pay and often without ever paying for

---

average annual medical bill, but to avoid the *extreme* medical bill. Indeed, the whole point of insurance is to make spending more regular and predictable. Comparing the "average" medical bill with the "average" insurance premium is hollow—insurance is purchased for the very reason that one cannot count on receiving the "average" medical bill every year.

them. Unlike any other sellers in any other marketplace, nearly all hospitals are required by law to provide emergency services to anyone, regardless of ability to pay. *See* EMTALA, 42 U.S.C. § 1395dd. If an individual shows up at the emergency room doorstep with a broken neck from an automobile accident or bleeding from a gunshot wound, or if an individual suffers a heart attack or a stroke, hospitals will not turn him away. Even aside from the federal obligation imposed by EMTALA, by my count, at least ten of the plaintiff states have statutes on the books requiring hospitals with emergency rooms to provide emergency treatment to those in need of it, regardless of ability to pay.[17] Still other plaintiff states have state court judicial rulings imposing similar requirements.[18] And even absent any *legal* duty, many

---

[17] *See* Fla. Stat. Ann. § 395.1041(1); Idaho Code Ann. § 39-1391b; La. Rev. Stat. Ann. § 40:2113.4(A); Nev. Rev. Stat. Ann. § 439B.410(1); 35 Pa. Stat. Ann. § 449.8(a); S.C. Code Ann. § 44-7-260(E); Tex. Health & Safety Code Ann. § 311.022(a); Utah Code Ann. § 26-8a-501(1); Wash. Rev. Code § 70.170.060(2); Wis. Stat. Ann. § 256.30(2); *see also* Gov't Br. at 35 (citing testimony before Congress in 1986 that at least 22 states had enacted statutes or issued regulations requiring provision of emergency medical services regardless of ability to pay, and observing that state court rulings impose a common law duty on doctors and hospitals to provide emergency care).

[18] *See, e.g.*, *Thompson v. Sun City Cmty. Hosp., Inc.*, 141 Ariz. 597, 688 P.2d 605, 610 (1984) ("[A]s a matter of public policy, licensed hospitals in this state are required to accept and render emergency care to all patients who present themselves in need of such care. . . . This standard of care has, in effect, been set by statute and regulation embodying a public policy which requires private hospitals to provide emergency care that is 'medically indicated' without consideration of the economic circumstances of the patient in need of such care."); *Walling v. Allstate Ins. Co.*, 183 Mich. App. 731, 455 N.W.2d 736, 738 (1990) ("[L]iability on the part of a private hospital may be based upon

hospitals provide free or deeply discounted care as part of their charitable mission, even when the patient's need does not rise to the level of an emergency. *See Thornton v. Sw. Detroit Hosp.*, 895 F.2d 1131, 1132 (6th Cir. 1990) (observing in the application of EMTALA that "American hospitals have a long tradition of giving emergency medical aid to anyone in need who appeared on the emergency room doorstep"). One expert from the Heritage Foundation persuasively illustrated this distinction between health care and other markets when recommending in 1989 that the government impose a mandate "to obtain adequate [health] insurance":

> If a young man wrecks his Porsche and has not had the foresight to obtain insurance, we may commiserate but society feels no obligation to repair his car. But health care is different. If a man is struck down by a heart attack in the street, Americans will care for him whether or not he has insurance. If we find that he has spent his money on other things rather than insurance, we may be angry but we will not deny him services—even if that means more prudent citizens end up paying the tab.

Stuart M. Butler, Heritage Found., The Heritage Lectures 218: Assuring Affordable Health Care for All Americans 6 (1989);[19] *see also* Gov't Br. at 37.

---

the refusal of service to a patient in a case of unmistakable medical emergency.").

[19] The Heritage Foundation has filed an amicus brief in support of the plaintiffs making clear that this excerpt does not reflect the policy of the Heritage Foundation or even the current beliefs of the speaker; both strongly dispute the efficacy and the constitutionality of the individual mandate. Brief for Heritage Found. as Amicus Curiae Supporting the Plaintiffs at 5–6. I do not doubt the sincerity of this position,

This obligation of health care providers to provide free medical care creates market imperfections that fall under a variety of labels: "an externality (a situation where one person's actions or inactions affect[ ] others), a free-rider problem (where people buy [or consume] a good and leave the costs to others), or a Samaritan's dilemma (where people choose not to be prepared for emergencies, knowing that others will care for them if needed)." Gov't Econ. Br. at 14–15. Individuals who decline to purchase health insurance are not held to the full economic consequence of that choice, as society does not refuse medical care to a patient in need, even when its cost far exceeds the individual's ability to pay. The ability of health care market participants to demand services without paying for them bolsters Congress' rational conclusion that the individual mandate—which helps to assure payment for services in advance—is peculiarly suited to addressing a unique economic problem in the health care market.[20]

---

and use this statement not to imply that the Heritage Foundation has blessed the individual mandate but rather only for the statement's own value as a persuasively articulated description of an important distinction between health insurance, health care, and other markets.

[20] Contrary to the plaintiffs' suggestion, it is not problematic that Congress' own legislation—EMTALA—may have contributed to the very market conditions that it sought to address in the Act. Significantly, EMTALA predated the individual mandate by over two decades, and was enacted for reasons wholly unrelated to the mandate. Moreover, EMTALA did not create a new federal obligation out of whole cloth and then impose it on health care providers; rather, it supplemented numerous state laws and overarching social judgments that the sick and injured should be cared for regardless of ability to pay. Nor should we be concerned that Congress might similarly enact legislation requiring companies to give away cars, food, or housing, and then accompany that legislation with a mandate prescribing the pre-purchase

Finally, the four factors described above converge to cause a fifth unique factor of the health care market: the substantial cost shifting from the uninsured to current participants in the health insurance market and to health care providers. This cost shifting does not occur in other markets, even those in which we all participate, such as transportation, food, or housing. When an individual purchases a home or a car, the purchaser pays all of the cost (whether upfront or over time through a loan or mortgage). My neighbor will not help cover my costs of purchasing a home by paying a higher price for his own house. And I will not pay more for my car, simply because my neighbor cannot afford to buy one for himself. The costs in those markets are borne by the individual purchaser alone. Again, in sharp contrast, the uninsured shift substantial costs to the insured and to health care providers, because the uninsured in the aggregate consume health care services in large numbers and yet bear only a small fraction of the costs for the services they consume. The parties agree that the uninsured fail to pay for 63% of the health care services they receive, and some 37% (amounting to $43 billion) of all health care costs incurred by the uninsured are uncompensated entirely. States Br. at 30–31; Gov't Reply Br. at 8–9, 11. Congress found that this uncompensated care increases the average insured family's annual insurance premiums by $1000. 42 U.S.C. § 18091(a)(2)(F).

---

of a mechanism for financing those items. Not only is it wholly unrealistic that Congress would require companies to give away free cars or housing (even if it could do so) simply so that it could then impose an insurance requirement on those items, but cars and houses are also products not already predominantly financed through insurance. An insurance mandate thus would not be a well-suited means to regulate payment in those markets.

This cost-shifting phenomenon simply does not occur in other industries.[21] Even under the majority's characterization of the regulated conduct as a "decision not to purchase health insurance," Maj. Op. at ___, deciding to self- insure in the health care market, unlike all other "financial decisions of Americans," *id.* at 115, is a decision to pay for your care if you can afford it *or* to shift costs onto society if you can't.

In sum, the particular problems riddling the health care industry that Congress sought to address, together with the unique factors that characterize the health care market and its peculiar interconnectedness with the health insurance market, all led Congress to enact the individual mandate as an appropriate means of ameliorating two large national problems. Although these economic factors "are not precise formulations, and in the nature of things they cannot be[,] . . . [I] think they point the way to a correct decision of this case." *Lopez*, 514 U.S. at 567; *see also id.* at 579 (Kennedy, J., concurring) ("[A]s the branch whose distinctive duty it is to declare 'what the law is,' we are often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines."

---

[21] Perhaps the closest analog to the individual mandate is a requirement that individuals buy other types of insurance. The district court rejected the government's contention that the failure to buy health insurance is a "financing decision" by reasoning that "this is essentially true of any and all forms of insurance." *Florida*, ___ F. Supp. 2d at ___, 2011 WL 285683, at *28; *see also* Maj. Op. at ___. But of the examples suggested by the district court—supplemental income, credit, mortgage guaranty, business interruption, or disability insurance—none insures against risks or costs that are inevitable, or that will otherwise be subsidized by those with insurance, unlike the relationship between health insurance and health care services.

(citation omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))). Upholding the mandate under the particular circumstances of this case would do little to pave the way for future congressional mandates that address wholly distinct problems that may arise in powerfully different contexts. While the individual mandate is indeed novel, I cannot accept the charge that it is a "bridge too far." The individual mandate, viewed in light of the larger economic regulatory scheme of the Act as a whole and the truly unique and interrelated nature of both markets, is a legitimate exercise of Congress' power under Art. I, § 8, cl. 3 of the Constitution and is not prone to the slippery slope of hypothetical horrors leading to an unlimited federal Commerce Clause power.

B.

Finally, implicit in the plaintiffs' Commerce Clause challenge, and providing the subtext to much of the majority's opinion, is the deeply rooted fear that the federal government is infringing upon the individual's right to be left alone—a fear that is intertwined with a visceral aversion to the government's making us do something we do not want to do (in this case, buy a product we do not wish to purchase). The plaintiffs say that Congress cannot compel unwilling individuals to engage in a private commercial transaction or otherwise pay a penalty. The difficulty, however, is in finding firm constitutional footing for the objection. The plaintiffs suggest that the claim derives, if anywhere, from either of two constitutional provisions: the Fifth Amendment's Due Process Clause or the Tenth Amendment. If derived from the Fifth Amendment, the objection, fairly stated, is that the mandate violates individual liberty, as protected by

the substantive component of the Due Process Clause. In the alternative, if derived from the Tenth Amendment, the objection is that the individual mandate infringes on the powers, or rights, retained by "the people."

At the trial court, the plaintiffs squarely raised a Fifth Amendment substantive due process challenge to the individual mandate, which the district court flatly rejected. *Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1161–62 (N.D. Fla. 2010). And while the plaintiffs also challenged the individual mandate on Tenth Amendment grounds, the district court addressed this challenge only implicitly in ruling that the mandate exceeded Congress' commerce power. *Florida*, 2011 WL 285683, at *33.

On appeal, the plaintiffs have expressly disclaimed any substantive due process challenge to the individual mandate, although they appear still to advance a Tenth Amendment challenge. Nevertheless, it is clear that individual liberty concerns lurk just beneath the surface, inflecting the plaintiffs' argument throughout, although largely dressed up in Commerce Clause and Necessary and Proper Clause terms. For example, the state plaintiffs go so far as to say that the individual mandate is "one of the Act's principal threats to individual liberty," States Br. at 16, and that upholding it would "sound the death knell for our constitutional structure and individual liberties," *id.* at 19. Similarly, the private plaintiffs claim that the individual mandate "exemplifies the threat to individual liberty when Congress exceeds its enumerated powers and attempts to wield a plenary police power." NFIB Br. at 7. Sounding almost entirely in economic substantive due process, the private plaintiffs

also assert that "[a]mong the most longstanding and fundamental rights of Americans is their freedom from being forced to give their property to, or contract with, other private parties." *Id.* at 47. Thus, to the extent the plaintiffs' individual liberty-based challenge to the individual mandate derives from the Fifth and Tenth Amendments, I address each constitutional source in turn.

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Although the Due Process Clause has both a procedural and a substantive component, only its substantive aspect is implicated here. "The substantive component [of the Due Process Clause] protects fundamental rights that are so implicit in the concept of ordered liberty that neither liberty nor justice would exist if they were sacrificed." *Doe v. Moore*, 410 F.3d 1337, 1342 (11th Cir. 2005) (internal quotation marks omitted). This narrow band of fundamental rights is largely protected from governmental action, regardless of the procedures employed. *Id.* at 1343. And any law, whether federal *or* state, that infringes upon these rights will undergo strict scrutiny review, which means that the law must be "narrowly tailored to serve a compelling state interest." *Id.* (quoting *Reno v. Flores*, 507 U.S. 292 (1993)). Today, substantive due process protects only a small class of fundamental rights, including "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion," *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citations omitted)—a list the Supreme Court has been "very reluctant to expand," *Moore*, 410 F.3d at 1343.

In a bygone period known as "the *Lochner* era,"[22] however, substantive due process was more broadly interpreted as also encompassing and protecting the right, liberty, or freedom of contract. *See, e.g., Adkins v. Children's Hosp. of D.C.*, 261 U.S. 525, 545 (1923); *Adair v. United States*, 208 U.S. 161, 174–175 (1908). Through this interpretation of the Due Process Clause, the Supreme Court struck down many federal and state laws that sought to regulate business and industrial conditions. *See, e.g., Adkins*, 261 U.S. 525 (striking down a federal law fixing minimum wages for women and children in the District of Columbia); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924) (striking down a Nebraska law regulating the weight of loaves of bread for sale).

However, the Supreme Court has long since abandoned the sweeping protection of economic rights through substantive due process. *See, e.g., Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("The doctrine that prevailed in *Lochner* . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded."); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."); *West Coast Hotel*

---

[22] The name refers, of course, to *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), where the Supreme Court struck down a New York law setting maximum hours for bakery employees on the ground that it violated the right of contract, as protected by the Fourteenth Amendment's Due Process Clause.

Co. v. Parrish, 300 U.S. 379, 391 (1937). Today, economic regulations are presumed constitutional, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), and are subject only to rational basis review, *Vesta Fire Ins. Corp. v. Florida*, 141 F.3d 1427, 1430 n.5 (11th Cir. 1998).

In substantive due process cases, binding precedent requires that we "carefully formulat[e]" the alleged fundamental right, *Glucksberg*, 521 U.S. at 722, which must be "defined in reference to the scope of the [statute at issue]," *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1241 (11th Cir. 2004). In light of the individual mandate's scope, the carefully formulated right would be the right of non-exempted individuals to refuse to maintain a minimum level of health insurance. And this right—whether cast as the freedom to contract, the right to remain uninsured, or, in the words of one commentator, the "right to force a society to pay for your medical care by taking a free ride on the system"[23]—cannot be characterized as a "fundamental" one receiving heightened protection under the Due Process Clause. The present state of our jurisprudence does not recognize any such right as a "fundamental" one, "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." *Williams*, 378 F.3d at 1239 (quoting *Glucksberg*, 521 U.S. at 720–21).

Since the individual liberty interest asserted by the plaintiffs is not a fundamental right, we are obliged to

---

[23] *See* Is the Obama Health Care Reform Constitutional? Fried, Tribe and Barnett Debate the Affordable Care Act, Harvard Law School (Mar. 28, 2011), http://www.law.harvard.edu/news/spotlight/constitutional-law/is-obama-health-care-reform-constitutional.html.

apply rational basis review, which only asks whether the mandate is rationally related to a legitimate government interest. *TRM, Inc. v. United States*, 52 F.3d 941, 945 (11th Cir. 1995). Under rational basis review, "legislation must be sustained if there is any conceivable basis for the legislature to believe that the means they have selected will tend to accomplish the desired end." *Id.* at 945–46 (internal quotation marks omitted); *see also Williams v. Morgan*, 478 F.3d 1316, 1320 (11th Cir. 2007) ("A statute is constitutional under rational basis scrutiny so long as 'there is *any reasonably conceivable state of facts* that could provide a rational basis for the [statute].'" (alteration in original) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993))).

Here, Congress rationally found that the individual mandate would address the powerful economic problems associated with cost shifting from the uninsured to the insured and to health care providers, and with the inability of millions of uninsured individuals to obtain health insurance. Thus, to the extent the plaintiffs' individual liberty concerns are rooted in the Fifth Amendment's Due Process Clause, they must fail.

The plaintiffs' more provocative argument is found in the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The plaintiffs do not explicitly flesh out *how* the mandate violates the Tenth Amendment. The state plaintiffs cite the Tenth Amendment generally, claiming that "[i]f this Court were to uphold [the individual mandate and the Act's Medicaid expansion], there would remain little if any power 'reserved to the States . . .

or to the people.'" States Br. at 3 (alteration in original) (quoting U.S. Const. amend. X).[24] And the private plaintiffs suggest that the portion of the amendment reserving undelegated power to the *people* provides the basis for their individual liberty claim. *See* NFIB Br. at 46 (reciting "the Tenth Amendment's admonition that the non-enumerated powers 'are reserved to the States respectively, *or to the people.*'" (quoting U.S. Const. amend. X) (emphasis in original)); *see also* Brief for Cato Institute as Amicus Curiae Supporting the Plaintiffs at 24 ("[T]he text of the Tenth Amendment protects not just state sovereignty, but also popular sovereignty.").

The Supreme Court, however, has said precious little about the tail end of the Tenth Amendment that reserves power to the people. Indeed, no case, either from the Supreme Court or from any lower federal court, has ever invoked this portion of the amendment to strike down an act of Congress. Instead, the Supreme Court's Tenth Amendment cases have grappled almost exclusively with the balance of power between the federal government and the *states*.[25]

---

[24] Indeed, when asked at oral argument if the Tenth Amendment had been abandoned on appeal, counsel for the states reiterated that "the Tenth Amendment is still very much in this case," and that "this is both an individual rights case and a Commerce Clause enumerated rights case."

[25] In *Bond v. United States*, ___ U.S. ___, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011), the Supreme Court recently held that an individual has prudential standing to "assert injury from governmental action taken in excess of the authority that federalism defines." *Id.* at 2363–64. In other words, Carol Anne Bond had standing to raise federalism-based arguments in challenging the constitutionality of the criminal statute under which she was indicted, 18 U.S.C. § 229 (which prohibits the knowing development, acquisition, possession, or use of chemical weapons). *Id.* at 2360. It remains true, however, that the Court has never

In these cases, the Supreme Court has interpreted the Tenth Amendment's reservation of power to the states to mean that the federal government may not "commandeer[ ] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York*, 505 U.S. at 176 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)); *see also Printz v. United States*, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."). The Court has thus held that federal laws compelling state governments to enact legislation providing for the disposal of radioactive waste, *New York*, 505 U.S. at 149, and compelling state agents to conduct background checks on prospective handgun purchasers, *Printz*, 521 U.S. at 902, violate the Tenth Amendment. In so holding, the Supreme Court has explained that the limits the Tenth Amendment imposes on Congress' power come not from the amendment's text, but rather from the principle of federalism, or dual sovereignty, that the Tenth Amendment embodies. *See New York*, 505 U.S. at 156–57.

But because of the utter lack of Supreme Court (or any other court) precedent, the amendment's "people" prong provides little, if any, support here. It may be that in time the law will come to breathe practical life into the Tenth Amendment's reservation of power to the people, but that day has not yet arrived.

---

used the "people" prong of the Tenth Amendment to invalidate an act of Congress.

Setting aside the lack of *any* precedent on point, a Tenth Amendment challenge to the individual mandate fails for an additional, and critical, reason: when a federal law is properly within Congress' delegated power to enact, the Tenth Amendment poses no limit on the exercise of that power. *See, e.g.*, *New York*, 505 U.S. at 156 ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States. . . ."); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1242 (11th Cir. 2004) ("Because [the Religious Land Use and Institutionalized Persons Act] is a proper exercise of Congress's power under § 5 of the Fourteenth Amendment, there is no violation of the Tenth Amendment."); *United States v. Williams*, 121 F.3d 615, 620 (11th Cir. 1997) ("[T]he [Child Support Recovery Act] is a valid exercise of Congress's power under the Commerce Clause, and Congress's 'valid exercise of authority delegated to it under the Constitution does not violate the Tenth Amendment.'" (quoting *Cheffer v. Reno*, 55 F.3d 1517, 1519 (11th Cir. 1995))); *N. Ala. Express, Inc. v. ICC*, 971 F.2d 661, 666 (11th Cir. 1992) ("Because the Tenth Amendment reserves only those powers not already delegated to the federal government, the Tenth Amendment has been violated only if [the federal law at issue] goes beyond the limits of Congress' power under the Commerce Clause."). Since the individual mandate falls within Congress' commerce power, its enactment is a proper exercise of a power "delegated to the United States by the Constitution." U.S. Const. amend. X. The Tenth Amendment, therefore, has no independent role to play. In short, the plaintiffs' individual liberty claims find little support in the Constitution—whether pegged

to the Fifth Amendment's Due Process Clause or to the Tenth Amendment's reservation of power to the people.

At bottom, Congress rationally concluded that the uninsured's consumption of health care services, in the aggregate, shifts enormous costs onto others and thus substantially affects interstate commerce. The individual mandate directly and unambiguously addresses this cost-shifting problem by regulating the timing and means of payment for the consumption of these services. Congress also fairly determined that the mandate is an essential part of the Act's comprehensive regulation of the health insurance market. I would, therefore, uphold the mandate as constitutional, and I respectfully dissent on this critical point.

APPENDIX A: OVERALL STRUCTURE OF ACT'S NINE TITLES

The Act's nine Titles are:

I. Quality, Affordable Health Care for All Americans

II. Role of Public Programs

III. Improving the Quality and Efficiency of Health Care

IV. Prevention of Chronic Disease and Improving Public Health

V. Health Care Workforce

VI. Transparency and Program Integrity

VII. Improving Access to Innovative Medical Therapies

VIII. Community Living Assistance Services and Supports

IX. Revenue Provisions[1]

We outline here the structure and many of the key provisions in these nine Titles.

Title I reforms the business and underwriting practices of insurance companies and overhauls their health insurance products. Title I requires that private insurers change their practices and products and offer new and better health insurance policies for consumers. Title I's hefty insurance reforms include: (1) elimination of preexisting conditions exclusions for children immediately, Act §§ 1201, 1255 (as re-numbered by §§ 10103(f)), 10103(e));[2] (2) elimination of preexisting conditions for adults in 2014, §§ 1201, 1255 (as re-numbered by § 10103(f)); (3) elimination of annual and lifetime limits on benefits, §§ 1001, 10101(a); (4) required coverage for preventive services, § 1001; (5) immediate extension of dependent coverage up to age 26, § 1001; (6) imposition of a cap on insurers' administrative costs in relation to their claims-payments (the medical loss ratio), §§ 1001, 10101(f); (7) prohibition on excessive waiting periods to obtain coverage, §§ 1251, 10103(b); (8) guaranteed issue of coverage and guaranteed renewability in 2014, §§ 1201, 1255 (as re-numbered by § 10103(f)(1)); (9) prohibition on rescission except on limited grounds,

---

[1] There is also a tenth Title dedicated to amendments to these nine Titles. Although the amendments are actually located in Title X, we list the substance of the amendments under the Title being amended.

[2] In this Appendix, we provide citations to the sections of the Act. Our opinion's in-depth discussion of the contents of specific provisions, however, cites to the sections of the U.S.Code where each provision is now, or will be, codified.

§ 1001; (10) prohibition of coverage denial based on health status, medical condition, claims experience, genetic information, or other health-related factors, § 1201; (11) "community-rated" premiums, § 1201; (12) prohibition of discrimination based on salary, §§ 1001, 10101(d); (13) development and utilization of uniform explanation of coverage documents and standardized definitions, § 1001; (14) coverage appeals process, §§ 1001, 10101(g); and (15) insurance offerings for persons who retire before age 65, § 1102.

In addition to requiring insurers to offer new, improved health insurance products, Title I creates new state-run marketplaces for consumers to buy those new products, accompanied by federal tax credits and subsidies. Title I establishes state-administered Health Benefit Exchanges where both individuals and small groups can, and are encouraged to, purchase health insurance plans through non-profits and private insurers. §§ 1301–1421, 10104-10105. The Exchanges allow individuals, families, and small businesses to pool resources together and obtain premium prices competitive with those of large employer group plans. § 1311. The Exchange provisions include: (1) state flexibility to establish basic health programs for low-income individuals not eligible for Medicaid, § 1331; (2) transitional reinsurance program for sellers of insurance in the individual and small group markets in each state, § 1341; (3) establishment of a temporary risk corridor program for plans in individual and small group markets, § 1342; (4) refundable premium-assistance tax credit and reduced cost-sharing for individuals enrolled in qualified health plans, §§ 1401–02; (5) tax credits for small businesses' employee health insurance expenses, § 1421; and (6) streamlining of enrollment procedures through the

Exchanges, Medicaid, CHIP, and health subsidy programs, § 1413.

Title I next addresses employers. Title I imposes penalties on certain employers if they do not offer any, or an adequate, health insurance plan to their employees. § 1513. Title I contains provisions regarding "automatic enrollment" for employees of large corporations, reporting requirements, informing employees of coverage options, and offering of Exchange-participating health plans through "cafeteria" plans. §§ 1511–1515. Miscellaneous Title I provisions include transparency in government, equity for certain eligible survivors, health information technology enrollment standards and protocols, and prohibition against discrimination on refusal to furnish services or goods used to facilitate assisted suicide. §§ 1552, 1553, 1556, 1561.

Title I contains the individual mandate, which requires individual taxpayers either to purchase health insurance or pay a monetary penalty with their federal tax return. § 1501. Title I includes three exemptions from the mandate and five exceptions to the penalty, which together exclude many uninsured persons from the individual mandate. § 1501.

Title II shifts the Act's focus to publicly-funded programs such as Medicaid, CHIP, and initiatives under the Indian Health Care Improvement Act. As to Medicaid, Title II's provisions: (1) expand Medicaid eligibility to 133% of the federal poverty level, § 2001; (2) provide Medicaid coverage for former foster children, § 2004; (3) rescind the Medicaid Improvement Fund, § 2007; (4) permit hospitals to make presumptive eligibility determinations for all Medicaid-eligible populations, § 2202; (5) extend Medicaid coverage to freestanding

birth center services and concurrent care to children, §§ 2301–02; (6) require premium assistance to Medicaid recipients for employer-sponsored coverage, § 2003; (7) provide a state eligibility option for Medicaid family planning services, § 2303; (8) create a Community First Choice Option for Medicaid, § 2401; (9) remove barriers to providing home- and community-based services through Medicaid, § 2402; (10) reauthorize Medicaid programs aimed at moving beneficiaries out of institutions and into their own homes or other community settings, § 2403; and (11) protect Medicaid recipients of home- and community-based services against spousal impoverishment, § 2404.

As to CHIP, Title II provides enhanced federal support and funding. § 2101. The Act: (1) reauthorizes CHIP through September 2015, § 10203; and (2) from October 2015 through September 2019, increases state matching rates for CHIP by 23 percentage points, up to a 100% cap, § 2101. Title II requires states to maintain CHIP eligibility through September 2019. § 2101.

Title II also amends and extends the Indian Health Care Improvement Act ("IHCIA"). § 10221. The Act's IHCIA amendments, *inter alia:* (1) make the IHCIA's provisions permanent; (2) expand programs to address diseases, such as diabetes, that are prevalent among the Indian population; (3) provide funding and technical assistance for tribal epidemiology centers; (4) establish behavioral health initiatives, especially as to Indian youth suicide prevention; and (5) authorize long-term care and home- and community-based care for the Indian health system. § 10221; *see* S. 1790, 111th Cong. (2009).

Title II's provisions also create, or expand, other new publicly-funded programs that: (1) establish a pregnancy assistance fund for pregnant and parenting teens and women, § 10212; (2) fund expansion of State Aging and Disability Resource Centers, § 2405; (3) fund maternal, infant, and early childhood home visiting programs in order to reduce infant and maternal mortality, § 2951; (4) provide for support, education, and research for postpartum depression, § 2952; (5) support personal responsibility education, § 2953; (6) restore funding for abstinence education, § 2954; and (7) require inclusion of information about the importance of foster-care children designating a health care power of attorney for them as part of their transition planning for aging out of either foster care or other programs, § 2955.

Title III primarily addresses Medicare. Title III establishes new Medicare programs, including: (1) a value-based purchasing program for hospitals that links Medicare payments to quality performance on common, high-cost conditions, § 3001; (2) a Center for Medicare & Medicaid Innovation to research and develop innovative payment and delivery arrangements, § 3021; (3) an Independent Payment Advisory Board to present to Congress proposals to reduce Medicare costs and improve quality, §§ 3403, 10320(b); and (4) a new program to develop community health teams supporting medical homes to increase access to community-based, coordinated care, §§ 3502, 10321. Title III revises the Medicare Part D prescription drug program and reduces the so-called "donut hole" coverage gap in that program.[3]

---

[3] The Medicare Part D "donut hole" is the gap in prescription drug coverage, where beneficiaries' prescription drug expenses exceed the initial coverage limit but do not yet reach the catastrophic coverage

§ 3301. Title III extends a floor on geographic adjustments to the Medicare fee schedule to increase provider fees in rural areas. § 3102.

Other sundry Medicare provisions in Title III include: (1) quality reporting for long-term care hospitals, inpatient rehabilitation hospitals, and hospice programs, § 3004; (2) permitting physician assistants to order post-hospital extended care services, § 3108; (3) exemption of certain pharmacies from accreditation requirements, § 3109; (4) payment for bone density tests, § 3111; (5) extensions of outpatient hold-harmless provisions, the Rural Community Hospital demonstration project, and the Medicare-dependent hospital program, §§ 3121, 3123–24; (6) payment adjustments for home health care, § 3131; (7) hospice reform, § 3132; (8) revision of payment for power-driven wheelchairs, § 3136; (9) payment for biosimilar biological products, § 3139; (10) an HHS study on urban Medicare-dependent hospitals, § 3142; (11) Medicare Part C benefit protection and simplification amendments, § 3202; and (12) an increase in premium amount for high-income Medicare Part D beneficiaries, § 3308. Title III also includes new federal grants for (1) improving women's health, § 3509; (2) health care delivery system research, § 3501; and (3) medication management services in treatment of chronic diseases, § 3503.

---

threshold, meaning beneficiaries must pay 100% of those prescription drug costs. *See* 42 U.S.C. § 1395w-102(b)(3)(A), (b)(4) (2009). In 2006, the donut hole extended to yearly prescription drug expenses between $2,250 and $3,600, with values for later years adjusted by an annual percentage increase. *See id.*

Title IV concentrates on prevention. Title IV creates the National Prevention, Health Promotion, and Public Health Council, and authorizes $15 billion for a new Prevention and Public Health Fund to support initiatives from smoking cessation to fighting obesity. §§ 4001, 4002. Title IV authorizes new publicly-funded programs for (1) an oral healthcare prevention education campaign, § 4102; (2) Medicare coverage for annual wellness visits, § 4103; and (3) the operation and development of school-based health clinics, § 4101. Title IV also: (1) waives Medicare coinsurance requirements and deductibles for most preventive services, § 4104; and (2) provides states with an enhanced funds-match if the state Medicaid program covers certain clinical preventive services and adult immunizations, § 4106. Title IV further provides for: (1) Medicaid coverage of comprehensive tobacco cessation services for pregnant women, § 4107; (2) community transformation grants, § 4201; (3) nutrition labeling of standard menu items at chain restaurants, § 4205; (4) reasonable break time for nursing mothers and a place, other than a bathroom, which may be used, § 4207; (5) research on optimization of public health services delivery, § 4301; (6) CDC and employer-based wellness programs, § 4303; (7) advancing research and treatment for pain care management, § 4305; (8) epidemiology-laboratory capacity grants, § 4304; and (9) funding for childhood obesity demonstration projects, § 4306.

Title V seeks to increase the supply of health care workers through education loans, training grants, and other spending. Title V: (1) modifies the federal student loan program, § 5201; (2) increases the nursing student loan program, § 5202; and (3) establishes a loan repayment program for pediatric subspecialists, juvenile

mental health providers, and public health workers who practice in underserved areas, § 5203. Title V also provides for: (1) state health care workforce development grants, § 5102; (2) a national health care workforce commission, § 5101; (3) nurse-managed health clinics, § 5208; (4) workforce diversity grants, § 5404; (5) training in general, pediatric, and public health dentistry, § 5303; (6) mental and behavioral health education and training grants, § 5306; (7) advanced nursing education grants, § 5309; (8) grants to promote the community health workforce, § 5313; (9) spending for Federally Qualified Health Centers, § 5601; and (10) reauthorization of the Wakefield Emergency Medical Services for Children program, § 5603. Title V addresses: (1) the distribution of additional residency positions, § 5503; and (2) rules for counting resident time for didactic and scholarly activities and in non-provider settings, §§ 5504–05.

Title VI creates new transparency and anti-fraud requirements for physician-owned hospitals participating in Medicare and for nursing facilities under Medicare or Medicaid. Title VI authorizes the HHS Secretary to (1) reduce civil monetary penalties for facilities that self-report and correct deficiencies, § 6111; and (2) establish a nationwide background-check program for employees of certain long-term support and service facilities, § 6201. Title VI also provides: (1) screening of providers and suppliers participating in Medicare, Medicaid, and CHIP, § 6401; and (2) new penalties for false statements on applications or contracts to participate in a federal health care program, § 6408.

Title VI also includes the Elder Justice Act, designed to prevent and eliminate elder abuse, neglect, and ex-

ploitation. § 6703. Other Title VI provisions include: (1) dementia and abuse prevention training, § 6121; (2) patient-centered outcomes research funded by a $2 fee on accident or health insurance policies, § 6301; (3) federal coordinating counsel for comparative effectiveness research, § 6302; (4) enhanced Medicare and Medicaid program integrity provisions, § 6402; (5) elimination of duplication between the Healthcare Integrity and Protection Data Bank and the National Practitioner Data Bank, § 6403; (6) reduction of maximum period for submission of Medicare claims to not more than 12 months, § 6404; (7) requirement for physicians to provide documentation on referrals to programs at high risk of waste and abuse, § 6406; (8) requirement of face-to-face encounter before physicians may certify eligibility for home health services or durable medical equipment under Medicare, § 6407; (9) prohibition on Medicaid payments to institutions or entities outside the United States, § 6505; (10) enablement of the Department of Labor to issue administrative summary cease-and-desist orders and summary seizure orders against plans in financially hazardous condition, § 6605; and (11) mandatory state use of the national correct coding initiative, § 6507.

Title VII extends and expands the drug discounts through the 340B program.[4] § 7101. Title VII establishes a process for FDA licensing of biological products

---

[4] Section 340B of the Public Health Service Act, 42 U.S.C. § 256b, establishes a program whereby HHS enters into contracts with manufacturers of certain outpatient drugs under which the manufacturers provide those drugs at discounted prices to "covered entities"—generally, certain enumerated types of federally funded health care facilities serving low-income patients. *Id.; see generally Univ. Med. Ctr. of S. Nev. v. Shalala*, 173 F.3d 438, 439 (D.C. Cir. 1999).

shown to be biosimilar or interchangeable with a licensed biological product. § 7002.

Title VIII establishes a national voluntary long-term care insurance program for purchasing community living assistance services and support by persons with functional limitations. § 8002.

Title IX includes: (1) an excise tax on high-premium employer-sponsored health plans, § 9001; (2) an increase in taxes on distributions from individuals' health savings accounts, § 9004; (3) increases in the employee portion of the FICA hospital insurance tax for employees with wages over certain threshold amounts, § 9015; (4) an additional tax of 3.8% on investment income above certain thresholds to fund Medicare, §§ 9001, 10901; HCERA § 1402; (5) a $2,500 limitation on individuals' health flexible spending accounts under cafeteria plans, § 9005; (6) imposition of an annual fee on manufacturers and importers of branded prescription drugs, § 9008; (7) elimination of the tax deduction for expenses allocable to the Medicare Part D subsidy, § 9012; (8) a decrease in the itemized tax deduction for medical expenses, § 9013; and (9) an excise tax on indoor tanning services, § 10907. Title IX also provides for: (1) inclusion of the cost of employer-sponsored health coverage on W-2 forms, § 9002; (2) expansion of information-reporting requirements, § 9006; (3) additional requirements for hospitals to receive "charitable" designation and tax status, § 9007; (4) a study and report on the effect of the Act's new fees on drug manufacturers and insurers on veterans' health care, § 9011; (5) prohibition on health insurers' deducting employee compensation over $500,000, § 9014; (6) tax credit for companies with fewer than 250 employees that are engaged in research

on qualifying therapeutic discoveries, § 9023; and (7) establishment of simple cafeteria plans for small businesses, § 9022. Title IX assesses an annual fee on health insurance companies, which is apportioned among insurers based on a ratio designed to reflect each insurer's share of the net premiums written in the United States health care market. §§ 9010, 10905; HCERA § 1406.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No. 3:10–cv–91–RV/EMT

STATE OF FLORIDA, BY AND THROUGH ATTORNEY GENERAL PAM BONDI, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

Filed: Jan. 3, 2011

ORDER GRANTING SUMMARY JUDGMENT

ROGER VINSON, Senior District Judge.

On March 23, 2010, President Obama signed health care reform legislation: "The Patient Protection and Affordable Care Act." Pub. L. No. 111–148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111–152, 124 Stat. 1029 (2010) (the "Act").

This case, challenging the Constitutionality of the Act, was filed minutes after the President signed. It has been brought by the Attorneys General and/or Gover-

nors of twenty-six states (the "state plaintiffs")[1]; two private citizens (the "individual plaintiffs"); and the National Federation of Independent Business ("NFIB") (collectively, the "plaintiffs"). The defendants are the United States Department of Health and Human Services, the Department of Treasury, the Department of Labor, and their secretaries (collectively, the "defendants"). I emphasized once before, but it bears repeating again: this case is not about whether the Act is wise or unwise legislation, or whether it will solve or exacerbate the myriad problems in our health care system. In fact, it is not really about our health care system at all. It is principally about our federalist system, and it raises very important issues regarding the Constitutional role of the federal government.

James Madison, the chief architect of our federalist system, once famously observed:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

---

[1] The states are Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Mississippi, Nebraska, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming.

The Federalist No. 51, at 348 (N.Y. Heritage Press ed., 1945) ("*The Federalist*").[2] In establishing our government, the Founders endeavored to resolve Madison's identified "great difficulty" by creating a system of dual sovereignty under which "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *The Federalist* No. 45, at 311 (Madison); *see also* U.S. Const. art. I, § 1 (setting forth the specific legislative powers "herein granted" to Congress). When the Bill of Rights was later added to the Constitution in 1791, the Tenth Amendment reaffirmed that relationship: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Framers believed that limiting federal power, and allowing the "residual" power to remain in the hands of the states (and of the people), would help "ensure protection of our fundamental liberties" and "reduce the risk of tyranny and abuse." *See Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) (citation omitted). Very early, the great Chief Justice John Marshall noted "that those limits may not be mistaken, or forgotten, the constitution is

---

[2] *The Federalist* consists of 85 articles or essays written by James Madison, Alexander Hamilton, and John Jay, advocating for ratification of the Constitution. "The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418, 5 L. Ed. 257 (1821) (Marshall, C.J.). It will be cited to, and relied on, several times throughout the course of this opinion.

written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L. Ed. 60 (1803). Over two centuries later, this delicate balancing act continues. Rather than being the mere historic relic of a bygone era, the principle behind a central government with limited power has "never been more relevant than in this day, when accretion, if not actual accession, of power to the federal government seems not only unavoidable, but even expedient." *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820, 826 (4th Cir. 1999) (*en banc*), *aff'd sub nom.*, *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000).[3]

To say that the federal government has limited and enumerated power does not get one far, however, for that statement is a long-recognized and well-settled truism. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 405, 4 L. Ed. 579 (1819) ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, . . . is now universally admitted.") (Marshall, C.J.). The ongoing challenge is deciding whether a particular

---

[3] In *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), a watershed decision that will be discussed *infra*, the Supreme Court began its analysis by referring to these limits on federal power as "first principles." In a manner of speaking, they may be said to be "last principles" as well, for the *Lopez* Court deemed them to be so important that it also ended its opinion with a full discussion of them. *See id.* at 567–68. Shortly thereafter, in *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000), which will also be discussed *infra*, the Supreme Court referred to the division of authority and limits on federal power as the "central principle of our constitutional system." *See id.* at 616 n.7. Clearly, if the modern Supreme Court regards the limits of federal power as first, central, and last principles, those principles are profoundly important—even in this day and age—and they must be treated accordingly in deciding this case.

federal law falls within or outside those powers. It is frequently a difficult task and the subject of heated debate and strong disagreement. As Chief Justice Marshall aptly predicted nearly 200 years ago, while everyone may agree that the federal government is one of enumerated powers, "the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist." *Id.* This case presents such a question.

BACKGROUND

The background of this case—including a discussion of the original claims, the defenses, and an overview of the relevant law—is set out in my order dated October 14, 2010, which addressed the defendants' motion to dismiss, and it is incorporated herein. I will only discuss the background necessary to resolving the case as it has been winnowed down to the two causes of action that remain.

In Count I, all of the plaintiffs challenge the "individual mandate" set forth in Section 1501 of the Act, which, beginning in 2014 will require that everyone (with certain limited exceptions) purchase federally-approved health insurance, or pay a monetary penalty.[4]

---

[4] I previously rejected the defendants' argument that this penalty was really a tax, and that any challenge thereto was barred by the Anti-Injunction Act. My earlier ruling on the defendants' tax argument is incorporated into this order and, significantly, has the effect of focusing the issue of the individual mandate on whether it is authorized by the Commerce Clause. To date, every court to consider this issue (even those that have ruled in favor of the federal government) have also rejected the tax and/or Anti–Injunction arguments. *See Goudy–Bachman v. U.S. Dep't of Health & Human Servs.*, 2011 WL 223010, at *9–*12 (M.D. Pa. Jan. 24, 2011); *Virginia v. Sebelius*, 728 F. Supp. 2d

The individual mandate allegedly violates the Commerce Clause, which is the provision of the Constitution Congress relied on in passing it. In Count IV, the state plaintiffs challenge the Act to the extent that it alters and amends the Medicaid program by expanding that program, *inter alia*, to: (i) include individuals under the age of 65 with incomes up to 133% of the federal poverty level, and (ii) render the states responsible for the actual provision of health services thereunder. This expansion of Medicaid allegedly violates the Spending Clause and principles of federalism protected under the Ninth and Tenth Amendments. The plaintiffs seek a declaratory judgment that the Act is unconstitutional and an injunction against its enforcement.

These two claims are now pending on cross motions for summary judgment (docs. 80, 82), which is a pre-trial vehicle through which a party shall prevail if the evidence in the record "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. While the parties dispute numerous facts (primarily in the context of the Medicaid count, noted *infra*), they appear to agree that disposition of this case by summary judgment is appropriate—as the dispute ultimately comes down to, and involves, pure issues of law. Both sides have filed strong and well researched memoranda in support of their motions for summary judgment ("Mem."), responses in opposition ("Opp."), and replies ("Reply") in fur-

---

768, 786–88 (E.D. Va. 2010); *Liberty Univ., Inc. v. Geithner*, __ F. Supp. 2d __, __ – __, 2010 WL 4860299, at *9–*11 (W.D. Va. Nov. 30, 2010); *U.S. Citizens Assoc. v. Sebelius*, __ F. Supp. 2d __, __, 2010 WL 4947043, at *5 (N.D. Ohio Nov. 22, 2010); *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882, 890–91 (E.D. Mich. 2010).

ther support. I held a lengthy hearing and oral argument on the motions December 16, 2010 ("Tr."). In addition to this extensive briefing by the parties, numerous organizations and individuals were granted leave to, and did, file *amicus curiae* briefs (sixteen total) in support of the arguments and claims at issue.

I have carefully reviewed and considered all the foregoing materials, and now set forth my rulings on the motions and cross-motions for summary judgment. I will take up the plaintiffs' two claims in reverse order.

DISCUSSION

I. Medicaid Expansion (Count Four)

For this claim, the state plaintiffs object to the fundamental and "massive" changes in the nature and scope of the Medicaid program that the Act will bring about. They contend that the Act violates the Spending Clause [U.S. Const. art. I, § 8, cl. 1] as it significantly expands and alters the Medicaid program to such an extent they cannot afford the newly-imposed costs and burdens. They insist that they have no choice but to remain in Medicaid as amended by the Act, which will eventually require them to "run their budgets off a cliff." This is alleged to violate the Constitutional spending principles set forth in *South Dakota v. Dole*, 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987), and in other cases.[5]

Under *Dole*, there are four restrictions on Congress' Constitutional spending power: (1) the spending must

---

[5] The state plaintiffs alleged in their complaint that the Medicaid provisions also violated the Ninth and Tenth Amendments, but those claims have not been advanced or briefed in their summary judgment motion (except in a single passing sentence, *see* Pl. Mem. at 25).

be for the general welfare; (2) the conditions must be stated clearly and unambiguously; (3) the conditions must bear a relationship to the purpose of the program; and 4) the conditions imposed may not require states "to engage in activities that would themselves be unconstitutional." *Supra*, 483 U.S. at 207–10. In addition, a spending condition cannot be "coercive." This conceptional requirement is also from *Dole*, where the Supreme Court speculated (in dicta at the end of that opinion) that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *See id.* at 211 (citation omitted). If that line is crossed, the Spending Clause is violated.

Preliminarily, I note that in their complaint the state plaintiffs appear to have relied solely on a "coercion and commandeering" theory. Nowhere in that pleading do they allege or intimate that the Act also violates the four "general restrictions" in *Dole*, nor did they make the argument in opposition to the defendants' previous motion to dismiss. Thus, as I stated in my earlier order after describing *Dole's* four general restrictions: "The plaintiffs do not appear to dispute that the Act meets these restrictions. Rather, their claim is based principally on [the coercion theory]." Apparently expanding that argument, the state plaintiffs now argue (very briefly, in less than one full page) that the Act's Medicaid provisions violate the four general restrictions. *See* Pl. Mem. at 44–45. This belated argument is unpersuasive. The Act plainly meets the first three of *Dole's* spending restrictions, and it meets the fourth as long as there is no other required activity that would be independently unconstitutional. Thus, the only real issue with respect to Count

IV, as framed in the pleadings, is whether the Medicaid provisions are impermissibly coercive and effectively commandeer the states.

The gist of this claim is that because Medicaid is the single largest federal grant-in-aid program to the states, and because the states and the needy persons receiving that aid have come to depend upon it, the state plaintiffs are faced with an untenable Hobson's Choice. They must either (1) accept the Act's transformed Medicaid program with its new costs and obligations, which they cannot afford, or (2) exit the program altogether and lose the federal matching funds that are necessary and essential to provide health care coverage to their neediest citizens (along with other Medicaid-linked federal funds). Either way, they contend that their state Medicaid systems will eventually collapse, leaving millions of their neediest residents without health care. The state plaintiffs assert that they effectively have no choice other than to participate in the program.

In their voluminous materials filed in support of their motion for summary judgment, the state plaintiffs have identified some serious financial and practical problems that they are facing under the Act, especially its costs. They present a bleak fiscal picture. At the same time, much of those facts have been disputed by the defendants in their equally voluminous filings; and also by some of the states appearing in the case as *amici curiae*, who have asserted that the Act will in the long run save money for the states. It is simply impossible to resolve this factual dispute now as both sides' financial data are based on economic assumptions, estimates, and projections many years out. In short, there are numerous genuine disputed issues of material fact with respect to

this claim that cannot be resolved on summary judgment.[6] However, even looking beyond these presently impossible-to-resolve disputed issues of fact, there is simply no support for the state plaintiffs' coercion argument in existing case law.

In considering this issue at the motion to dismiss stage, I noted that state participation in the Medicaid program under the Act is—as it always has been—voluntary. This is a fundamental binary element: it either is voluntary, or it is not. While the state plaintiffs insist that their participation is involuntary, and that they cannot exit the program, the claim is contrary to the judicial findings in numerous other Medicaid cases [*see, e.g., Wilder v. Virginia Hosp. Assoc.*, 496 U.S. 498, 502, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990) (observing that "Medicaid is a cooperative federal-state program [and]

---

[6] Perhaps anticipating this, the state plaintiffs maintained in response to the defendants' filings that "the entire question of whether the States' costs might to some extent be offset by collateral savings is legally irrelevant." *See* Pl. Opp. at 29. Thus, "even if the States were projected to achieve collateral savings, those savings would in no way lessen the coercion and commandeering of which Plaintiff States complain, because they would still be required to do Congress's bidding." *Id.* at 41–42. However, it would appear from the operative complaint that the coercion claim has always been rooted in the underlying contention that the Act forces the states to expend resources that they cannot afford: "Plaintiff States cannot afford the unfunded costs of participating under the Act, but effectively have no choice other than to participate." Second Amended Complaint at ¶ 84; *see also id.* at ¶ 86 (referring to the "fiscal impact" of the Medicaid expansion and explaining that it will compel states "to assume costs they cannot afford"); *id.* at ¶ 41 (Act will "expand eligibility for enrollment beyond the State's ability to fund its participation"); *id.* at ¶ 56 (referring to the projected billions of dollars in additional costs "stemming from the Medicaid-related portions of the Act" which will "grow in succeeding years"); *id.* at ¶ 66 (referencing the "harmful effects of the Act on [the state] fiscs").

participation in the program is voluntary"); *Florida Assoc. of Rehab. Facilities v. Florida Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1211 (11th Cir. 2000) ("No state is obligated to participate in the Medicaid program."); *Doe v. Chiles*, 136 F.3d 709, 722 (11th Cir. 1998) (Medicaid is a program from which the state "always retains [the] option" to withdraw)], and belied by numerous published news reports that several states (including certain of the plaintiffs in this case) are presently considering doing exactly that. Furthermore, two plaintiff states have acknowledged in declarations filed in support of summary judgment that they can withdraw from the program. *See* Declaration of Michael J. Willden (Director of Department of Health and Human Services, Nevada) ("Nevada can still consider opting out of Medicaid a viable option."); Declaration of Deborah K. Bowman (Secretary of Department of Social Services, South Dakota) (conceding that although it would be detrimental to its Medicaid recipients, South Dakota could "cease participation in the Medicaid Program"). When the freedom to "opt out" of the program is viewed in light of the fact that Congress has expressly reserved the right to alter or amend the Medicaid program [see 42 U.S.C. § 1304 ("The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Congress.")], and has done so many times over the years, I observed in my earlier order that the plaintiffs' argument was not strong. *See Harris v. McRae*, 448 U.S. 297, 301, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980) (stating that "participation in the Medicaid program is entirely optional, [but] once a State elects to participate, it must comply with the requirements").

Indeed, a survey of the legal landscape revealed that there was "very little support for the plaintiffs' coercion theory argument" as every single federal Court of Appeals called upon to consider the issue has rejected the coercion theory as a viable claim. *See, e.g., Doe v. Nebraska*, 345 F.3d 593, 599–600 (8th Cir. 2003); *Kansas v. United States*, 214 F.3d 1196, 1201–02 (10th Cir. 2000); *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997); *Oklahoma v. Schweiker*, 655 F.2d 401, 413–14 (D.C. Cir. 1981); *State of New Hampshire Dep't of Employment Sec. v. Marshall*, 616 F.2d 240, 246 (1st Cir. 1980); *but see West Virginia v. U.S. Dep't of Health & Human Servs.*, 289 F.3d 281, 288–90 (4th Cir. 2002) (referring to a prior decision of that court, *Commonwealth of Virginia Dep't of Education v. Riley*, 106 F.3d 559 (4th Cir. 1997), where six of the thirteen judges on an *en banc* panel stated in dicta that a coercion claim may be viable in that court, but going on to note that due to "strong doubts" about the viability of the coercion theory "most courts faced with the question have effectively abandoned any real effort to apply the coercion theory" after finding, in essence, that it "raises political questions that cannot be resolved by the courts").

In the absence of an Eleventh Circuit case on point, the state plaintiffs' claim was "plausible" at the motion to dismiss stage. Thus, the plaintiffs were allowed to proceed and provide evidentiary support and further legal support for a judicially manageable standard or coherent theory for determining when, in the words of the Supreme Court, a federal spending condition "pass[es] the point at which 'pressure turns into compulsion.'" *See Dole, supra*, 483 U.S. at 211. The evidentiary support is substantially in dispute, as already noted, and

further legal support has not been forthcoming. It is now apparent that existing case law is inadequate to support the state plaintiffs' coercion claim. As the Ninth Circuit has explained in its analysis of an earlier coercion claim made by the State of Nevada:

> We can hardly fault appellant [for not providing the court with any principled definition of the word "coercion"] because our own inquiry has left us with only a series of unanswered questions. Does the relevant inquiry turn on how high a percentage of the total programmatic funds is lost when federal aid is cut-off? Or does it turn, as Nevada claims in this case, on what percentage of the federal share is withheld? Or on what percentage of the state's total income would be required to replace those funds? Or on the extent to which alternative private, state, or federal sources of . . . funding are available? There are other interesting and more fundamental questions. For example, should the fact that Nevada, unlike most states, fails to impose a state income tax on its residents play a part in our analysis? Or, to put the question more basically, can a sovereign state which is always free to increase its tax revenues ever be coerced by the withholding of federal funds—or is the state merely presented with hard political choices?

Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989). It is not simply a matter of these being generally difficult or complex questions for courts to resolve because, as I have said, "courts deal every day with the difficult complexities of applying Constitutional principles set forth and defined by the Supreme Court." Rather, as Justice Cardozo cautioned in what appears to have been the

first case to hint at the possibility of a coercion theory claim, "to hold that motive or temptation is equivalent to coercion is to plunge the law in *endless* difficulties." *See Steward Machine Co. v. Davis*, 301 U.S. 548, 589–90, 57 S. Ct. 883, 81 L. Ed. 1279 (1937) (emphasis added); *see also, e.g., Skinner, supra*, 884 F.2d at 448 ("The difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments.").

In short, while the plaintiffs' coercion theory claim was plausible enough to survive dismissal, upon full consideration of the relevant law and the Constitutional principles involved, and in light of the numerous disputed facts alluded to above, I must conclude that this claim cannot succeed and that the defendants are entitled to judgment as a matter of law. In so ruling, I join all courts to have considered this issue and reached the same result, even in factual situations that involved (as here) the potential withdrawal of a state's entire Medicaid grant. *See, e.g., Schweiker, supra*, 655 F.2d at 414 ("The courts are not suited to evaluating whether the states are faced here with an offer they cannot refuse or merely a hard choice."); *California, supra*, 104 F.3d at 1086 (rejecting coercion theory argument based on the claim that while the state joined Medicaid voluntarily, it had grown to depend on federal funds and "now has no choice but to remain in the program in order to prevent a collapse of its medical system").

I appreciate the difficult situation in which the states find themselves. It is a matter of historical fact that at the time the Constitution was drafted and ratified, the

Founders did not expect that the federal government would be able to provide sizeable funding to the states and, consequently, be able to exert power over the states to the extent that it currently does. To the contrary, it was expected that the federal government would have limited sources of tax and tariff revenue, and might have to be supported by the states. This reversal of roles makes any state-federal partnership somewhat precarious given the federal government's enormous economic advantage. Some have suggested that, in the interest of federalism, the Supreme Court should revisit and reconsider its Spending Clause cases. *See* Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 Chap. L. Rev. 195–96 (2001) (maintaining the "greatest threat to state autonomy is, and has long been, Congress's spending power" and "the states will be at the mercy of Congress so long as there are no meaningful limits on its spending power"). However, unless and until that happens, the states have little recourse to remaining the very junior partner in this partnership.

Accordingly, summary judgment must be granted in favor of the defendants on Count IV.

II. <u>Individual Mandate (Count One)</u>

For this claim, the plaintiffs contend that the individual mandate exceeds Congress' power under the Commerce Clause. To date, three district courts have ruled on this issue on the merits. Two have held that the individual mandate is a proper exercise of the commerce power [*Liberty Univ., Inc. v. Geithner*, __ F. Supp. 2d __, 2010 WL 4860299 (W.D. Va. Nov. 30, 2010); *Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010)], while the other court held that it vio-

lates the Commerce Clause. *Virginia v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010).

At issue here, as in the other cases decided so far, is the assertion that the Commerce Clause can only reach individuals and entities engaged in an "activity"; and because the plaintiffs maintain that an individual's failure to purchase health insurance is, almost by definition, "inactivity," the individual mandate goes beyond the Commerce Clause and is unconstitutional. The defendants contend that activity is not required before Congress can exercise its Commerce Clause power, but that, even if it is required, not having insurance constitutes activity. The defendants also claim that the individual mandate is sustainable for the "second reason" that it falls within the Necessary and Proper Clause.[7]

---

[7] The Necessary and Proper Clause is not really a separate inquiry, but rather is part and parcel of the Commerce Clause analysis as it augments that enumerated power by authorizing Congress "To make all Laws which shall be necessary and proper" to regulate interstate commerce. *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 22, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005); *see also id.* at 34–35, 39 (Scalia, J., concurring in judgment); *accord Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1249 (11th Cir. 2008) (the Commerce Clause power is "the combination of the Commerce Clause per se and the Necessary and Proper Clause"). Nevertheless, I will consider the two arguments separately for ease of analysis, and because that is how the defendants have framed and presented their arguments. *See* Def. Mem. at 23 (contending that the individual mandate is an essential part of the regulatory health care reform effort, and is thus "also a valid exercise of Congress's authority if the provision is analyzed under the Necessary and Proper Clause").

A. Standing to Challenge the Individual Mandate

Before addressing the individual mandate, I must first take up the issue of the plaintiffs' standing to pursue this claim. I previously held on the motion to dismiss that the individual plaintiffs and NFIB had standing, but the defendants have re-raised the issue on summary judgment.[8]

One of the individual plaintiffs, Mary Brown, has filed a declaration in which she avers, among other things: (i) that she is a small business owner and member of NFIB; (ii) that she does not currently have health insurance and has not had health insurance for the past four years; (iii) that she regularly uses her personal funds to meet her business expenses; (iv) that she is not eligible for Medicaid or Medicare and will not be eligible in 2014; (v) that she is subject to the individual mandate and objects to being required to comply as she does not believe the cost of health insurance is a wise or acceptable use of her resources; (vi) that both she and her business will be harmed if she is required to buy health insurance that she neither wants nor needs because it will force her to divert financial resources from her other priorities, including running her business, and doing so will "threaten my ability to maintain my own, independent business"; (vii) that she would be forced to reorder her personal and business affairs because, "[w]ell in advance of 2014, I must now investigate whether and how to both obtain and maintain the required insurance"; and lastly, (viii) that she "must also now investigate the impact" that compliance with the individ-

[8] It was not necessary to address standing for the Medicaid challenge as the defendants did not dispute that the states could pursue that claim.

ual mandate will have on her priorities and whether she can maintain her business, or whether, instead, she will have to lay off employees, close her business, and seek employment that provides qualifying health insurance as a benefit.

The other individual plaintiff, Kaj Ahlburg, has filed a declaration in which he avers, *inter alia*: (i) that he is retired and holds no present employment; (ii) that he has not had health care insurance for the past six years; (iii) that he has no desire or intention to buy health insurance as he is currently, and expects to remain, able to pay for his and his family's own health care needs; (iv) that he is not eligible for Medicaid or Medicare and will not be eligible in 2014; (v) that he is subject to the individual mandate and he objects to being forced to comply with it as it does not represent "a sensible or acceptable use of my financial resources" and will force him "to divert funds from other priorities which I know to be more important for myself and my family"; and (vi) that he "must now investigate" how and whether to rearrange his finances "to ensure the availability of sufficient funds" to pay for the required insurance premiums.

These declarations are adequate to support standing for the reasons set forth and discussed at length in my prior opinion, which need not be repeated here in any great detail. To establish standing to challenge a statute, a plaintiff needs to show "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement" [*Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)]; that is "pegged to a sufficiently fixed period of time" [*ACLU of Florida, Inc. v. Miami-Dade County School Bd.*, 557 F.3d 1177, 1194 (11th Cir.

2009)]; and which is not "merely hypothetical or conjectural" [*Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008)]. The individual plaintiffs, Ms. Brown in particular, have established that because of the financial expense they will definitively incur under the Act in 2014, they are needing to take investigatory steps and make financial arrangements now to ensure compliance then. That is enough to show standing, as the clear majority of district courts to consider legal challenges to the individual mandate have held. *See Goudy–Bachman v. U.S. Dep't of Health & Human Servs.*, 2011 WL 223010, at *4–*7 (M.D. Pa. Jan. 24, 2011); *Liberty Univ., Inc., supra*, __ F. Supp. 2d at __ – __, 2010 WL 4860299, at *5–*7; *U.S. Citizens Assoc., supra*, __ F. Supp. 2d at __, 2010 WL 4947043, at *3; *Thomas More Law Center, supra*, 720 F. Supp. 2d 882, 887–89; *but see Baldwin v. Sebelius*, 2010 WL 3418436, at *3 (S.D. Cal. Aug. 27, 2010) (holding that plaintiff in that case lacked standing to challenge individual mandate on the grounds that by 2014 he may have secured insurance on his own). As the District Court for the Eastern District of Michigan properly noted in *Thomas More Law Center* (a case on which the defendants heavily rely because it ultimately upheld the individual mandate): "[T]he government is requiring plaintiffs to undertake an expenditure, for which the government must anticipate that significant financial planning will be required. That financial planning must take place well in advance of the actual purchase of insurance in 2014 . . . There is nothing improbable about the contention that the Individual Mandate is causing

plaintiffs to feel economic pressure today." *Thomas More Law Center, supra,* 720 F. Supp. 2d at 889.[9]

Because the individual plaintiffs have demonstrated standing, including NFIB member Mary Brown, that means (as also discussed in my earlier order) that NFIB has associational standing as well. This leaves the question of the state plaintiffs' standing to contest the individual mandate—an issue which was not necessary to reach on the motion to dismiss, but which the plaintiffs request that I address now.

The state plaintiffs have raised several different grounds for standing. One of those grounds is that some of the states have passed legislation seeking to protect their citizens from forced compliance with the individual mandate. For example, on March 17, 2010, before the Act passed into law, plaintiff Idaho enacted the Idaho Health Freedom Act, which provides in pertinent part:

> (1) The power to require or regulate a person's choice in the mode of securing health care services, or to impose a penalty related thereto, is not found in the Constitution of the United States of America, and is therefore a power reserved to the people pursuant to the Ninth Amendment, and to the several states pursuant to the Tenth Amendment. The state of Idaho hereby exercises its sovereign power to declare the public policy of the state of Idaho regarding the right of all persons residing in the state of Idaho in choosing the mode of securing health care services

---

[9] I note that *Thomas More Law Center* is on appeal to the Sixth Circuit, and in their recently-filed appellate brief the Department of Justice has expressly declined to challenge the district court's conclusion that the plaintiffs had standing.

> free from the imposition of penalties, or the threat thereof, by the federal government of the United States of America relating thereto.
>
> (2) It is hereby declared that . . . every person within the state of Idaho is and shall be free to choose or decline to choose any mode of securing health care services without penalty or threat of penalty by the federal government of the United States of America.

I.C. § 39–9003 (2010).

Similarly, on March 22, 2010, also before the Act became law, Utah passed legislation declaring that the then-pending federal government proposals for health care reform "infringe on state powers" and "infringe on the rights of citizens of this state to provide for their own health care" by "requiring a person to enroll in a third party payment system" and "imposing fines on a person who chooses to pay directly for health care rather than use a third party payer." *See generally* U.C.A.1953 § 63M–1–2505.5.

Judge Henry Hudson considered similar legislation in one of the two Virginia cases. After engaging in a lengthy analysis and full discussion of the applicable law [*see generally Virginia v. Sebelius*, 702 F. Supp. 2d 598, 602–07 (E.D. Va. 2010)], he concluded that despite the statute's declaratory nature, the Commonwealth had adequate standing to bring the suit insofar as "[t]he mere existence of the lawfully-enacted statue is sufficient to trigger the duty of the Attorney General of Virginia to defend the law and the associated sovereign power to enact it." *See id.* at 605–06. I agree with Judge Hudson's thoughtful analysis of the issue and

adopt it here. The States of Idaho and Utah, through plaintiff Attorneys General Lawrence G. Wasden and Mark L. Shurtleff, have standing to prosecute this case based on statutes duly passed by their legislatures, and signed into law by their Governors.[10]

In sum, the two individual plaintiffs (Brown and Ahlburg), the association (NFIB), and at least two of the states (Idaho and Utah) have standing to challenge the individual mandate. This eliminates the need to discuss the standing issue with respect to the other state plaintiffs, or the other asserted bases for standing. *See Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160, 102 S. Ct. 205, 70 L. Ed. 2d 309 (1981) ("Because we find California has standing, we do not consider the standing of the other plaintiffs."); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264 n.9, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) ("Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain this suit."); *see also Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) (if standing is shown for at least one plaintiff with respect to each claim, "we need not consider the standing of the other plaintiffs to raise that claim").

Having reaffirmed that the plaintiffs have adequate standing to challenge the individual mandate, I will consider whether that provision is an appropriate exercise of power under the Commerce Clause, and, if not, whether it is sustainable under the Necessary and

---

[10] I note that several other plaintiff states passed similar laws after the Act became law and during the pendency of this litigation. Other states have similar laws still pending in their state legislatures.

Proper Clause. The Constitutionality of the individual mandate is the crux of this entire case.

B. Analysis

(1) The Commerce Clause

The current state of Commerce Clause law has been summarized and defined by the Supreme Court on several occasions:

> [W]e have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.

United States v. Lopez, 514 U.S. 549, 558–59, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (citations omitted); *accord United States v. Morrison*, 529 U.S. 598, 608–09, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000); *see also Hodel v. Virginia Surface Min. & Reclamation Assoc., Inc.*, 452 U.S. 264, 276–77, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981); *Perez v. United States*, 402 U.S. 146, 150, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971). It is thus well settled that Congress has the authority under the Commerce Clause to regulate three—and only three—"categories of activity." *Lopez, supra*, 514 U.S. at 558; *see also, e.g., Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1249–51

(11th Cir. 2008) (discussing in detail the "three categories of activities" that Congress can regulate); *United States v. Maxwell*, 446 F.3d 1210, 1212 (11th Cir. 2006) (noting that, "to date," Congress can regulate only "three categories of activities"). The third category is the one at issue in this case.

As will be seen, the "substantially affects" category is the most frequently disputed and "most hotly contested facet of the commerce power." *Garcia, supra*, 540 F.3d at 1250. This is because, while under the first two categories Congress may regulate and protect actual interstate commerce,

> the third allows Congress to regulate intrastate noncommercial activity, based on its effects. Consideration of effects necessarily involves matters of degree [and] thus poses not two hazards, like Scylla and Charybdis, but three. If we entertain too expansive an understanding of effects, the Constitution's enumeration of powers becomes meaningless and federal power becomes effectively limitless. If we entertain too narrow an understanding, Congress is stripped of its enumerated power, reinforced by the Necessary and Proper Clause, to protect and control commerce among the several states. If we employ too nebulous a standard, we exacerbate the risk that judges will substitute their own subjective or political calculus for that of the elected representatives of the people, or will appear to be doing so.

United States v. Patton, 451 F.3d 615, 622–23 (10th Cir. 2006). Before attempting to navigate among these three "hazards," a full review of the historical roots of the

commerce power, and a discussion of how we got to where we are today, may be instructive.

(a) The Commerce Clause in its Historical Context

Chief Justice Marshall wrote in 1824, in the first ever Commerce Clause case to reach the Supreme Court:

> As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 188, 6 L. Ed. 23 (1824). Justice Marshall continued his opinion by noting that if, "from the imperfection of human language," there are doubts as to the extent of any power authorized under the Constitution, the underlying object or purpose for which that power was granted "should have great influence in the construction." *Id.* at 188–89. In other words, in determining the full extent of any granted power, it may be helpful to not only focus on *what* the Constitution says (i.e., the actual language used), but also *why* it says what it says (i.e., the problem or issue it was designed to address). Both will be discussed in turn.

The Commerce Clause is a mere sixteen words long, and it provides that Congress shall have the power:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. art. I, § 8, cl. 3. For purposes of this case, only seven words are relevant: "To regulate Commerce . . . among the several States." There is considerable historical evidence that in the early years of the Union, the word "commerce" was understood to encompass trade, and the intercourse, traffic, or exchange of goods; in short, "the activities of buying and selling that come after production and before the goods come to rest." Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 Harv. J. L. & Pub. Pol'y 849, 861–62 (2002) ("Bork & Troy") (citing, *inter alia*, dictionaries from that time which defined commerce as "exchange of one thing for another"). In a frequently cited law review article, one Constitutional scholar has painstakingly tallied each appearance of the word "commerce" in Madison's notes on the Constitutional Convention and in *The Federalist*, and discovered that in none of the ninety-seven appearances of that term is it ever used to refer unambiguously to activity beyond trade or exchange. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 114–16 (2001) ("Barnett"); *see also id.* at 116 (further examining each and every use of the word that appeared in the state ratification convention reports and finding "the term was uniformly used to refer to trade or exchange"). Even a Constitutional scholar who has argued for an expansive interpretation of the Commerce Clause (and, in fact, has been cited to, and relied on, by the defendants in this case) has acknowledged that when the Constitution was drafted and ratified, commerce "was the practical equivalent of the word 'trade.'" *See* Robert L. Stern, *That Commerce Which Concerns More States than One*, 47 Harv. L. Rev. 1335, 1346 (1934) ("Stern").

The Supreme Court's first description of commerce (and still the most widely accepted) is from *Gibbons v. Ogden, supra,* which involved a New York law that sought to limit the navigable waters within the jurisdiction of that state. In holding that "commerce" comprehended navigation, and thus it fell within the reach of the Commerce Clause, Chief Justice Marshall explained that "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." 22 U.S. at 72. This definition is consistent with accepted dictionary definitions of the Founders' time. *See* 1 Samuel Johnson, *A Dictionary of the English Language* (4th ed. 1773) (commerce defined as "Intercourse; exchange of one thing for another; interchange of any thing; trade; traffick"). And it remained a good definition of the Supreme Court's Commerce Clause interpretation throughout the Nineteenth Century. *See, e.g., Kidd v. Pearson,* 128 U.S. 1, 20–21, 9 S. Ct. 6, 32 L. Ed. 346 (1888) ("The legal definition of the term [commerce] . . . consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities"). As Alexander Hamilton intimated in *The Federalist,* however, it did not at that time encompass manufacturing or agriculture. *See The Federalist* No. 34, at 212–13 (noting that the "encouragement of agriculture and manufactures" was to remain an object of state expenditure). This interpretation of commerce as being primarily concerned with the commercial intercourse associated with the trade or exchange of goods and commodities is consistent with the original purpose of the

Commerce Clause (discussed immediately below), which is entitled to "great influence in [its] construction." *See Gibbons, supra*, 22 U.S. at 188–89.[11]

There is no doubt historically that the primary purpose behind the Commerce Clause was to give Congress power to regulate commerce so that it could eliminate the trade restrictions and barriers by and between the states that had existed under the Articles of Confederation. Such obstructions to commerce were destructive to the Union and believed to be precursors to war. The Supreme Court has explained this rationale:

> When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift to-

---

[11] As an historical aside, I note that pursuant to this original understanding and interpretation of "commerce," insurance contracts did not qualify because "[i]ssuing a policy of insurance is not a transaction of commerce." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183, 19 L. Ed. 357 (1868) (further explaining that insurance contracts "are not articles of commerce in any proper meaning of the word" as they are not objects "of trade and barter," nor are they "commodities to be shipped or forwarded from one State to another, and then put up for sale"). That changed in 1944, when the Supreme Court held that Congress could regulate the insurance business under the Commerce Clause. *United States v. South-Eastern Underwriters Assoc.*, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944). "Concerned that [this] decision might undermine state efforts to regulate insurance, Congress in 1945 enacted the McCarran-Ferguson Act. Section 1 of the Act provides that 'continued regulation and taxation by the several States of the business of insurance is in the public interest,' and that 'silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.'" *Humana Inc. v. Forsyth*, 525 U.S. 299, 306, 119 S. Ct. 710, 142 L. Ed. 2d 753 (1999) (quoting 15 U.S.C. § 1011). Thus, ever since passage of the McCarran-Ferguson Act, the insurance business has continued to be regulated almost exclusively by the states.

ward anarchy and commercial warfare between states began . . . [E]ach state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view. This came to threaten at once the peace and safety of the Union. The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was to take into consideration the trade of the United States; to examine the relative situations and trade of the said states; to consider how far a uniform system in their commercial regulation may be necessary to their common interest and their permanent harmony and for that purpose the General Assembly of Virginia in January of 1786 named commissioners and proposed their meeting with those from other states.

The desire of the Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of power over their internal affairs. No other federal power was so universally assumed to be necessary, no other state power was so readily relin[q]uished. There was no desire to authorize federal interference with social conditions or legal institutions of the states. Even the Bill of Rights amendments were framed only as a limitation upon the powers of Congress. The states were quite content with their several and diverse controls over most matters but, as Madison has indicated, "want of a general power over Commerce led to an exercise of this power separately, by the States, which not only proved abortive, but engendered rival, conflicting and angry regulations."

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533–34, 69 S. Ct. 657, 93 L. Ed. 865 (1949) (citations and quotations omitted). The foregoing is a frequently repeated history lesson from the Supreme Court. In his concurring opinion in the landmark 1824 case of *Gibbons v. Ogden, supra*, for example, Justice Johnson provided a similar historical summary:

> For a century the States [as British colonies] had submitted, with murmurs, to the commercial restrictions imposed by the parent State; and now, finding themselves in the unlimited possession of those powers over their own commerce, which they had so long been deprived of, and so earnestly coveted, that selfish principle which, well controlled, is so salutary, and which, unrestricted, is so unjust and tyrannical, guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the States, and fatal to their commercial interests abroad.
>
> This was the immediate cause, that led to the forming of a convention.

Gibbons, supra, 22 U.S. at 224. In the Supreme Court's 1888 decision in *Kidd v. Pearson*, Justice Lamar noted that "it is a matter of public history that the object of vesting in congress the power to regulate commerce . . . among the several states was to insure uniformity for regulation against conflicting and discriminatory state legislation." *See Kidd, supra*, 128 U.S. at 21. More recently, Justice Stevens has advised that when "construing the scope of the power granted to Congress by the Commerce Clause . . . [i]t is important to re-

member that this clause was the Framers' response to the central problem that gave rise to the Constitution itself," that is, the Founders had "'set out only to find a way to reduce trade restrictions.'" *See EEOC v. Wyoming*, 460 U.S. 226, 244–45, 103 S. Ct. 1054, 75 L. Ed. 2d 18 (1983) (Stevens, J., concurring). The foregoing history is so "widely shared," [*see id.* at 245 n.1], that Constitutional scholars with opposing views on the Commerce Clause readily agree on this point. *Compare* Stern, *supra*, at 1344 ("There can be no question, of course, that in 1787 [when] the framers and ratifiers of the Constitution . . . considered the need for regulating 'commerce with foreign nations and among the several states,' they were thinking only in terms of . . . the removal of barriers obstructing the physical movements of goods across state lines."), *with* Bork & Troy, *supra*, at 858, 865 ("One thing is certain: the Founders turned to a federal commerce power to carve stability out of this commercial anarchy" and "keep the States from treating one another as hostile foreign powers"; in short, "the Clause was drafted to grant Congress the power to craft a coherent national trade policy, to restore and maintain viable trade among the states, and to prevent interstate war."). Hamilton and Madison both shared this concern that conflicting and discriminatory state trade legislation "would naturally lead to outrages, and these to reprisals and wars." *The Federalist* No. 7, at 37 (Hamilton); *see also The Federalist* No. 42, at 282 (Madison) (referencing the "unceasing animosities" and "serious interruptions of the public tranquility" that would inevitably flow from the lack of national commerce power).

To acknowledge the foregoing historical facts is not necessarily to say that the power under the Commerce Clause was intended to (and must) remain limited to the trade or exchange of goods, and be confined to the task of eliminating trade barriers erected by and between the states.[12] The drafters of the Constitution were aware that they were preparing an instrument for the ages, not one suited only for the exigencies of that particular time. *See, e.g., McCulloch, supra,* 17 U.S. at 415 (the Constitution was "intended to endure for ages to come" and "to be adapted to the various crises of human affairs") (Marshall, C.J.); *Weems v. United States,* 217 U.S. 349, 373, 30 S. Ct. 544, 54 L. Ed. 793 (1910) (explaining that constitutions "are not ephemeral enactments, designed to meet passing occasions," but rather are "designed to approach immortality as nearly as human institutions can approach it . . . [and], therefore, our contemplation cannot be only of what has been, but of what may be"); *accord New York v. United States,* 505 U.S. 144, 157, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) (the Constitution was "phrased in language broad enough to allow for the expansion" of federal power and allow "enormous changes in the nature of government"). As Hamilton explained:

---

[12] Although there is some evidence that is exactly what Madison, at least, had intended. In one of his letters, he wrote that the Commerce Clause "'grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government.'" *West Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 193 n.9, 114 S. Ct. 2205, 129 L. Ed. 2d 157 (1994) (quoting 3 M. Farrand, Records of the Federal Convention of 1787, p. 478 (1911)).

> Constitutions of civil government are not to be framed upon a calculation of existing exigencies, but upon a combination of these with the probable exigencies of ages, according to the natural and tried course of human affairs. Nothing, therefore, can be more fallacious than to infer the extent of any power, proper to be lodged in the national government, from an estimate of its immediate necessities. There ought to be a *capacity* to provide for future contingencies as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity.

The Federalist No. 34, at 210–11 (emphasis in original).

Thus, the exercise and interpretation of the commerce power has evolved and undergone a significant change "as the needs of a dynamic and constantly expanding national economy have changed." *See EEOC, supra*, 460 U.S. at 246 (Stevens, J., concurring). But, I will begin at the beginning.

(b) Evolution of Commerce Clause Jurisprudence

Some have maintained that the Commerce Clause power began as, and was intended to remain, a narrow and limited one. *See, e.g.*, Raoul Berger, *Federalism: The Founders Design* (1987) (arguing that the founders sought to create a limited federal government whose power, including the commerce power, was narrow in scope); Barnett, *supra*, at 146 (concluding that "the most persuasive evidence of original meaning . . . strongly supports [the] narrow interpretation of Congress's power [under the Commerce Clause]"). Despite evidence to support this position, it is difficult to prove decisively

because for the first century of our history the Clause was seldom invoked by Congress (if at all), and then only negatively to prevent the interference with commerce by individual states. This necessarily means that there is a lack of early congressional and judicial pronouncements on the subject. This, in turn, makes it harder to conclusively determine how far the commerce power was originally intended to reach. It was not until 1824 (more than three decades after ratification) that the Supreme Court was first called upon in *Gibbons v. Ogden* to consider the commerce power. By that time, it would appear that the Clause was given a rather expansive treatment by Chief Justice Marshall, who wrote:

> [The commerce power] is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances . . . the sole restraints on which they have relied, to secure them from its abuse.

Gibbons, supra, 22 U.S. at 75. Notwithstanding this seemingly broad interpretation of Congress' power to negate New York's assertion of authority over its navigable waters, it was not until 1887, one hundred years after ratification, that Congress first exercised its power to affirmatively and positively regulate commerce among the states. And when it did, the Supreme Court at that time rejected the broad conception of commerce and the power of Congress to regulate the economy was sharply restricted. *See, e.g., Kidd v. Pearson, supra* (1888). Thus, for most of the first century and a half of Constitutional government (with the possible exception of *Gibbons v. Ogden* in 1824), the Clause was narrowly construed and given "miserly construction." *See EEOC, supra*, 460 U.S. at 246 (Stevens, J., concurring) (citing *Kidd, supra*, 128 U.S. at 20–21, 9 S. Ct. 6 (manufacturing not subject to the commerce power of Congress); *United States v. E.C. Knight Co.*, 156 U.S. 1, 12–16, 15 S. Ct. 249, 39 L. Ed. 325 (1895) (manufacturing monopoly not subject to commerce power); *Adair v. United States*, 208 U.S. 161, 178–179, 28 S. Ct. 277, 52 L. Ed. 436 (1908) (connection between interstate commerce and membership in a labor union insufficient to authorize Congress to make it a crime for an interstate carrier to fire employee for his union membership); *Hammer v. Dagenhart*, 247 U.S. 251, 276, 38 S. Ct. 529, 62 L. Ed. 1101 (1918) (Congress without power to prohibit the interstate transportation of goods produced with child labor); *Carter v. Carter Coal Co.*, 298 U.S. 238, 298, 308–10, 56 S. Ct. 855, 80 L. Ed. 1160 (1936) (holding that commerce power does not extend to the regulation of wages, hours, and working conditions of coal miners; defining commerce—consistent with the original under-

standing of the term—as "the equivalent of the phrase 'intercourse for the purposes of trade'")).

For example, in *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935), a case well known to first year law students, the Court invalidated regulations fixing employee hours and wages in an intrastate business because the activity being regulated only related to interstate commerce "indirectly." The Supreme Court characterized the distinction between "direct" and "indirect" effects on interstate commerce as "a fundamental one, essential to the maintenance of our constitutional system," for without it "there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government." *Id.* at 548.

But, everything changed in 1937, beginning with the first of three significant New Deal cases. In *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937), the Supreme Court, after recognizing the well known principle "that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power" [*see id.* at 31], held for the first time that Congress could also regulate purely intrastate activities that could be said to have a "substantial effect" on interstate commerce. "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." *Id.* at 37. The question was now "the *effect* upon interstate

commerce of the [intrastate activity] involved." *Id.* at 40 (emphasis added).

Four years later, in *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941), the Supreme Court overruled *Hammer v. Dagenhart, supra.* In upholding the wage and hour requirements in the Fair Labor Standards Act, and its suppression of substandard labor conditions, the Court reaffirmed that with respect to intrastate "transactions" and "activities" having a substantial effect on interstate commerce, Congress may regulate them without doing violence to the Constitution. *See id.* at 118–23.

And then came *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942), which, until recently, was widely considered the most far-reaching expansion of Commerce Clause regulatory authority over intrastate activity. At issue in *Wickard* were amendments to the Agricultural Adjustment Act of 1938 that set acreage allotments for wheat farmers in an effort to control supply and avoid surpluses that could result in abnormally low wheat prices. The plaintiff in that case, Roscoe Filburn, owned a small farm on which he raised and harvested wheat, among other things. When he exceeded his allotment by 12 acres (which yielded 239 bushels of wheat), he was penalized under the statute. Although the intended disposition of the crop involved in the case was not "expressly stated," [*id.* at 114], the Supreme Court assumed and analyzed the issue as though the excess wheat was "not intended in any part for commerce but wholly for consumption on the farm." *See id.* at 118. Even though production of such wheat "may not be regarded as commerce" in the strictest sense of the word, [*see id.* at 125], consumption on the farm satisfied

needs that would (theoretically, at least) be otherwise filled by another purchase or commercial transaction. *See id.* at 128 (explaining that homegrown wheat "supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market [and] in this sense competes with wheat in commerce"). In holding that Congress had power under the Commerce Clause to regulate production intended for personal consumption, the Supreme Court stated:

> [E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."
>
> * * *
>
> That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

Id. at 125, 127–28. The latter statement is commonly known and described as the "aggregation principle." It allows Congress under the Commerce Clause to reach a "class of activities" that have a substantial impact on interstate commerce when those activities are aggregated with all similar and related activities—even though the activities within the class may be themselves trivial and insignificant. *See, e.g., Maryland v. Wirtz*, 392 U.S. 183, 192–93, 196 n.27, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968) (any claim that reviewing courts have the

power to excise, as trivial, individual activity within a broader class of activities "has been put entirely to rest" as the "de minimis character of individual instances arising under [the] statute is of no consequence"). To illustrate this principle, as applied in *Wickard*, even though Filburn's 239 bushels were presumably for his own consumption and seed, and did not significantly impact interstate commerce, if every farmer in the country did the same thing, the aggregate impact on commerce would be cumulatively substantial.

Together, *Jones & Laughlin Steel*, *Darby*, and *Wickard* either "ushered in" a new era of Commerce Clause jurisprudence "that greatly expanded the previously defined authority of Congress under that Clause" [*Lopez*, *supra*, 514 U.S. at 556, 115 S. Ct. 1624], or they merely "restored" the "broader view of the Commerce Clause announced by Chief Justice Marshall." *Perez*, *supra*, 402 U.S. at 151. Regardless of whether the cases represented a new era or simply a restoration of the old, it seemed that from that point forward congressional action under the Commerce Clause was to be given virtually insurmountable deference. *See* Kenneth Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment Through the Privileges or Immunities Clause*, 39 N.M. L. Rev. 195, 232–33 (2009) (noting that in these New Deal cases "the Court read the Commerce Clause so broadly that it is a bold statement to say that the provision even nominally constrained federal action"). And, indeed, from the New Deal period through the next five decades, not a single federal legislative enactment was struck down as exceeding Congress' power under the Commerce Clause power—until *Lopez* in 1995.

In *United States v. Lopez* the Supreme Court considered the Constitutionality of the Gun Free School Zones Act of 1990, which criminalized the possession of a firearm in a school zone. In holding that the statute exceeded Congress' authority under the Commerce Clause, the Supreme Court began by recognizing the "first principles" behind the limitations on federal power as set forth in the Constitution. *See supra*, 514 U.S. at 552. Then, after detailing the history and transformation of Commerce Clause jurisprudence—from *Gibbons*, to *A.L.A. Schechter Poultry*, and up through *Wickard*—the Court observed that even in cases which had interpreted the Commerce Clause more expansively, every decision to date had recognized that the power granted by the Clause is necessarily "subject to outer limits" which, if not recognized and respected, could lead to federal action that would "effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *See generally id.* at 553–57. Consistent with those limits, the *Lopez* Court stated "we have identified three broad categories of *activity* that Congress may regulate under its commerce power." *See id.* at 558 (emphasis added). The "substantially affects" category was the one at issue there, and in holding that the statute did not pass muster thereunder, the Supreme Court focused on four considerations: (i) the activity being regulated (guns near schools) was not economic in nature; (ii) the statute did not contain jurisdictionally limiting language; (iii) Congress did not make any formal findings concerning the effect of the regulated activity on commerce; and (iv) the connection between that activity and its effect on commerce was attenuated. *See generally id.* at 559–67.

As for the fourth consideration, the Court impliedly conceded the claims by the government and the dissent that: (1) gun-related violence is a serious national problem with substantial costs that are spread throughout the population; (2) such violence has adverse effects on classroom learning (which can result in decreased productivity) and discourages traveling into areas felt to be unsafe; all of which, in turn, (3) represents a substantial threat to interstate commerce. The *Lopez* majority made a point to "pause to consider the implications" of such arguments, however. *See id.* at 563–65. It found that if such theories were sufficient to justify regulation under the Commerce clause (even though their underlying logic and truth were not questioned), "it is difficult to perceive any limitation on federal power" and "we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *See id.* at 564. To accept such arguments and uphold the statute, the majority concluded, would require the Court:

> . . . to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

Id. at 567–68; *see also id.* at 578, 580 (explaining that it is the Court's duty to "recognize meaningful limits on the commerce power" and intervene if Congress "has tipped the scales too far" as federal balance "is too essential a part of our constitutional structure and plays too vital a role in securing freedom") (Kennedy, J., concurring).

The next significant Commerce Clause case to be decided by the Supreme Court was the 2000 case of *United States v. Morrison, supra,* 529 U.S. at 598, which involved a challenge to the Violence Against Women Act of 1994. The government argued in that case—similar to what it did in *Lopez*—that Congress could regulate gender-motivated violence based on a syllogistic theory that victims of such violence are deterred from traveling and engaging in interstate business or employment; they are thus less productive (and incur increased medical and other costs); all of which, in turn, substantially affects interstate commerce. *See id.* at 615. The Court began its analysis by recognizing the foundational principle that the power of the federal government is "defined and limited" and therefore: "Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *See id.* at 607. It emphasized that while the legal analysis of the Commerce Clause "has changed as our Nation has developed," which has resulted in Congress having "considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted," authority under the Clause "is not without effective bounds." *See id.* at 607–08. The Court then looked to the four "significant considerations" that were identified in *Lopez* and found that, "[w]ith these princi-

ples underlying our Commerce Clause jurisprudence as reference points, the proper resolution of the present cases is clear." *See id.* at 610–13. First, the statute at issue in *Morrison* did not regulate economic activity:

> Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.

Id. at 613. Further, the statute did not contain jurisdictionally limiting language; and while it was supported, in contrast to *Lopez*, with numerous congressional findings regarding the personal, familial, and economic impact of gender-motivated violence, those findings were insufficient to sustain the legislation as they relied on the same "method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers." *Id.* at 615. In other words, it would require the Court "to pile inference upon inference," and, in the process, run the risk of "completely obliterat[ing] the Constitution's distinction between national and local authority." *See id.*

In light of the circumscriptial rulings in *Lopez* and *Morrison*, many were surprised by the Supreme Court's subsequent decision in *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005), which was not only seen as a return to the more expansive Commerce Clause jurisprudence [*see, e.g.*, Matthew Farley, *Challenging Supremacy: Virginia's Response to the Patient*

Protection and Affordable Care Act, 45 U. Rich. L. Rev. 37, 65 (2010)], but was, in fact, viewed by some as even going beyond and "displacing" *Wickard* as the most far-reaching of all Commerce Clause cases. *See* Douglas W. Kmiec, *Gonzales v. Raich: Wickard v. Filburn Displaced*, 2005 Cato Sup. Ct. Rev. 71 (2005).

At issue in *Raich* was whether Congress had authority under the Commerce and Necessary and Proper Clauses to prohibit, via the Controlled Substances Act, "the local cultivation and use of marijuana in compliance with California law." *See Raich, supra*, 545 U.S. at 5. The marijuana at issue, which was being used by two seriously ill women for medicinal purposes pursuant to state law, had been neither bought nor sold and never crossed state lines. It was, and is, illegal in most states, and does not have a legal free market in interstate commerce, the normal attribute of any economic analysis. Nevertheless, the Supreme Court began its analysis by stating: "Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 17. The Court found *Wickard* to be "striking" in similarity and "of particular relevance" to the analysis as that case "establishes that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut regulation of the interstate market in that commodity." *Id.* at 17–18. The Court held that Congress had a "rational basis" for finding that leaving home-consumed marijuana outside of federal control would affect the price and market conditions for that commodity because, as was noted in *Wic-*

kard, the "production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity." *See id.* at 19. Surprisingly, "[t]hat the market in *Raich* happened to be an illegal one did not affect the Court's analysis in the least." *Maxwell, supra*, 446 F.3d at 1214.

The Eleventh Circuit has indicated that the distinguishing feature between *Raich* and *Wickard* on the one hand, and *Morrison* and *Lopez* on the other, "was the comprehensiveness of the economic component of the regulation." *Maxwell, supra*, 446 F.3d at 1214. The statute in *Lopez*, for example, was a brief, single-subject criminal statute that did not regulate any economic activity. By contrast, the statute in *Raich* was a broader legislative scheme "at the opposite end of the regulatory spectrum." *Supra*, 545 U.S. at 24. It was "a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of [controlled substances]," which were "activities" the Supreme Court determined to be "quintessentially economic" in nature. *See id.* at 24–25. The Court reached this conclusion by "quite broadly defin[ing] 'economics' as 'the production, distribution, and consumption of commodities.'" *See Maxwell, supra*, 446 F.3d at 1215 n.4 (quoting *Raich, supra*, 545 U.S. at 25–26, in turn quoting Webster's Third New International Dictionary 720 (1966)).[13]

---

[13] In objecting to the majority's use of this "broadest possible" definition, Justice Thomas argued in dissent that "economics" is not defined as broadly in other dictionaries, and "the majority does not explain why it selects a remarkably expansive 40–year–old definition." *Raich, supra*, 545 U.S. at 69 and n.7 (Thomas, J., dissenting).

(c) Application of the Foregoing to the Facts of this Case

Unsurprisingly, the plaintiffs rely heavily on *Lopez* and *Morrison* in framing their arguments, while the defendants, of course, look principally to *Wickard* and *Raich*. These cases (along with the others discussed above) all have something to add to the discussion. However, while they frame the analysis, and are important from a historical perspective, they do not by themselves resolve this case. That is because, as Congress' attorneys in the Congressional Research Service ("CRS") and Congressional Budget Office ("CBO") advised long before the Act was passed into law, the notion of Congress having the power under the Commerce Clause to directly impose an individual mandate to purchase health care insurance is "novel" and "unprecedented." *See* Jennifer Staman & Cynthia Brougher, Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, July 24, 2009, at 3, 6 ("whether Congress can use its Commerce Clause authority to require a person to buy a good or a service" raises a "novel issue" and "most challenging question") ("CRS Analysis"); Congressional Budget Office Memorandum, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, August 1994 ("A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action.") ("CBO Analysis"). Never before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive and residing in the United States.[14]

---

[14] The individual mandate differs from the regulations in *Wickard* and *Raich*, for example, in that the individuals being regulated in those

As I explained in my earlier order, the fact that legislation is unprecedented does not by itself render it unconstitutional. To the contrary, all federal legislation carries with it a "presumption of constitutionality." *Morrison, supra*, 529 U.S. at 607, 120 S. Ct. 1740. However, the presumption is arguably weakened, and an "absence of power" might reasonably be inferred where—as here—"earlier Congresses avoided use of this highly attractive power." *Printz v. United States*, 521 U.S. 898, 905, 908, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997); *id.* at 907–08 ("the utter lack of statutes imposing obligations [like the one at issue in that case] (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power") (emphasis in original); *id.* at 918 ("almost two centuries of apparent congressional avoidance of the practice [at issue] tends to negate the existence of the congressional power asserted here").[15] The mere fact that the defendants have tried to analogize the individual mandate to things like jury service, participation in the census, eminent domain pro-

---

cases were engaged in an activity (regardless of whether it could readily be deemed interstate commerce in itself) and each had the choice to discontinue that activity and avoid penalty. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 130, 63 S. Ct. 82, 87 L. Ed. 122 (1942) (noting Congress "gave the farmer a choice" of several options under the statute). Here, people have no choice but to buy insurance or be penalized. And their freedom is actually more restricted as they do not even have a choice as to the minimum level or type of insurance to buy because Congress established the floor. A single twenty-year old man or woman who only needs and wants major medical or catastrophic coverage, for example, is precluded from buying such a policy under the Act.

[15] Indeed, as the plaintiffs have persuasively noted, not even in the context of insurance under the National Flood Insurance Program did Congress mandate that all homeowners buy flood insurance directly from a private company. *See* Pl. Opp. at 26–27.

ceedings, forced exchange of gold bullion for paper currency under the *Gold Clause Cases*, and required service in a "posse" under the Judiciary Act of 1789 (all of which are obviously distinguishable) only underscores and highlights its unprecedented nature.

However, unprecedented or not, I will assume that the individual mandate *can* be Constitutional under the Commerce Clause and will analyze it accordingly. This analysis requires the resolution of two essential questions.

(i) <u>Is Activity Required Under the Commerce Clause?</u>

The threshold question that must be addressed is whether activity is required before Congress can exercise its power under the Commerce Clause. As previously discussed, Commerce Clause jurisprudence has "'taken some turns,'" [*see Lopez, supra*, 514 U.S. at 579, (Kennedy, J., concurring)], and contracted and expanded (and contracted and expanded again) during our nation's development. But, in every one of the cases—in both the contractive and expansive—there has always been clear and inarguable *activity*, from exerting control over and using navigable waters *(Gibbons)* to growing or consuming marijuana (*Raich*).[16] In all the cases

---

[16] The defendants cite to *Raich* for the proposition that Congress may reach "even wholly intrastate, non-commercial matters when it concludes that the failure to do so would undercut a larger program regulating interstate commerce." *See* Def. Mem. at 13. By paraphrasing *Raich* here rather than quoting from the decision the defendants have attempted to obscure the importance of "activity," for the cited portion, and Justice Scalia's concurrence (on which the defendants also rely), do not talk at all of "matters"—either commercial or not. They only mention (and often) "activities."

discussed above, the Supreme Court was called upon to decide different issues (e.g., whether commerce encompassed navigation; whether it included manufacture and agriculture or was limited to trade or exchange of goods; whether the activity at issue was interstate or intrastate and had a direct or indirect effect on commerce; whether that effect was substantial; whether the activity was economic or noneconomic; and whether it was part of a single-subject statute or a necessary and essential component of a broader comprehensive scheme), but it has never been called upon to consider if "activity" is required. On this point at least, the district courts that have reached opposite conclusions on the individual mandate agree. *Compare Thomas More Law Center, supra*, 720 F. Supp. 2d at 893 (noting that the Supreme Court "has never needed to address the activity/inactivity distinction advanced by plaintiffs because in every Commerce Clause case presented thus far, there has been some sort of activity"; then proceeding to uphold the individual mandate), *with Virginia, supra*, 728 F. Supp. 2d at 781 (noting that "every application of Commerce Clause power found to be constitutionally sound by the Supreme Court involved some form of action, transaction, or deed placed in motion by an individual or legal entity"; then proceeding to strike down the individual mandate).

The defendants contend, however, that despite the inarguable presence of activity in every Supreme Court case to date, activity is not required under the Commerce Clause. *See* Def. Mem. at 31 (maintaining that "there is no 'activity' clause in the constitution"). In fact, they go so far as to suggest that to impose such a requirement would be bold and radical. According to

the defendants, because the Supreme Court has never identified a distinction between activity and inactivity as a limitation on Congress' commerce power, to hold otherwise would "break new legal ground" and be "novel" and "unprecedented." *See* Def. Opp. at 1, 2, 16. First, it is interesting that the defendants—apparently believing the best defense is a good offense—would use the words "novel" and "unprecedented" since, as previously noted, those are the *exact* same words that the CRS and CBO used to describe the individual mandate before it became law. Furthermore, there is a simple and rather obvious reason why the Supreme Court has never distinguished between activity and inactivity before: it has not been called upon to consider the issue because, until now, Congress had never attempted to exercise its Commerce Clause power in such a way before. *See* CBO Analysis (advising Congress during the previous health care reform efforts in 1994 that "[t]he government has never required people to buy any good or service as a condition of lawful residence in the United States."). In every Supreme Court case decided thus far, Congress was not seeking to regulate under its commerce power something that could even arguably be said to be "passive inactivity."[17]

---

[17] I note that in *Gibbons v. Ogden*, where Chief Justice Marshall "described the Federal Commerce power with a breadth never yet exceeded" [*Wickard*, *supra*, 317 U.S. at 111], commerce was defined as "intercourse." Even that word would seem to carry with it an implicit presumption of at least *some* sort of preexisting dealing between people or entities. *See* 1 Samuel Johnson, *A Dictionary of the English Language* (4th ed. 1773) (defining "intercourse" as "Commerce; exchange" and "Communication"). Furthermore, as one of the *amici* notes in their brief, the word "regulate" in the Commerce Clause itself would also appear to presuppose action upon some object or activity that is already extant (*see* doc. 121 at 4 n.1, citing Samuel Johnson's dictionary defining

It would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause. If it has the power to compel an otherwise passive individual into a commercial transaction with a third party merely by asserting—as was done in the Act—that compelling the actual transaction is *itself* "commercial and economic in nature, and substantially affects interstate commerce" [*see* Act § 1501(a)(1)], it is not hyperbolizing to suggest that Congress could do almost anything it wanted. It is difficult to imagine that a nation which began, at least in part, as the result of opposition to a British mandate giving the East India Company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place. If Congress can penalize a passive individual for failing to engage in commerce, the enumeration of powers in the Constitution would have been in vain for it would be "difficult to perceive any limitation on federal power" [*Lopez, supra*, 514 U.S. at 564], and we would have a Constitution in name only. Surely this is not what the Founding Fathers could have intended. *See id.* at 592 (quoting Hamilton at the New York Convention that there would be just cause to reject the Constitution if it would allow the federal government to "penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals") (Thomas, J., concurring). In *Lopez*, the Supreme Court struck down the Gun Free School Zones Act of 1990 after stating that, if the statute were to be upheld, "we are *hard pressed* to posit any *activity* by an individual that

---

"regulate" as "to adjust by rule or method" or "to direct"). Thus, a regulator "comes to an existing phenomenon and orders it." *Id.*

Congress is without power to regulate." *See id.* at 564. (emphasis added). If some type of already-existing activity or undertaking were not considered to be a prerequisite to the exercise of commerce power, we would go beyond the concern articulated in *Lopez* for it would be virtually *impossible* to posit *anything* that Congress would be without power to regulate.

As previously noted, the Supreme Court has summarized and defined the current state of the law under the Commerce Clause, and it has uniformly and consistently declared that it applies to "three broad categories of *activity.*" *Lopez, supra,* 514 U.S. at 558 (emphasis added); *accord Morrison, supra,* 529 U.S. at 608, 120 S. Ct. 1740. It has further described the third category as "the power to regulate those *activities* having a substantial relation to interstate commerce." *Lopez, supra,* 514 U.S. at 558–59 (emphasis added); *accord Morrison, supra,* 529 U.S. at 609; *see also Raich, supra,* 545 U.S. at 17, *Perez,* 402 U.S. at 150; *Wickard, supra,* 317 U.S. at 124; *Darby, supra,* 312 U.S. at 119–20; *Jones & Laughlin Steel, supra,* 301 U.S. at 37. Without doubt, existing case law thus extends only to those "activities" that have a substantial relationship to, or substantially affect, interstate commerce. I am required to interpret this law as the Supreme Court presently defines it. Only the Supreme Court can redefine it or expand it further—a point implicitly made by one of the defendants' own cited authorities. *See* Stern, *supra,* at 1363 (stating that the Supreme Court had at one point in time only talked about "movement" of goods across state lines under the Commerce Clause because it was necessary to decide those earlier cases and there had "been no need for a broader definition" of commerce; going on to opine that

"it would seem timely that the *Supreme Court* " expand the definition, as "the time has now arrived for the *[Supreme] Court* to cut loose from the 'old' approach and to select the 'new' one") (emphasis added).

Having found that "activity" is an indispensable part the Commerce Clause analysis (at least as currently understood, defined, and applied in Supreme Court case law), the Constitutionality of the individual mandate will turn on whether the failure to buy health insurance is "activity."

(ii) **Is the Failure to Purchase Health Insurance "Activity"?**

Preliminarily, based solely on a plain reading of the Act itself (and a common sense interpretation of the word "activity" and its absence), I must agree with the plaintiffs' contention that the individual mandate regulates inactivity. Section 1501 states in relevant part: "If an applicable individual fails to [buy health insurance], there is hereby imposed a penalty." By its very own terms, therefore, the statute applies to a person who does not buy the government-approved insurance; that is, a person who "fails" to act pursuant to the congressional dictate. In fact, prior to final passage of the Act, CRS attorneys advised Congress that it was "unclear" if the individual mandate had "solid constitutional foundation" specifically because:

> One could argue that while regulation of the health insurance industry or the health care system could be considered economic activity, regulating a choice to purchase health insurance is not. It may also be questioned whether a requirement to purchase

> health insurance is really a regulation of an economic activity or enterprise, if individuals who would be required to purchase health insurance are not, but for this regulation, a part of the health insurance market. In general, Congress has used its authority under the Commerce Clause to regulate individuals, employers, and others who voluntarily take part in some type of economic activity. While in *Wickard* and *Raich*, the individuals were participating in their own home activities (i.e., producing wheat for home consumption and cultivating marijuana for personal use), they were acting of their own volition, and this activity was determined to be economic in nature and affected interstate commerce. *However, [the individual mandate] could be imposed on some individuals who engage in virtually no economic activity whatsoever.* This is a novel issue: whether . . . this type of required participation can be considered economic activity.

CRS Analysis, *supra*, at 3, 6 (emphasis added).

The defendants insist that the uninsured are active. In fact, they even go so far as to make the claim—which the plaintiffs call "absurd"—that going without health insurance constitutes "economic activity to an even greater extent than the plaintiffs in *Wickard* or *Raich*." *See* Def. Mem. at 29. They offer two (somewhat overlapping) arguments why the appearance of inactivity here is just an "illusion."

(iii) **The Purported "Uniqueness" of the Health Care Market**

The defendants contend that there are three unique elements of the health care market which, when viewed cumulatively and in combination, belie the claim that the uninsured are inactive.[18] First, as living and breathing human beings who are always susceptible to sudden and unpredictable illness and injury, no one can "opt out" of the health care market. Second, if and when health services are sought, hospitals are required by law to provide care, regardless of inability to pay. And third, if the costs incurred cannot be paid (which they frequently cannot, given the high cost of medical care), they are passed along (cost-shifted) to third parties, which has economic implications for everyone. Congress found that the uninsured received approximately $43 billion in "uncompensated care" in 2008 alone. These three things, according to the defendants and various health care industry experts and scholars on whom they rely, are "replicated in no other market" and defeat the argument that uninsured individuals are inactive.[19]

---

[18] During oral argument, the plaintiffs opposed defining the relevant market broadly as one for health *care*, insisting that the only relevant market for purposes of analyzing the individual mandate is the more specific health *insurance* market. I agree that the plaintiffs' position is the more precise and accurate. Every market can be broadly defined in a way that encompasses the specific characteristics one seeks to reach or include. Nonetheless, I will consider and examine the defendants' claim that the individual mandate is justifiable because the much broader "health care market" is purportedly unique.

[19] For example, in their briefs and during oral argument, the defendants cited to and relied on the *amicus* brief filed by an impressive list of nearly forty economic scholars, who have urged that these "three observations . . . do not exist in other contexts" and establish that the

First, it is not at all clear whether or why the three allegedly unique factors of the health care market are Constitutionally significant. What if only one of the three factors identified by the defendants is present? After all, there are lots of markets—especially if defined broadly enough—that people cannot "opt out" of. For example, everyone must participate in the food market. Instead of attempting to control wheat supply by regulating the acreage and amount of wheat a farmer could grow as in *Wickard*, under this logic, Congress could more directly raise too-low wheat prices merely by increasing demand through mandating that every adult purchase and consume wheat bread daily, rationalized on the grounds that because everyone must participate in the market for food, non-consumers of wheat bread adversely affect prices in the wheat market. Or, as was discussed during oral argument, Congress could require that people buy and consume broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because people who eat healthier tend to be healthier, and are thus more productive and put less of a strain on the health care system. Similarly, because virtually no one can be divorced from the transportation market, Congress could require that everyone above a certain income threshold buy a General Motors automobile—now partially government-owned—because those who do not buy GM cars (or those who buy foreign cars) are adversely impacting commerce and a taxpayer-subsidized business.

---

uninsured are not inactive and passive bystanders, but rather they "participate in the market for medical services and necessarily affect the market for health insurance" (doc. 125 at 6–13).

I pause here to emphasize that the foregoing is not an irrelevant and fanciful "parade of horribles." Rather, these are some of the serious concerns implicated by the individual mandate that are being discussed and debated by legal scholars. For example, in the course of *defending* the Constitutionality of the individual mandate, and responding to the same concerns identified above, often-cited law professor and dean of the University of California Irvine School of Law Erwin Chemerinsky has opined that although "what people choose to eat well *might* be regarded as a personal liberty" (and thus unregulable), "Congress *could* use its commerce power to require people to buy cars." *See* ReasonTV, *Wheat, Weed, and Obamacare: How the Commerce Clause Made Congress All-Powerful*, August 25, 2010, available at: http://reason.tv/video/show/wheat-weed-and-obamacare-how-t. When I mentioned this to the defendants' attorney at oral argument, he allowed for the possibility that "maybe Dean Chemerinsky is right." *See* Tr. at 69. Therefore, the potential for this assertion of power has received at least some theoretical consideration and has not been ruled out as Constitutionally implausible.[20]

---

[20] There is perhaps a general assumption that it is "ridiculous" to believe that Congress *would* do such a thing, even though it *could*. However, before *Wickard* was decided, it is likely that most people (including legal scholars and judges) would have thought it equally "ridiculous" to believe that Congress would one day seek (and be permitted) to regulate (as interstate commerce) the amount of wheat that a farmer grew on a small private farm for his personal consumption. In any event, even if such an assumption is well-founded, "the limitation of congressional authority is not solely a matter of legislative grace." *See Morrison, supra*, 529 U.S. at 616; *see also id.* at 616 n.7 (stating that legislative power is not limited only by "the Legislature's self-restraint"); *cf. United States v. Stevens*, __ U.S. __, 130 S. Ct. 1577,

Or what if two of the purported "unique" factors—inevitable participation coupled with cost-shifting—are present? For example, virtually no one can opt out of the housing market (broadly defined) and a majority of people will at some point buy a home. The vast majority of those homes will be financed with a mortgage, a large number of which (particularly in difficult economic times, as we have seen most recently) will go into default, thereby cost-shifting billions of dollars to third parties and the federal government. Should Congress thus have power under the Commerce Clause to preemptively regulate and require individuals above a certain income level to purchase a home financed with a mortgage (and secured with mortgage guaranty insurance) in order to add stability to the housing and financial markets (and to guard against the possibility of future cost-shifting because of a defaulted mortgage), on the theory that most everyone is currently, or inevitably one day will be, active in the housing market?

In alluding to these same general concerns, another court has observed that requiring advance purchase of health insurance based on a future contingency that will substantially affect commerce could also "apply to transportation, housing, or nutritional decisions. This broad definition of the economic activity subject to congressional regulation lacks logical limitation and is unsupported by Commerce Clause jurisprudence." *See Virginia, supra*, 728 F. Supp. 2d at 781. That the defendants' argument is "unsupported by Commerce Clause jurispru-

---

1591, 176 L. Ed. 2d 435 (2010) ("[T]he [Constitution] protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

dence" can perhaps best be seen by looking to *Lopez*. Although that case is distinct from this one in some notable ways (e.g., it involved a brief, single-subject criminal statute that did not contain detailed legislative findings), in the context of the defendants' "health care is unique" argument, it is quite similar.

In *Lopez*, the majority was concerned that using the Commerce Clause to regulate things such as possession of guns in school zones would "obliterate" the distinction between what is national and what is local and effectively create a centralized government that could potentially permit Congress to begin regulating "any and all aspects" of our lives, including marriage, divorce, child custody, and education. The dissent insisted that this concern was unfounded because the statute at issue was "aimed at curbing a *particularly acute* threat" of violence in schools that had "*singularly* disruptive potential." *Supra*, 514 U.S. at 624 (Breyer, J., dissenting). Relying on "empirical evidence . . . documented by scholars," the dissent highlighted the link between education and the national economy and "the *special way* in which guns and education are incompatible." *See id.* The impact on commerce, it was urged, derived from the unchallenged fact that "violent crime in school zones has brought about a decline in the quality of education" which, in turn, has "an adverse impact on interstate commerce." *See id.* at 623 (citation and quotation marks omitted). This was "the *rare* case, then, that a statute strikes at conduct that (when considered in the abstract) seems so removed from commerce, but which (practically speaking) has so significant an impact upon commerce." *Id.* (all emphasis added).

Two things become apparent after reading these arguments attempting to justify extending Commerce Clause power to the legislation in that case, and the majority opinion (which is the controlling precedent) rejecting those same arguments. First, the contention that Commerce Clause power should be upheld merely because the government and its experts or scholars claim that it is being exercised to address a "particularly acute" problem that is "singular[ ]," "special," and "rare"—that is to say "unique"—will not by itself win the day. Uniqueness is not an adequate limiting principle as every market problem is, at some level and in some respects, unique. If Congress asserts power that exceeds its enumerated powers, then it is unconstitutional, regardless of the purported uniqueness of the context in which it is being asserted.

Second, and perhaps more significantly, under *Lopez* the causal link between what is being regulated and its effect on interstate commerce cannot be attenuated and require a court "to pile inference upon inference," which is, in my view, exactly what would be required to uphold the individual mandate. For example, in contrast to individuals who grow and consume marijuana or wheat (even in extremely small amounts), the mere status of being without health insurance, in and of itself, has absolutely no impact whatsoever on interstate commerce (not "slight," "trivial," or "indirect," but *no impact whatsoever*)—at least not any more so than the status of being without any particular good or service. If impact on interstate commerce were to be expressed and calculated mathematically, the status of being uninsured would necessarily be represented by zero. Of course, any other figure multiplied by zero is also zero. Conse-

quently, the impact must be zero, and of no effect on interstate commerce. The uninsured can only be said to have a substantial effect on interstate commerce in the manner as described by the defendants: (i) if they get sick or injured; (ii) if they are still uninsured at that specific point in time; (iii) if they seek medical care for that sickness or injury; (iv) if they are unable to pay for the medical care received; and (v) if they are unable or unwilling to make payment arrangements directly with the health care provider, or with assistance of family, friends, and charitable groups, and the costs are thereafter shifted to others. In my view, this is the sort of piling "inference upon inference" rejected in *Lopez, supra*, 514 U.S. at 567, and subsequently described in *Morrison* as "unworkable if we are to maintain the Constitution's enumeration of powers." *Supra*, 529 U.S. at 615.[21]

I do not mean to suggest that these inferences are illogical or unreasonable to draw. As did the majority in *Lopez* and *Morrison*, I do not dispute or question their underlying existence. Indeed, while $43 billion in uncompensated care from 2008 was only 2% of national health care expenditures for that year, it is clearly a large amount of money; and it demonstrates that a number of the uninsured are taking the five sequential steps.

---

[21] I suppose it is also possible to contend that being uninsured impacts the economy because (regardless of whether the uninsured receive care that is cost-shifted to others) people without insurance tend to be less healthy and thus less productive. This seems to be the basis of one of Congress' findings. *See* Act § 1501(a)(2)(E) (finding that the national economy "loses up to $207,000,000,000 a year because of the poorer health and shorter lifespan of the uninsured"). However, such a claim would be similar to the argument that was rejected in *Morrison*, i.e., that victims of gender-motivated violence also tend to be less productive.

And when they do, Congress plainly has the power to regulate them at that time (or even at the time that they initially seek medical care), a fact with which the plaintiffs agree. But, to cast the net wide enough to reach everyone *in the present*, with the expectation that they will (or could) take those steps *in the future*, goes beyond the existing "outer limits" of the Commerce Clause and would, I believe, require inferential leaps of the sort rejected in *Lopez*. To the extent the defendants have suggested it is "empty formalism" [Def. Mem. at 16] to hold that the uninsured can be regulated at the time they seek or fail to pay for medical care (but not before) the Supreme Court has explained:

> Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day. . . . [A] judiciary that licensed extra-constitutional government with each issue of comparable gravity would, in the long run, be far worse [than the crisis itself].

New York, supra, 505 U.S. at 187.

In short, the defendants' argument that people without health insurance are actively engaged in interstate commerce based on the purported "unique" features of

the much broader health care market is neither factually convincing nor legally supportable.[22]

(iv) **The "Economic Decision" to Forego Health Insurance**

The defendants next contend that the uninsured have made the calculated decision to engage in market timing and try to finance their future medical needs out-of-pocket rather than through insurance, and that this "economic decision" is tantamount to activity. The plaintiffs respond by suggesting that it is "a remarkable exaggeration of [the] rational aspects of human nature" to claim that the uninsured (as a rule) make structured and calculated decisions to forego insurance and engage in market timing, as opposed to simply not having it. *See* Tr. at 16 ("All we know is some people do not have insurance and some people do"). The plaintiffs describe the defendants' argument on this point "Orwellian," because they seek "to redefine the inactivity of not having healthcare insurance as an affirmative economic activity of 'deciding' not to buy insurance, or deciding *now* how to pay (or not to pay) for potential *future* economic activity in the form of obtaining medical services." *See* Pl. Opp. at 10 (emphasis in original). This "economic decision" argument has been accepted by two district courts, *Liberty Univ., Inc., supra*, 2010 WL 4860299, at *15; *Thomas More Law Center, supra*, 720 F. Supp. 2d

[22] The defendants also suggest that the uninsured are "active" in the health insurance market—and therefore can be regulated and forced to buy insurance—because a large percentage of them have had insurance within the past year. The defendants have provided no authority for the suggestion that once someone is in the health insurance market at a particular point in time, they are forever in that market, always subject to regulation, and not ever permitted to leave.

at 893–94. For example, in *Liberty University*, the District Court for the Western District of Virginia stated that "by choosing to forego insurance, Plaintiffs are making an economic decision to try to pay for health care services later, out of pocket, rather than now, through the purchase of insurance," and concluded that these decisions constitute economic activity "[b]ecause of the nature of supply and demand, Plaintiff's choices directly affect the price of insurance in the market, which Congress set out in the Act to control." *See* 2010 WL 4860299, at *15.

The problem with this legal rationale, however, is it would essentially have unlimited application. There is quite literally *no* decision that, in the natural course of events, does not have an economic impact of some sort. The decisions of whether and when (or not) to buy a house, a car, a television, a dinner, or even a morning cup of coffee also have a financial impact that—when aggregated with similar economic decisions—affect the price of that particular product or service and have a substantial effect on interstate commerce. To be sure, it is not difficult to identify an economic decision that has a cumulatively substantial effect on interstate commerce; rather, the difficult task is to find a decision that does not.[23]

Some of our wisest jurists have pointed out the threat that lies in an over-expansive Commerce Clause construction. The words that Judge Learned Hand wrote in 1935 are even truer today:

---

[23] As was discussed at the hearing, even personal decisions about whether to marry, whom to marry, or whether to have children could also be characterized as "economic decisions."

> In an industrial society bound together by means of transport and communication as rapid and certain as ours, it is idle to seek for any transaction, however apparently isolated, which may not have an effect elsewhere; such a society is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.

United States v. A.L.A. Schechter Poultry Corp., 76 F.2d 617, 624 (2d Cir. 1935), *aff'd in part and rev'd in part, supra*, 295 U.S. at 554 (noting in an elastic society like ours everything affects commerce in the sense that "[m]otion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center;" but to hold that everything may thus be regulated under the Commerce Clause "will be an end to our federal system") (Cardozo, J., concurring). As the Supreme Court emphasized in *Morrison, supra*: "'In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.'" 529 U.S. at 611 (quoting *Lopez, supra*, 514 U.S. at 580 (Kennedy, J., concurring)); *accord Patton, supra*, 451 F.3d at 628 (explaining that everything could be said to affect interstate commerce "in the same sense in which a butterfly flapping its wings in China might bring about a change of weather in New York," but if all things affecting interstate commerce were held to be within Congress' regulatory power, "the Constitution's enumeration of powers would have been in vain").

Attempting to deflect this rather common sense rebuttal to their argument, the defendants emphasized during oral argument that it is not just the "economic decision" itself that renders the failure to buy insurance

activity; rather, it is that decision coupled with the fact that the uninsured are guaranteed access to medical care in hospital emergency rooms as a "backstop," the use of which can and does shift costs onto third parties. The defendants thus refer to the failure to buy health insurance as a "financing decision." However, this is essentially true of any and all forms of insurance. It could just as easily be said that people without burial, life, supplemental income, credit, mortgage guaranty, business interruption, or disability insurance have made the exact same or similar economic and financing decisions based on their expectation that they will not incur a particular risk at a particular point in time; or that if they do, it is more beneficial for them to self-insure and try to meet their obligations out-of-pocket, but always with the benefit of "backstops" provided by law, including bankruptcy protection and other government-funded financial assistance and services. *See, e.g.*, Katie Zezima, *Indigent Burials Are On the Rise*, New York Times, Oct. 11, 2009, at A23 (reporting the number of burials of those who die with insufficient assets are increasing across the country, up 50% in Oregon, and that funeral expenses are frequently borne by governmental entities; noting that Illinois alone budgets $12 million for these expenses). The "economic decision" to forego virtually any and all types of insurance can (and cumulatively do) similarly result in significant cost-shifting to third parties.[24]

---

[24] To the extent that people dying without burial insurance is by itself not as severe a problem as people without health insurance—and I readily acknowledge it is not—that is merely a difference in degree, not in kind. The fact that people without health insurance pose a more serious problem than people without burial insurance may give Congress more of a *reason* to act; but it does not give it more Constitutional

The important distinction is that "economic decisions" are a much broader and far-reaching category than are "activities that substantially affect interstate commerce." While the latter necessarily encompasses the first, the reverse is not true. "Economic" cannot be equated to "commerce." And "decisions" cannot be equated to "activities." Every person throughout the course of his or her life makes hundreds or even thousands of life decisions that involve the same general sort of thought process that the defendants maintain is "economic activity." There will be no stopping point if that should be deemed the equivalent of activity for Commerce Clause purposes.[25]

---

authority to do so. *See United States v. A.L.A. Schechter Poultry Corp.*, 76 F.2d 617, 624 (2d Cir. 1935) (noting that "emergency does not create the power [of Congress to act], but it may furnish the occasion for the exercise of the power conferred by the Constitution"), *aff'd in part and rev'd in part*, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935).

[25] For example, if the decision to forego insurance qualifies as activity, then presumably the decision to not *use* that insurance once it has been obtained is also activity. The government acknowledged during oral argument in *Virginia v. Sebelius* that although people are required to buy health insurance under the Act, they are not yet required to use it. *See* Transcript of Oral Argument on Defendants' Motion to Dismiss, July 1, 2010, at 26 ("the statute doesn't require anybody to [actually] get medical services"); *see also id.* at 30 ("Congress isn't saying go see a doctor, or you have to go. What Congress is saying is you have to purchase health insurance."). But what happens if the newly-insured (as a class) do not seek preventive medical care? Because Congress found in the Act that the economy loses money each year "because of the poorer health and shorter lifespan of the uninsured" [*see supra* note 19], it would seem only logical under the defendants' rationale that Congress may also regulate the "economic decisions" not to go to the doctor for regular check-ups and screenings to improve health and longevity, which, in turn, is intended and expected to increase economic productivity.

The Commerce Clause originally applied to the trade and exchange of goods as it sought to eliminate trade barriers by and between the states. Over the years, the Clause's reach has been expanded from covering actual interstate commerce (and its channels and instrumentalities) to intrastate activities that substantially affect interstate commerce. It has even been applied to activities that involve the mere consumption of a product (even if there is no legal commercial interstate market for that product). To now hold that Congress may regulate the so-called "economic decision" to *not* purchase a product or service in anticipation of *future* consumption is a "bridge too far." It is without logical limitation and far exceeds the existing legal boundaries established by Supreme Court precedent.

Because I find both the "uniqueness" and "economic decision" arguments unpersuasive, I conclude that the individual mandate seeks to regulate economic inactivity, which is the very opposite of economic activity. And because activity is required under the Commerce Clause, the individual mandate exceeds Congress' commerce power, as it is understood, defined, and applied in the existing Supreme Court case law.

(2) <u>The Necessary and Proper Clause</u>

The defendants contend that the individual mandate is "also a valid exercise of Congress's authority if the provision is analyzed under the Necessary and Proper Clause." *See* Def. Mem. at 23. This argument has been appropriately called "the last, best hope of those who defend ultra vires congressional action." *See Printz, supra*, 521 U.S. at 923. Oversimplified, the defendants' argument on this point can be reduced to the following:

(i) the Act bans insurers from denying health coverage (guaranteed issue), or charging higher premiums (community rating), to individuals with pre-existing medical conditions (which increases the insurers' costs); (ii) as a result of these bans, individuals will be incentivized to delay obtaining insurance as they are now guaranteed coverage if they get sick or injured (which decreases the insurers' revenues); and (iii) as a result of the foregoing, there will be fewer healthy people in the insured pool (which will raise the premiums and costs for everyone). Consequently, it is necessary to require that everyone "get in the pool" so as to protect the private health insurance market from inevitable collapse.

At the outset, I note that in *United States v. Comstock*, __ U.S. __, 130 S. Ct. 1949, 176 L. Ed. 2d 878 (2010), the Supreme Court's most recent discussion and application of the Necessary and Proper Clause, the Court identified and looked to five "considerations" that informed its decision about whether the legislation at issue was sustainable: (1) the breadth of the Necessary and Proper Clause; (2) the history of federal involvement in the relevant arena, and the modest addition to that arena; (3) the sound reasons for the legislation in light of the government's interest; (4) the statute's accommodation of state interests; and (5) its narrow scope. It is not entirely clear if this constitutes a "five-factor test," as Justice Thomas urged in dissent, *see id.* at 1974, or whether the "considerations" were merely factors that the majority believed relevant to deciding that particular case. To the extent that they constitute a "test," the individual mandate clearly gets a failing score on at least two (and possibly a couple more) of the five elements. A statute mandating that everyone purchase

a product from a private company or be penalized (merely by virtue of being alive and a lawful citizen) is not a "modest" addition to federal involvement in the national health care market, nor is it "narrow [in] scope." I will assume, however, that the *Comstock* "considerations" were just that, and that they did not bring about any fundamental change in the Court's long established Necessary and Proper Clause analysis.

The Necessary and Proper Clause provides that Congress shall have the power:

> To make all Laws which shall be *necessary and proper for carrying into Execution the foregoing Powers*, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. art. I, § 8, cl. 18 (emphasis added). The Supreme Court has repeatedly held, and the emphasized text makes clear, that the Clause is not an independent source of federal power; rather, it is simply "a caveat that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of [section] 8 'and all other Powers vested by this Constitution.' [It] is 'but merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those (powers) otherwise granted are included in the grant.'" *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247, 80 S. Ct. 297, 4 L. Ed. 2d 268 (1960); *see also Raich, supra*, 545 U.S. at 39 (Scalia, J., concurring in judgment) (stating that, while the Clause "empowers Congress to enact laws . . . that are not within its authority to enact in isolation," those laws must be "in effectuation of [Congress'] enumerated powers");

Kansas v. Colorado, 206 U.S. 46, 88, 27 S. Ct. 655, 51 L. Ed. 956 (1907) (stating that the Necessary and Proper Clause "is not the delegation of a new and independent power, but simply provision for making effective the powers theretofore mentioned").

Hamilton wrote the following in response to the concern voiced by some that the Necessary and Proper Clause—and the Supremacy Clause as well—could be used to expand federal power and destroy liberties:

> These two clauses have been the source of much virulent invective and petulant declamation against the proposed Constitution. They have been held up to the people in all the exaggerated colors of misrepresentation as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated; as the hideous monster whose devouring jaws would spare neither sex nor age, nor high nor low, nor sacred nor profane; and yet, strange as it may appear, after all this clamor, to those who may not have happened to contemplate them in the same light, it may be affirmed with perfect confidence, that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specific powers.

The Federalist No. 33, at 204–05. To the extent there was anything to fear in the Constitution, Hamilton explained, it must be found in the specific powers that

were enumerated and not in the Necessary and Proper Clause, for though the latter "may be chargeable with tautology or redundancy, [it] is at least perfectly harmless." *See id.* at 206. Madison concurred with this view. *See The Federalist* No. 44, at 302 (explaining that the Clause is entirely redundant for if it had been omitted, "there can be no doubt" that the same power and authority "would have resulted to the government, by unavoidable implication"). If these advocates for ratification had any inkling that, in the early twenty-first century, government proponents of the individual health insurance mandate would attempt to justify such an assertion of power on the basis of this Clause, they probably would have been the strongest opponents of ratification. They would have recognized how such an interpretation and application of the Necessary and Proper Clause would eviscerate the bedrock enumerated powers principle upon which the Constitution rests.

One of the *amicus curiae* briefs illustrates how using the Necessary and Proper Clause in the manner as suggested by the defendants would vitiate the enumerated powers principle (doc. 119). It points out that the defendants' are essentially admitting that the Act will have serious negative consequences, e.g., encouraging people to forego health insurance until medical services are needed, increasing premiums and costs for everyone, and thereby bankrupting the health insurance industry—unless the individual mandate is imposed. Thus, rather than being used to implement or facilitate enforcement of the Act's insurance industry reforms, the individual mandate is actually being used as the means to avoid the adverse consequences of the Act itself. Such an application of the Necessary and Proper Clause

would have the perverse effect of enabling Congress to pass ill-conceived, or economically disruptive statutes, secure in the knowledge that the more dysfunctional the results of the statute are, the more essential or "necessary" the statutory fix would be. Under such a rationale, the more harm the statute does, the more power Congress could assume for itself under the Necessary and Proper Clause. This result would, of course, expand the Necessary and Proper Clause far beyond its original meaning, and allow Congress to exceed the powers specifically enumerated in Article I. Surely this is not what the Founders anticipated, nor how that Clause should operate.

Ultimately, the Necessary and Proper Clause vests Congress with the power and authority to exercise *means* which may not in and of themselves fall within an enumerated power, to accomplish *ends* that must be within an enumerated power. Although Congress' authority to act in furtherance of those ends is unquestionably broad, there are nevertheless "restraints upon the Necessary and Proper Clause authority." *See Raich, supra*, 545 U.S. at 39 (Scalia, J., concurring in judgment). Thomas Jefferson warned against an overly expansive application of cause and effect in interpreting the interplay between Congress' enumerated powers and the Necessary and Proper Clause:

> Congress are authorized to defend the nation. Ships are necessary for defense; copper is necessary for ships; mines necessary for copper; a company necessary to work mines; and who can doubt this reasoning who has ever played at "This is the House that Jack Built?"

Letter from Thomas Jefferson to Edward Livingston (Apr. 30, 1800), in 31 *The Papers of Thomas Jefferson* 547 (B. Oberg ed., 2004); *accord Comstock*, *supra*, 130 S. Ct. at 1966 (referencing same analogy and stating that the Necessary and Proper Clause "must be controlled by some limitations lest, as Thomas Jefferson warned, congressional powers become completely unbounded by linking one power to another *ad infinitum*") (Kennedy, J., concurring); *see also id.* at 1970 (explaining that the Clause "does not give Congress carte blanche," and it is the "obligation of this Court" to impose limitations) (Alito, J., concurring). As for where the restraints and limitations might be, it is—as is often the case—appropriate to look to Chief Justice Marshall, who first considered this issue and articulated the still-governing analysis:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.
>
> * * *
>
> [However,] should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.

McCulloch, *supra*, 17 U.S. at 421, 423.

In light of *United States v. South-Eastern Underwriters*, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944), the "end" of regulating the health care insurance industry (including preventing insurers from excluding or charging higher rates to people with pre-existing conditions) is clearly "legitimate" and "within the scope of the constitution." But, the means used to serve that end must be "appropriate," "plainly adapted," and not "prohibited" or inconsistent "with the letter and spirit of the constitution." These phrases "are not merely hortatory." *Raich, supra*, 545 U.S. at 39 (Scalia, J., concurring in judgment).

The Necessary and Proper Clause cannot be utilized to "pass laws for the accomplishment of objects" that are not within Congress' enumerated powers. As the previous analysis of the defendants' Commerce Clause argument reveals, the individual mandate is neither within the letter nor the spirit of the Constitution. To uphold that provision via application of the Necessary and Proper Clause would authorize Congress to reach and regulate far beyond the currently established "outer limits" of the Commerce Clause and effectively remove all limits on federal power. As the Supreme Court explained in *Printz*:

> When a "Law . . . for carrying into Execution" the Commerce Clause [violates other Constitutional principles], it is not a "Law . . . *proper* for carrying into Execution the Commerce Clause," and is thus, in the words of the Federalist, "merely an act of usurpation" which "deserves to be treated as such."

Printz, supra, 521 U.S. at 923–24 (citations and brackets omitted) (emphasis in original); *see also Comstock, su-*

pra, 130 S. Ct. at 1967–68 ("It is of fundamental importance to consider whether essential attributes [of federalism embodied in the Constitution] are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power.") (Kennedy, J., concurring). Here, the "essential attributes" of the Commerce Clause limitations on the federal government's power would definitely be compromised by this assertion of federal power via the Necessary and Proper Clause. If Congress is allowed to define the scope of its power merely by arguing that a provision is "necessary" to avoid the negative consequences that will potentially flow from its own statutory enactments, the Necessary and Proper Clause runs the risk of ceasing to be the "perfectly harmless" part of the Constitution that Hamilton assured us it was, and moves that much closer to becoming the "hideous monster [with] devouring jaws" that he assured us it was not.

The defendants have asserted again and again that the individual mandate is absolutely "necessary" and "essential" for the Act to operate as it was intended by Congress. I accept that it is.[26] Nevertheless, the individual mandate falls outside the boundary of Congress' Commerce Clause authority and cannot be reconciled with a limited government of enumerated powers. By definition, it cannot be "proper."

---

[26] As will be seen, the defendants' repeated assertions on this point impact the severability analysis.

(3) Constitutionality of the Individual Mandate

The individual mandate is outside Congress' Commerce Clause power, and it cannot be otherwise authorized by an assertion of power under the Necessary and Proper Clause. It is not Constitutional. Accordingly, summary judgment must be granted in favor of the plaintiffs on Count I.

(4) Severability

Having determined that the individual mandate exceeds Congress' power under the Commerce Clause, and cannot be saved by application of the Necessary and Proper Clause, the next question is whether it is severable from the remainder of the Act. In considering this issue, I note that the defendants have acknowledged that the individual mandate and the Act's health insurance reforms, including the guaranteed issue and community rating, will rise or fall together as these reforms "cannot be severed from the [individual mandate]." *See, e.g.*, Def. Opp. at 40. As explained in my order on the motion to dismiss: "the defendants concede that [the individual mandate] is absolutely necessary for the Act's insurance market reforms to work as intended. In fact, they refer to it as an 'essential' part of the Act at least fourteen times in their motion to dismiss." Thus, the only question is whether the Act's other, non-health-insurance-related provisions can stand independently or whether they, too, must fall with the individual mandate.[27]

---

[27] In considering this issue, I will at times borrow heavily from one of the *amicus* briefs filed in the case for it quite cogently and effectively

Severability is a doctrine of judicial restraint, and the Supreme Court has applied and reaffirmed that doctrine just this past year: "'*Generally speaking*, when confronting a constitutional flaw in a statute, [courts] try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, __ U.S. __, 130 S. Ct. 3138, 3161, 177 L. Ed. 2d 706 (2010) (citation omitted) (emphasis added). Because the unconstitutionality of one provision of a legislative scheme "does not *necessarily* defeat or affect the validity of its remaining provisions," the "*normal* rule" is that partial invalidation is proper. *Id.* (citations omitted) (emphasis added). Where Congress has "enacted a statutory scheme for an obvious purpose, and where Congress has included a series of provisions operating as incentives to achieve that purpose, the invalidation of one of the incentives should not *ordinarily* cause Congress' overall intent to be frustrated." *New York, supra*, 505 U.S. at 186 (emphasis added). As the emphasized text shows, the foregoing is not a rigid and inflexible rule, but rather it is the general standard that applies in the typical case. However, this is anything but the typical case.

The question of severability ultimately turns on the nature of the statute at issue. For example, if Congress intended a given statute to be viewed as a bundle of separate legislative enactment or a series of short laws, which for purposes of convenience and efficiency were arranged together in a single legislative scheme, it is presumed that any provision declared unconstitutional

---

sets forth the applicable standard and governing analysis of severability (doc. 123).

can be struck and severed without affecting the remainder of the statute. If, however, the statute is viewed as a carefully-balanced and clockwork-like statutory arrangement comprised of pieces that all work toward one primary legislative goal, and if that goal would be undermined if a central part of the legislation is found to be unconstitutional, then severability is not appropriate. As will be seen, the facts of this case lean heavily toward a finding that the Act is properly viewed as the latter, and not the former.

The standard for determining whether an unconstitutional statutory provision can be severed from the remainder of the statute is well-established, and it consists of a two-part test. First, after finding the challenged provision unconstitutional, the court must determine if the other provisions can function independently and remain "fully operative as a law." *See Free Enterprise Fund, supra*, 130 S. Ct. at 3161. In a statute that is approximately 2,700 pages long and has several hundred sections—certain of which have only a remote and tangential connection to health care—it stands to reason that some (perhaps even most) of the remaining provisions can stand alone and function independently of the individual mandate. The defendants have identified several provisions that they believe can function independently: the prohibition on discrimination against providers who will not furnish assisted suicide services; an "Independence at Home" project for chronically ill seniors; a special Medicare enrollment period for disabled veterans; Medicare reimbursement for bone-marrow density tests; and provisions devised to improve women's health, prevent abuse, and ameliorate dementia [Def. Opp. at 40], as well as abstinence education and disease preven-

tion [doc. 74 at 14]. And as was mentioned during oral argument, there is little doubt that the provision in the Act requiring employers to provide a "reasonable break time" and separate room for nursing mothers to go and express breast milk [Act § 4207] can function without the individual mandate. Importantly, this provision and many others are already in effect and functioning. However, the question is not whether these and the myriad other provisions can function as a technical or practical matter; instead, the "more relevant inquiry" is whether these provisions will comprise a statute that will function "in a *manner* consistent with the intent of Congress." *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (1987) (emphasis in original). Thus, the first step in the severability analysis requires (at least to some extent) that I try to infer Congress' intent. Although many of the remaining provisions, as just noted, can most likely function independently of the individual mandate, there is nothing to indicate that they can do so in the manner intended by Congress. The analysis at the second step of the severability test makes that conclusion pretty clear.

At this second step, reviewing courts may look to "the statute's text or historical context" to determine if Congress, had it been presented with a statute that did not contain the struck part, would have preferred to have no statute at all. *See Free Enterprise Fund, supra*, 130 S. Ct. at 3161–62. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *See Alaska Airlines, Inc., supra*, 480 U.S. at 684. But once again, that presupposes that

the provisions left over function in a manner consistent with the main objective and purpose of the statute in the first place. *Cf. New York, supra,* 505 U.S. at 187 (unconstitutional provision held to be severable where the remaining statute "still serves Congress' *objective*" and the "*purpose* of the Act is not defeated by the invalidation" of the unconstitutional provision) (emphasis added). While this inquiry "can sometimes be 'elusive'" [*Free Enterprise Fund, supra,* 130 S. Ct. at 3161], on the unique facts of this particular case, the record seems to strongly indicate that Congress would not have passed the Act in its present form if it had not included the individual mandate. This is because the individual mandate was indisputably essential to what Congress was ultimately seeking to accomplish. It was, in fact, the keystone or lynchpin of the entire health reform effort. After looking at the "statute's text" (or, rather, its conspicuous lack of text) and the "historical record" [*see Free Enterprise Fund, supra,* 130 S. Ct. at 3162], there are two specific facts that are particularly telling in this respect.

First, the Act does not contain a "severability clause," which is commonly included in legislation to provide that if any part or provision is held invalid, then the rest of the statute will not be affected. Although it is true that the absence of such a clause, in and of itself, "does not raise a presumption against severability," [*New York, supra,* 505 U.S. at 186], that is not the same thing as saying that its absence is irrelevant to the analysis. In *INS v. Chadha,* 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983), for example, the Supreme Court concluded that it did not have to embark on the "elusive inquiry" of whether Congress intended the unconstitu-

tional provision in that case to be severable from the rest of the statute because Congress included a severability clause with language that was plain and unambiguous. *See id.* at 931–32. And, in *Alaska Airlines, Inc., supra,* 480 U.S. at 686, 107 S. Ct. 1476, the Court similarly held that the severability analysis is "eased" when there is a severability clause in the statute, such that only "strong evidence" can overcome it. By necessary implication, the evidence against severability need not be as strong to overcome the general presumption when there is no such clause.

The lack of a severability clause in this case is significant because one had been included in an earlier version of the Act, but it was removed in the bill that subsequently became law. "Where Congress includes [particular] language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the [omitted provision] was not intended." *Russello v. United States,* 464 U.S. 16, 23–24, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983). In other words, the severability clause was intentionally left out of the Act. The absence of a severability clause is further significant because the individual mandate was controversial all during the progress of the legislation and Congress was undoubtedly well aware that legal challenges were coming. Indeed, as noted earlier, even before the Act became law, several states had passed statutes declaring the individual mandate unconstitutional and purporting to exempt their residents from it; and Congress' own attorneys in the CRS had basically advised that the challenges might well have legal merit as it was "unclear" if the individual mandate had "solid constitutional foundation." *See* CRS Analysis, *supra,* at 3. In light of the foregoing, Con-

gress' failure to include a severability clause in the Act (or, more accurately, its decision to not include one that had been included earlier) can be viewed as strong evidence that Congress recognized the Act could not operate *as intended* without the individual mandate.

Moreover, the defendants have conceded that the Act's health insurance reforms cannot survive without the individual mandate, which is extremely significant because the various insurance provisions, in turn, are the very heart of the Act itself. The health insurance reform provisions were cited repeatedly during the health care debate, and they were instrumental in passing the Act. In speech after speech President Obama emphasized that the legislative goal was "health *insurance* reform" and stressed how important it was that Congress fundamentally reform how health insurance companies do business, and "protect every American from the worst practices of the insurance industry." *See*, for example, Remarks of President Obama, The State of the Union, delivered Jan. 27, 2009.[28] Meanwhile, the Act's supporters in the Senate and House similarly spoke repeatedly and often of the legislative efforts as being the means to comprehensively reform the health insurance industry.[29]

---

[28] *See also, e.g.*, The White House, Office of the Press Secretary, Official Transcript of President Obama's News Conference, July 22, 2009, available at: http://www.whitehouse.gov/the-press-office/news-conferencepresident-july-22-2009; The White House, Office of the Press Secretary, Official Transcript of President Obama's Remarks at Health Care Reform Town Hall, July 23, 2009, *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-Health-Care-Reform-Town-Hall/.

[29] *See, e.g.*, David Welna, *Analyzing Democrats' Word Shift on Health Care*, National Public Radio, Nov. 17, 2009 (reporting that

To be sure, the words "protection" and "affordable" in the title of the Act itself are inextricably tied to the health insurance reform provisions (and the individual mandate in particular), as the defendants have emphasized throughout the course of this litigation. *See, e.g.*, Def. Mem. at 1 ("Focusing on insurance industry practices that prevented millions of Americans from obtaining *affordable* insurance, the Act bars insurers from denying coverage to those with pre-existing conditions or from charging discriminatory premiums on the basis of medical history. Congress recognized that these reforms of insurance industry practices were required to *protect* consumers . . . ") (emphasis added); Reply in Support of Defendants' Motion to Dismiss, filed August 27, 2010 (doc. 74), at 21 (stating that the individual mandate "is necessary for Congress's insurance reforms to work"; that "those provisions *protect* millions of Americans"; and that "Congress plainly regarded their *protection* as a core objective of the Act") (emphasis added). The defendants have further identified and highlighted the essential role that the individual mandate played in the overall regulatory reform of the interstate health care and health insurance markets:

> [T]he [individual mandate] is essential to the Act's comprehensive scheme to ensure that health insurance coverage is available and *affordable*. In addition to regulating industry underwriting practices,

---

during the health care reform debate the Act's proponents referred to the ongoing efforts as "health insurance reform," which, according to the head of a nonpartisan health care organization, "is a much more accurate label" as the "health care makeover has ended up being largely about [reforming] insurance companies"), *available at* http:// www.npr.org/templates/story/story.php?storyId=120464701.

> the Act promotes availability and *affordability* through (a) "health benefit exchanges" that enable individuals and small businesses to obtain competitive prices for health insurance; (b) financial incentives for employers to offer expanded insurance coverage, (c) tax credits to low-income and middle-income individuals and families, and (d) extension of Medicaid to additional low-income individuals. *The [individual mandate] works in tandem with these and other reforms.* . . .
>
> Congress thus found that failure to regulate the decision to forgo insurance . . . would undermine the "comprehensive regulatory regime" in the Act. . . .
>
> *[The individual mandate] is essential to Congress's overall regulatory reform of the interstate health care and health insurance markets . . . is "essential" to achieving key reforms of the interstate health insurance market . . . [and is] necessary to make the other regulations in the Act effective.*

Memorandum in Support of Defendants' Motion to Dismiss, filed June 17, 2010 (doc. 56–1), at 46–48 (emphasis added).

Congress has also acknowledged in the Act itself that the individual mandate is absolutely "essential" to the Act's overarching goal of expanding the availability of affordable health insurance coverage and protecting individuals with pre-existing medical conditions:

> [I]f there were no [individual mandate], many individuals would wait to purchase health insurance until they needed care . . . The [individual mandate] is

> *essential* to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.

Act § 1501(a)(2)(I) (emphasis added).

In other words, the individual mandate is indisputably necessary to the Act's insurance market reforms, which are, in turn, indisputably necessary to the purpose of the Act. This is obviously a very different situation than in *Alaska Airlines, Inc., supra*, 480 U.S. at 694 n.18 and 696 (unconstitutional provision severed from rest of statute where the provision was "uncontroversial," and the debate on the final bill demonstrated its "relative unimportance"), and is more in line with the situation alluded to in *New York, supra*, 505 U.S. at 187 (suggesting by implication that the entire legislation should be struck when "the purpose of the Act is . . . defeated by the invalidation" of one of its provisions).

In weighing the Act's provisions and attempting to discern legislative intent and purpose, I have kept in mind the rationale underlying the severability doctrine, which the Supreme Court has described as follows:

> Three interrelated principles inform our approach to remedies. First, we try not to nullify more of a legislature's work than is necessary, for we know that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people. . . . Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting [a] law to conform it to constitutional requirements even as we strive to salvage it . . . Third, the touchstone for any decision about

> remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature.

Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320, 329–30, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006) (citations and brackets omitted). The first principle merely reflects the general judicial policy discussed at the beginning of this section; that is, because a ruling of unconstitutionality frustrates the intent of democratically-elected representatives of the people, the "normal rule"—in the "normal" case—will ordinarily require that as little of a statute be struck down as possible. The two other principles, however, require closer analysis.

As for the second principle, the *Ayotte* Court explained:

> Our ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly we have already articulated the background constitutional rules at issue . . . But making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a "far more serious invasion of the legislative domain" than we ought to undertake.

Supra, 546 U.S. at 329–30. Thus, cleanly and clearly severing an unconstitutional provision is one thing, but having to re-balance a statutory scheme by engaging in quasi-legislative "line drawing" is a "'far more serious invasion of the legislative domain'" than courts should undertake. *See id.* This analysis merges into the third principle identified in *Ayotte*:

> After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all? All the while, we are wary of legislatures who would rely on our intervention, for it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside to announce to whom the statute may be applied. This would, to some extent, substitute the judicial for the legislative department of the government.

Id. at 330 (citations and brackets omitted).

Severing the individual mandate from the Act along with the other insurance reform provisions—and in the process reconfiguring an exceedingly lengthy and comprehensive legislative scheme—cannot be done consistent with the principles set out above. Going through the 2,700–page Act line-by-line, invalidating dozens (or hundreds) of some sections while retaining dozens (or hundreds) of others, would not only take considerable time and extensive briefing, but it would, in the end, be tantamount to rewriting a statute in an attempt to salvage it, which is foreclosed by *Ayotte, supra.* Courts should not even attempt to do that. It would be impossible to ascertain on a section-by-section basis if a particular statutory provision could stand (and was intended by Congress to stand) independently of the individual mandate. The interoperative effects of a partial deletion of legislative provisions are often unforseen and unpredictable. For me to try and "second guess" what Congress would want to keep is almost impossible. To highlight one of many examples, consider the Internal Revenue Service Form 1099 reporting requirement, which re-

quires that businesses, including sole proprietorships, issue 1099 tax forms to individuals or corporations to whom or which they have paid more than $600 for goods or services in any given tax year [Act § 9006]. This provision has no discernable connection to health care and was intended to generate offsetting revenue for the Act, the need of which is greatly diminished in the absence of the "health benefit exchanges," subsidies and tax credits, and Medicaid expansion (all of which, as the defendants have conceded, "work in tandem" with the individual mandate and other insurance reform provisions). How could I possibly determine if Congress intended the 1099 reporting provision to stand independently of the insurance reform provisions? Should the fact that it has been widely criticized by both Congressional supporters and opponents of the Act and the fact that there have been bipartisan efforts to repeal it factor at all into my determination?

In the final analysis, this Act has been analogized to a finely crafted watch, and that seems to fit. It has approximately 450 separate pieces, but one essential piece (the individual mandate) is defective and must be removed. It cannot function as originally designed. There are simply too many moving parts in the Act and too many provisions dependent (directly and indirectly) on the individual mandate and other health insurance provisions—which, as noted, were the chief engines that drove the entire legislative effort—for me to try and dissect out the proper from the improper, and the able-to-stand-alone from the unable-to-stand-alone. Such a quasi-legislative undertaking would be particularly inappropriate in light of the fact that any statute that might conceivably be left over after this analysis is complete

would plainly not serve Congress' main purpose and primary objective in passing the Act. The statute is, after all, called "The Patient Protection and Affordable Care Act," not "The Abstinence Education and Bone Marrow Density Testing Act." The Act, like a defectively designed watch, needs to be redesigned and reconstructed by the watchmaker.

If Congress intends to implement health care reform—and there would appear to be widespread agreement across the political spectrum that reform is needed—it should do a comprehensive examination of the Act and make a legislative determination as to which of its hundreds of provisions and sections will work as intended without the individual mandate, and which will not. It is Congress that should consider and decide these quintessentially legislative questions, and not the courts.

In sum, notwithstanding the fact that many of the provisions in the Act can stand independently without the individual mandate (as a technical and practical matter), it is reasonably "evident," as I have discussed above, that the individual mandate was an essential and indispensable part of the health reform efforts, and that Congress did not believe other parts of the Act could (or it would want them to) survive independently. I must conclude that the individual mandate and the remaining provisions are all inextricably bound together in purpose and must stand or fall as a single unit. The individual mandate cannot be severed. This conclusion is reached with full appreciation for the "normal rule" that reviewing courts should ordinarily refrain from invalidating more than the unconstitutional part of a statute, but non-severability is required based on the unique facts of

this case and the particular aspects of the Act. This is not a situation that is likely to be repeated.

(5) Injunction

The last issue to be resolved is the plaintiffs' request for injunctive relief enjoining implementation of the Act, which can be disposed of very quickly.

Injunctive relief is an "extraordinary" [*Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312, 102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982)], and "drastic" remedy [*Aaron v. S.E.C.*, 446 U.S. 680, 703, 100 S. Ct. 1945, 64 L. Ed. 2d 611 (1980) (Burger, J., concurring)]. It is even more so when the party to be enjoined is the federal government, for there is a long-standing presumption "that officials of the Executive Branch will adhere to the law as declared by the court. As a result, the declaratory judgment is the functional equivalent of an injunction." *See Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008); *accord Sanchez–Espinoza v. Reagan*, 70 F.2d 202, 208 n.8 (D.C. Cir. 1985) ("declaratory judgment is, in a context such as this where federal officers are defendants, the practical equivalent of specific relief such as an injunction . . . since *it must be presumed that federal officers will adhere to the law as declared by the court*") (Scalia, J.) (emphasis added).

There is no reason to conclude that this presumption should not apply here. Thus, the award of declaratory relief is adequate and separate injunctive relief is not necessary.

CONCLUSION

The existing problems in our national health care system are recognized by everyone in this case. There is widespread sentiment for positive improvements that will reduce costs, improve the quality of care, and expand availability in a way that the nation can afford. This is obviously a very difficult task. Regardless of how laudable its attempts may have been to accomplish these goals in passing the Act, Congress must operate within the bounds established by the Constitution. Again, this case is not about whether the Act is wise or unwise legislation. It is about the Constitutional role of the federal government.

For the reasons stated, I must reluctantly conclude that Congress exceeded the bounds of its authority in passing the Act with the individual mandate. That is not to say, of course, that Congress is without power to address the problems and inequities in our health care system. The health care market is more than one sixth of the national economy, and without doubt Congress has the power to reform and regulate this market. That has not been disputed in this case. The principal dispute has been about how Congress chose to exercise that power here.[30]

---

[30] On this point, it should be emphasized that while the individual mandate was clearly "necessary and essential" to the Act as drafted, it is not "necessary and essential" to health care reform in general. It is undisputed that there are various other (Constitutional) ways to accomplish what Congress wanted to do. Indeed, I note that in 2008, then-Senator Obama supported a health care reform proposal that did not include an individual mandate because he was at that time strongly opposed to the idea, stating that "if a mandate was the solution, we can try that to solve homelessness by mandating everybody to buy a

Because the individual mandate is unconstitutional and not severable, the entire Act must be declared void. This has been a difficult decision to reach, and I am aware that it will have indeterminable implications. At a time when there is virtually unanimous agreement that health care reform is needed in this country, it is hard to invalidate and strike down a statute titled "The Patient Protection and Affordable Care Act." As Judge Luttig wrote for an *en banc* Fourth Circuit in striking down the "Violence Against Women Act" (before the case was appealed and the Supreme Court did the same):

> No less for judges than for politicians is the temptation to affirm any statute so decorously titled. We live in a time when the lines between law and politics have been purposefully blurred to serve the ends of the latter. And, when we, as courts, have not participated in this most perniciously machiavellian of enterprises ourselves, we have acquiesced in it by others, allowing opinions of law to be dismissed as but pronouncements of personal agreement or disagreement. The judicial decision making contemplated by the Constitution, however, unlike at least the politics

---

house." *See* Interview on CNN's American Morning, Feb. 5, 2008, transcript *available at*: http://transcripts.cnn.com/TRANSCRIPTS/0802/05/ltm.02.html. In fact, he pointed to the similar individual mandate in Massachusetts—which was imposed under the state's police power, a power the federal government does not have—and opined that the mandate there left some residents "worse off" than they had been before. *See* Christopher Lee, *Simple Question Defines Complex Health Debate*, Washington Post, Feb. 24, 2008, at A10 (quoting Senator Obama as saying: "In some cases, there are people [in Massachusetts] who are paying fines and still can't afford [health insurance], so now they're worse off than they were . . . They don't have health insurance, and they're paying a fine . . .").

> of the moment, emphatically is not a function of labels. If it were, the Supreme Court assuredly would not have struck down the "Gun-Free School Zones Act," the "Religious Freedom Restoration Act," the "Civil Rights Act of 1871," or the "Civil Rights Act of 1875." And if it ever becomes such, we will have ceased to be a society of law, and all the codification of freedom in the world will be to little avail.

Brzonkala, supra, 169 F.3d at 889.

In closing, I will simply observe, once again, that my conclusion in this case is based on an application of the Commerce Clause law as it exists pursuant to the Supreme Court's current interpretation and definition. Only the Supreme Court (or a Constitutional amendment) can expand that.

For all the reasons stated above and pursuant to Rule 56 of the Federal Rules of Civil Procedure, the plaintiffs' motion for summary judgment (doc. 80) is hereby GRANTED as to its request for declaratory relief on Count I of the Second Amended Complaint, and DENIED as to its request for injunctive relief; and the defendants' motion for summary judgment (doc. 82) is hereby GRANTED on Count IV of the Second Amended Complaint. The respective cross-motions are each DENIED.

In accordance with Rule 57 of the Federal Rules of Civil Procedure and Title 28, United States Code, Section 2201(a), a Declaratory Judgment shall be entered separately, declaring "The Patient Protection and Affordable Care Act" unconstitutional.

DONE and ORDERED this 31st day of Jan., 2011.

/s/ ROGER VINSON
ROGER VINSON
Senior United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No. 3:10–cv–91–RV/EMT

STATE OF FLORIDA, BY AND THROUGH ATTORNEY GENERAL PAM BONDI, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

Filed: Mar. 3, 2011

ORDER

ROGER VINSON, Senior District Judge.

My order of January 31, 2011 ("Order"), granted summary judgment for the plaintiffs (in part); held the "individual mandate" provision of The Patient Protection and Affordable Care Act (the "Act") unconstitutional; and declared the remainder of the Act void because it was not severable. The defendants have now filed a motion to "clarify" this ruling (doc. 156) ("Def. Mot."). During the four-plus weeks since entry of my order, the defendants have seemingly continued to move forward and implement the Act. In their response in

opposition to the defendants' motion, the plaintiffs have asserted that "[i]f the Government was not prepared to comply with the Court's judgment, the proper and respectful course would have been to seek an immediate stay, not an untimely and unorthodox motion to clarify" (doc. 158 at 2) ("Pl. Resp.").

While I believe that my order was as clear and unambiguous as it could be, it is possible that the defendants may have perhaps been confused or misunderstood its import. Accordingly, I will attempt to synopsize the 78–page order and clarify its intended effect. To that extent, the defendants' motion to clarify is GRANTED.

I. Clarification

Let me begin the clarification by emphasizing, once again, what this case is all about. The plaintiffs filed this case to challenge the Constitutionality of the Act. The complaint raised several causes of action, but the crux of the case centered on the Constitutionality of the individual mandate, which, beginning in 2014, will require everyone (with certain stated exceptions) to buy federally-approved health insurance or pay a monetary "penalty." Like every single district court to consider this issue so far—including those that have ruled for the federal government—I rejected the defendants' argument that the penalty should be construed as a tax barred by the Anti–Injunction Act. Instead, I concluded that it was a civil regulatory penalty which could not be based on the federal government's broad taxing power. The issue was thus narrowed to whether the individual mandate fell within, or went beyond, Congress's Constitutional authority "To regulate Commerce . . . among the several States." U.S. Const. art I, § 8, cl. 3.

In granting summary judgment in favor of the plaintiffs on that question, I traced the historical roots of the Commerce Clause and the evolution of its judicial interpretation. I noted that the word "commerce" had a well-understood meaning when the Founding Fathers drafted our Constitution and when "We the People" later adopted it. I analyzed and discussed (in detail) every significant and pertinent Commerce Clause case decided by the Supreme Court, including the primary cases relied on by the defendants: *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942); and *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005). I concluded, however, that those (and other) cases neither supported the defendants' position nor directly resolved the Constitutional question at issue. Indeed, as Congress's own attorneys (in the Congressional Research Service) have explained:

> While in *Wickard* and *Raich*, the individuals were participating in their own home activities (i.e., producing wheat for home consumption and cultivating marijuana for personal use), they were acting of their own volition, and this activity was determined to be economic in nature and affected interstate commerce. However, [the individual mandate] could be imposed on some individuals who engage in virtually no economic activity whatsoever. *This is a novel issue*: whether Congress can use its Commerce Clause authority to require a person to buy a good or a service and whether this type of required participation can be considered economic activity.

Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analy-*

sis, July 24, 2009, at 6 ("CRS Analysis") (emphasis added).[1]

I recognized in my order that "novel" and unprecedented did not, by itself, mean "unconstitutional," so I then proceeded to address the defendants' several arguments in support of the individual mandate. Following the Supreme Court's precedent in *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995), I "pause[d] to consider the implications of the Government's arguments" by discussing possible hypothetical extensions of the logic underlying them. *See id.* at 564–65. For example, in *Lopez*, the Court also used hypothetical examples to illustrate other areas that "Congress could regulate" and activities that "Congress could mandate" in the future under the federal government's logic, and concluded that, under such reasoning, it would be hard "to posit any activity by an individual that Congress is without power to regulate." *See id.* I similarly concluded that the government's arguments in this case—including the "economic decisions" argument—could authorize Congress to regulate almost any

---

[1] Even the district courts that have upheld the individual mandate seem to agree that "activity" is indeed required before Congress can exercise its authority under the Commerce Clause. They have simply determined that an individual's *decision* not to buy health insurance qualifies as *activity*. For example, in the most recent case, *Mead v. Holder*, __ F. Supp. 2d __, 2011 WL 611139 (D.C.C. Feb. 22, 2011), the District Court for the District of Columbia concluded that "[m]aking a choice is an affirmative action, whether one decides to do something or not do something," and, therefore, Congress can regulate "*mental activity*" under the commerce power. *See id.* at __, at *18 (emphasis added). As that court acknowledged, however, there is "little judicial guidance" from the Supreme Court with respect to this issue as "previous Commerce Clause cases have all involved physical activity." *Id.*

activity (or inactivity). This could not be reconciled with a federal government of limited and enumerated powers. I thus concluded that the meaning of the term "commerce" as understood by the Founding Fathers would not have encompassed the individual mandate, not because of some vague "original intent," but because it would have violated the fundamental and foundational principles upon which the Constitution was based: a federal government with limited enumerated powers which can only exercise those specific powers granted to it.

Similarly, I determined (consistent with the *Lopez* majority's rejection of the dissent's arguments) that "market uniqueness" is not an adequate limiting principle as the same basic arguments in support of the individual mandate could be applied in other contexts outside the "unique" health care market, and could be used to require that individuals buy (under threat of penalty) virtually any good or service that Congress has a "rational basis" to conclude would help the national economy, from cars to broccoli.[2] I thus held that the individ-

---

[2] Although some have suggested that the possibility of Congress being able to claim such a power is Constitutionally implausible, subsequent events have only reinforced the legitimacy of this concern. On February 2, 2011, two days after my order was entered, the Senate Judiciary Committee held a hearing to explore the Constitutionality of the individual mandate. The possibility of a "broccoli mandate" was discussed at this hearing. Former Solicitor General and Harvard law professor Charles Fried testified (during the course of *defending* the Constitutionality of the individual mandate) that under this view of the commerce power Congress could, indeed, mandate that everyone buy broccoli. *See* Transcript of Senate Judiciary Committee Hearing: Constitutionality of the Affordable Care Act (Feb. 2, 2011); *see also* Written Testimony of Charles Fried, Beneficial Professor of Law, Harvard Law School, Before the Senate Judiciary Committee on "The Constitutionality of the Affordable Care Act" (Feb. 2, 2011), at 4. This testimony only

ual mandate exceeded Congress's authority under the Commerce Clause (at least as understood, defined, and applied in existing case law). Such an unprecedented and potentially radical expansion of Congress's commerce power could only be authorized in the first instance by the Supreme Court, or possibly by a Constitutional amendment. It is not for a lower court to expand upon Supreme Court jurisprudence, and in the process authorize the exercise of a "highly attractive power" *that Congress has never before claimed in the history of the country* [*see generally Printz v. United States*, 521 U.S. 898, 905–18, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997)], and which Congress's very own attorneys have

---

highlights my concern because it directly undercuts the defendants' principal argument for why an economic mandate is justified here; to wit, that it is justified in this case (and only this case) because the broad health care market is "unique" and because the failure to buy health insurance constitutes an "economic financing decision" about how to pay for an unavoidable service that hospital emergency rooms (unlike sellers of produce and other commodities) are required under law to provide regardless of ability to pay. As noted, to the extent that one may respond to this hypothetical concern by suggesting that "political accountability" would prevent Congress from ever imposing a "broccoli mandate" (even though it could), the Supreme Court has specifically rejected that as the appropriate test for "the limitation of congressional authority is not solely a matter of legislative grace." *See United States v. Morrison*, 529 U.S. 598, 616, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000); *see also id.* at 616 n.7 (explaining that Congress's authority under the Commerce Clause is not "limited only by public opinion and the Legislature's self-restraint," and thereby rejecting the claim that "political accountability is . . . the only limit on Congress' exercise of the commerce power"); *cf. United States v. Stevens*, __ U.S. __, 130 S. Ct. 1577, 1591, 176 L. Ed. 2d 435 (2010) ("[T]he [Constitution] protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

warned "could be perceived as virtually unlimited in scope." See CRS Analysis, *supra*, at 7. After concluding that the individual mandate could not be supported by existing Commerce Clause precedent—nor under Necessary and Proper Clause case law, including the recent doctrinal analysis articulated in *United States v. Comstock*, __ U.S. __, 130 S. Ct. 1949, 176 L. Ed. 2d 878 (2010)—I then considered the question of severability.

In deciding the severability issue, I began by recognizing and acknowledging that, if at all possible, courts will usually only strike down the unconstitutional part of a statute and leave the rest intact. However, I noted that this was not the usual case, and that its unique facts required a finding of non-severability. In particular, I noted that:

(i) At the time the Act was passed, Congress knew for certain that legal challenges to the individual mandate were coming;

(ii) Congress's own Research Service had essentially advised that the legal challenges would have merit (and therefore might result in the individual mandate being struck down) as it could not be said that the individual mandate had "solid constitutional foundation" [CRS Analysis, *supra*, at 3];

(iii) And yet, Congress specifically (and presumably intentionally) *deleted* the "severability clause" that had been included in the earlier version of the Act.

I concluded that, in light of the foregoing facts, the conspicuous absence of a severability clause—which is ordinarily included in complex legislation as a matter of routine—could be viewed as strong evidence that Con-

gress recognized that the Act could not operate as intended if the individual mandate was eventually struck down by the courts.

I also found that the defendants' own arguments in defense of the individual mandate on Necessary and Proper grounds necessarily undermined its argument for severability. I noted, for example, that during this case the defendants consistently and repeatedly highlighted the "essential" role that the individual mandate played in the regulatory reform of the interstate health care and health insurance markets, which was the entire point of the Act. As the defendants themselves made clear:

> [The individual mandate] is *essential* to the Act's comprehensive scheme to ensure that health insurance coverage is available and affordable [and it "works in tandem" with the health benefit exchanges, employer incentives, tax credits, and the Medicaid expansion].
>
> * * *
>
> [The absence of an individual mandate] would *undermine the "comprehensive regulatory regime"* in the Act.
>
> * * *
>
> *[The individual mandate] is essential to Congress's overall regulatory reform of the interstate health care and health insurance markets . . . [it] is "essential" to achieving key reforms of the interstate health insurance market . . . [and it is] necessary to make the other regulations in the Act effective.*

Memorandum in Support of Defendants' Motion to Dismiss (doc. 56–1), at 46–48 (emphasis added). Therefore, according to the defendants' own arguments, the individual mandate and the insurance reform provisions must rise or fall together.[3]

In the course of applying the two-part severability analysis, I noted that the Supreme Court has stressed that the "relevant inquiry in evaluating severability is whether the statute [with the unconstitutional provision removed] will function in a manner consistent with the intent of Congress." *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (1987). In light of the defendants' own arguments as quoted above and dozens of similar representations that they made throughout this case, I had no choice but to find that the individual mandate was essential to, and thus could not be severed from, the rest of the Act.

I further noted that, because the Act was extremely lengthy and many of its provisions were dependent (directly or indirectly) on the individual mandate, it was improper for me (a judge) to engage in the quasi-legislative undertaking of deciding which of the Act's several hundred provisions could theoretically survive without the individual mandate (as a technical or practical matter) and which could not—or which provisions Congress could have arguably *wanted* to survive. To

---

[3] As explained in my order, the mere fact that the individual mandate was "necessary" to the Act as drafted does not mean it was Constitutionally "proper." *See, e.g., Printz v. United States*, 521 U.S. 898, 923–24, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) ("When a 'Law for carrying into Execution' the Commerce Clause violates [other Constitutional principles], it is not a 'Law *proper* for carrying into Execution the Commerce Clause'") (emphasis in original) (ellipses omitted).

demonstrate this problem, I discussed the Act's much-maligned Internal Revenue Service Form 1099 reporting requirement, which was an apparent revenue-generating provision with no connection to health care:

> How could I possibly determine if Congress intended the 1099 reporting provision to stand independently of the insurance reform provisions? Should the fact that it has been widely criticized by both Congressional supporters and opponents of the Act and the fact that there have been bipartisan efforts to repeal it factor at all into my determination?

Order at 73. In fact, on February 2, 2011, two days after entry of my order, the Senate voted (with bipartisan support) to repeal the Form 1099 provision (and the House is expected to follow with a similar vote in upcoming weeks). This is exactly how the process should be, as it highlights that it is Congress—and not courts—that should consider and decide the quintessentially legislative questions of which, if any, of the statute's hundreds of provisions should stay and which should go.

Because of these atypical and unusual circumstances (e.g., the *deletion of a severability clause* in the face of inevitable and well-founded legal challenges; the defendants' *repeated acknowledgment* in this case that the individual mandate was the keystone or lynchpin of the statute's overall purpose; and the obvious difficulty (if not impropriety) of reconfiguring an *extremely lengthy and comprehensive statute* with so many interconnected provisions), I concluded that these facts were not likely to be present in future litigation, and that the "normal rule" of severability—which would still apply in the vast majority of cases—was not applicable here.

Compare, for example, the unusual facts of this case with a case where the "normal rule" has been applied. In *New York v. United States*, 505 U.S. 144, 157, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992), the Supreme Court was called upon to consider the Constitutionality of the Low–Level Radioactive Waste Policy Act, which, in an effort to address a looming shortage of disposal sites of low level radioactive waste, set forth three "incentives" to states that provided for disposal of waste generated within their borders. The Supreme Court held that the first two incentives were Constitutional, but the third—the take title provision—was not. In holding that provision could be severed from the statute, the Court explained:

> Common sense suggests that where Congress has enacted a statutory scheme for an obvious purpose, and where Congress has included a series of provisions operating as incentives to achieve that purpose, the invalidation of one of the incentives should not ordinarily cause Congress' overall intent to be frustrated. . . . [The one incentive] may fail, and still the great body of the statute have operative force, and the force contemplated by the legislature in its enactment. . . .
>
> [T]he take title provision may be severed *without doing violence* to the rest of the Act. The Act is still operative and it *still serves Congress' objective* of encouraging the States to attain local or regional self-sufficiency in the disposal of low level radioactive waste. It still includes two incentives that coax the States along this road. . . . *The purpose of the Act* is not defeated by the invalidation of the take

> title provision, so we may leave the remainder of the Act in force.

Id. at 186–67 (emphasis added). Plainly, the "normal case" is very different from the one presented here, where the federal government has repeatedly made clear that the primary and overall *purpose* (albeit not necessarily every single provision) of the Act would be directly and irretrievably compromised by the removal of the central feature that Congress described as "essential" in the words of the Act itself. *See* Act § 1501(a)(2)(I).[4]

After determining that the individual mandate was unconstitutional and that it could not be severed from the remainder of the Act—and thus "the entire Act must be declared void"—I finally considered the plaintiffs' request for injunctive relief. I explained that the "extraordinary" and "drastic" remedy of an injunction is not typically required against the federal government because:

---

[4] For example, during the summary judgment hearing and oral argument, the defendants' attorney stressed that the individual mandate is absolutely necessary to the health insurance reforms as those reforms "literally can't work without" the individual mandate [*see* Tr. 83]. As noted, this was very significant because the insurance reform provisions were not a small or inconsequential part of the Act. In fact, they were its primary purpose and main objective—as clearly demonstrated, *inter alia*, by the title of the Act itself and the fact that its proponents frequently referred to the legislative efforts as "health insurance reform." It is, quite frankly, difficult to comprehend how severing and removing the "health insurance reform provisions" from "health insurance reform legislation" could even arguably leave a statute that would "function in a manner consistent with the intent of Congress." *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (1987)

> . . . there is a long-standing presumption "that officials of the Executive Branch will adhere to the law as declared by the court. As a result, the declaratory judgment is the functional equivalent of an injunction." *See Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008); *accord Sanchez–Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985) ("declaratory judgment is, in a context such as this where federal officers are defendants, the practical equivalent of specific relief such as an injunction . . . since *it must be presumed that federal officers will adhere to the law as declared by the court*") (Scalia, J.) (emphasis added).
>
> There is no reason to conclude that this presumption should not apply here. Thus, the award of declaratory relief is adequate and separate injunctive relief is not necessary.

Order at 75. The above language seems to be plain and unambiguous. Even though I expressly declared that the entire Act was "void," and even though I emphasized that "separate injunctive relief is not necessary" only because it must be presumed that "the Executive Branch will adhere to the law as declared by the court," which means that "declaratory judgment is the functional equivalent of an injunction," the defendants have indicated that they "do not interpret the Court's order as requiring them to immediately cease [implementing and enforcing the Act]." *See* Def. Mot. at 4; *see also id.* at 6 ("we do not understand the Court's declaratory judgment of its own force to relieve the parties to this case of any obligations or deny them any rights under the Act"). They have reportedly continued with full im-

plementation of the Act. They claim that they have done so based on certain language in (and legal analyses left out of) my order, which they believe suggests that the ruling "does not in itself automatically and in self-executing manner relieve the parties of their obligations or rights under the [Act] while appellate review is pending." *See id.*

The defendants have suggested, for example, that my order and judgment could not have been intended to have the full force of an injunction because, if I had so intended, I would have been "required to apply the familiar four-factor test" to determine if injunctive relief was appropriate. *See* Def. Mot. at 14. That well-settled four-factor test requires the party seeking an injunction to demonstrate:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay, Inc. v. MercExchange, LLC, 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006). I did not undertake this four-factor analysis for a simple reason: it was not necessary. Even though the defendants had technically disputed that the plaintiffs could satisfy those four factors, the defendants had acknowledged in their summary judgment opposition brief that, if I were to find for the plaintiffs, separate injunctive relief would be superfluous and unnecessary. The defendants expressly assured the court that, in light of the "long-standing pre-

sumption that a declaratory judgment provides adequate relief as against an executive officer, as it will not be presumed that that officer will ignore the judgment of the Court," any declaratory judgment in the plaintiffs' favor "would [ ] be adequate to vindicate [the plaintiffs'] claims." Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment (doc. 137), at 43. Consequently, there was no need to discuss and apply the four-factor test to determine if injunctive relief was appropriate because the defendants had confirmed that they would "not . . . ignore the judgment of the Court" and that my "declaratory judgment would [ ] be adequate." In other words, the defendants are now claiming that it is somehow confusing that I bypassed the four-factor test and applied the "long-standing presumption" that they themselves had identified and specifically insisted that they would honor.

I am aware that in their opposition brief the defendants attempted to qualify and limit the "long-standing presumption"—and avoid the declaratory judgment's *immediate* injunction-like effect—by intimating that it should apply "after appellate review is exhausted." *See id.* There were several problems with this claim (which is why I rejected it *sub silentio*). First of all, the case the defendants cited in making their qualifying statement [*Miers, supra*, 542 F.3d at 911] does not at all support the position that a district court's declaratory judgment will only be presumed to have injunctive effect against federal officials "after appellate review is exhausted." Quite to the contrary, in that case the Court of Appeals for the District of Columbia determined that the presumption attached *immediately* and thus the district court's declaratory judgment had immediate

injunction-like effect (which is why the order under review was "immediately appealable" in the first instance). *See id.* at 910–11. Accordingly, while the defendants may have tried to qualify the long-standing presumption and limit it to post-appeal, I was (and still am) unpersuaded that the presumption can (or should) be limited in such fashion. Indeed, I note that the federal government previously advanced the exact same "after appellate review is exhausted" argument (almost word-for-word) in one of the Virginia cases [*see* doc. 96, in 3:10–cv–188, at 34–35], where it appears to have been rejected *sub silentio* as well. *See Virginia v. Sebelius*, 728 F. Supp. 2d 768, 790 (E.D. Va. 2010) (declaring individual mandate unconstitutional, but declining to issue injunction because, in light of the long-standing presumption against enjoining federal officers, "the award of declaratory judgment is sufficient to stay the hand of the Executive branch *pending* appellate review") (emphasis added).

Furthermore, as the plaintiffs have correctly pointed out [*see* Pl. Resp. at 3–6], to suggest that a declaratory judgment will only be effective and binding on the parties after the appeals process has fully run its course is manifestly incorrect and inconsistent with well established statutory and case law. A declaratory judgment establishes and declares "the rights and other legal relations" between the parties before the court and has "the force and effect of a final judgment." *See* 28 U.S.C. § 2201(a). "A declaratory judgment cannot be enforced by contempt proceedings, but it has the same effect as an injunction in fixing the parties' legal entitlements. . . . A litigant who tries to evade a federal court's judgment—and a declaratory judgment is a real judg-

ment, not just a bit of friendly advice—will come to regret it." *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 782 (7th Cir. 2010). If it were otherwise, a federal court's declaratory judgment would serve "no useful purpose as a final determination of rights." *See Public Service Comm'n of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 247, 73 S. Ct. 236, 97 L. Ed. 291 (1952). For the defendants to suggest that they were entitled (or that in the weeks after my order was issued they thought they might be entitled) to basically ignore my declaratory judgment until "after appellate review is exhausted" is unsupported in the law.[5]

So to "clarify" my order and judgment: The individual mandate was declared unconstitutional. Because that "essential" provision was unseverable from the rest of the Act, the entire legislation was void. This declaratory judgment was expected to be treated as the "prac-

---

[5] The defendants have claimed that "[i]n other declaratory judgment cases, pending appellate review, 'the Government has been free to continue to apply [a] statute' following entry of a declaratory judgment." *See* Def. Mot. at 4–5 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963); *Carreno v. Johnson*, 899 F. Supp. 624 (S.D. Fla. 1995)). Quoting from *Mendoza-Martinez*, the defendants further claim that "'a single federal judge'" is not authorized to "'paralyze totally the operation of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order' prior to appellate review." *See id.* at 5. The two cited cases are plainly inapposite for the reasons identified by the plaintiffs. *See* Pl. Resp. at 4–5. *Mendoza-Martinez*, for example, applied a statute that precluded single-judge district courts from enjoining an Act of Congress; but that statute was repealed by Congress thirty-five years ago, in 1976. The defendants' selective quoting from those cases—to suggest that the federal government may simply ignore a declaratory judgment by a district court until the appeals process has fully run its course—borders on misrepresentation.

tical" and "functional equivalent of an injunction" with respect to the parties to the litigation. This expectation was based on the "longstanding presumption" that the defendants themselves identified and agreed to be bound by, which provides that a declaratory judgment against federal officials is a *de facto* injunction. To the extent that the defendants were unable (or believed that they were unable) to comply, it was expected that they would immediately seek a stay of the ruling, and at that point in time present their arguments for why such a stay is necessary, which is the usual and standard procedure. It was not expected that they would effectively ignore the order and declaratory judgment for two and one-half weeks, continue to implement the Act, and only then file a belated motion to "clarify."[6]

The plaintiffs have contended that the defendants did not actually need any of the above clarification as they were not really confused by, or unsure of, the effect of my order and judgment. They have suggested that if the defendants had truly believed there was any uncertainty or ambiguity, they would have immediately sought clarification rather than continuing to move forward with implementing the Act as if nothing had happened. The plaintiffs have asserted that the defendants'

---

[6] The defendants have suggested in reply to the plaintiffs' response that the reason for the delay was due to the fact that my order "required careful analysis," and it was only after this "careful review" that the defendants could determine its "potential impact" with respect to implementation of the Act (*see* doc. 164 at 11). This seems contrary to media reports that the White House declared within *hours* after entry of my order that "implementation will proceed apace" regardless of the ruling. *See, e.g.*, N.C. Aizenman and Amy Goldstein, *U.S. Judge in Florida Rejects Health Law*, Washington Post, Feb. 1, 2011, at A01 (quoting a senior White House official).

motion to clarify is, "in fact, a transparent attempt, through the guise of seeking clarification, to obtain a stay pending appeal." *See* Pl. Resp. at 2. At certain parts in the pleading, the defendants' motion does seem to be more of a motion to stay than a motion to clarify. Because the defendants have stated that they intend to file a subsequent motion to stay [Def. Mot. at 15] if I were to "clarify" that I had intended my declaratory judgment to have immediate injunction-like effect (which I just did), I will save time in this time-is-of-the-essence case by treating the motion to clarify as one requesting a stay as well.

II. <u>Motion to Stay</u>

In deciding whether to grant a stay pending appeal, courts should generally examine four factors: (1) whether the applicants have made a strong showing that they are likely to prevail; (2) whether the applicants will be irreparably injured if a stay is not granted; (3) whether granting the stay will substantially injure the other parties interested in the proceeding; and (4) "where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987).

For the first factor, I cannot say that the defendants do not have a likelihood of success on appeal. They do. And so do the plaintiffs. Although I strongly believe that expanding the commerce power to permit Congress to regulate and mandate mental decisions not to purchase health insurance (or any other product or service) would emasculate much of the rest of the Constitution and effectively remove all limitations on the power of the federal government, I recognize that others believe otherwise. The individual mandate has raised some novel

issues regarding the Constitutional role of the federal government about which reasonable and intelligent people (and reasonable and intelligent jurists) can disagree. To be sure, members of Congress, law professors, and several federal district courts have already reached varying conclusions on whether the individual mandate is Constitutional. It is likely that the Courts of Appeal will also reach divergent results and that, as most court-watchers predict, the Supreme Court may eventually be split on this issue as well. Despite what partisans for or against the individual mandate might suggest, this litigation presents a question with some strong and compelling arguments on both sides. Ultimately, I ruled the way I did, not only because I believe it was the right overall result, but because I believe that is the appropriate course for a lower court to take when presented with a (literally) unprecedented argument whose success depends on stretching existing Supreme Court precedent well beyond its current high water mark and further away from the "first principles" that underlie our entire federalist system. Under these circumstances, I must conclude that the defendants do have some (sufficient for this test only) likelihood of success on appeal.

I must next consider the injury to the defendants if the stay is not entered, and the injury to the plaintiffs if it is. The Act, as previously noted, is obviously very complicated and expansive. It contains about 450 separate provisions with different time schedules for implementation. Some are currently in effect, while others, including the individual mandate, are not scheduled to go into effect for several years. In their motion, the defendants have identified and described the "significant disruption" and "wide-ranging and indeterminate conse-

quences" that could result if implementation of the entire Act must stop immediately [*see* Def. Mot. at 4, 7–11], and, upon review and consideration of these arguments, I agree that it would indeed be difficult to enjoin and halt the Act's implementation while the case is pending appeal. It would be extremely disruptive and cause significant uncertainty.

Against this, however, I must balance the potential injury to the plaintiffs if a stay is entered. Relying on their previous summary judgment filings, the plaintiffs have argued that the Act is causing them substantial harm now because the state plaintiffs are being required to expend significant funds and resources in order to comply with the Act's numerous provisions. In this respect, it is apparent that the plaintiffs will be injured by a stay of my ruling.[7] Similarly, businesses, families, and individuals are having to expend time, money, and effort in order to comply with all of the Act's requirements. Further, I do not doubt that—assuming that my ruling is eventually affirmed—the plaintiffs will sustain injury if the Act continues to be implemented. Reversing what is presently in effect (and what will be put into effect in the future) may prove enormously difficult. Indeed, one could argue that was the entire point in front-loading certain of the Act's provisions in the first place. It could also be argued that the Executive Branch seeks to continue the implementation, in part, for the very reason

---

[7] Although the severity of that injury is undercut by the fact that at least eight of the plaintiff states (noted further *infra*) have represented that they will continue to implement and fully comply with the Act's requirements—in an abundance of caution while this case is on appeal—irrespective of my ruling.

that the implemented provisions will be hard to undo once they are fully in place. However, after balancing the potential harm to the plaintiffs against the potential harm to the defendants, I find that, on balance, these two factors weigh in favor of granting a stay—particularly in light of several unusual facts present in this case.

For example, my declaratory judgment, of course, only applies to the parties to this litigation. The State of Michigan is one of those parties. However, a federal district court in Michigan has already upheld the Act and the individual mandate. *See Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010). Can (or should) I enjoin and halt implementation of the Act in a state where one of its federal courts has held it to be Constitutional? In addition, many of the plaintiff states have publicly represented that they will immediately halt implementation of the Act in light of my declaratory judgment, while at least eight plaintiff states (as identified by the defendants in their motion and reply) have suggested that, in an abundance of caution, they will *not* stop implementing the Act pending appeal. In addition to these apparent disagreements *among* the plaintiff states, there is even disagreement *within* the plaintiff states as to whether the implementation should continue pending appeal. For example, while the plaintiffs (a group that includes the *Attorney General* of Washington) have requested that I enjoin the defendants from implementing the Act, the *Governor* of Washington has just filed an amicus brief specifically opposing that request (doc. 163). At this point in time, and in light of all this uncertainty, it would be difficult to deny the defendants a stay pending appeal. Nonethe-

less, in light of the potential for ongoing injury to the plaintiffs, the stay should be in place for as short of time as possible (months, and not years), as discussed immediately below.

Finally, for the last factor, I must consider "where the public interest lies." Although the defendants' pleadings present a reasonably persuasive argument for why the "public interest lies" in having my declaratory judgment and *de facto* injunction stayed pending appeal, almost every argument that the defendants have advanced speaks much more persuasively to why the case should be immediately appealed and pursued in the most expeditious and accelerated manner allowable. As both sides have repeatedly emphasized throughout this case, the Act seeks to comprehensively reform and regulate more than one-sixth of the national economy. It does so via several hundred statutory provisions and thousands of regulations that put myriad obligations and responsibilities on individuals, employers, and the states. It has generated considerable uncertainty while the Constitutionality of the Act is being litigated in the courts. The sooner this issue is finally decided by the Supreme Court, the better off the entire nation will be. And yet, it has been more than one month from the entry of my order and judgment and still the defendants have not filed their notice of appeal.

It should not be at all difficult or challenging to "fast-track" this case.[8] The briefing with respect to the general issues involved are mostly already done, as the federal government is currently defending several other

---

[8] I note that two of the pending appeals (in the Fourth and Sixth Circuits) are apparently proceeding on an expedited basis.

similar challenges to the Act that are making their way through the appellate courts. Furthermore, the legal issues specific to this case have already been fully and very competently briefed. With a few additional modifications and edits (to comply with the appellate rules), the parties could probably just change the caption of the case, add colored covers, and be done with their briefing.

After careful consideration of the factors noted above, and all the arguments set forth in the defendants' motion to clarify, I find that the motion, construed as a motion for stay, should be GRANTED. However, the stay will be conditioned upon the defendants filing their anticipated appeal within seven (7) calendar days of this order and seeking an expedited appellate review, either in the Court of Appeals or with the Supreme Court under Rule 11 of that Court. *See, e.g., NML Capital Ltd. v. Republic of Argentina*, 2005 WL 743086, at *5 (S.D. N.Y. Mar. 31, 2005) (district court granted motion to stay its own ruling, "conditioned on as prompt as possible appeal and a motion for an expedited appeal").

III. Conclusion

As I wrote about two weeks after this litigation was filed: "the citizens of this country have an interest in having this case resolved as soon as practically possible" (doc. 18 at 4). That was nearly eleven months ago. In the time since, the battle lines have been drawn, the relevant case law marshaled, and the legal arguments refined. Almost everyone agrees that the Constitutionality of the Act is an issue that will ultimately have to be decided by the Supreme Court of the United States. It is very important to everyone in this country that this case move forward as soon as practically possible.

Therefore, the defendants' motion to clarify (doc. 156) is GRANTED, as set forth above. To the extent that motion is construed as a motion to stay, it is also GRANTED, and the summary declaratory judgment entered in this case is STAYED pending appeal, conditioned upon the defendants filing their notice of appeal within seven (7) calendar days of this order and seeking an expedited appellate review.

DONE and ORDERED this 3rd day of Mar., 2011.

/s/ ROGER VINSON
ROGER VINSON
Senior United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

No. 3:10–cv–91 RV/EMT

STATE OF FLORIDA, BY AND THROUGH BILL MCCOLLUM, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

Oct. 14, 2010

ORDER AND MEMORANDUM OPINION

ROGER VINSON, Senior District Judge.

Now pending is the defendants' motion to dismiss (doc. 55). This motion seeks dismissal of Counts One, Two, Three, and Six of the plaintiffs' amended complaint for lack of subject matter jurisdiction (pursuant to Rule 12(b)(1), Fed. R. Civ. P.), and dismissal of all counts in the amended complaint for failure to state a claim upon which relief can be granted (pursuant to Rule 12(b)(6), Fed. R. Civ. P.). The plaintiffs have filed a response in opposition, and the defendants have filed a reply to that

response. A hearing was held in this matter on September 14, 2010.

I. INTRODUCTION

This litigation—one of many filed throughout the country—raises a facial Constitutional challenge to the federal healthcare reform law, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111–152, 124 Stat. 1029 (2010) (the "Act"). It has been filed by sixteen state Attorneys General and four state Governors (the "state plaintiffs");[1] two private citizens, Mary Brown and Kaj Ahlburg (the "individual plaintiffs"); and the National Federation of Independent Business ("NFIB") (together, the "plaintiffs"). The defendants are the United States Department of Health and Human Services, Department of Treasury, Department of Labor, and their respective secretaries (together, the "defendants").

Before addressing the plaintiffs' allegations, and the arguments in support of the defendants' motion to dismiss, I will take a moment to emphasize preliminarily what this case is, and is not, about.

The Act is a controversial and polarizing law about which reasonable and intelligent people can disagree in good faith. There are some who believe it will expand access to medical treatment, reduce costs, lead to improved care, have a positive effect on the national economy, and reduce the annual federal budgetary deficit,

---

[1] The state plaintiffs represent: Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North and South Dakota, Pennsylvania, South Carolina, Texas, Utah, and Washington.

while others expect that it will do exactly the opposite. Some say it was the product of an open and honest process between lawmakers sufficiently acquainted with its myriad provisions, while others contend that it was drafted behind closed doors and pushed through Congress by parliamentary tricks, late night weekend votes, and last minute deals among members of Congress who did not read or otherwise know what was in it. There are some who believe the Act is designed to strengthen the private insurance market and build upon free market principles, and others who believe it will greatly expand the size and reach of the federal government and is intended to create a socialized government healthcare system.

While these competing arguments would make for an interesting debate and discussion, it is not my task or duty to wade into the thicket of conflicting opinion on any of these points of disagreement. For purposes of this case, it matters not whether the Act is wise or unwise, or whether it will positively or negatively impact healthcare and the economy. Nor (except to the limited extent noted in Part III.A(7) *infra*) am I concerned with the manner in which it was passed into law. My review of the statute is not to question or second guess the wisdom, motives, or methods of Congress. I am only charged with deciding if the Act is Constitutional. If it is, the legislation must be upheld—even if it is a bad law. *United States v. Butler*, 297 U.S. 1, 79, 56 S. Ct. 312, 80 L. Ed. 477 (1936) ("For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government") (Stone, J., dissenting). Conversely, if it is unconstitutional, the legislation must be struck down—even if it is a good law. *Bailey v. Drexel Furniture Co. (Child*

Labor Tax Case), 259 U.S. 20, 37, 42 S. Ct. 449, 66 L. Ed. 817 (1922) (reviewing court must strike down unconstitutional law even though that law is "designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards.").

At this stage in the case, however, my job is much simpler and more narrow than that. In ruling on the defendants' motion to dismiss, I must only decide if this court has jurisdiction to consider some of the plaintiffs' claims, and whether each of the counts of the amended complaint states a plausible claim for relief.

II. BACKGROUND

As Congress has recognized: "By most measures, we have the best medical care system in the world." H.R. Rep. No. 111–443, pt. 1. However, at the same time, no one can deny that there are significant and serious problems. Costs are high and millions do not have insurance. Lack of health insurance can preclude the uninsured from accessing preventative care. If and when the uninsured are injured or become ill, they receive treatment, as the defendants acknowledge, because in this country medical care is generally not denied due to lack of insurance coverage or inability to pay. However, the costs that are incurred to treat the uninsured are sometimes left unpaid—to the tune of $43 billion in 2008 (which is less than 2% of all national healthcare expenditures for that year). The costs of uncompensated care are passed along to market participants in the form of higher costs

and raised premiums, which, in turn, can help perpetuate the cycle (or the "premium spiral," as the defendants call it) and add to the number of uninsured. It was against this backdrop that Congress passed the Act.

A. The Legislative Scheme

At nearly 2,700 pages, the Act is very lengthy and includes many provisions, only a few of which are specifically at issue in this litigation. Chief among them is Section 1501, which, beginning in 2014, will require that all citizens (with stated exceptions) obtain federally-approved health insurance, or pay a monetary penalty (the "individual mandate"). This provision is necessary, according to Congress and the defendants, to lower premiums (by spreading risks across a much larger pool) and to meet "a core objective of the Act," which is to expand insurance coverage to the uninsured by precluding the insurance companies from refusing to cover (or charging exorbitant rates to) people with pre-existing medical conditions. Without the individual mandate and penalty in place, the argument goes, people would simply "game the system" by waiting until they get sick or injured and only then purchase health insurance (that insurers must by law now provide), which would result in increased costs for the insurance companies. This is known as "the moral hazard." The increased costs would ultimately be passed along to consumers in the form of raised premiums, thereby creating market pressures that would (arguably) inevitably drive the health insurance industry into extinction. The plaintiffs allege that regardless of whether the individual mandate is well-meaning and essential to the Act, it is unconstitutional and will have both a "profound and injurious impact" on the states, individuals, and businesses.

The plaintiffs object to several interrelated portions of the Act as well. First, the Act significantly alters and expands the Medicaid program. Created in 1965, Medicaid is a cooperative federal-state program that provides for federal financial assistance (in the form of matching funds) to states that elect to provide medical care to needy persons. The Act will add millions of new enrollees to the states' Medicaid rolls by expanding the program to include all individuals under the age of 65 with incomes up to 133% of the federal poverty line. Second, the Act provides for creation of "health benefit exchanges" designed to allow individuals and small businesses to leverage their buying power to obtain competitive prices. The Act contemplates that these exchanges will be set up and operated by the states, or by the federal government if the states elect not to do so. And lastly, the Act requires that the states (along with other "large employers") provide their employees with a prescribed minimum level of health insurance coverage (the "employer mandate"). The plaintiffs allege that these several provisions violate the Constitution and state sovereignty by coercing and commandeering the states and depriving them of their "historic flexibility" to run their state government, healthcare, and Medicaid programs. The plaintiffs anticipate that these and various other provisions in the Act will cost Florida (and the other states similarly) billions of dollars between now and the year 2019, not including the administrative costs it will take to implement the Act, and that these costs will only increase in the subsequent years. In short, the plaintiffs

contend that the legislation is coercive, intrusive, and could bankrupt the states.[2]

B. This Lawsuit and the Motion to Dismiss

The plaintiffs advance six causes of action in their amended complaint, and they seek declaratory and injunctive relief with respect to each. They contend that the Act violates the Constitution in the following ways: (1) the individual mandate and concomitant penalty exceed Congress's authority under the Commerce Clause and violate the Ninth and Tenth Amendments (Count I); (2) the individual mandate and penalty violate substantive due process under the Fifth Amendment (Count II); (3) "alternatively," if the penalty imposed for failing to comply with the individual mandate is found to be a tax, it is an unconstitutional unapportioned capitation or direct tax in violation of U.S. Const. art. I, § 9, cl. 4, and the Ninth and Tenth Amendments (Count III); (4) the Act coerces and commandeers the states with respect to Medicaid by altering and expanding the program in violation of Article I and the Ninth and Tenth Amendments (Count IV); (5) it coerces and commandeers with respect to the health benefit exchanges in violation of Article I and the Ninth and Tenth Amendments (Count V); and (6) the employer mandate interferes with the states' sovereignty as large employers and in the performance of government functions in violation of Article I and the

---

[2] Not all states feel this way, and there is even a division within a few of the plaintiff states. Three Attorneys General and four Governors previously requested leave to participate in this case as *amici curiae*, and they have indicated that they favor the changes the Act will bring as they believe the new legislation will save money and reduce their already overburdened state budgets (docs. 57, 59).

Ninth and Tenth Amendments (Count VI). *See generally* Amended Complaint ("Am. Compl.") (doc. 42).

The defendants seek to have the complaint dismissed on numerous grounds; four of the counts for lack of jurisdiction (under Rule 12(b)(1)), and all six of them for failure to state a claim upon which relief can be granted (under Rule 12(b)(6)). With respect to jurisdiction, the defendants contend that for the challenges to the individual mandate and employer mandate (Counts I, II, and VI), the plaintiffs lack standing; the claims are not ripe; and the claims are barred by the Anti–Injunction Act. (By not raising similar arguments for Counts IV and V, the defendants appear to impliedly concede that those counts allege injuries that are immediately ripe for review). As for the plaintiffs' "alternative" cause of action contending that, if the individual mandate penalty is deemed to be a tax, then it is an impermissible and unconstitutional one (Count III), the defendants maintain that, too, is precluded by the Anti–Injunction Act.

If the foregoing jurisdictional challenges fail, the defendants go on to assert that those causes of action, and all others, fail to state a claim for which relief can be granted.

III. DISCUSSION

A. Is the "Penalty" for Non–Compliance with the Individual Mandate Actually a "Tax" for Constitutional Analysis?

A fundamental issue overlaps the defendants' challenges to several of the plaintiffs' claims, and that is whether the individual mandate penalty is a "tax" within Congress's broad taxing power and thus subject to the

Anti–Injunction Act, or instead, a "penalty" that must be authorized, if at all, by Congress's narrower Commerce Clause power. Because of the importance of this issue, I will analyze it first and at some length.

The defendants contend that the individual mandate penalty is a tax that is sustainable under Congress's expansive power to tax for the general welfare. U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the . . . general Welfare"). The plaintiffs urge that, if it is a tax, it is an unconstitutional one. The defendants maintain that the plaintiffs have no standing to raise the claim at this point in time because of the Anti–Injunction Act.

The Anti–Injunction Act [26 U.S.C. § 7421(a)] provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. . . . " The remedy for challenging an improper tax is a post-collection suit for refund. As the Supreme Court has explained:

> The Anti–Injunction Act . . . could scarcely be more explicit—"no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court . . . " The Court has interpreted the principal purpose of this language to be the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference, "and to require that the legal right to the disputed sums be determined in a suit for refund." The Court has also identified "a collateral objective of the Act—

> protection of the collector from litigation pending a suit for refund."

Bob Jones Univ. v. Simon, 416 U.S. 725, 736–37, 94 S. Ct. 2038, 40 L. Ed. 2d 496 (1974) (citations omitted); *accord, e.g., United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 10, 128 S. Ct. 1511, 170 L. Ed. 2d 392 (2008) ("[The Anti–Injunction Act] commands that (absent certain exceptions) 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court,'" even if the tax is alleged to be unconstitutional, which means "the taxpayer must succumb to an unconstitutional tax, and seek recourse only after it has been unlawfully exacted"); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7, 82 S. Ct. 1125, 8 L. Ed. 2d 292 (1962) (explaining that the "manifest purpose" of the Anti–Injunction Act "is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue."). The Anti–Injunction Act, in short, applies to "truly revenue-raising tax statutes," *see Bob Jones Univ., supra*, 416 U.S. at 743, and seeks "protection of the revenues" pending a suit for refund. *See id.* at 737, 740.

Because the individual mandate does not go into effect until 2014, which means the penalty for noncompliance could not be assessed until that time, the Anti–Injunction Act, if it applies, could render much of this case premature and inappropriate as any injunctive or declaratory relief in favor of the plaintiffs could hinder collection of tax revenue. *See id.* at 732 n.7, 738–39 (where the outcome of a suit seeking injunctive or de-

claratory relief will prevent assessment and collection of tax revenue, the case "falls within the literal scope and the purposes of the [Anti–Injunction Act]"). Consequently, whether the individual mandate penalty is a tax is an important question that not only implicates jurisdiction (vis-a-vis the Anti–Injunction Act), and is not only the specific basis of one of the plaintiffs' causes of action, but it also goes to the merits of the individual mandate-related challenges of Counts One and Two (that is, whether the penalty can be justified by, and enforced through, Congress's indisputably broad taxing power), or whether, instead, the penalty must pass Constitutional muster, if at all, under the more limited Commerce Clause authority. As noted, I should, and will, consider this significant issue at the outset.[3]

---

[3] The plaintiffs have briefly suggested that the Anti–Injunction does not apply to this case because their challenge "is to the individual mandate itself" and not the "incidental penalty that accompanies the individual mandate." While it is true that the language of the Anti–Injunction Act only prohibits suits "for the purpose of restraining the assessment or collection of any tax," which would not apply to the individual mandate for every citizen to maintain healthcare coverage, the mandate and penalty clearly work in tandem. If the penalty is a legitimate tax, striking the individual mandate down will necessarily impede assessment and collection of tax revenue. The Anti–Injunction Act is not limited to direct and actual tax assessment or collection; the Eleventh Circuit and other courts have held that the statute also reaches activities that may "eventually" impede the collection of revenue (even if indirectly). *See, e.g., Gulden v. United States*, 287 Fed. Appx. 813, 815–17 (11th Cir. 2008) (explaining that the Anti–Injunction Act is "interpreted broadly" and "bars not only suits that directly seek to restrain the assessment or collection of taxes, but also suits that seek to restrain . . . activities 'which are intended to or may culminate in the assessment or collection of taxes' ") (citation omitted); *Judicial Watch Inc. v. Rossotti*, 317 F.3d 401, 405 (4th Cir. 2003) ("it is clear that the Anti-Injunction Act extends beyond the mere assessment and collection

(1) Revenue-raising vs. regulatory

The plaintiffs contend that the individual mandate penalty is not a "true tax" because, among other things, it will (at most) "generate only 'some revenue,' and then only as an incident to some persons' failure to obey the law." *See* Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss ("Pl. Mem."), at 19 (doc. 68). In other words, because its primary purpose is regulatory—and will only raise "little" revenue—it is not a tax as the term is generally understood. It is true, as held in certain of the early tax cases to which the plaintiffs cite, *see, e.g., Lipke v. Lederer*, 259 U.S. 557, 42 S. Ct. 549, 66 L. Ed. 1061 (1922); *Hill v. Wallace*, 259 U.S. 44, 42 S. Ct. 453, 66 L. Ed. 822 (1922), that the Supreme Court once drew distinctions between regulatory and revenue-raising taxes. However, those holdings had a very short shelf-life. As noted in *Bob Jones Univ., supra*, which cited to *Lipke* and *Hill* for that position, "the Court . . . subsequently abandoned such distinctions." 416 U.S. at 741 n.12; *see also id.* at 743 (further stating that the cases were "of narrow scope" and "produced a prompt correction in course"). Succeeding case law recognized that "[e]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect." *Sonzinsky v. United States*, 300 U.S. 506, 513, 57 S. Ct. 554, 81 L. Ed. 772 (1937); *see also id.* ("it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax . . . tends to re-

---

of taxes to embrace other activities," such as those that may eventually "culminate in the assessment or collection of taxes").

strict or suppress the thing taxed"). Thus, as the law currently exists, "[i]t is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. The principle applies even though the revenue obtained is obviously negligible, or the revenue purpose of the tax may be secondary." *United States v. Sanchez*, 340 U.S. 42, 44, 71 S. Ct. 108, 95 L. Ed. 47 (1950); *accord United States v. Kahriger*, 345 U.S. 22, 27 n.3, 28, 73 S. Ct. 510, 97 L. Ed. 754 (1953) (holding same and sustaining federal gambling tax even though its proponents sought to hinder the activity at issue and "'indulge[d] the hope that the imposition of this type of tax would eliminate that kind of activity'"), overruled on other grounds, *Marchetti v. United States*, 390 U.S. 39, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968). The elimination of the "regulatory vs. revenue-raising" test does not necessarily mean, however, that the exaction at issue in this case is a "tax."

(2) The Court's role in ascertaining what Congress intended

In deciding this specific question, I will start from the assumption (only for the analysis of whether it is a tax) that Congress could have used its broad taxing power to impose the exaction and that, if it had clearly (or even arguably) intended to do so, then the exaction would have been sustainable under its taxing authority. *See Kahriger, supra*, 345 U.S. at 28, 31 ("As is well known, the constitutional restraints on taxing are few," and courts are generally "without authority to limit the exercise of the taxing power"); *see also United States v. Ptasynski*, 462 U.S. 74, 103 S. Ct. 2239, 76 L. Ed. 2d 427

(1983) (observing that "Congress's power to tax is virtually without limitation").[4] However, that is not what happened here. Although factually dissimilar, on this point I find instructive the early case of *Helwig v. United States*, 188 U.S. 605, 23 S. Ct. 427, 47 L. Ed. 614 (1903). At issue in that case was a federal law that required importers to pay a duty on imported items based on their declared value, plus "a further sum" for any item subsequently found to have been inadequately valued. The sole question the Supreme Court was called upon to decide was whether, for jurisdictional purposes, the so-called "further sum" was "revenue from imports or tonnage" (i.e., a tax), or whether it was in the nature of a penalty. The Court stated:

> Although the statute, under § 7, *supra*, terms the money demanded as 'a further sum,' and does not describe it as a penalty, still the use of those words does not change the nature and character of the enactment. *Congress may enact that such a provision shall not be considered as a penalty or in the nature of one, . . . and it is the duty of the court to be governed by such statutory direction*, but the intrinsic nature of the provision remains, and, *in the absence of any declaration by Congress affecting the manner in which the provision shall be treated*, courts must decide the matter in accordance with their views of the nature of the act.

Id. at 612–13 (emphasis added). In concluding that the provision was a penalty, the Court stated that, based on the statutory language and its application to the facts of

---

[4] *But see* the discussion with respect to Count Three, Part III.C(4) *infra*.

the case, it was "impossible . . . to hold this provision to be other than penal in its nature." *Id.* at 613. To be clear, it is *not* necessarily significant for our purposes that *Helwig* found the "further sum" to be in the nature of a penalty and not a tax; rather, what is significant is what the Supreme Court said along the way to getting there. In reaching its conclusion, the Court made it a point to stress—as it did in the emphasized portion quoted above—that regardless of the "ordinary or general meaning of the words" in the statute, and regardless of the "nature and character of the enactment," the exaction would *not* have been found a penalty if Congress intended otherwise. Thus, "[i]f it clearly appear that it is the will of Congress that the provision shall *not* be regarded as in the nature of a penalty, *the court must be governed by that will.*" *Id.* (emphasis added).

As applied to the facts of this case, *Helwig* can be interpreted as concluding that, regardless of whether the exaction could otherwise qualify as a tax (based on the dictionary definition or "ordinary or general meaning of the word"), it cannot be regarded as one if it "clearly appears" that Congress did not intend it to be. In this case, there are several reasons (perhaps none dispositive alone, but convincing in total) why it is inarguably clear that Congress did not intend for the exaction to be regarded as a tax.[5]

---

[5] Although it only matters what Congress intended, I note for background purposes that before the Act was passed into law, one of its chief proponents, President Barack Obama, strongly and emphatically denied that the penalty was a tax. When confronted with the dictionary definition of a "tax" during a much-publicized interview widely disseminated by all of the news media, and asked how the penalty did not meet that definition, the President said it was "absolutely not a tax" and, in fact, "[n]obody considers [it] a tax increase." *See, e.g., Obama: Re-*

(3) Congress did not call it a tax, despite knowing how to do so

In addition to the Act, there were several healthcare reform bills introduced and debated during the 111th Congress. For example, "America's Affordable Health Choices Act of 2009" (H.R. 3200) was introduced in the House of Representatives on July 14, 2009. Like the Act, it contained an individual mandate and concomitant penalty. However, it called the penalty a tax. Section 401 was unambiguously titled "Tax on Individuals Without Acceptable Health Care Coverage," and went on to refer to the exaction as a "tax" no less than fourteen times in that section alone. *See, e.g., id.* (providing that with respect to "any individual who does not meet the requirements of subsection (d) at any time during the taxable year, there is hereby imposed a tax"). H.R. 3200 was thereafter superseded by a similar bill, "Affordable Health Care for America Act" (H.R. 3962), which was actually passed in the House of Representatives on November 7, 2009. That second House bill also included an individual mandate and penalty, and it repeatedly referred to the penalty as a "tax." *See, e.g.,* Section 501 (providing that for any person who does not comply with the individual mandate "there is hereby imposed a tax," and referring to that "tax" multiple times); Section 307(c)(1)(A) (further referring to the penalty as a "tax[] on individuals not obtaining acceptable coverage").

While the above bills were being considered in the House, the Senate was working on its healthcare reform bills as well. On October 13, 2009, the Senate Finance

---

quiring Health Insurance is Not a Tax Increase, CNN, Sept. 29, 2009, available at: http://www.cnn.com/2009/POLITICS/09/20/obama.health.care/index.html.

Committee passed a bill, "America's Healthy Future Act" (S. 1796). A precursor to the Act, this bill contained an individual mandate and accompanying penalty. In the section titled "Excise Tax on Individuals Without Essential Health Benefits Coverage," the penalty was called a "tax." *See* Section 1301 ("If an applicable individual fails to [obtain required insurance] there is hereby imposed a tax").

In contrast to the foregoing, the Act—which was the final version of the healthcare legislation later passed by the Senate on December 24, 2009—did *not* call the failure to comply with the individual mandate a tax; it was instead called a "penalty." The Act reads in pertinent part: "If an applicable individual fails to meet the requirement of subsection (a) . . . there is hereby imposed a penalty." Act § 1501(b)(1). Congress's conspicuous decision to not use the term "tax" in the Act when referring to the exaction (as it had done in at least three earlier incarnations of the legislation) is significant. "'Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.'" *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987). Thus, "[w]here Congress includes [certain] language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the [omitted text] was not intended." *Russello v. United States*, 464 U.S. 16, 23–24, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983); *see also United States v. NEC Corp.*, 931 F.2d 1493, 1502 (11th Cir. 1991) (changes in statutory language "generally indicate[ ] an intent to change the meaning of the statute"); *Southern Pac.*

Transportation Co. v. Usery, 539 F.2d 386, 390–91 (5th Cir. 1976) (rejecting the interpretation of a statute that was based on language in an earlier House version that the Senate changed prior to passing into law, and attaching "weight to the [Senate's] conscious and deliberate substitution of [the House's] language") (binding under *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*)).

Congress's failure to call the penalty a "tax" is especially significant in light of the fact that the Act itself imposes a number of taxes in several other sections (*see, e.g.*, Excise Tax on Medical Device Manufacturers, § 1405 ("There is hereby imposed on the sale of any taxable medical device by the manufacturer, producer, or importer a tax"); Excise Tax on High Cost Employer–Sponsored Health Coverage, § 9001 ("there is hereby imposed a tax"); Additional Hospital Insurance Tax on High-Income Taxpayers, § 9015 ("there is hereby imposed a tax"); Excise Tax on Indoor Tanning Services, § 10907 ("There is hereby imposed on any indoor tanning service a tax")). This shows beyond question that Congress knew how to impose a tax when it meant to do so. Therefore, the strong inference and presumption must be that Congress did not intend for the "penalty" to be a tax. *See generally Hodge v. Muscatine County*, 196 U.S. 276, 25 S. Ct. 237, 49 L. Ed. 477 (1905) (noting that "[i]t is not easy to draw an exact line of demarcation between a tax and a penalty," but where the statute uses "tax" in one section and "penalty" in another, courts "cannot go far afield" in treating the exaction as it is called; to do otherwise "would be a distortion of the words employed"); *see also Duncan v. Walker*, 533 U.S. 167, 173, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001) ("It is

well settled that '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (citations omitted); *Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205, 1209 (11th Cir. 2009) ("[W]here Congress knows how to say something but chooses not to, its silence is controlling"); *DIRECTV, Inc. v. Brown*, 371 F.3d 814, 818 (11th Cir. 2004) ("[W]hen Congress uses different language in similar sections, it intends different meanings.").

The defendants assert in their memorandum, *see* Memorandum in Support of Defendants' Motion to Dismiss ("Def. Mem."), at 33, 50 n.23 (doc. 56–1), as they did during oral argument, that in deciding whether the exaction is a penalty or tax, "it doesn't matter" what Congress called it because the label "is not conclusive." *See* Transcript of Oral Argument ("Tr."), at 27–29 (doc. 77). As a general rule, it is true that the label used is not controlling or dispositive because Congress, at times, may be unclear and use inartful or ambiguous language. Therefore, as the Supreme Court recognized more than 100 years ago in *Helwig, supra*, the use of a particular word "does not change the nature and character of the [exaction]," and it is the ultimate duty of the court to decide the issue based on "the intrinsic nature of the provision" irrespective of what it is called. *See* 188 U.S. at 612–13; *accord Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 314, 13 L. Ed. 996 (1851) ("it is the thing, and not the name, which is to be considered"). However, as also noted in *Helwig*, this rule must be set aside when it is clear and manifest that Congress intended the exac-

tion to be regarded as one and not the other. For that reason, the defendants are wrong to contend that what Congress called it "doesn't matter." To the extent that the label used is not just a label, but is actually indicative of legislative purpose and intent, it very much does matter. By deliberately changing the characterization of the exaction from a "tax" to a "penalty," but at the same time including many other "taxes" in the Act, it is manifestly clear that Congress intended it to be a penalty and not a tax.[6]

Quoting the Third Circuit in *Penn Mut. Indem. Co. v. C.I.R*, 277 F.2d 16, 20 (3d Cir. 1960), the defendants maintain that "'Congress has the power to impose taxes generally, and if the particular imposition does not run afoul of any constitutional restrictions then the tax is lawful, call it what you will.'" Def. Mem. at 50 n.23. I do not necessarily disagree with this position, at least not when it is quite clear that Congress intends to impose a tax and is acting pursuant to its taxing power. However, as will be discussed in the next section, that is not the situation here. In the *Penn Mutual Indemnity* case, for example, it was clear and undisputed that Congress had exercised its taxing authority to impose the exaction; it was inarguably a "tax," and the only question was

---

[6] A hypothetical helps to further illustrate this point. Suppose that after the Act imposed the penalty it went on to expressly state: "This penalty is not a tax." According to the logic of the defendants' argument, if the intrinsic nature of the penalty was a tax, it could still be regarded as one despite what it was called and despite the clear and unmistakable Congressional intent to the contrary. Such an outcome would be absurd. In my view, changing the word from tax to penalty, but at the same time including various other true (and accurately characterized) taxes in the Act, is the equivalent of Congress saying "This penalty is not a tax."

whether it was an excise tax, an income tax, or some other type of tax. It was in that particular context that the Third Circuit's analysis included the quoted statement, and further elaborated that: "It is not necessary to uphold the validity of the tax imposed by the United States that the tax itself bear an accurate label." *See* 277 F.2d at 20. That is obviously a very different situation from the one presented here, where the precise *label* of an acknowledged tax is not being disputed, but rather whether it is even a tax *at all.*

(4) Congress did not state that it was acting under its taxing authority, and, in fact, it treated the penalty differently than traditional taxes

Congress did not state in the Act that it was exercising its taxing authority to impose the individual mandate and penalty; instead, it relied exclusively on its power under the Commerce Clause. U.S. Const. art. I, § 8, cl. 3 ("[Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). The Act recites numerous (and detailed) factual findings to show that the individual mandate regulates commercial activity important to the economy. Specifically, it states that: "The [individual mandate] is commercial and economic in nature, and substantially affects interstate commerce" in that, *inter alia*, "[h]ealth insurance and health care services are a significant part of the national economy" and the mandate "will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services." Act § 1501(a)(1)-(2)(B)(C). It further states that health insurance "is in interstate commerce," and the individual mandate is "essential to

creating effective health insurance markets." *Id.* § 1501(a)(2)(F), (H). The Act contains *no* indication that Congress was exercising its taxing authority or that it meant for the penalty to be regarded as a tax. Although the penalty is to be placed in the Internal Revenue Code under the heading "Miscellaneous Excise Taxes," the plain language of the Code itself states that this does not give rise to any inference or presumption that it was intended to be a tax. *See United States v. Reorganized Fabricators of Utah, Inc.*, 518 U.S. 213, 222–23, 116 S. Ct. 2106, 135 L. Ed. 2d 506 (1996) (citing to 26 U.S.C. § 7806(b), which provides that: "No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title"). In fact, while the penalty is placed under the "Excise Taxes" heading of the Code, at the same time Congress specifically exempted and divorced the penalty from all the traditional enforcement and collection methods used by the Internal Revenue Service, such as tax liens, levies, and criminal proceedings. *See* Act § 1501(b). These exemptions from normal tax attributes—coupled with Congress's failure to identify its taxing authority—belie the claim that, simply because it is mentioned in the Internal Revenue Code, the penalty must be a tax.[7]

---

[7] In highlighting that Congress did not identify its taxing power as the basis for imposing the "penalty," I am not suggesting that legislative action is invalid if a power source is not identified. To the contrary, I recognize that "Congress's failure to cite [a particular power] does not eliminate the possibility that [said power] can sustain this legislation." *United States v. Moghadam*, 175 F.3d 1269, 1275 n.10 (11th Cir. 1999); *see also Wilson–Jones v. Caviness*, 99 F.3d 203, 208 (6th Cir. 1996) ("A source of power [can] justify an act of Congress even if Congress did

(5) Lack of statutorily-identified revenue-generating purpose

Perhaps most significantly, the Act does not mention any revenue-generating purpose that is to be served by the individual mandate penalty, even though such a purpose is required. *See Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 841, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) ("'A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government'"). In this circuit, the ultimate test of tax validity "is whether *on its face* the tax operates as a revenue generating measure and the attendant regulations are in aid of a revenue purpose." *United States v. Ross*, 458 F.2d 1144, 1145 (5th Cir. 1972) (emphasis added) (binding under *Bonner, supra*, 661 F.2d at 1207).

The revenue-generating provisions in the Act were an important part of the legislation as they were necessary under current Congressional procedure to score its final cost. To be sure, much of the debate within and outside Congress focused on the bill's final price tag and whether it would exceed the threshold of $1 trillion over the course of the first ten years; and while the legisla-

---

not state that it rested the act on the particular source of power.") (citing cases, including *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144, 68 S. Ct. 421, 92 L. Ed. 596 (1948) ("The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.")). Thus, to be clear, I am not saying that the penalty is invalid as a tax because Congress did not expressly identify its taxing power. Rather, its failure to do so (particularly when it took time to extensively identify its Commerce Clause power), is merely one of several facts that shows Congress was not exercising its taxing authority and did not intend for the penalty to be regarded as a tax.

tion was being debated, Congress worked closely and often with the Congressional Budget Office ("CBO") to ensure that it did not. Obviously, if the penalty had been intended by Congress to be a true revenue-generating tax (that could be used to keep the Act's final cost down) then it would have been treated as a tax "on its face." During oral argument, defense counsel stated that "[t]he purpose of the [penalty] is . . . to raise revenue to offset expenditures of the federal government that it makes in connection, for example, with the Medicaid expansion." *See* Tr. at 9. However, there is absolutely no support for that statement in the statute itself.

On its face, the Act lists seventeen "Revenue Offset Provisions" (including the several taxes described *supra*), and, as reconciled, it further includes a section entitled "Provisions Relating to Revenue" (which also references those taxes and other revenue offsetting provisions). However, the individual mandate penalty is not listed anywhere among them. Nowhere in the statute is the penalty provision identified or even mentioned as raising revenue and offsetting the Act's costs. It is especially noteworthy that the Act does not identify revenue to be generated from the penalty (which the defendants now maintain would raise about *$4 billion* each year), but the statute identifies the tanning salon tax as revenue-raising (even though that tax is expected to raise a significantly smaller *$300 million* annually). *See* Joint Committee on Taxation, Estimated Revenue Effects of the Manager's Amendment to the Revenue Provisions Contained in the "Patient Protection and Affordable Care Act," as Passed by the Senate on December 24, 2009 (JCX–10–10), March 11, 2010, at 2. If Congress had intended and understood the penalty to be a tax that

would raise revenue for the government, which could in turn be used to partially finance the Act's budgetary effect and help keep its ten-year cost below the $1 trillion threshold by offsetting its expenditures, it makes little sense that Congress would ignore a "tax" that could be expected to raise almost $20 billion in revenue between the years 2015–2019, yet mention another tax that was expected to raise less than one-tenth of that revenue annually during the same time period.

To the extent there is statutory ambiguity on this issue, both sides ask that I look to the Act's legislative history to determine if Congress intended the penalty to be a tax. Ironically, they rely on the same piece of legislative history in making their respective arguments, to wit, the 157–page "Technical Explanation" of the Act that was prepared by the Staff of the Joint Committee on Taxation on March 21, 2010 (the same day the House voted to approve and accept the Senate bill and two days before the bill was signed into law). The plaintiffs highlight the fact that the report "consistently" refers to the penalty as a penalty and *not* a tax, *see* Pl. Mem. at 19 (as compared, for example, with the tanning salon tax that is consistently referred to as a "tax" in that same report, *see* JCT, Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as amended, in Combination with the "Patient Protection and Affordable Care Act" (JCX–18–10), March 21, 2010, at 108). The defendants, on the other hand, highlight the fact that the JCT referred to the penalty as an "excise tax" in a single heading in that report. *See* Def. Mem. at 51.

As the Supreme Court has repeatedly held, "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic

materials have a role in statutory interpretation *only* to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise *ambiguous terms.*" *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) (emphasis added). On the facts of this case, "penalty" is not an ambiguous term, but rather was a carefully and intentionally selected word that has a specific meaning and carries a particular import (discussed *infra*). Moreover, even if the term was ambiguous, the Supreme Court has pointed out two "serious criticisms" of attempting to rely on legislative history:

> Not all extrinsic materials are reliable sources of insight into legislative understandings . . . , and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking out your friends.'" *See* Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 Iowa L. Rev. 195, 214 (1983). Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text. *Id.*

In this case, both criticisms are directly on the mark. The report is ambiguous and contradictory, as evidenced by the simple fact that both sides claim it supports their position. Should I look to the heading (that calls the exaction an "excise tax"), or should I look to the actual body of the report (that calls it a penalty no less than twenty times with no mention of it being a tax)? It is, as Judge Leventhal said, like "looking over a crowd and picking out your friends." Further, a strong argument could be (and has been) made that the staffers who drafted the report were merely engaging in last minute "strategic manipulation" to secure results they were unable to achieve through the Act itself. *See, e.g., The Insurance Mandate in Peril*, Wall St. J., Apr. 29, 2010, at A19 (opining that the "excise tax" heading in the JCT report should not be used to convert the penalty into a tax because the Supreme Court "will not allow staffers and lawyers to change the statutory cards that Congress already dealt when it adopted the Senate language"). For these reasons, as recognized by the Supreme Court, resort to, or reliance upon, the JCT staff's Technical Explanation would be inappropriate on the facts of this case—even if the term "penalty" was ambiguous (which it is not).

To summarize the foregoing, it "clearly appears" from the statute itself, *see Helwig, supra*, 188 U.S. at 613, that Congress did not intend to impose a tax when it imposed the penalty. To hold otherwise would require me to look beyond the plain words of the statute. I would have to ignore that Congress:

(i) specifically changed the term in previous incarnations of the statute from "tax" to "penalty;"

(ii) used the term "tax" in describing the several other exactions provided for in the Act;

(iii) specifically relied on and identified its Commerce Clause power and not its taxing power;

(iv) eliminated traditional IRS enforcement methods for the failure to pay the "tax;" and

(v) failed to identify in the legislation any revenue that would be raised from it, notwithstanding that at least seventeen other revenue-generating provisions were specifically so identified.

The defendants have not pointed to any reported case decided by any court of record that has ever found and sustained a tax in a situation such as the one presented here, and my independent research has also revealed none. At bottom, the defendants are asking that I divine hidden and unstated intentions, and despite considerable evidence to the contrary, conclude that Congress really meant to say one thing when it expressly said something else. The Supreme Court confronted the inverse of this situation in *Sonzinsky, supra,* and I believe the rationale of that case forecloses the defendants' argument.

The issue in *Sonzinsky* was whether a levy on the sale of firearms was a tax. The exaction was called a tax on its face, and it was undisputed that it had been passed pursuant to Congress's taxing power. Nonetheless, the petitioner sought to invalidate the tax because it was "prohibitive in effect and [disclosed] unmistakably the legislative purpose to regulate rather than to tax." The petitioner argued that it was not "a true tax, but a pen-

alty." In rejecting this argument, the Supreme Court explained:

> Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power.

Stated somewhat differently, reviewing courts cannot look beyond a statute and inquire as to whether Congress meant something different than what it said. If an exaction says "tax" on its face and was imposed pursuant to Congress's taxing power, courts "are not free to speculate as to the motives which moved Congress to impose it, or as to the extent to which it may [be a penalty intended] to restrict the activities taxed." *See generally Sonzinsky, supra*, 300 U.S. at 511–14; *accord Kahriger, supra*, 345 U.S. at 22 (similarly declining invitation to hold that "under the pretense of exercising" a particular power, Congress was, in fact, exercising another power).

The holding of *Sonzinsky* cuts both ways, and applying that holding to the facts here, I have no choice but to find that the penalty is not a tax. Because it is called a penalty on its face (and because Congress knew how to say "tax" when it intended to, and for all the other reasons noted), it would be improper to inquire as to whether Congress really meant to impose a tax. I will not assume that Congress had an unstated design to act pursuant to its taxing authority, nor will I impute a revenue-generating purpose to the penalty when Congress specifically chose not to provide one. It is "beyond the

competency" of this court to question and ascertain whether Congress really meant to do and say something other than what it did. As the Supreme Court held by necessary implication, this court cannot "undertake, by collateral inquiry as to the measure of the [revenue-raising] effect of a [penalty], to ascribe to Congress an attempt, under the guise of [the Commerce Clause], to exercise another power." *See Sonzinsky, supra*, 300 U.S. at 514. This conclusion is further justified in this case since President Obama, who signed the bill into law, has "absolutely" rejected the argument that the penalty is a tax. *See supra* note 5.

To conclude, as I do, that Congress imposed a penalty and not a tax is not merely formalistic hair-splitting. There are clear, important, and well-established differences between the two. *See Dep't of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 779–80, 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994) ("Whereas [penalties] are readily characterized as sanctions, taxes are typically different because they are usually motivated by revenue-raising, rather than punitive, purposes."); *Reorganized CF&I Fabricators of Utah, Inc., supra*, 518 U.S. at 224, 116 S. Ct. 2106 ("'a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government,'" whereas, "if the concept of penalty means anything, it means punishment for an unlawful act or omission"); *United States v. La Franca*, 282 U.S. 568, 572, 51 S. Ct. 278, 75 L. Ed. 551 (1931) ("A 'tax' is an enforced contribution to provide for the support of government; a 'penalty,' as the word is here used, is an exaction imposed by statute as punishment for an unlawful act.'"). Thus, as the Supreme Court has said, "[t]he two words are not interchangeable one for the

other . . . ; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *La Franca, supra,* 282 U.S. at.

(6) Does the Anti–Injunction Act apply anyway?

The defendants insist that the Anti–Injunction Act should still preclude the individual mandate challenges even if the penalty is not a tax. For this argument, the defendants rely on Title 26, United States Code, Section 6671, which states that the "penalties" provided under subchapter B of chapter 68 of the IRS Code (a classification that includes the individual mandate penalty) "shall be assessed and collected in the same manner as taxes." If the penalty is intended to be assessed and collected in the same manner as a tax, the defendants contend, then the Anti–Injunction Act should apply. I do not agree. First of all, the penalty is obviously *not* to be collected and treated "in the same manner as taxes" in light of the fact that Congress specifically divorced the penalty from the tax code's traditional collection and enforcement mechanisms. Further, and more significantly, as noted *supra,* the whole point of the Anti–Injunction Act is to protect the government in the collection of its lawful tax revenues, and thus it applies to "truly revenue-raising tax statutes," which Congress plainly did not understand and intend the penalty to be. The Eleventh Circuit has recognized (albeit by implication) that the Anti–Injunction Act does not reach penalties that are, as here, "imposed for substantive violations of laws not directly related to the tax code" and which are not good-faith efforts to enforce the technical requirements of the tax law. *Cf. Mobile Republican Assembly v. United States,* 353 F.3d 1357, 1362 n.5 (11th Cir. 2003). The defendants

have cited two out-of-circuit cases in support of their contention that Section 6671(a) requires penalties to be treated the same as taxes for Anti–Injunction Act purposes, *Barr v. United States*, 736 F.2d 1134 (7th Cir. 1984); *Warren v. United States*, 874 F.2d 280 (5th Cir. 1989). Although those cases did indeed hold that the penalties at issue fell under the Anti–Injunction Act, they do not really support the defendants' position. As the plaintiffs note, the penalties in both those cases were imposed for failing to pay an undisputed *tax*, that is, falsely claiming an exemption in *Barr*, and refusing to sign a tax return in *Warren*. In other words, the penalties were "directly related to the tax code." *Cf. Mobile Republican Assembly, supra*, 353 F.3d at 1362 n.5. Allowing IRS penalties such as those to qualify as a tax for Anti–Injunction Act purposes "is simply a means for ensuring that the [underlying] tax is paid." *See Botta v. Scanlon*, 314 F.2d 392, 393 (2d Cir. 1963). That is not the situation here. It would be inappropriate to give tax treatment under the Anti–Injunction Act to a civil penalty that, by its own terms, is not a tax; is not to be enforced as a tax; and does not bear any meaningful relationship to the revenue-generating purpose of the tax code. Merely placing a penalty (which virtually all federal statutes have) in the IRS Code, even though it otherwise bears no meaningful relationship thereto, is not enough to render the Anti–Injunction Act (which only applies to true revenue-raising exactions) applicable to this case.

(7) Accountability

I will say one final thing on the tax issue, which, although I believe it to be important, is not essential to my decision. For purposes of this discussion, I will assume

that the defendants are correct and that the penalty is (and was always intended to be) a tax.

In *Virginia v. Sebelius*, 3:10cv188, one of the twenty or so other lawsuits challenging the Act, the federal government's lead counsel (who is lead defense counsel in this litigation, as well) urged during oral argument in that case that the penalty is proper and sustainable under the taxing power. Although that power is broad and does not easily lend itself to judicial review, counsel stated, "there is a check. It's called Congress. *And taxes are scrutinized*. And the reason we don't have all sorts of crazy taxes is because taxes are among the *most scrutinized* things we have. *And the elected representatives in Congress are held accountable for taxes that they impose.*" *See* Transcript of Oral Argument (Virginia case), at 45 (emphasis added).

This foregoing statement highlights one of the more troubling aspects of the defendants' "newfound"[8] tax argument. As noted at the outset of this order, and as anyone who paid attention to the healthcare reform debate already knew, the Act was very controversial at the time of passage. Irrespective of the merits of the arguments for or against it, the legislation required lawmakers in favor of the bill to cast politically difficult and tough votes. As it turned out, the voting was extremely close. Because by far the most publicized and controversial part of the Act was the individual mandate and pen-

---

[8] *See, e.g.*, *Changing Stance, Administration Now Defends Insurance Mandate as a Tax*, N.Y. Times, July 17, 2010, at A14 ("When Congress required most Americans to obtain health insurance or pay a penalty, Democrats denied that they were creating a new tax. But in court, the Obama administration and its allies now defend the requirement as an exercise of the government's 'power to lay and collect taxes.'").

alty, it would no doubt have been even more difficult to pass the penalty as a tax. Not only are taxes always unpopular, but to do so at that time would have arguably violated pledges by politicians (including the President) to not raise taxes, which could have made it that much more difficult to secure the necessary votes for passage. One could reasonably infer that Congress proceeded as it did specifically *because* it did not want the penalty to be "scrutinized" as a $4 billion annual tax increase, and it did not want at that time to be "held accountable for taxes that they imposed." In other words, to the extent that the defendants are correct and the penalty was intended to be a tax, it seems likely that the members of Congress merely called it a penalty and did not describe it as revenue-generating to try and insulate themselves from the potential electoral ramifications of their votes.

Regardless of whether the members of Congress had this specific motivation and intent (which, once again, is not my place to say), it is obvious that Congress did not pass the penalty, in the version of the legislation that is now "the Act," as a tax under its taxing authority, but rather as a penalty pursuant to its Commerce Clause power. Those two exactions, as previously noted, are not interchangeable. And, now that it has passed into law on that basis, government attorneys have come into this court and argued that it was a tax after all. This rather significant shift in position, if permitted, could have the consequence of allowing Congress to avoid the very same accountability that was identified by the government's counsel in the Virginia case as a check on Congress's broad taxing power in the first place. In other words, the members of Congress would have reaped a *political advantage* by calling and treating it as a pen-

alty while the Act was being debated, *see Virginia v. Sebelius*, 702 F. Supp. 2d 598, 612 (E.D. Va. 2010) (referring to "preenactment representations by the Executive and Legislative branches" that the penalty was *not* "a product of the government's power to tax for the general welfare"), and then reap a *legal advantage* by calling it a tax in court once it passed into law. *See* Def. Mem. at 33–34, 49 (arguing that the Anti–Injunction Act bars any challenge to the penalty which, in any event, falls under Congress's "very extensive" authority to tax for the general welfare). This should not be allowed, and I am not aware of any reported case where it ever has been.

Congress should not be permitted to secure and cast politically difficult votes on controversial legislation by deliberately calling something one thing, after which the defenders of that legislation take an "Alice–in–Wonderland" tack[9] and argue in court that Congress really meant something else entirely, thereby circumventing the safeguard that exists to keep their broad power in check. If Congress intended for the penalty to be a tax, it should go back and make that intent clear (for example, by calling it a tax, relying on Congress's Constitutional taxing power, allowing it to be collected and enforced as a tax, or identifying revenue to be raised) so it can be "scrutinized" as a tax and Congress can accordingly be held accountable. They cannot, however, use a different linguistic with a perhaps secret un-

---

[9] Lewis, Carroll, *Through the Looking–Glass*, Chapter 6 (Heritage 1969):

> "When *I* use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more or less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."

derstanding between themselves that the word, in fact, means something else entirely. As the First Circuit has explained, the integrity of the process must be guaranteed by the judiciary:

> In our republican form of government, legislators make laws by writing statutes—an exercise that requires putting words on paper in a way that conveys a reasonably definite meaning. Once Congress has spoken, it is bound by what it has plainly said, notwithstanding the nods and winks that may have been exchanged. . . . And the judiciary must stand as the ultimate guarantor of the integrity of an enacted statute's text.

State of Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 699–70[0] (1st Cir. 1994).

(8) For Constitutional purposes, it is a penalty, and must be analyzed under Congress's Commerce Clause power

For all the above reasons, I conclude that the individual mandate penalty is not a "tax." It is (as the Act itself says) a penalty. The defendants may not rely on Congress's taxing authority under the General Welfare Clause to try and justify the penalty after-the-fact. If it is to be sustained, it must be sustained as a penalty imposed in aid of an enumerated power, to wit, the Commerce Clause power. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393, 60 S. Ct. 907, 84 L. Ed. 1263 (1940) ("Congress may impose penalties in aid of the exercise of any of its enumerated powers"). Therefore, the Anti–Injunction Act does not deprive this court of jurisdiction. *See Lipke, supra*, 259 U.S. at 562 ("The

collector demanded payment of a penalty, and [thus the Anti-Injunction Act], which prohibits suits to restrain assessment or collection of any tax, is without application."). I will next consider the rest of the defendants' jurisdictional challenges.

B. Rule 12(b)(1) ("Lack of Subject Matter Jurisdiction") Challenges

The defendants raise two additional jurisdictional arguments: first, that the individual plaintiffs and the NFIB do not have standing to pursue Counts One and Two, and the state plaintiffs do not have standing with respect to Count Six; and second, that those same causes of action are not ripe.

(1) Standing

The Constitution limits the subject matter of the federal courts to "cases" and "controversies." U.S. Const. art. III, § 2. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The "irreducible constitutional minimum of standing" contains three elements: "(1) an injury in fact, meaning an injury that is concrete and particularized, and actual or imminent, (2) a causal connection between the injury and the causal conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *Granite State Outdoor Advertising Inc. v. City of Clearwater*, 351 F.3d 1112, 1116 (11th Cir. 2003). The defendants appear to concede that (2) and (3) are present in this litigation, but contend that the plain-

tiffs cannot establish an injury-in-fact. Accordingly, only element (1) is at issue here.

For purposes of ruling on the defendants' motion to dismiss, I simply need to examine the plaintiffs' factual allegations:

> At the pleading stage, general factual allegations of injury resulting from defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim."

Lujan, supra, 504 U.S. at 561 (quoting *Lujan v. Nat'l Wildlife Federation,* 497 U.S. 871, 889, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)). Thus, "mere allegations of injury" are sufficient to withstand a motion to dismiss based on lack of standing. *Dep't of Commerce v. U.S. House of Representatives,* 525 U.S. 316, 329, 119 S. Ct. 765, 142 L. Ed. 2d 797 (1999); *accord Miccosukee Tribe of Indians of Florida v. Southern Everglades Restoration Alliance,* 304 F.3d 1076, 1081 (11th Cir. 2002) (noting "at the motion to dismiss stage [the plaintiff] is only required to generally allege a redressable injury caused by the actions of [the defendant] about which it complains").

The individual plaintiffs make numerous allegations in the amended complaint that are relevant to the standing issue. According to those allegations, Mary Brown is a small business owner and current member of the NFIB. She has not had health insurance for the last four years. She devotes her available resources to maintaining her business and paying her employees. She does not currently qualify for Medicaid or Medicare, and she does not expect to qualify for those programs prior

to the individual mandate taking effect. Thus, "Ms. Brown will be subject to the mandate and objects to being forced to comply with it" because, *inter alia*, it will force her (and other NFIB members) "to divert resources from their business endeavors" and "reorder their economic circumstances" to obtain qualifying coverage. Similarly, Kaj Ahlburg has not had health insurance for more than six years; he has no intention or desire to get health insurance; he does not qualify for Medicaid or Medicare and will thus be subject to the individual mandate and penalty; and he is, and expects to remain, financially able to pay for his own healthcare services if and as needed. The individual plaintiffs object to the Act's "unconstitutional overreaching" and claim injury because the individual mandate will force them to spend their money to buy something they do not want or need (or be penalized). *See* Am. Compl. ¶¶ 27–28, 62. The defendants make several arguments why these claims are insufficient to establish an injury-in-fact.

First, quoting *Lujan, supra*, the defendants contend that "[a] plaintiff alleging 'only an injury at some indefinite future time' has not shown injury in fact." Def. Mem. at 26. While that statement is certainly true, the injury alleged in this case will not occur at "some indefinite future time." Instead, the date is definitively fixed in the Act and will occur in 2014, when the individual mandate goes into effect and the individual plaintiffs are forced to buy insurance or pay the penalty. *See ACLU of Florida, Inc. v. Miami-Dade County School Bd.*, 557 F.3d 1177, 1194 (11th Cir. 2009) (standing shown in pre-enforcement challenge where the claimed injury was "pegged to a sufficiently fixed period of time"). Because

time is the primary factor here, this case presents a durational issue, and not a contingency issue. "A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. But, 'one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979) (citations and brackets omitted). The defendants contend that the forty-months gap between now and 2014 is "too far off" and not immediate enough to confer standing. However, as the Eleventh Circuit has expressly held:

> [P]laintiffs here have alleged when and in what manner the alleged injuries are likely going to occur. Immediacy requires only that the anticipated injury occur with some fixed period of time in the future, not that it happen in the colloquial sense of soon or precisely within a certain number of days, weeks, or months.

Fla. State Conf. of the NAACP v. Browning, 522 F.3d 1153, 1161 (11th Cir. 2008) (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995)); *accord 520 Michigan Ave. Associates, Ltd. v. Devine*, 433 F.3d 961, 962 (7th Cir. 2006) ("Standing depends on the probability of harm, not its temporal proximity. When injury . . . is likely in the future, the fact that [the complained of harm] may be deferred does not prevent federal litigation now.").

The defendants concede that an injury does not have to occur immediately to qualify as an injury-in-fact, but

they argue that forty months "is far longer than typically allowed." Def. Mem. at 27. It is true that forty months is longer than the time period at issue in the particular cases the defendants cite. *See, e.g., ACLU, supra*, 557 F.3d at 1194 (harm was six weeks away); *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1242 (11th Cir. 2003) (harm was between one week to one month away). But, the fact that the harm was closer in those cases does not necessarily mean that forty months is ipso facto "too far off." In *Village of Bensenville v. FAA*, 376 F.3d 1114 (D.C. Cir. 2004), for example, the plaintiffs challenged a passenger fee at Chicago's O'Hare International Airport that was not scheduled to be imposed until *thirteen years* in the future. The District of Columbia Circuit held that, despite the significant time gap, there was an "'impending threat of injury'" to plaintiffs that was "'sufficiently real to constitute injury-in-fact and afford constitutional standing'" because the decision to impose the fee was "final and, absent action by us, come 2017 Chicago will begin collecting [it]." *See id.* at 1119 (citations omitted). That is the same situation at issue here. Imposition of the individual mandate and penalty, like the fee in *Village of Bensenville*, is definitively fixed in time and impending. And absent action by this court, starting in 2014, the federal government will begin enforcing it.

The defendants suggest that the individual plaintiffs may not have to be forced to comply with the individual mandate in 2014. They contend that the individual plaintiffs "cannot reliably predict that insurance will be an economic burden" to them when the individual mandate is in place because, once the Act "mak[es] health insurance more affordable," they may decide to volun-

tarily buy insurance on their own. Def. Mem. at 26. This argument appears to presuppose that the individual plaintiffs object to the individual mandate solely on the grounds that it will be an "economic burden" to them, and that they do not currently have insurance because they cannot afford it. That does not appear to be the case. Ms. Brown alleges in the amended complaint that she devotes her resources to running and maintaining her business and paying her employees; she does *not* allege that she has no money left over after doing so or that she is otherwise *unable* to buy insurance if she wanted it. Rather, she has apparently just made the decision that she would prefer to direct and divert her resources elsewhere because obtaining insurance, in her particular situation, is not "a worthwhile cost of doing business." *See* Am. Comp. ¶¶ 27, 62. Further, Mr. Ahlburg has affirmatively stated that he is financially able to pay for all of his own healthcare-related services. Thus, both he and Ms. Brown do not want to be forced to spend their money (whether they have a little or a lot) on something they do not want (or feel that they need), and, in this respect, they object to the individual mandate as "unconstitutional overreaching." *See* Am. Comp. at ¶¶ 27, 28.[10]

---

[10] And in any event, the defendants' argument seems to assume that the Act will, in fact, reduce premiums so that insurance is "more affordable." That claim is both self-serving and far from undisputed. Indeed, most objective analyses indicate an insurance premium *increase*, and the CBO itself has predicted that premiums will rise 10–13% under the Act, at least with respect to individuals with certain policies who do not qualify for government subsidies. *See* Congressional Budget Office, An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act, November 30, 2009.

Continuing this argument, the defendants further contend that there is too much "uncertainty" surrounding the individual plaintiffs' allegations. They allege, for example, that while Ms. Brown may not want to purchase healthcare insurance now (because she would rather devote her resources to her business), and although Mr. Ahlburg does not need insurance now (because he is financially able to pay for his own healthcare out-of-pocket and as needed), the "vagaries" of life could alter their situations by 2014. Def. Mem. at 26. The defendants suggest that because "businesses fail, incomes fall, and disabilities occur," by the time the individual mandate is in effect, the individual plaintiffs "could find that they need insurance, or that it is the most sensible choice." *See id.* That is possible, of course. It is also "possible" that by 2014 either or both the plaintiffs will no longer be alive, or may at that time fall within one of the "exempt" categories. Such "vagaries" of life are always present, in almost every case that involves a pre-enforcement challenge. If the defendants' position were correct, then courts would essentially *never* be able to engage in pre-enforcement review. Indeed, it is easy to conjure up hypothetical events that could occur to moot a case or deprive any plaintiff of standing in the future. In *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), for example, a private school sought and obtained review of a law that required children to attend public schools, even though that law was not to take effect for more than two years. Under the defendants' position, there was no standing to consider the case because—since "businesses fail"—it was possible that the school may have closed down by the time the law finally went into effect. However, the Supreme Court found that it had standing to consider the chal-

lenge, notwithstanding the universe of possibilities that could have occurred between the filing of the suit and the law going into effect years later. The Court concluded that it was appropriate to consider the challenge because the complained of injury "was present and very real, not a mere possibility in the remote future," and because the "[p]revention of impending injury by unlawful action is a well- recognized function of courts of equity." *Id.* at 536.

In short, to challenge the individual mandate, the individual plaintiffs need not show that their anticipated injury is absolutely certain to occur despite the "vagaries" of life; they need merely establish "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," *see Babbitt, supra*, 442 U.S. at 298, that is reasonably "pegged to a sufficiently fixed period of time," *see ACLU, supra*, 557 F.3d at 1194, and which is not "merely hypothetical or conjectural," *see NAACP, supra*, 522 F.3d at 1161. Based on the allegations in the amended complaint, I am satisfied that the individual plaintiffs have done so. Accordingly, they have standing to pursue Counts One and Two.

The defendants next contend that the state plaintiffs do not have standing to pursue the employer mandate being challenged in Count Six. They devote less than one paragraph to this argument, *see* Def. Mem. at 21, and I can be equally brief in addressing it. For this count, the state plaintiffs contend that in their capacities as "large employers," they will have to offer and enroll state employees in federally-approved health plans, which they currently do not do. They claim, for example, that under existing Florida law, thousands of OPS (Other Personnel Services) employees are excluded

from that state's healthcare plan, but under the Act the employees will have to be enrolled in an approved health plan, which will cost the state money if they do, and will cost the state money (in the form of penalties) if they do not. I am satisfied that this qualifies as an injury-in-fact, for essentially the same reasons discussed with respect to the individual mandate—to wit, the state plaintiffs have established a realistic (and not hypothetical or conjectural) danger of sustaining a redressable injury at a sufficiently fixed point in time as a result of the Act's operation or enforcement.

The individual plaintiffs thus have standing to pursue Counts One and Two, and the state plaintiffs have standing to pursue Count Six. Because those are the only causes of action for which the defendants have challenged standing, this eliminates any need to discuss whether the NFIB also has standing. *See Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 160, 102 S. Ct. 205, 70 L. Ed. 2d 309 (1981) ("Because we find California has standing, we do not consider the standing of the other plaintiffs."); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264 n.9, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) ("Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain this suit."); *see also Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996) ("For each [challenged] claim, if . . . standing can be shown for at least one plaintiff, we need not consider the standing of the other plaintiffs to raise that claim.") (citing *Watt* and *Village of Arlington Heights, supra*).

However, for the sake of completeness, I will briefly discuss whether the NFIB has standing as well. Under *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977), an association has representative standing when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 343. All three elements have been satisfied here. First, the NFIB's members (including Ms. Brown, as noted) plainly have standing to challenge the individual mandate, thus meeting *Hunt's* first element. Furthermore, the interests that the NFIB seeks to protect in challenging the individual mandate on behalf of its members—certain of whom operate sole proprietorships and will suffer cost and cash flow consequences if they are compelled to buy qualifying healthcare insurance—are germane to the NFIB's purpose and mission "to promote and protect the rights of its members to own, operate, and earn success in their businesses, in accordance with lawfully-imposed governmental requirements." Am. Comp. ¶ 26; *see, e.g., New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 10 n.4, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988) (consortium of private clubs had standing to sue on behalf of its members to enjoin state anti-discrimination law because the interests it sought to protect were "clearly" germane to its broad purpose "'to promote the common business interests of its [member clubs]'") (brackets in original). And lastly, because the NFIB seeks injunctive relief which, if granted, will benefit its individual members, joinder is generally not required. *See, e.g., NAACP, supra*, 522 F.3d at 1160

(*Hunt's* third element satisfied because, "when the relief sought is injunctive, individual participation of the organization's members is 'not normally necessary'") (citation omitted).

In light of the foregoing, the plaintiffs have standing to pursue their claims.

(2) Ripeness

There is a "conspicuous overlap" between the doctrines of standing and ripeness and the two "often converge[ ]." *See Elend v. Basham*, 471 F.3d 1199, 1205 (11th Cir. 2006). Nevertheless, they warrant separate analyses.

"Ripeness is peculiarly a question of timing. Its basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 580, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985) (citations and alterations omitted). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998) (citation omitted). The ripeness inquiry turns on "'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983) (citation omitted). In the context of a facial challenge, as in this case, "a purely legal claim is presumptively ripe for judicial review because it does not require a developed factual

record." *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2009).

Because the individual mandate and employer mandate will not take effect until 2014, the defendants contend that those claims are unripe because no injury can occur before that time. However, "[w]here the inevitability of the operation of a statute against [plaintiffs] is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions come into effect." *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 143, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974). "The Supreme Court has long . . . held that where the enforcement of a statute is certain, a preenforcement challenge will not be rejected on ripeness grounds." *NAACP, supra*, 522 F.3d at 1164 (citing *Blanchette, supra*, 419 U.S. at 143.

The complained of injury in this case is "certainly impending" as there is no reason whatsoever to doubt that the federal government will enforce the individual mandate and employer mandate against the plaintiffs. Indeed, with respect to the individual mandate in particular, the defendants concede that it is absolutely necessary for the Act's insurance market reforms to work as intended. In fact, they refer to it as an "essential" part of the Act at least fourteen times in their motion to dismiss. It will clearly have to be enforced. *See Commonwealth of Pennsylvania v. State of West Virginia*, 262 U.S. 553, 592–93, 262 U.S. 553, 43 S. Ct. 658,(1923) (suit filed shortly after the challenged statute passed into law and before it was enforced was not premature where the statute "certainly would operate as the complainant states apprehended it would"). The individual mandate will have to be imposed and enforced against the plain-

tiffs and others because if it is not, and with proscriptions against insurance companies denying coverage for pre-existing medical conditions, there would the potential for an enormous moral hazard.

The fact that the individual mandate and employer mandate do not go into effect until 2014 does not mean that they will not be felt in the immediate or very near future. To be sure, responsible individuals, businesses, and states will have to start making plans now or very shortly to comply with the Act's various mandates. Individuals who are presently insured will have to confirm that their current plans comply with the Act's requirements and, if not, take appropriate steps to comply; the uninsured will need to research available insurance plans, find one that meets their needs, and begin budgeting accordingly; and employers and states will need to revamp their healthcare programs to ensure full compliance. I note that at least two courts considering challenges to the individual mandate have thus far denied motions to dismiss on standing and ripeness grounds. *See Virginia, supra*, 702 F. Supp. 2d at 607–08 (determining that because the individual mandate "radically changes the landscape of health insurance coverage in America," it will be felt by individuals, insurance carriers, employers, and states "in the near future"); *Thomas More Law Center v. Obama*, 2010 WL 3952805, at *4 (E.D. Mich. Oct. 7, 2010) ("[T]he government is requiring plaintiffs to undertake an expenditure, for which the government must anticipate that significant financial planning will be required. That financial planning must take place well in advance of the actual purchase of insurance in 2014 . . . There is nothing improbable about

the contention that the Individual Mandate is causing plaintiffs to feel economic pressure today.")[11]

The Supreme Court and the Eleventh Circuit, as noted, have not hesitated to consider pre-enforcement challenges to the constitutionality of legislation when the complained of injury is certainly impending and more than a hypothetical possibility. Because the issues in this case are fully framed, and the relevant facts are settled, "[n]othing would be gained by postponing a decision, and the public interest would be well served by a prompt resolution of the constitutionality of [the statute]." *See Thomas, supra*, 473 U.S. at 582. Therefore, the case is ripe for review.[12]

Because the defendants' jurisdictional challenges fail, I will now turn to their arguments for failure to

---

[11] The defendants have recently filed a notice of supplemental authority in which they have attempted to distinguish *Thomas More Law Center* by claiming that the standing analysis in that case "hinge[d] on allegations not present here;" specifically, according to the defendants, the plaintiffs alleged in that case that "they were being compelled to 'reorganize their affairs,' and 'forego certain spending today, so they will have the funds to pay for health insurance when the Individual Mandate takes effect in 2014'" (doc. 78 at 1–2). The defendants allege that "[t]he individual plaintiffs here make no comparable assertion." *See id.* That does not appear to be so. Ms. Brown has alleged that the individual mandate will force her to "divert resources from [her] business" and "reorder [her] economic circumstances" in order to obtain qualifying coverage. Am. Comp. ¶ 62.

[12] Further strengthening the conclusion that the public interest would be best served by a prompt resolution, I recognize that this court is but the first of probably several steps this case will take. Because that process will likely take another year or two, and because this court "will be in no better position later than we are now" to decide the case, *see Blanchette, supra*, 419 U.S. at 145, it would not serve the public interest to postpone the first step of this litigation until at least 2014.

state a claim upon which relief can be granted under Rule 12(b)(6), Fed. R. Civ. P.

C. Rule 12(b)(6) Challenges for Failure to State a Claim Upon which Relief Can be Granted

A motion to dismiss for failure to state a claim under Rule 12(b)(6) will be granted if the complaint alleges no set of facts that, if proved, would entitle the plaintiff to relief. *Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994). On a motion to dismiss, the court must accept all the alleged facts as true and take all the inferences from those facts in the light most favorable to plaintiff. *See Cruz v. Beto*, 405 U.S. 319, 322, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972); *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1484 (11th Cir. 1994). Although the Federal Rules do not require plaintiffs to set out in detail the facts on which they base their claim—Rule 8(a) only requires a "short and plain statement" showing that the plaintiff is entitled to relief—the complaint's "factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *accord Ashcroft v. Iqbal*, — U.S. —, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (explaining that "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation'"). Thus, "to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal, supra*, 129 S. Ct. at 1949 (quoting *Twombly, supra*, 550 U.S. at 570. This does not "impose a probability requirement at the pleading stage." *See*

Twombly, 550 U.S. at 556. Rather, the test is whether the complaint "succeeds in 'identifying facts that are suggestive enough to render [the claim] plausible.'" *See Watts v. Florida Int'l University*, 495 F.3d 1289, 1296 (11th Cir. 2007) (quoting *Twombly, supra*, 550 U.S. at 556.).

The defendants claim that all counts in the amended complaint are deficient under Rule 12(b)(6); in other words, no cause of action is "plausible." Each claim must be both factually and legally plausible. This requires me to examine each of the claims factually and to "take a peek" at the status of the applicable existing Constitutional law. Several of the plaintiffs' claims arise under Constitutional provisions for which the Supreme Court's interpretations have changed over the years. But, of course, the court is bound by the law as it exists now. Each count will be discussed below, in reverse order.

(1) Interference with state sovereignty as employers and performance of governmental functions (Count VI)

For this count, the plaintiffs object to the Act's employer mandate which requires the states, in their capacities as large employers, to offer and automatically enroll state employees in federally-approved insurance plans or else face substantial penalties and assessments. These "extensive new benefits," the plaintiffs contend, will "impose immediate and expensive requirements on the States that will continue to increase," *see* Pl. Mem. at 55–56, and "burden[ ] the States' ability to procure goods and services and to carry out governmental functions," *see* Am. Compl. ¶ 90. The employer mandate al-

legedly exceeds Article I of the Constitution and also runs afoul of state sovereignty in violation of the Ninth and Tenth Amendments.

Regardless of whether the employer mandate will be costly and burdensome to the states in their capacity as large employers (which at this stage of the case is assumed to be true), it is a "generally applicable" law that reaches both public and private employers alike. Although a law of general applicability, as opposed to one directed only at the states, is not per se Constitutional, it is a factor that the Supreme Court and the courts of appeal have consistently found to be significant. In the landmark case of *Garcia v. San Antonio Metro. Transit Auth.*, the Supreme Court held that a city's transit authority (SAMTA) was bound by the minimum wage and overtime pay provisions in the Fair Labor Standards Act ("FLSA"). During the course of its decision, the Court stated:

> [W]e need go no further than to state that we perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet.

469 U.S. 528, 554, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985); *see also Reno v. Condon*, 528 U.S. 141, 151, 120 S. Ct. 666, 145 L. Ed. 2d 587 (2000) (generally applicable law upheld that regulated the entire "universe of entities" in the market, both in the public and private realm, and applied "to individuals as well as States"); *see also*

Oklahoma Dep't of Public Safety v. United States, 161 F.3d 1266, 1271 (10th Cir. 1998) (noting the "logical distinction" that the Supreme Court has drawn between generally applicable laws that "incidentally apply to states" and those that apply only to states; explaining that "because generally applicable laws are not aimed at uniquely governmental functions," and because such "laws affecting both private and public interests are subject to stricter political monitoring by the private sector," a law is less likely to be found oppressive "where the law is aimed at both private and public entities"). The Seventh Circuit has thus stated:

> Neutrality between governmental and private spheres is a principal ground on which the Supreme Court has held that states may be subjected to regulation when they participate in the economic marketplace—for example, by hiring workers covered by the Fair Labor Standards Act. So long as public market participants are treated the same as private ones, they enjoy the protection the latter have been able to secure from the legislature; and as Congress is not about to destroy private industry (think what that would do to the tax base!) it can not hobble the states either.

Travis v. Reno, 163 F.3d 1000, 1002–03 (7th Cir. 1998) (citations omitted). I find these cases to be instructive. Although a law of general applicability may not be per se Constitutional, *see Condon, supra*, 528 U.S. at 151 (leaving the question open), the fact that the employer mandate is generally applicable goes a long way toward sustaining it.

Further, in this case, the mere fact that the states will be required to provide the same healthcare benefits to employees as private employers does not, by itself, implicate or interfere with state functions and sovereignty. In *Maryland v. Wirtz*, 392 U.S. 183, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968), the Supreme Court rejected the argument that extending FLSA wage and overtime pay provisions to the states would violate state sovereignty by telling public hospitals and schools how to carry out their sovereign functions:

> The Act establishes only a minimum wage and a maximum limit of hours unless overtime wages are paid, and does not otherwise affect the way in which school and hospital duties are performed. Thus appellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the States how to perform medical and educational functions is not factually accurate. Congress has "interfered with" these state functions only to the extent of providing that when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals.

Id. at 193–94. The state plaintiffs allege that the employer mandate will interfere with their sovereignty and impede state functions insofar as it will be financially burdensome and that, if it is allowed to stand, the state's authority "to define the conditions of its officeholders and employees and to control appropriations [will be] usurped." Pl. Mem. at 57; *see also id.* at 56 n.59 (contending that "Congress may [not] decree the basic terms of the employment relationship with State officers and

employees and usurp the States' authority over their budgets and resources").

However, virtually any and all attempts to regulate the wages and conditions of employment in the national labor market (which Congress has long done) will result in similar restrictions and adversely impact the state fisc. The minimum wage and overtime pay provisions in the FLSA, which the Supreme Court upheld against the states in *Wirtz* and *Garcia*, *supra*, certainly had much the same effect, as the dissenters in those cases made it a point to emphasize. *See Garcia*, *supra*, 469 U.S. at 528 ("The financial impact on States and localities of displacing their control over wages, hours, overtime regulations, pensions, and labor relations with their employees could have serious, as well as unanticipated, effects on state and local planning, budgeting, and the levying of taxes.") (Powell, J., dissenting); *Wirtz*, *supra*, 392 U.S. at 203 (stating that "[t]here can be no doubt" that if the FLSA is extended to the states it could "disrupt the fiscal policy of the States and threaten their autonomy in the regulation of health and education") (Douglas, J., dissenting). The majority opinions in those two cases control here, unless there is a discernable reason to treat healthcare benefits differently than compensation and conditions of employment.

I see no persuasive reason why healthcare benefits—which are generally viewed as a condition of employment and part of an employee's compensation package[13]—

---

[13] *Cf., e.g., Owen v. McKibben*, 78 Fed. Appx. 50, 51 n.3 (10th Cir. 2003) (compensation package at issue included healthcare insurance); *United States v. City of New York*, __ F. Supp. 2d __, 2010 WL 1948562, at *1 (S.D. N.Y. May 13, 2010) (same); *Portugues–Santa v. B. Fernandez Hermanos, Inc.*, 614 F. Supp. 2d 221, 228 (D. P.R. 2009) (same);

should be treated differently than other aspects of compensation and conditions of employment that the Supreme Court has already held Congress may regulate and mandate against the states (such as wages, hours, overtime pay, etc.). This is particularly so in light of the fact that, as the defendants correctly point out, to some extent Congress already regulates health benefits for state employees, for example, with respect to COBRA's temporary continuation of coverage provisions and HIPAA's restrictions on the ability of group plans to deny coverage due to preexisting conditions. *See* Def. Mem. at 22. If the employer mandate in the Act is unconstitutional as applied to the states, for the reasons claimed by the plaintiffs, then the FLSA (and arguably COBRA and HIPAA) are likewise unconstitutional as applied to the states. The plaintiffs tried to distinguish *Garcia* during oral argument by contending that the case was justified because Congress there was trying to ensure that workers "were, in effect, not going to be abused with regard to hours or inadequate wages." Tr. at 79. Whether the plaintiffs feel that Congress had a more noble and well-meaning *purpose* in passing the FLSA is irrelevant. The *power* that Congress asserted (and the effect it would have on the state fisc) is essentially the same as here.

For the foregoing reasons, I believe *Wirtz* and *Garcia* control. I recognize that *Wirtz* (state employers

---

Laselva v. Schmidt, 2009 WL 1312559, *1 (N.D. N.Y. May 7, 2009) (same); *Plitt v. Ameristar Casino, Inc.*, 2009 WL 1297404, at *1 (E.D. Mo. May 6, 2009) (same); *Perrotti v. Wal-Mart Stores, Inc.*, 2006 WL 146232, *1 (D. N.H. Jan. 19, 2006) (same); *Hudson v. International Computer Negotiations, Inc.*, 2005 WL 3087865, at *1 (M.D. Fla. Nov. 16, 2005) (same).

subject to the FLSA) was overruled by *National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1975) (state employers not subject to the FLSA), which was in turn overruled by *Garcia* (state employers once again subject to the FLSA). Accordingly, in light of this "unsteady path" of Supreme Court jurisprudence, *New York v. United States*, 505 U.S. 144, 160, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992), the plaintiffs would most likely have stated a plausible claim if it had been brought between 1975 and 1985. But, of course, I am required to apply the law as it now exists.

Because the Act's employer mandate regulates the states as participants in the national labor market the same as it does private employers, and because the Supreme Court has held in this context that adversely impacting the state fisc (by requiring a minimum level of employment-based benefits) does not interfere with state sovereignty and impede state functions, the employer mandate does not violate the Constitution as a matter of law——under the current law. Therefore, Count Six does not state a plausible claim upon which relief can be granted and must be dismissed.[14]

---

[14] The plaintiffs argue that the employer mandate runs afoul of the inter-governmental-tax-immunity doctrine, *see* Pl. Mem. at 58–60, but the defendants persuasively respond that the claim has not been pled in the amended complaint and that, in any event, it must fail as a matter of law, *see* Reply in Support of Defendants' Motion to Dismiss ("Reply Mem."), at 8–11 (doc. 74). Indeed, under the current state of the law, it is unclear if the inter-governmental-tax-immunity even retains any viability. *See South Carolina v. Baker*, 485 U.S. 505, 518 n.11, 108 S. Ct. 1355, 99 L. Ed. 2d 592 (1988) (noting the inter-governmental-tax-immunity doctrine has "shifted into the modern era," and declining to decide "the extent, *if any*, to which States are currently immune from direct nondiscriminatory federal taxation") (emphasis added).

(2) Coercion and commandeering as to healthcare insurance (Count V)

The Act provides for the creation of health benefit exchanges to foster and provide "consumer choices and insurance competition." The Act gives the states the option to create and operate the exchanges themselves, or have the federal government do so. The plaintiffs acknowledge that they have a choice, but they claim it is tantamount to no choice because the Act forces them to operate the exchange "under threat of removing or significantly curtailing their long-held regulatory authority" (*see* Am. Compl. ¶ 88), which will "displace State authority over a substantial segment of intrastate insurance regulation . . . that the States have always possessed under the police powers provided in the Constitution." *See id.* ¶ 44. This is improper "coercion and commandeering" in violation of the Ninth and Tenth Amendments, according to the plaintiffs.

The plaintiffs' argument for this claim is directly foreclosed by *Hodel v. Virginia Surface Min. & Reclamation Association, Inc.*, 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981). That case involved a pre-enforcement challenge to the Surface Mining Control and Reclamation Act, which was a comprehensive statute designed to "'establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.'" *Id.* at 268, 101 S. Ct. 2352. Pursuant to the statute, "any State wishing to assume permanent regulatory authority over the surface coal mining operations" was required to submit a "proposed permanent program" demonstrating compliance with federal regulations. *Id.* at 271. If any state chose not to do so, the statute provided that the Secretary of

the Interior would "develop and implement" the program for that particular state. Virginia filed suit and alleged that the statute violated the Constitution in that "the threat of federal usurpation of their regulatory roles coerces the States into enforcing the Surface Mining Act." *Id.* at 289. The district court agreed, reasoning that while the statute "allows a State to elect to have its own regulatory program, the 'choice that is purportedly given is no choice at all' because the state program must comply with federally prescribed standards." *Id.* at 285 n.25. However, the Supreme Court flatly rejected the argument and reversed. In doing so, the Court explained that the statute merely established "a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Id.* at 289. It "prescribes federal minimum standards governing surface coal mining, which a State may either implement itself or else yield to a federally administered regulatory program." *Id.* The Supreme Court further stated that:

> A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law. Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result.

* * *

> Thus, Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining. We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role.

Id. at 290 (citations omitted). Notably, the Court made it a point to emphasize that its conclusion applied even though—as the plaintiffs maintain in this case—"the federal legislation displaces laws enacted under the States' 'police powers.'" *Id.* at 291.

Commandeering was found in *New York, supra,* 505 U.S. at 144, 112 S. Ct. 2408, where Congress passed a statute requiring state legislatures to enact a particular kind of law, and that holding was later extended in *Printz v. United States,* 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997), to apply to individual state officials. *Id.* at 935 (holding that "Congress cannot circumvent [the prohibition in *New York*] by conscripting the State's officers directly"). The plaintiffs rely heavily on these two decisions for their argument, but both cases are factually and substantively different from the one here. The plaintiffs have not identified any provision in the Act that requires the states to enact a particular law or regulation, as in *New York,* nor have they identified any provision that requires state officials to enforce federal laws that regulate private individuals, as in *Printz.* "[T]he anti-commandeering rule comes into play *only* when the federal government calls on the states to use their sovereign powers as regulators of their citizens." *Travis, supra,* 163 F.3d at 1004–05 (emphasis added); *see also id.* at 1004 (noting that states may be objects of regulation but "cannot be compelled to become regula-

tors of private conduct"). Indeed, both *New York* and *Printz* cited *Hodel* with approval and distinguished it from the facts presented in those two cases. *See Printz, supra*, 521 U.S. at 925–26 (explaining "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs," which the legislation at issue in *Hodel* did not do "because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field"); *New York, supra*, 505 U.S. at 161, 167 (the statute at issue in *Hodel* was an example of "cooperative federalism" that did not commandeer the legislative process because the states were not compelled to enforce the statute, expend any state funds, or participate in the program "in any manner whatsoever"; they could have elected not to participate and "the full regulatory burden will be borne by the Federal Government"). Because the health benefit exchanges are voluntary and do not compel states to regulate private conduct of their citizens, Count Five does not state a claim upon which relief can be granted. The Act gives the states the choice to establish the exchanges, and is therefore the type of cooperative federalism that was authorized in *Hodel, supra*.[15]

---

[15] The plaintiffs appear to suggest that our case is distinguishable from *Hodel* because, unlike the statute under review in that case, the federal government here has not accepted the "full regulatory burden" of the health benefit exchanges. For this, the plaintiffs rely on six statutory provisions that they maintain "conscript and coerce States into carrying out critical elements of the insurance exchange program." *See* Pl. Mem. at 51–54. As the defendants correctly point out, however, *see* Reply Mem. at 6–7, upon close and careful review, each challenged provision is voluntary and generally applicable only if the state elects to establish the exchange.

(3) Coercion and commandeering as to Medicaid (Count IV)

For this claim, the state plaintiffs object to the "fundamental changes in the nature and scope of the Medicaid program" that the Act will bring about. *See* Am. Comp. ¶ 86. They have described these changes at length in their complaint, *see* Am. Comp. ¶¶ 39–60, and they need not be repeated here in any great detail. It is sufficient to say that the state plaintiffs maintain that the Act drastically expands and alters the Medicaid program to such an extent they cannot afford the newly-imposed costs as it will force them to "run [their] budgets off a cliff." Tr. 72. The Medicaid provisions in the Act allegedly run afoul of Congress's Article I powers; exceed the Commerce Clause; and violate the Ninth and Tenth Amendments.

The defendants do not appear to deny that the Act will significantly alter and expand the Medicaid program as it currently exists (although they do point out that the federal government will be absorbing 100% of the new costs for the first three years[16]). Rather, the defendants rest their argument on this simple and unassailable fact: state participation in Medicaid under the Act is, as it always has been, entirely voluntary. When the freedom to opt out of the program is considered in conjunction with the fact that Congress has expressly reserved the right to alter and amend the program, *see* 42 U.S.C. § 1304 ("The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Con-

---

[16] One could argue, however, that the "federal government" will not really be absorbing the costs as the government has little money except through taxpayers, who almost exclusively reside within the states.

gress."), and, in fact, it has done so numerous times over the years, *see* Def. Mem. at 10, the defendants contend that the state plaintiffs have failed to state a claim. *See Harris v. McRae*, 448 U.S. 297, 301, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980) (noting "[a]lthough participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements" that Congress sees fit to impose).

The state plaintiffs assert that they do not actually have the freedom to opt out. They note that "'Medicaid is the single largest Federal grant-in-aid program to the States, accounting for over 40 percent of all Federal grants to states.'" *See* Pl. Mem. at 50 (quoting Bipartisan Comm'n on the Medicaid Act of 2005, H.R. 985, 109th Cong. § 2(13) (2005)). They further note that in Florida, for example, 26% of its budget is presently devoted to Medicaid outlays, and because the federal government contributes an average of 55.45% of Medicaid costs, Florida's outlays would have to be more than doubled (to the point of consuming more than 58% of its state budget) to offer the same level of benefits that its Medicaid enrollees now receive. In short, the plaintiffs contend that the Act imposes a Hobson's Choice. They must either: (1) accept the Act's transformed Medicaid program with all its new obligations and costs that the states cannot afford; or (2) exit the program altogether and lose federal matching funds that are necessary and essential for them to provide healthcare to their neediest citizens (along with other Medicaid-linked federal funds). Either way, they contend that their Medicaid systems will eventually collapse, leaving millions of their neediest residents without any health insurance. Consequently, they claim that they are being forced into ac-

cepting the changes to the Medicaid program—even though they cannot afford it and doing so will work an enormous financial hardship—because they "effectively have no choice other than to participate." *See* Am. Comp. ¶ 84. Although this claim has intuitive appeal, the status of existing law makes it a close call as to whether it states a "plausible" claim upon which relief can be granted.

The underlying question presented is whether the Medicaid provisions satisfy the Spending Clause. There are four "general restrictions" on Congress's spending power: (1) the exercise of spending power must be for the general welfare; (2) the conditions must be stated clearly and unambiguously; (3) the conditions must bear a relationship to the purpose of the program; and (4) the conditions imposed may, of course, not require states "to engage in activities that would themselves be unconstitutional." *See generally South Dakota v. Dole,* 483 U.S. 203, 207–10, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987). The plaintiffs do not appear to dispute that the Act meets these restrictions. Rather, their claim is based principally on a single sentence near the end of *Dole,* where the Supreme Court speculated that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 211. For that statement, the Court relied upon an earlier decision, *Steward Machine Co. v. Davis,* 301 U.S. 548, 57 S. Ct. 883, 81 L. Ed. 1279 (1937), which likewise speculated that there may be a point at which Congressional pressure turns into impermissible coercion. However, the *Steward Machine* Court made no attempt to define exactly where that line might be drawn and, in fact, sug-

gested that no such line could be drawn. Justice Cardozo cautioned that any spending measure (in that case, in the form of a tax rebate) "conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Id.* at 589–90.

Accordingly, the coercion theory has been often discussed in case law and scholarship, but never actually applied. While it appears that the Eleventh Circuit has not yet been called upon to consider the issue, the courts of appeal that have considered the theory have been almost uniformly hostile to it. *See, e.g.*, *Doe v. Nebraska*, 345 F.3d 593, 599 (8th Cir. 2003) (acknowledging what the Supreme Court said in *Dole*, but going on to note that the "circuits are in accord" with the view that no coercion is present if a state—even when faced with the possible "sacrifice" of a large amount of federal funding—voluntarily exercises its own choice in accepting the conditions attached to receipt of federal funds; noting that a "politically painful" choice does not compulsion make); *Kansas v. United States*, 214 F.3d 1196, 1201–02 (10th Cir. 2000) ("The cursory statements in *Steward Machine* and *Dole* mark the extent of the Supreme Court's discussion of the coercion theory. The Court has never employed the theory to invalidate a funding condition, and federal courts have been similarly reluctant to use it"; the theory is "unclear, suspect, and has little precedent to support its application."); *Nevada v. Skinner*, 884 F.2d 445, 448 (9th Cir. 1989) ("The coercion theory has been much discussed but infrequently applied in federal case law, and never in favor of the challenging party. . . . The difficulty if not the impropriety of making judicial judgments regarding

a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments."); *Oklahoma v. Schweiker*, 655 F.2d 401, 413–14 (D.C. Cir. 1981) (pre-*Dole*) (coercion argument rejected because courts "are not suited to evaluating whether states are faced here with an offer they cannot refuse or merely a hard choice. Even a rough assessment of the degree of temptation would require extensive and complex factual inquiries on a state-by-state basis. We therefore follow the lead of other courts that have explicitly declined to enter this thicket when similar funding conditions have been at issue."); *State of New Hampshire Dep't of Employment Sec. v. Marshall*, 616 F.2d 240, 246 (1st Cir. 1980) (pre-*Dole*) ("Petitioners argue, however, that this option of the state to refuse to participate in the program is illusory, since the severe financial consequences that would follow such refusal negate any real choice. . . . We do not agree that the carrot has become a club because rewards for conforming have increased. It is not the size of the stakes that controls, but the rules of the game.").

Perhaps the case most analogous to this one is *California v. United States*, 104 F.3d 1086 (9th Cir. 1997), where California challenged the Medicaid program, in pertinent part, because it conditioned the receipt of federal matching funds on the provision of emergency medical services to illegal aliens. Because illegal aliens comprised 5% of its population, the state was having to spend $400 million each year on providing health care to the aliens. California objected to having to spend that money and argued, like plaintiffs here, that it was being coerced into doing so because, while its initial decision to participate in Medicaid was voluntary, "it now has no

choice but to remain in the program in order to prevent a collapse of its medical system." In rejecting this argument, the Ninth Circuit questioned the "viability" of the coercion theory, as well as the possibility that any "sovereign state which is always free to increase its tax revenues [could] ever be coerced by the withholding of federal funds." The Court of Appeals concluded—as have all courts to have considered the issue—that the state was merely presented with a "hard political choice." *See generally id.* at 1089–92; *accord Padavan v. United States*, 82 F.3d 23, 28–29 (2d Cir. 1996) (holding same and noting that "Medicaid is a voluntary program in which states are free to choose whether to particulate. If New York chose not to participate, there would be no federal regulation requiring the state to provide medical services to illegal aliens").

The Fourth Circuit appears to be the one circuit where the coercion theory has been considered and "is not viewed with such suspicion." *West Virginia v. U.S. Dep't of Health & Human Servs.*, 289 F.3d 281, 290 (4th Cir. 2002) (referencing a prior decision of that court, *Commonwealth of Virginia Dep't of Education v. Riley*, 106 F.3d 559 (4th Cir. 1997), where six of the thirteen judges on the *en banc* panel stated in dicta that coercion theory may be viable). Notwithstanding that the theory may be available in the Fourth Circuit, *West Virginia* acknowledged that because of "strong doubts about the viability of the coercion theory"; in light of the fact that it is "somewhat amorphous and cannot easily be reduced to a neat set of black-letter rules of application"; and given the "difficulties associated with [its] application," there is "no decision from any court finding a conditional grant to be impermissibly coercive." Therefore, "most

courts faced with the question have effectively abandoned any real effort to apply the coercion theory" after finding, in essence, that it "raises political questions that cannot be resolved by the courts." *See id.* at 288–90. All this to say, if the coercion theory stands at all, it stands on extremely "wobbly legs." *See Skinner, supra*, 884 F.2d at 454.

In light of the foregoing, the current status of the law provides very little support for the plaintiffs' coercion theory argument. Indeed, when the "pressure turns into compulsion" theory is traced back, its entire underpinning is shaky. In *Steward Machine Co., supra*, the Supreme Court held that there was no coercion because "[n]othing in the case suggests the exertion of a power akin to undue influence, *if we assume that such a concept can ever be applied with the fitness to the relations between state and nation.*" 301 U.S. at 590 (emphasis added). Thus, in addition to being left undefined, the theory appears to stem from a "what if" assumption. Nevertheless, while the law does not provide much support for the plaintiffs' argument, it does not preclude it either (at least not in this circuit).

Further, I cannot ignore that, based on the allegations in the complaint, the plaintiffs are in an extremely difficult situation. They either accept the sweeping changes to Medicaid (which they contend will explode their state budgets), or they withdraw from the system entirely (which they allege could leave millions of their poorest and neediest citizens without any medical coverage). The plaintiffs have argued that this is tantamount to no choice at all, which can perhaps be inferred from the fact that Congress does not really anticipate that the states will (or could) drop out of the Medicaid program.

To be sure, since the Act seeks to reduce costs, reduce uncompensated care, and reduce the number of uninsured, it would make little sense for Congress to expect that objecting states would opt out of Medicaid and leave millions of the country's poorest citizens without medical coverage, and thus make each of those stated problems significantly worse.

In addition, if the state plaintiffs make the decision to opt out of Medicaid, federal funds taken from their citizens via taxation that used to flow back into the states from Washington, D.C., would instead be diverted to the states that have agreed to continue participating in the program.[17]

If the Supreme Court meant what it said in *Dole* and *Steward Machine Co.* (and I must presume that it did), there is a line somewhere between mere pressure and impermissible coercion. The reluctance of some circuits to deal with this issue because of the potential legal and factual complexities is not entitled to a great deal of weight, because courts deal every day with the difficult complexities of applying Constitutional principles set forth and defined by the Supreme Court. Because the Eleventh Circuit (unlike the other circuits) has apparently not directly addressed and foreclosed this argu-

---

[17] *See, e.g.*, Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 Chap. L. Rev. 195, 213–14 (2001) ("[S]hould a state decline proffered federal funds because it finds a condition intolerable, it receives no rebate of any tax dollars that its residents have paid into the federal fisc. In these cases, the state (through its residents) contributes a proportional share of federal revenue only to receive less than a proportional share of federal spending. Thus, when the federal government offers the states money, it can be understood as simply offering to return the states' money to them, often with unattractive conditions attached.").

ment, and because, in any event, "the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree, at times, perhaps, *of fact*," *Steward Machine Co., supra*, 301 U.S. at 590 (emphasis added), the plaintiffs have stated a "plausible" claim in this circuit.

(4) Violation of constitutional prohibition of unapportioned capitation or direct tax (Count III)

For this count, the plaintiffs object to the individual mandate penalty. They make an "alternative" claim that, *if* the penalty is a tax (which they do not believe it is, and some Constitutional authorities have concluded it could not be[18]), it is an unconstitutional capitation or direct tax, prohibited by Article I, Section 9, Clause 4 of the Constitution.[19] Although the argument is not only plausible, but appears to have actual merit, as some commentators have noted, *see, e.g.*, Steven J. Willis and Nakku Chung, *Constitutional Decapitation and Health-*

---

[18] *See, e.g.*, Randy Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, N.Y.U. J.L. & Liberty (forthcoming), at 27 (stating that the argument for the penalty being justified under Congress's broad taxing authority is based on a "radical" theory that, if accepted, would authorize Congress "to penalize or mandate any activity by anyone in the country, provided it limited the sanction to a fine enforced by the Internal Revenue Service," which would "effectively grant Congress a general police power").

[19] This is the same Constitutional provision under which the Supreme Court held that the first attempt to impose a federal income tax was unconstitutional to the extent it was not apportioned. *See generally Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S. Ct. 673, 39 L. Ed. 759 (1895). Subsequently, passage of the Sixteenth Amendment in 1913 authorized the imposition of an income tax without the need for apportionment among the states.

care, Tax Notes (2010), I need not be concerned with the issue. As previously explained, it is quite clear that Congress did not intend the individual mandate penalty to be a tax; it is a penalty. It must be analyzed on the basis of whether it is authorized under Congress's Commerce Clause power, not its taxing power. Therefore, Count Three will be dismissed as moot.

(5) Challenge to individual mandate on due process grounds (Count II)

The plaintiffs next allege that the individual mandate violates their rights to substantive due process under the Fifth Amendment. Again, this claim would have found Constitutional support in the Supreme Court's decisions in the years prior to the New Deal legislation of the mid-1930's, when the Due Process Clause was interpreted to reach economic rights and liberties. *See Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905); *see also Coppage v. Kansas*, 236 U.S. 1, 35 S. Ct. 240, 59 L. Ed. 441 (1915), *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 785 (1923); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 44 S. Ct. 412, 68 L. Ed. 813 (1924). However, "[t]he doctrine that prevailed in *Lochner, Coppage, Adkins, Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963); *see also New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 106–07, 99 S. Ct. 403, 58 L. Ed. 2d 361 (1978) (since the demise of substantive due process in the arena of economic regula-

tion, legislatures have "broad scope to experiment with economic problems").

Therefore, as the law now exists, if a challenged statute does not implicate the very limited and narrow class of rights that have been labeled "fundamental," courts reviewing legislative action on substantive due process grounds will accord substantial deference to the legislative judgments. In the absence of a fundamental right, the question is not whether the court thinks the legislative action is wise, but whether the legislature could reasonably conclude that the measure at issue is "rationally related" to a legitimate end. As the Eleventh Circuit has explained:

> Substantive due process claims not involving a fundamental right are reviewed under the rational basis test. The rational basis test is not a rigorous standard [and] is generally easily met. A searching inquiry into the validity of legislative judgments concerning economic regulation is not required. . . . The task is to determine if "any set of facts may be reasonably conceived to justify" the legislation. . . . To put it another way, the legislation must be sustained if there is any conceivable basis for the legislature to believe that the means they have selected will tend to accomplish the desired end. Even if the court is convinced that the political branch has made an improvident, ill-advised or unnecessary decision, it must uphold the act if it bears a rational relation to a legitimate governmental purpose.

TRM, Inc. v. United States, 52 F.3d 941, 945–46 (11th Cir. 1995) (citations omitted).

The plaintiffs contend that the individual mandate does, in fact, implicate fundamental rights to the extent that people have "recognized liberty interests in the freedom to eschew entering into a contract, to direct matters concerning dependent children, and to make decisions regarding the acquisition and use of medical services." *See* Pl. Mem. at 43–44; *accord* Tr. at 82 ("The fundamental interest involved here, aside from the liberty of contract, is the right to . . . bodily autonomy and use of medical care . . . the right to run your family life as you see fit with some limited intrusions available"). Fundamental rights are a narrow class of rights involving the rights to marry, have children, direct the education of those children, marital privacy, contraception, bodily integrity, and abortion; and the Supreme Court is "very reluctant to expand" that list. *See Doe v. Moore*, 410 F.3d 1337, 1343 (11th Cir. 2005). There is, to be sure, a liberty interest in the freedom to be left alone by the government. We all treasure the freedom to make our own life decisions, including what to buy with respect to medical services. Is that a "fundamental right"? The Supreme Court has not indicated that it is—at least not yet. That is the current state of the law, and it is not a district court's place to expand upon that law.

Congress made factual findings in the Act and concluded that the individual mandate was "essential" to the insurance market reforms contained in the statute. This is a "rational basis" justifying the individual mandate—if it does not relate to a fundamental right, which only the Supreme Court can recognize. In the absence of such a recognized fundamental right, that stated

"rational basis" is sufficient to withstand a substantive due process challenge. This count must be dismissed.

(6) Challenge to individual mandate as exceeding Commerce Clause (Count I)

Under the Commerce Clause, Congress may regulate: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities "affecting" interstate commerce. *Perez v. United States*, 402 U.S. 146, 150, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971). Only (3) is at issue here.

For this count, the plaintiffs maintain that the individual mandate does not regulate activity affecting interstate commerce; instead, it seeks to impermissibly regulate economic *inactivity*. The decision not to buy insurance, according to the plaintiffs, is the exact opposite of economic activity. Because the individual mandate "compels all Americans to perform an affirmative act or incur a penalty, simply on the basis that they exist and reside within any of the United States," the plaintiffs contend that it will deprive them of "their rights under State law to make personal healthcare decisions without governmental interference." Am. Comp. ¶¶ 70, 75. Thus alleged, the individual mandate exceeds the Commerce Clause, and violates the Ninth and Tenth Amendments.

The defendants, of course, have a different take. They contend that "[t]he appearance of inactivity here is just an illusion" because the people who decide to not buy insurance *are* participating in the relevant economic market. *See* Tr. at 30. Their argument on this point can be broken down to the following syllogism: (1) because

the majority of people will at some point in their lives need and consume healthcare services, and (2) because some of the people are unwilling or unable to pay for those services, (3) Congress may regulate everyone and require that everyone have specific, federally-approved insurance. Framed this way, the defendants insist that the individual mandate does not require people to pay for a service they do not want; rather, it merely tells them how they must pay for a service they will almost certainly consume in the future.

It is, according to the defendants, no different than Congress telling people "you need to pay by cash instead of check or credit card." Tr. at 88; *accord* Def. Mem. at 43 ("[Individuals who choose not to buy insurance] have not opted out of health care; they are not passive bystanders divorced from the health care market. Instead, they have chosen a method of payment for services they will receive, no more 'inactive' than a decision to pay by credit card rather than by check."). Also, because the individual mandate is essential to the insurance market reforms in the Act, the defendants argue that it is sustainable for the "second reason" that it falls within the Necessary and Proper Clause. *See* Def. Mem. at 44–48.

At this stage in the litigation, this is not even a close call. I have read and am familiar with all the pertinent Commerce Clause cases, from *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (1824), to *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005). I am also familiar with the relevant Necessary and Proper Clause cases, from *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819), to *United States v. Comstock*, — U.S. —, 130 S. Ct. 1949, 176 L. Ed. 2d 878 (2010). This case law is instructive, but ultimately incon-

clusive because the Commerce Clause and Necessary and Proper Clause have never been applied in such a manner before. The power that the individual mandate seeks to harness is simply without prior precedent. The Congressional Research Service (a nonpartisan legal "think tank" that works exclusively for Congress and provides analysis on the constitutionality of pending legislation) advised Congress on July 24, 2009, long before the Act was passed into law, that "it is unclear whether the [Commerce Clause] would provide a solid constitutional foundation for legislation containing a requirement to have health insurance." The analysis goes on to state that the individual mandate presents "the most challenging question . . . as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or service." Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, July 24, 2009, at 3. Even *Thomas More Law Center, supra*, 2010 WL 3952805, which recently upheld the individual mandate, seems to recognize that the individual mandate is without any precedent. *See id.* at *8 ("The Supreme Court has always required an economic or commercial component in order to uphold an act under the Commerce Clause. The Court has never needed to address the activity/inactivity distinction advanced by plaintiffs because in every Commerce Clause case presented thus far, there has been some sort of activity").[20]

---

[20] The district court, however, went on to adopt the government's argument that the Commerce Clause should not only reach economic activity—which had "always" been present in "every Commerce Clause case" decided to date—but it should be applied to "economic decisions" as well, such as the decision not to buy health insurance.

The defendants "firmly disagree" with the characterization of the individual mandate as "unprecedented" and maintain that it is "just false" to suggest that it breaks any new ground. *See* Tr. 31, 33. During oral argument, as they did in their memorandum, *see* Def. Mem. at 44, they attempted to analogize this case to *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S. Ct. 348, 13 L. Ed. 2d 258 (1964), which held that Congress had the power under the Commerce Clause and the Civil Rights Act to require a local motel to rent rooms to black guests; and *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942), which held that Congress could limit the amount of wheat grown for personal consumption on a private farm in an effort to control supply and avoid surpluses or shortages that could result in abnormally low or high wheat prices. The defendants have therefore suggested that because the motel owner in *Heart of Atlanta* was required to rent rooms to a class of people he did not want to serve, Congress was regulating inactivity. And, because the farmer in *Wickard* was limited in the amount of wheat he could grow for his own personal consumption, Congress was forcing him to buy a product (at least to the extent that he wanted or needed more wheat than he was allowed). There are several obvious ways in which *Heart of Atlanta* and *Wickard* differ markedly from this case, but I will only focus on perhaps the most significant one: the motel owner and the farmer were each involved in an *activity* (regardless of whether it could readily be deemed interstate commerce) and each had a choice to discontinue that activity. The plaintiff in the former was not required to be in the motel business, and the plaintiff in the latter did not have to grow wheat (and if he did decide to grow the wheat, he could have

opted to stay within his allotment and use other grains to feed his livestock—which would have been most logical, since wheat is usually more expensive and not an economical animal feed—and perhaps buy flour for him and his family). Their respective obligations under the laws being challenged were tethered to a voluntary undertaking. Those cases, in other words, involved activities in which the plaintiffs had chosen to engage. All Congress was doing was saying that if you *choose* to engage in the activity of operating a motel or growing wheat, you are engaging in interstate commerce and subject to federal authority.

But, in this case we are dealing with something very different. The individual mandate applies across the board. People have no choice and there is no way to avoid it. Those who fall under the individual mandate either comply with it, or they are penalized. It is not based on an activity that they make the choice to undertake. Rather, it is based solely on citizenship and on being alive. As the nonpartisan CBO concluded sixteen years ago (when the individual mandate was considered, but not pursued during the 1994 national healthcare reform efforts): "A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service *as a condition of lawful residence in the United States.*" *See* Congressional Budget Office Memorandum, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance,* August 1994 (emphasis added).

Of course, to say that something is "novel" and "unprecedented" does not necessarily mean that it is "unconstitutional" and "improper." There may be a first

time for anything. But, at this stage of the case, the plaintiffs have most definitely stated a plausible claim with respect to this cause of action.[21]

IV. CONCLUSION

The Supreme Court has said:

> Some truths are so basic that, like the air around us, they are easily overlooked. Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power

---

[21] Starting in the First World War, there have been at least six attempts by the federal government to introduce some kind of universal healthcare insurance coverage. At no point—until now—did it mandate that everyone buy insurance (although it was considered during the healthcare reform efforts in 1994, as noted above). While the novel and unprecedented nature of the individual mandate does not automatically render it unconstitutional, there is perhaps a *presumption* that it is. In *Printz, supra*, 521 U.S. at 898, the Supreme Court stated several times that an "absence of power" to do something could be inferred because Congress had never made an attempt to exercise that power before. *See id.* at 905 (stating that if "earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist"); *see id.* at 907–08 ("the utter lack of statutes imposing obligations [like the one at issue there] (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power") (emphasis in original); *see id.* at 918 (stating "almost two centuries of apparent congressional avoidance of the practice [at issue] tends to negate the existence of the congressional power asserted here").

> among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

New York, supra, 505 U.S. at 187. As noted at the outset of this order, there is a widely recognized need to improve our healthcare system. How to accomplish that is quite controversial. For many people, including many members of Congress, it is one of the most pressing national problems of the day and justifies extraordinary measures to deal with it. However, "a judiciary that licensed extra-constitutional government with each issue of comparable gravity would, in the long run, be far worse." *See id.* at 187–88. In this order, I have not attempted to determine whether the line between Constitutional and extraconstitutional government has been crossed. That will be decided on the basis of the parties' expected motions for summary judgment, when I will have the benefit of additional argument and all evidence in the record that may bear on the outstanding issues. I am only saying that (with respect to two of the particular causes of action discussed above) the plaintiffs have at least stated a plausible claim that the line has been crossed.

Accordingly, the defendants' motion to dismiss (doc. 55) is GRANTED with respect to Counts Two, Five, and Six, and those counts are hereby DISMISSED. The motion is DENIED with respect to Counts One and Four. Count Three is also DISMISSED, as moot. The case will continue as to Counts One and Four pursuant to the scheduling order previously entered.

DONE and ORDERED this 14th day of Oct., 2010.

/s/ ROGER VINSON
ROGER VINSON
Senior United States District Judge

APPENDIX E

1. Article I, Section 8 of the United States Constitution provides in relevant part:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

* * *

To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.

* * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

2. 26 U.S.C.A. 5000A provides:

Requirement to maintain minimum essential coverage

(a) **Requirement to maintain minimum essential coverage.**—An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

(b) **Shared responsibility payment.**—

(1) **In general.**—If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).

(2) **Inclusion with return.**—Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

(3) **Payment of penalty.**—If an individual with respect to whom a penalty is imposed by this section for any month—

(A) is a dependent (as defined in section 152) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

(B) files a joint return for the taxable year including such month, such individual and the spouse of such individual shall be jointly liable for such penalty.

(c) **Amount of penalty.**—

(1) In general.—The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to the lesser of—

(A) the sum of the monthly penalty amounts determined under paragraph (2) for months in the taxable year during which 1 or more such failures occurred, or

(B) an amount equal to the national average premium for qualified health plans which have a bronze level of coverage, provide coverage for the applicable family size involved, and are offered through Exchanges for plan years beginning in the calendar year with or within which the taxable year ends.

(2) **Monthly penalty amounts.**—For purposes of paragraph (1)(A), the monthly penalty amount with respect to any taxpayer for any month during which any failure described in subsection (b)(1) occurred is an amount equal to 1/12 of the greater of the following amounts:

(A) **Flat dollar amount.**—An amount equal to the lesser of—

(i) the sum of the applicable dollar amounts for all individuals with respect to whom such failure occurred during such month, or

(ii) 300 percent of the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

(B) **Percentage of income.**—An amount equal to the following percentage of the excess of the taxpayer's household income for the tax-

able year over the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer for the taxable year:

(i) 1.0 percent for taxable years beginning in 2014.

(ii) 2.0 percent for taxable years beginning in 2015.

(iii) 2.5 percent for taxable years beginning after 2015.

(3) **Applicable dollar amount.**—For purposes of paragraph (1)—

(A) **In general.**—Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $695.

(B) **Phase in.**—The applicable dollar amount is $95 for 2014 and $325 for 2015.

(C) **Special rule for individuals under age 18.**—If an applicable individual has not attained the age of 18 as of the beginning of a month, the applicable dollar amount with respect to such individual for the month shall be equal to one-half of the applicable dollar amount for the calendar year in which the month occurs.

(D) **Indexing of amount.**—In the case of any calendar year beginning after 2016, the applicable dollar amount shall be equal to $695, increased by an amount equal to—

(i) $695, multiplied by

(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year, determined by substituting "calendar year 2015" for "calendar year 1992" in subparagraph (B) thereof.

If the amount of any increase under clause (i) is not a multiple of $50, such increase shall be rounded to the next lowest multiple of $50.

(4) **Terms relating to income and families.**—For purposes of this section—

(A) **Family size.**—The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year.

(B) **Household income.**—The term "household income" means, with respect to any taxpayer for any taxable year, an amount equal to the sum of—

(i) the modified adjusted gross income of the taxpayer, plus

(ii) the aggregate modified adjusted gross incomes of all other individuals who—

(I) were taken into account in determining the taxpayer's family size under paragraph (1), and

(II) were required to file a return of tax imposed by section 1 for the taxable year.

(C) Modified adjusted gross income.—The term "modified adjusted gross income" means adjusted gross income increased by—

(i) any amount excluded from gross income under section 911, and

(ii) any amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax.

[(D) **Repealed.** Pub. L. 111-152, Title I, § 1002(b)(1), Mar. 30, 2010, 124 Stat. 1032]

(d) **Applicable individual.**—For purposes of this section—

(1) **In general.**—The term "applicable individual" means, with respect to any month, an individual other than an individual described in paragraph (2), (3), or (4).

(2) **Religious exemptions.**—

(A) **Religious conscience exemption.**—Such term shall not include any individual for any month if such individual has in effect an exemption under section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act which certifies that such individual is—

(i) a member of a recognized religious sect or division thereof which is described in section 1402(g)(1), and

(ii) an adherent of established tenets or teachings of such sect or division as described in such section.

(B) **Health care sharing ministry.**—

(i) **In general.**—Such term shall not include any individual for any month if such individual is a member of a health care sharing ministry for the month.

(ii) **Health care sharing ministry.**—The term "health care sharing ministry" means an organization—

(I) which is described in section 501(c)(3) and is exempt from taxation under section 501(a),

(II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,

(III) members of which retain membership even after they develop a medical condition,

(IV) which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and

without interruption since at least December 31, 1999, and

(V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.

(3) **Individuals not lawfully present.**—Such term shall not include an individual for any month if for the month the individual is not a citizen or national of the United States or an alien lawfully present in the United States.

(4) **Incarcerated individuals.**—Such term shall not include an individual for any month if for the month the individual is incarcerated, other than incarceration pending the disposition of charges.

(e) **Exemptions.**—No penalty shall be imposed under subsection (a) with respect to—

(1) **Individuals who cannot afford coverage.**—

(A) **In general.**—Any applicable individual for any month if the applicable individual's required contribution (determined on an annual basis) for coverage for the month exceeds 8 percent of such individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act. For purposes of applying this subparagraph, the taxpayer's household income shall be increased by any exclusion from gross income for any por-

tion of the required contribution made through a salary reduction arrangement.

(B) Required contribution.—For purposes of this paragraph, the term "required contribution" means—

(i) in the case of an individual eligible to purchase minimum essential coverage consisting of coverage through an eligible-employer-sponsored plan, the portion of the annual premium which would be paid by the individual (without regard to whether paid through salary reduction or otherwise) for self-only coverage, or

(ii) in the case of an individual eligible only to purchase minimum essential coverage described in subsection (f)(1)(C), the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides (without regard to whether the individual purchased a qualified health plan through the Exchange), reduced by the amount of the credit allowable under section 36B for the taxable year (determined as if the individual was covered by a qualified health plan offered through the Exchange for the entire taxable year).

(C) Special rules for individuals related to employees.—For purposes of subparagraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by

reason of a relationship to an employee, the determination under subparagraph (A) shall be made by reference to required contribution of the employee.

(D) **Indexing.**—In the case of plan years beginning in any calendar year after 2014, subparagraph (A) shall be applied by substituting for '8 percent' the percentage the Secretary of Health and Human Services determines reflects the excess of the rate of premium growth between the preceding calendar year and 2013 over the rate of income growth for such period.

(2) **Taxpayers with income below filing threshold.**—Any applicable individual for any month during a calendar year if the individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act is less than the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer.

(3) **Members of Indian tribes.**—Any applicable individual for any month during which the individual is a member of an Indian tribe (as defined in section 45A(c)(6)).

(4) **Months during short coverage gaps.**—

(A) **In general.**—Any month the last day of which occurred during a period in which the applicable individual was not covered by minimum essential coverage for a continuous period of less than 3 months.

(B) Special rules.—For purposes of applying this paragraph—

(i) the length of a continuous period shall be determined without regard to the calendar years in which months in such period occur,

(ii) if a continuous period is greater than the period allowed under subparagraph (A), no exception shall be provided under this paragraph for any month in the period, and

(iii) if there is more than 1 continuous period described in subparagraph (A) covering months in a calendar year, the exception provided by this paragraph shall only apply to months in the first of such periods.

The Secretary shall prescribe rules for the collection of the penalty imposed by this section in cases where continuous periods include months in more than 1 taxable year.

(5) Hardships.—Any applicable individual who for any month is determined by the Secretary of Health and Human Services under section 1311(d)(4)(H) to have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.

(f) Minimum essential coverage.—For purposes of this section—

(1) In general.—The term "minimum essential coverage" means any of the following:

(A) Government sponsored programs.—Coverage under—

(i) the Medicare program under part A of title XVIII of the Social Security Act,

(ii) the Medicaid program under title XIX of the Social Security Act,

(iii) the CHIP program under title XXI of the Social Security Act,

(iv) medical coverage under chapter 55 of title 10, United States Code, including coverage under the TRICARE program;

(v) a health care program under chapter 17 or 18 of title 38, United States Code, as determined by the Secretary of Veterans Affairs, in coordination with the Secretary of Health and Human Services and the Secretary,

(vi) a health plan under section 2504(e) of title 22, United States Code (relating to Peace Corps volunteers); or

(vii) the Nonappropriated Fund Health Benefits Program of the Department of Defense, established under section 349 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337; 10 U.S.C. 1587 note).

(B) **Employer-sponsored plan.**—Coverage under an eligible employer-sponsored plan.

(C) **Plans in the individual market.**—Coverage under a health plan offered in the individual market within a State.

(D) **Grandfathered health plan.**—Coverage under a grandfathered health plan.

(E) **Other coverage.**—Such other health benefits coverage, such as a State health benefits risk pool, as the Secretary of Health and Human Services, in coordination with the Secretary, recognizes for purposes of this subsection.

(2) **Eligible employer-sponsored plan.**—The term "eligible employer-sponsored plan" means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to the employee which is—

(A) a governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act), or

(B) any other plan or coverage offered in the small or large group market within a State.

Such term shall include a grandfathered health plan described in paragraph (1)(D) offered in a group market.

(3) **Excepted benefits not treated as minimum essential coverage.**—The term "minimum essential coverage" shall not include health insurance coverage which consists of coverage of excepted benefits—

(A) described in paragraph (1) of subsection (c) of section 2791 of the Public Health Service Act; or

(B) described in paragraph (2), (3), or (4) of such subsection if the benefits are provided un-

der a separate policy, certificate, or contract of insurance.

(4) **Individuals residing outside United States or residents of territories.**—Any applicable individual shall be treated as having minimum essential coverage for any month—

(A) if such month occurs during any period described in subparagraph (A) or (B) of section 911(d)(1) which is applicable to the individual, or

(B) if such individual is a bona fide resident of any possession of the United States (as determined under section 937(a)) for such month.

(5) **Insurance-related terms.**—Any term used in this section which is also used in title I of the Patient Protection and Affordable Care Act shall have the same meaning as when used in such title.

(g) **Administration and procedure.**—

(1) **In general.**—The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) **Special rules.**—Notwithstanding any other provision of law—

(A) Waiver of criminal penalties.—In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.

(B) Limitations on liens and levies.—The Secretary shall not—

(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

(ii) levy on any such property with respect to such failure.

2. 26 U.S.C. 6665(a) provides:

Applicable rules

(a) **Additions treated as tax**

Except as otherwise provided in this title—

(1) the additions to the tax, additional amounts, and penalties provided by this chapter shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes; and

(2) any reference in this title to "tax" imposed by this title shall be deemed also to refer to the additions to the tax, additional amount, and penalties provided by this chapter.

3. 26 U.S.C. 6671(a) provides:

Rules for application of assessable penalties

(a) Penalty assessed as tax

The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

4. 26 U.S.C. 7421(a) provides:

Prohibition of suits to restrain assessment or collection

(a) Tax

Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), and 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

5. 42 U.S.C.A. 300gg provides:

Fair health insurance premiums

(a)[1] Prohibiting discriminatory premium rates

(1) In general

With respect to the premium rate charged by a health insurance issuer for health insurance coverage offered in the individual or small group market—

(A) such rate shall vary with respect to the particular plan or coverage involved only by—

(i) whether such plan or coverage covers an individual or family;

(ii) rating area, as established in accordance with paragraph (2);

(iii) age, except that such rate shall not vary by more than 3 to 1 for adults (consistent with section 300gg-6(c) of this title); and

(iv) tobacco use, except that such rate shall not vary by more than 1.5 to 1; and

(B) such rate shall not vary with respect to the particular plan or coverage involved by any other factor not described in subparagraph (A).

(2) Rating area

(A) In general

Each State shall establish 1 or more rating areas within that State for purposes of applying the requirements of this title.

---

[1] So in original. No subsec. (b) enacted.

(B) Secretarial review

The Secretary shall review the rating areas established by each State under subparagraph (A) to ensure the adequacy of such areas for purposes of carrying out the requirements of this title. If the Secretary determines a State's rating areas are not adequate, or that a State does not establish such areas, the Secretary may establish rating areas for that State.

(3) Permissible age bands

The Secretary, in consultation with the National Association of Insurance Commissioners, shall define the permissible age bands for rating purposes under paragraph (1)(A)(iii).

(4) Application of variations based on age or tobacco use

With respect to family coverage under a group health plan or health insurance coverage, the rating variations permitted under clauses (iii) and (iv) of paragraph (1)(A) shall be applied based on the portion of the premium that is attributable to each family member covered under the plan or coverage.

(5) Special rule for large group market

If a State permits health insurance issuers that offer coverage in the large group market in the State to offer such coverage through the State Exchange (as provided for under section 18033(f)(2)(B) of this title), the provisions of this subsection shall apply to all coverage offered in such market (other than self-

insured group health plans offered in such market) in the State.

6. 42 U.S.C.A. 300gg-1 will provide:*

Guaranteed availability of coverage

(a) Guaranteed issuance of coverage in the individual and group market

Subject to subsections (b) through (e), each health insurance issuer that offers health insurance coverage in the individual or group market in a State must accept every employer and individual in the State that applies for such coverage.

(b) Enrollment

(1) Restriction

A health insurance issuer described in subsection (a) may restrict enrollment in coverage described in such subsection to open or special enrollment periods.

(2) Establishment

A health insurance issuer described in subsection (a) shall, in accordance with the regulations promulgated under paragraph (3), establish special enrollment periods for qualifying events (under section 1163 of Title 29).

---

* See 42 U.S.C.A. 300gg-1 note.

(3) Regulations

The Secretary shall promulgate regulations with respect to enrollment periods under paragraphs (1) and (2).

(c) Special rules for network plans

(1) In general

In the case of a health insurance issuer that offers health insurance coverage in the group and individual market through a network plan, the issuer may—

(A) limit the employers that may apply for such coverage to those with eligible individuals who live, work, or reside in the service area for such network plan; and

(B) within the service area of such plan, deny such coverage to such employers and individuals if the issuer has demonstrated, if required, to the applicable State authority that—

(i) it will not have the capacity to deliver services adequately to enrollees of any additional groups or any additional individuals because of its obligations to existing group contract holders and enrollees, and

(ii) it is applying this paragraph uniformly to all employers and individuals without regard to the claims experience of those individuals, employers and their employees (and their dependents) or any health status-related factor relating to such individuals employees and dependents.

(2) 180-day suspension upon denial of coverage

An issuer, upon denying health insurance coverage in any service area in accordance with paragraph (1)(B), may not offer coverage in the group or individual market within such service area for a period of 180 days after the date such coverage is denied.

(d) Application of financial capacity limits

(1) In general

A health insurance issuer may deny health insurance coverage in the group or individual market if the issuer has demonstrated, if required, to the applicable State authority that—

(A) it does not have the financial reserves necessary to underwrite additional coverage; and

(B) it is applying this paragraph uniformly to all employers and individuals in the group or individual market in the State consistent with applicable State law and without regard to the claims experience of those individuals, employers and their employees (and their dependents) or any health status-related factor relating to such individuals, employees and dependents.

(2) 180-day suspension upon denial of coverage

A health insurance issuer upon denying health insurance coverage in connection with group health plans in accordance with paragraph (1) in a State may not offer coverage in connection with group health plans in the group or individual market in the State for a period of 180 days after the date

such coverage is denied or until the issuer has demonstrated to the applicable State authority, if required under applicable State law, that the issuer has sufficient financial reserves to underwrite additional coverage, whichever is later. An applicable State authority may provide for the application of this subsection on a service-area-specific basis.

7. 42 U.S.C.A. 300gg-3 provides in relevant part:

Prohibition of preexisting condition exclusions or other discrimination based on health status

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage may not impose any preexisting condition exclusion with respect to such plan or coverage.

(b) Definitions

For purposes of this part—

(1) Preexisting condition exclusion

(A) In general

The term "preexisting condition exclusion" means, with respect to coverage, a limitation or exclusion of benefits relating to a condition based on the fact that the condition was present before the date of enrollment for such coverage, whether or not any medical advice, diagnosis, care, or treatment was recommended or received before such date.

(B) Treatment of genetic information

Genetic information shall not be treated as a condition described in subsection (a)(1) of this section in the absence of a diagnosis of the condition related to such information.

(2) Enrollment date

The term "enrollment date" means, with respect to an individual covered under a group health plan or health insurance coverage, the date of enrollment of the individual in the plan or coverage or, if earlier, the first day of the waiting period for such enrollment.

(3) Late enrollee

The term "late enrollee" means, with respect to coverage under a group health plan, a participant or beneficiary who enrolls under the plan other than during—

(A) the first period in which the individual is eligible to enroll under the plan, or

(B) a special enrollment period under subsection (f) of this section.

(4) Waiting period

The term "waiting period" means, with respect to a group health plan and an individual who is a potential participant or beneficiary in the plan, the period that must pass with respect to the individual before the individual is eligible to be covered for benefits under the terms of the plan.

* * * * *

8. 42 U.S.C.A. 300gg-4(a) provides:

Prohibiting discrimination against individual participants and beneficiaries based on health status

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage may not establish rules for eligibility (including continued eligibility) of any individual to enroll under the terms of the plan or coverage based on any of the following health status-related factors in relation to the individual or a dependent of the individual:

(1) Health status.

(2) Medical condition (including both physical and mental illnesses).

(3) Claims experience.

(4) Receipt of health care.

(5) Medical history.

(6) Genetic information.

(7) Evidence of insurability (including conditions arising out of acts of domestic violence).

(8) Disability.

(9) Any other health status-related factor determined appropriate by the Secretary.

9. 42 U.S.C.A. 18091 provides:

Requirement to maintain minimum essential coverage

(a) Findings

Congress makes the following findings:

(1) In general

The individual responsibility requirement provided for in this section (in this subsection referred to as the "requirement") is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2).

(2) Effects on the national economy and interstate commerce

The effects described in this paragraph are the following:

(A) The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased. In the absence of the requirement, some individuals would make an economic and financial decision to forego health insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers.

(B) Health insurance and health care services are a significant part of the national economy. National health spending is projected to increase from $2,500,000,000,000, or 17.6 percent of the economy, in 2009 to $4,700,000,000,000 in

2019. Private health insurance spending is projected to be $854,000,000,000 in 2009, and pays for medical supplies, drugs, and equipment that are shipped in interstate commerce. Since most health insurance is sold by national or regional health insurance companies, health insurance is sold in interstate commerce and claims payments flow through interstate commerce.

(C) The requirement, together with the other provisions of this Act, will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services, and will increase the number and share of Americans who are insured.

(D) The requirement achieves near-universal coverage by building upon and strengthening the private employer-based health insurance system, which covers 176,000,000 Americans nationwide. In Massachusetts, a similar requirement has strengthened private employer-based coverage: despite the economic downturn, the number of workers offered employer-based coverage has actually increased.

(E) The economy loses up to $207,000,000,000 a year because of the poorer health and shorter lifespan of the uninsured. By significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will significantly reduce this economic cost.

(F) The cost of providing uncompensated care to the uninsured was $43,000,000,000 in 2008.

To pay for this cost, health care providers pass on the cost to private insurers, which pass on the cost to families. This cost-shifting increases family premiums by on average over $1,000 a year. By significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will lower health insurance premiums.

(G) 62 percent of all personal bankruptcies are caused in part by medical expenses. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will improve financial security for families.

(H) Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 *et seq.*), the Public Health Service Act (42 U.S.C. 201 *et seq.*), and this Act, the Federal Government has a significant role in regulating health insurance. The requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market.

(I) Under sections 2704 and 2705 of the Public Health Service Act (as added by section 1201 of this Act), if there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection

and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.

(J) Administrative costs for private health insurance, which were $90,000,000,000 in 2006, are 26 to 30 percent of premiums in the current individual and small group markets. By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the requirement, together with the other provisions of this Act, will significantly reduce administrative costs and lower health insurance premiums. The requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.

(3) Supreme Court ruling

In *United States v. South-Eastern Underwriters Association* (322 U.S. 533 (1944)), the Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation.

RESPONDENT'S BRIEF

No. 11-398

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN RESPONSE FOR PRIVATE RESPONDENTS

KAREN R. HARNED
NFIB SMALL BUSINESS LEGAL CENTER
1201 F St. NW, Suite 200
Washington, DC 20004

PROF. RANDY E. BARNETT
GEORGETOWN UNIV. LAW CENTER
600 New Jersey Ave. NW
Washington, DC 20001

MICHAEL A. CARVIN
Counsel of Record
GREGORY G. KATSAS
C. KEVIN MARSHALL
HASHIM M. MOOPPAN
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Private Respondents

RULE 29.6 STATEMENT

Private Respondents are: National Federation of Independent Business ("NFIB"); Kaj Ahlburg; and Mary Brown. NFIB is a nonprofit mutual benefit corporation that promotes and protects the rights of its members to own, operate, and grow their small businesses across the fifty States and the District of Columbia. NFIB is not a publicly traded corporation, issues no stock, and has no parent corporation. There is no publicly held corporation with more than a 10% ownership stake in NFIB.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

BRIEF IN RESPONSE FOR PRIVATE RESPONDENTS 1

I. THE MANDATE'S CONSTITUTIONALITY IS AN EXCEPTIONALLY IMPORTANT FEDERAL QUESTION THAT WARRANTS THIS COURT'S IMMEDIATE REVIEW 3

A. The Mandate Is An Unprecedented Federal Duty Divorced From Both Traditional Commerce Regulation And American Legal Traditions 3

B. The Mandate Lacks Any Cognizable Limiting Principle And Therefore Conflicts With This Court's Rejection Of A Federal Police Power 9

C. The Eleventh Circuit Correctly Held That The Mandate Exceeds Congress' Authority 12

II. THE ANTI-INJUNCTION ACT HAS BEEN FORFEITED BY THE GOVERNMENT, AND, IF NOT, ITS APPLICABILITY CAN BE DECIDED HERE WITHOUT CONSOLIDATING *LIBERTY UNIVERSITY* 16

III. *THOMAS MORE* SHOULD NOT BE CONSOLIDATED WITH THIS CASE 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Arbaugh v. Y & H Corp.,
546 U.S. 500 (2006) 16, 17, 18

Bob Jones Univ. v. Simon,
416 U.S. 725 (1974) 17

Bond v. United States,
131 S. Ct. 2355 (2011) 9, 11

Bowles v. Russell,
551 U.S. 205 (2007) 17, 18

Calder v. Bull,
3 U.S. (3 Dall.) 386 (1798) 8

E. Enters. v. Apfel,
524 U.S. 498 (1998) 9

Gibbons v. Ogden,
22 U.S. (9 Wheat.) 1 (1824) 5, 10

Gonzales v. Raich,
545 U.S. 1 (2005) 6

Helvering v. Davis,
301 U.S. 619 (1937) 17, 18

Henderson ex rel. Henderson v. Shinseki,
131 S. Ct. 1197 (2011) 16, 17

Liberty University v. Geithner,
No. 11-438 (U.S. Oct. 7, 2011).....2, 16, 18

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 6, 11

NLRB v. Jones & Laughlin Steel Corp.,
301 U.S. 1 (1937) 6, 12

Printz v. United States,
521 U.S. 898 (1997) 4, 6, 12

Thomas More Law Ctr. v. Obama,
No. 10-2388, --- F.3d ----, 2011 WL 2556039
(6th Cir. June 29, 2011), *petition for cert. filed*, No. 11-117 (U.S. July 26, 2011) ..... *passim*

United States v. Comstock,
130 S. Ct. 1949 (2010) 11

United States v. Darby,
312 U.S. 100 (1941) 6, 10

United States v. Lopez,
514 U.S. 549 (1995) ..... *passim*

United States v. Morrison,
529 U.S. 598 (2000) 9, 11, 14

United States v. Reorganized CF & I Fabricators of Utah, Inc.,
518 U.S. 213 (1996) 15

United States v. Wrightwood Dairy Co.,
315 U.S. 110 (1942) 6

Wickard v. Filburn,
317 U.S. 111 (1942) 7

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., amend. X 4

U.S. Const., art. 1, § 8, cl. 3 5

U.S. Const., art. 1, § 8, cl. 18 5

26 U.S.C. § 7421 16

OTHER AUTHORITIES

S. Ct. R. 15.2 1

Prosser & Keeton on the Law of Torts § 56,
373 (5th ed. 1984) 8

St. George Tucker, 2 *Blackstone's Commentaries* (1803) 8

BRIEF IN RESPONSE FOR PRIVATE RESPONDENTS

NFIB, Ahlburg, and Brown are Private Respondents here and Petitioners in No. 11-393. They concur with the Government that this Court should review the Eleventh Circuit's holding that the individual mandate is unconstitutional, as they explained in their own petition seeking review of the Eleventh Circuit's additional holding that the mandate is severable from the ACA.[1]

Although Private Respondents agree that the Government's petition should be granted, they nevertheless respectfully submit this response to that petition, for three reasons.

First, the Government does not fully convey the exceptionally important nature of the question presented. As explained below, the ACA's mandate to purchase an unwanted commercial product is an unprecedented and unbounded exercise of federal authority. This Court's immediate review is thus warranted, not just to resolve the conflict between the Eleventh Circuit and the Sixth Circuit over the validity of an essential part of a significant federal law, but also to reaffirm the fundamental principle that Congress' powers are limited and enumerated.

---

[1] The Government's petition does not appear to contain any factual or legal misstatements "that bear[] on what issues properly would be before the Court if certiorari were granted." S. Ct. R. 15.2. That said, the Government's petition does omit important facts about the purpose and effect of the mandate, which were relied upon by the Eleventh Circuit. Private Respondents refer this Court to the discussion in their petition. No. 11-393 Pet. 2-4. Likewise, all "Pet.App." citations in this brief refer to the appendix to Private Respondents' petition.

Second, the Government unnecessarily suggests that this Court should add a question presented on whether the Anti-Injunction Act applies and also appoint an *amicus* to argue that it does, either in this case or in the Fourth Circuit case that invoked the AIA over the Government's objection, *Liberty University v. Geithner*, No. 11-438 (U.S. Oct. 7, 2011). But the Government's agreement that the AIA is inapplicable obviates any need for this Court ever to consider the question, because *the statute is not jurisdictional*. As discussed below, the AIA does not purport to be jurisdictional and this Court has not treated it as jurisdictional, instead allowing that statutory bar to be waived as well as equitably excused. At a minimum, though, if the AIA's jurisdictional status is in doubt, then that question and (if necessary) the statute's applicability can be resolved in this case alone, without needlessly complicating matters by also granting review in *Liberty University*.

Third, the Government fails to explain the reasons why this case should not be consolidated for review with the Sixth Circuit case that upheld the mandate, *Thomas More Law Center v. Obama*, No. 11-117 (U.S. July 26, 2011). As Private Respondents explained in their petition in No. 11-393, *Thomas More* is a flawed vehicle because the petitioners there do not have undisputed standing and have not even challenged the ACA's severability from the mandate. Nor is there any countervailing benefit from granting review in that case, because the merits challenge to the mandate there is indistinguishable from the challenge here, contrary to the belated suggestion of the *Thomas More* petitioners in their recently filed reply brief.

Accordingly, this Court should simply grant review of the first question presented in the Government's petition here, along with Private Respondents' petition in No. 11-393, thereby facilitating simultaneous resolution of the mandate's constitutionality and severability, without needlessly complicating these proceedings.

I. THE MANDATE'S CONSTITUTIONALITY IS AN EXCEPTIONALLY IMPORTANT FEDERAL QUESTION THAT WARRANTS THIS COURT'S IMMEDIATE REVIEW

The profound importance of the constitutional question raised by the mandate is underscored by two basic and indisputable points: *first*, Congress has never before exercised its commerce power to conscript individuals to participate in commerce for the benefit of existing market participants; and *second*, if Congress can thus compel the purchase of health insurance, then it has the plenary power to compel any product purchase, because there is nothing constitutionally unique about health insurance. The Eleventh Circuit correctly held the mandate unconstitutional for these reasons among others, and this Court should review and then affirm that important constitutional holding.

A. The Mandate Is An Unprecedented Federal Duty Divorced From Both Traditional Commerce Regulation And American Legal Traditions

1. The mandate's unprecedented nature is beyond serious dispute. *First*, the CBO recognized it: Congress "has never required people to buy any good or service as a condition of lawful residence in the United States," instead regulating only "parties to

economic transactions." Pet.App. 109a. *Second*, the Eleventh Circuit emphasized it: "the ability to compel Americans to purchase an expensive health insurance product [that] they have elected not to buy" "represents a wholly novel ... assertion of congressional authority." *Id.* 195a; *see also id.* 107a-115a. *Finally*, even the Sixth Circuit conceded it: "the lack of historical precedent" caused "the government" to "give[] analogy a bad name" by absurdly equating "drafting a citizen to join the military and forcing him to respond to a price quote from Aetna." *Thomas More Law Ctr. v. Obama*, No. 10-2388, --- F.3d ----, 2011 WL 2556039, at *26 (6th Cir. June 29, 2011) (Sutton, J., concurring in part).

Of course, "almost two centuries of apparent congressional avoidance of the practice" of mandating commercial purchases "tends to negate the existence of the congressional power asserted." *Printz v. United States*, 521 U.S. 898, 918 (1997). That "earlier Congresses avoided use of this highly attractive power" is, standing alone, good "reason to believe that the power was thought not to exist." *Id.* at 905. Thus, just as this Court reviewed and rejected Congress' relatively novel attempt to use the commerce power to impose a regulatory mandate that "commandeer[ed]" the States, *id.* at 925, 933, so too should this Court scrutinize Congress' entirely unprecedented economic mandate that commandeers "the people," U.S. Const., amend. X.

2. Moreover, it is unsurprising that Congress was far "removed from the traditional subjects of [its] commerce authority," Pet.App. 116a, when it tried for the first time to regulate "non-market participants" whom Congress merely desired "to

enter into commerce," *id.* 159a. The textual power "[t]o regulate Commerce ... among the several States" and "[t]o make all Laws which shall be necessary and proper for carrying into Execution th[at] ... Power[]" (U.S. Const., art. 1, § 8, cls. 3, 18) is hardly a source of authority for regulating a class of individuals whose defining feature is that they are *strangers* to commerce in health insurance. Likewise, this fundamental disconnect between the subjects of Congress' commerce power and the subjects of the mandate is reflected in this Court's precedent, which provides no support for regulating individuals who are neither engaged in commerce nor pose barriers to commerce or its regulation.

At the core of Congress' commerce power, of course, are direct regulations of interstate commerce—*i.e.*, laws that "prescrib[e] rules for carrying on" interstate "commercial intercourse." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824); *see also United States v. Lopez*, 514 U.S. 549, 553, 558 (1995). That "power to regulate commerce," however, "presupposes that something exists to regulate," yet "the regulated conduct [here] is defined by the *absence* of ... commerce." Pet.App. 102a, 119a. In short, *compelling* commerce is not *regulating* commerce: Congress regulates the commerce in insurance by prescribing the terms of voluntary contracts between Aetna and its customers, *not* by forcing individuals to enter into purchase contracts with Aetna.

To be sure, Congress also has sweeping power to regulate things that are *not themselves* interstate commerce, but the regulation of which *effectuates the execution* of the enumerated power to regulate

interstate commerce. *United States v. Darby*, 312 U.S. 100, 118-20 & n.3 (1941) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)). Thus, Congress may regulate certain "intrastate activities" that, in the aggregate, are "burdens and obstructions" that adversely "[a]ffect" Congress' preferred market conditions in "interstate commerce or ... the exercise of [its] power to regulate [such commerce]." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 121 (1942). Specifically, Congress can "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce," *Gonzales v. Raich*, 545 U.S. 1, 17, 23-26 (2005), and it can also regulate "noneconomic local activity" that "interfere[s] with," "obstruct[s]," or "undercut[s]" a commercial "regulatory scheme" that Congress is trying to "carry[] into Execution," *id.* at 36-37, 39 (Scalia, J., concurring in the judgment) (citing *Wrightwood Dairy*, 315 U.S. at 119; *Lopez*, 514 U.S. at 561, and *Printz*, 521 U.S. at 923-24).

But this Court's doctrine has never authorized laws where "the regulated subject matter" has no "connection to interstate commerce" *other* than Congress' mere desire *to create* a connection "by compelling non-market participants to *enter into* commerce." Pet.App. 119a, 159a. Since individuals who are *strangers* to a commercial market pose no "burdens [or] obstructions" to Congress' regulation of that commerce, *Jones & Laughlin*, 301 U.S. at 36-37, there is no basis for Congress to compel their participation in commerce simply to benefit voluntary market participants or to mitigate the costly burdens of its own federal scheme.

This Court's seminal decision in *Wickard v. Filburn*, 317 U.S. 111 (1942), illustrates this fundamental distinction. Although Congress could *restrict* Filburn's intrastate wheat production because that kind of economic activity, in the aggregate, was *obstructing* Congress' goal of raising interstate wheat prices, Congress did not impose, and this Court did not approve, a *mandate* that Filburn or his neighbors *buy* wheat, even though that more directly would have facilitated Congress' goal. *Id.* at 113-15, 127-29. That is, while Congress may regulate purely local bootleggers because of their aggregate effect on the interstate liquor market, it may not conscript teetotalers merely because conditions in the liquor market would be improved if more people imbibed.

Yet the uninsured who are regulated by the mandate are the teetotalers, not the bootleggers, of the health-insurance market. And so it is entirely unprecedented that they are Congress' "regulated subject matter" despite lacking any "nexus" to commerce other than their mere non-participation in commerce. Pet.App. 119a.

In particular, an "individual's decision not to purchase health insurance" "in no way 'burdens' or 'obstructs'" either "the insurance industry" or "Congress's ability to enforce its regulation of [that] industry." *Id.* 156a. "Congress's ability to regulate" the contracting criteria of "insurance companies" is unaffected by strangers to those contracts. *Id.* 156a-157a. Nor does the mandate regulate uncompensated care that gives rise to "cost-shifting," because it "is not tied to those who do not pay for a portion of their health care," but "[r]ather ... is

unlimited[] and covers even those who do not enter the health care market at all." *Id.* 120a. In short, the mandate merely "counteract[s] the [ACA's] significant regulatory costs on insurance companies and [the] adverse consequences stemming from [its] fully executed reforms," by "forc[ing] healthy and voluntarily uninsured individuals to purchase insurance ... in order to subsidize the private insurers' costs." *Id.* 134a, 157a.

3. There is an additional reason that Congress has never thought to authorize such regulatory conscription. Substantive mandates to benefit third parties are in serious tension with core tenets of Anglo-American jurisprudence.

In general, mandates to act ignore the "deeply rooted" "difference ... between 'misfeasance' and 'nonfeasance'—[*i.e.*,] between [an individual's] active misconduct working positive injury to others and [his] passive inaction or ... failure to take steps to protect them from harm." *Prosser & Keeton on the Law of Torts* § 56, 373 (5th ed. 1984). This distinction reflects a fundamental principle of personal liberty: unlike negative restrictions against "the commission of affirmative acts of harm"—which only marginally circumscribe an individual's freedom—affirmative "mandate[s]" directly "forc[e] men to help one another," leaving no other choices at all. *Id.*; *see also* St. George Tucker, 2 *Blackstone's Commentaries*, 124 (1803). And that infringement of liberty is particularly serious for mandates that "take[] property from A. and give[] it to B.," which have long been recognized as "against all reason and justice." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388

(1798) (opinion of Chase, J.); *see also E. Enters. v. Apfel*, 524 U.S. 498, 523 (1998) (plurality opinion).

It thus is unsurprising that Congress has never attempted to impose a purchase mandate. Unable to defend such onerous mandates under a broad "police power" akin to that which the States alone possess, *United States v. Morrison*, 529 U.S. 598, 618 (2000), Congress instead has "historically" restricted itself to a "limited set of personal mandates" that "contain clear foundations in the constitutional text" and "are in the nature of duties owed to the government attendant to citizenship," Pet.App. 113a.

In sum, the ACA's unprecedented mandate to engage in commerce poses an obvious "risk of tyranny and abuse." *Lopez*, 514 U.S. at 552. It is the precise type of law that the Framers would have *withheld* from Congress to "enhance[] freedom" by "secur[ing] to citizens the liberties that derive from the diffusion of sovereign power." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). And thus it is critical for this Court to determine whether, instead, the authority to enact this onerous mandate has been lurking unnoticed for more than two centuries within the "few and defined" "powers delegated by the ... Constitution to the federal government." *Lopez*, 514 U.S. at 552.

B. The Mandate Lacks Any Cognizable Limiting Principle And Therefore Conflicts With This Court's Rejection Of A Federal Police Power

1. As with its unprecedented nature, the mandate's unbounded nature has not been credibly contested. *First*, the CBO contemplated it: "a mandate-issuing government" could lead, "[i]n the

extreme," to "a command economy[] in which the President and the Congress dictated how much each individual and family spent on all goods and services." Pet.App. 118a (n.96). *Second*, the Eleventh Circuit stressed it: "[f]rom a doctrinal standpoint, we see no way to cabin the government's theory only to decisions not to purchase *health insurance*," because "any person's decision not to purchase a good would, when aggregated, substantially affect interstate commerce in that good." *Id.* 117a-119a; *see also id.* 124a-130a. *Finally*, the Sixth Circuit all but admitted it: one "way to look at [this Court's] precedents" is that "th[is] Court either should stop saying that a meaningful limit on Congress's commerce powers exists or prove that it is so." *Thomas More*, 2011 WL 2556039, at *22 (Sutton, J., concurring in part).

Indeed, if the Rubicon were crossed to sustain this health-insurance mandate, well-established precedent holds that there would be no judicially cognizable limit on what purchases Congress could compel. If forcing individuals to purchase a product is a "specified object[]" within Congress' "power over commerce" simply due to the aggregate effect on commerce, then "the sovereignty of Congress ... is plenary as to th[at] object[]," without regard to the particular effect for a particular product. *Gibbons*, 22 U.S. at 197; *see also Darby*, 312 U.S. at 115. Likewise, if forcing non-participants in a commercial market to purchase a product is "necessary and proper" merely "to counteract the significant regulatory costs" that Congress' "fully executed" scheme has imposed on the regulated seller, Pet.App. 157a, then Congress can mandate such purchases whenever it is "convenient," "useful," or "conducive"

to the "beneficial exercise" of any fully functional statute. *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (citing *McCulloch*, 17 U.S. at 413, 418).

In short, although the Government trumpets "five factual criteria" that it claims render health insurance "unique[]," Pet.App. 124a-125a, those criteria cannot constrain future Congresses bent on mandating purchases of less "unique" products. The judiciary can neither require nor second-guess the empirical satisfaction of those "*ad hoc* factors," which are not "administrab[le]" "limiting principles rooted in any constitutional understanding of the commerce power." *Id.* 124a-127a.

2. These inevitable consequences warrant this Court's immediate attention. This Court repeatedly has held that Congress lacks the power to "create a completely centralized government," *Lopez*, 514 U.S. at 557, because "the Founders denied the National Government" a "plenary police power" and "reposed [it instead] in the States," *Morrison*, 529 U.S. at 618.

Of particular relevance here, the Framers did so to "enhance[] freedom" for "the people." *Bond*, 131 S. Ct. at 2364. *First*, federalism protects against a *politically unresponsive* government, by preserving "the initiative of [individuals] who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Id.* *Second*, federalism protects against a *substantively unchecked* government, "[b]y denying any one government complete jurisdiction over all the concerns of public life." *Id.* In short, while it "may appear 'formalistic' in a given case to partisans of the measure at issue," the Constitution "divides power

among sovereigns ... precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Printz*, 521 U.S. at 933.

Until the ACA's unbounded mandate, Congress' commerce power was not understood as exempt from these bedrock principles. Although "the great changes that ha[ve] occurred in the way business [is] carried on" have "greatly expanded the ... authority of Congress" under its commerce power, *Lopez*, 514 U.S. at 556, this Court has strongly warned—both recently and even at the height of the New Deal—that appeals to "our complex society" can never be allowed to "effectually obliterate the distinction between what is national and what is local," *id.* at 557 (quoting *Jones & Laughlin*, 301 U.S. at 37).

But since Congress, the Executive Branch, and some judges now doubt this Court's word, this Court must "prove that it is so." *Thomas More*, 2011 WL 2556039, at *22 (Sutton, J., concurring in part).

C. The Eleventh Circuit Correctly Held That The Mandate Exceeds Congress' Authority

Given the parties' agreement that plenary review is warranted, Private Respondents will refrain from a point-by-point refutation of the merits arguments in the Government's petition. In light of the foregoing discussion, it suffices for now to summarize briefly the Eleventh Circuit's cogent analysis why the "mandate exceeds Congress's enumerated ... power[s]" and cannot be upheld "without obliterating the boundaries inherent in the system of enumerated congressional powers." Pet.App. 195a.

First, whether "fram[ed]" as "inactivity or a financial decision to forego insurance," the mandate's

"regulated conduct" lacks the requisite "connection to interstate commerce." *Id.* 119a. "[A]n individual's decision not to purchase health insurance" "in no way 'burdens' or 'obstructs'" either "the insurance industry" or "Congress's ability to enforce its regulation of [that] industry." *Id.* 156a. Rather, "the regulated conduct is defined by the *absence*" of "commerce" or even "economic[]" activities—*i.e.*, "the production, distribution, and consumption of commodities [or services]." *Id.* 119a. "Although any decision not to purchase a good or service entails commercial consequences, this does not warrant the facile conclusion that Congress may therefore regulate these decisions," for otherwise there is *no* "product whose purchase Congress could not mandate." *Id.* 118a.

Second, "[f]rom a doctrinal standpoint," there is "no way to cabin the government's theory only to decisions not to purchase *health insurance*." *Id.* 117a-118a. The "five factual criteria comprising the government's 'uniqueness' argument are not limiting principles rooted in any constitutional understanding of the commerce power," but "are *ad hoc* factors" that merely describe "the health insurance and health care industries." *Id.* 125a, 127a.

Third, the mandate does not carry into "execution ... the Act's [insurance] regulations," because "[a]n individual's uninsured status [neither] interferes with Congress's ability to regulate insurance companies" "no[r] prevents insurance companies' regulatory compliance with the Act's insurance reforms." *Id.* 156a-157a. Instead, the mandate merely "*counteract[s]* the [ACA]'s significant regulatory costs on insurance companies

and [the] adverse consequences stemming from [its] *fully executed* reforms." *Id.* 157a (emphasis added).

Fourth, the mandate does not regulate the economic activity of receiving uncompensated care while uninsured. "The language of the mandate is not tied to those who do not pay for a portion of their health care," but "[r]ather ... is unlimited[] and covers even those who do not enter the health care market at all." *Id.* 120a. Accordingly, this is not a situation where Congress is exercising its "preventive" commerce power over a class of individuals who all have engaged in economic activity that may cause potential "future disruptions to interstate commerce." *Id.* 122a (n.100). Rather, the mandate regulates a class of individuals who lack any "connection" to economic activity and thus are beyond the reach of Congress's commerce power, notwithstanding that *some* of those individuals will *later* engage in economic activity that exposes them to federal regulation. *Id.* 122a; *but see id.* 218a-220a (dissent below erroneously arguing that whether the individuals subject to the mandate have engaged in economic activity that Congress may regulate is merely "a temporal question").

Fifth, the commercial inactivity of the uninsured also cannot be deemed "[economic] activity" within Congress' regulatory ambit simply because that inactivity later has "an economic effect" due to "cost-shifting" by some uninsured individuals. *Id.* 139a-140a (n.119). Under that improper "conflation of activity and effect," the gender-motivated violence ban in *Morrison* "[w]ould be regarded as regulating the 'consumption of health care services,' because such consumption inevitably and empirically flows

from gender-motivated violence." *Id.*; *but see Thomas More*, 2011 WL 2556039, at *24-25, 27 (Sutton, J., concurring in part) (employing such erroneous logic when applying the "substantial effects" doctrine).

Sixth, because the mandate's regulated conduct—*i.e.*, lack of the requisite insurance—exceeds Congress' commerce power, the statute is *facially* unconstitutional in all its applications. It cannot be upheld simply because *some* regulated individuals could be covered under a *different* statute regulating additional economic activity in which they happen to be engaged—*e.g.*, a mandate *conditioned* on the activity of seeking and receiving healthcare. *Lopez* forecloses such an "as-applied" defense for a statute exceeding Congress' commerce power, because this Court facially invalidated the gun-possession law at issue, even though a slightly different law could have been applied to the defendant there and in the vast majority of cases: "Lopez himself was paid $40 to traffic the [offending] gun" *and* "[a] staggering proportion of the firearms in America ha[d] been transported across state lines." Pet.App. 120a (n.97), 122a (n.100); *but see Thomas More*, 2011 WL 2556039, at *33 (Sutton, J., concurring in part) (employing an erroneous "as-applied" analysis).

Finally, the mandate is not a "tax." Rather, it is a regulatory "requirement" to buy insurance, where "compliance" is enforced through a "monetary sanction on conduct that violates that requirement." Pet.App. 168a, 176a (quoting *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) ("[A] penalty ... is an exaction

imposed by statute as punishment for an unlawful act," whereas "a tax is an enforced contribution to provide for the support of government.")).

II. THE ANTI-INJUNCTION ACT HAS BEEN FORFEITED BY THE GOVERNMENT, AND, IF NOT, ITS APPLICABILITY CAN BE DECIDED HERE WITHOUT CONSOLIDATING *LIBERTY UNIVERSITY*

The Government has taken the position that the Anti-Injunction Act does *not* apply to pre-enforcement challenges to the mandate, No. 11-398 Pet. 33, and Private Respondents agree, No. 11-393 Pet. 17-19. For precisely that reason though, the Government errs in its suggestion that this Court should add a question presented on the AIA and appoint an *amicus* to argue that the statute applies, either in this case or in *Liberty University*. *First*, the AIA is not jurisdictional, and thus the Government has forfeited any available defense under it. *Second*, if the AIA is deemed jurisdictional (or its non-jurisdictional status is in doubt), then this Court can and must decide in this case whether the statute applies, thereby rendering it unnecessary to grant review in *Liberty University* as well.

A. The Anti-Injunction Act is not jurisdictional. As a threshold matter, its text does not speak in jurisdictional terms. Rather, it merely provides, with a few exceptions, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." 26 U.S.C. § 7421. Thus, "Congress d[id] not rank [this] statutory limitation on [relief] as jurisdictional," *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006), nor is there "any 'clear' indication that Congress wanted the [bar]

to be 'jurisdictional,'" *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011). Absent such "bright line" proof of jurisdictional status, this Court's recent cases strongly suggest that the AIA should not be deemed jurisdictional. *See id.*

More importantly, whenever the distinction between jurisdictional and non-jurisdictional rules has been implicated, this Court has treated the AIA as non-jurisdictional. For example, jurisdictional objections "can never be forfeited or waived." *Arbaugh*, 546 U.S. at 514. Yet, as the Government recognizes (No. 11-398 Pet. 33), this Court has accepted the Government's express "waiver of a defense under" the AIA's predecessor statute. *Helvering v. Davis*, 301 U.S. 619, 639-40 (1937). Likewise, "this Court has no authority to create equitable exceptions to jurisdictional requirements." *Bowles v. Russell*, 551 U.S. 205, 214 (2007). Yet there is at least one "extraordinary and exceptional circumstance[]" where this Court has adopted a "judicially created exception[]" to the AIA—*i.e.*, "where the [IRS] ha[s] no chance of success on the merits"—and this Court previously felt free to adopt other such exceptions (though it has since repudiated them on textualist grounds). *Bob Jones Univ. v. Simon*, 416 U.S. 725, 742-46 (1974).

Consequently, it is immaterial that this Court occasionally has described the AIA in passing as "jurisdiction[al]." *See* No. 11-398 Pet. at 33 (citing cases). That is just another example of the familiar proposition that "[t]his Court, no less than other courts, has sometimes been profligate in its use of the term." *Arbaugh*, 546 U.S. at 510. As this Court has explained, such "less than meticulous"

statements are "'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." *Id.* at 511. Otherwise, this Court might have *to overrule* its AIA cases that have created equitable exceptions and accepted express waivers. *See Bowles*, 551 U.S. at 214.

In sum, under both text and precedent, the AIA is properly characterized as non-jurisdictional. Accordingly, the Government's official position that the AIA does not bar pre-enforcement challenges to the mandate is an express forfeiture of any defense that it may have under the statute. Indeed, whether or not the AIA is technically "jurisdictional," this Court should adhere to *Helvering v. Davis* and accept the Government's express AIA waiver. Thus, there is no need to add a question presented about the AIA or appoint an *amicus* for argument.

B. At a minimum, however, it is unnecessary to grant review in *Liberty University*, because any questions about the AIA's applicability can be resolved in this case alone. If the AIA is deemed jurisdictional, then this Court must decide whether it applies in this case even though the Eleventh Circuit did not consider the question below. And it would needlessly complicate these proceedings to grant review in *Liberty University* as well, given that this Court can simply consider the Fourth Circuit's application of the AIA in the context of its review here, if necessary.

III. *THOMAS MORE* SHOULD NOT BE CONSOLIDATED WITH THIS CASE

Like Private Respondents, the Government believes that consolidating *Thomas More* with this

case "could complicate the briefing and presentation of the arguments to the Court, without a sufficient corresponding benefit." No. 11-117 Resp. Br. 20 (Sept. 28, 2011). But because the Government does not explain the reasons why this is true, Private Respondents will briefly do so.

As previously explained, the *Thomas More* petitioners do not have undisputed standing and have not challenged the ACA's severability. No. 11-393 Pet. 13-15. Notably, their subsequently filed reply brief completely ignores this serious defect. No. 11-117 Reply Br. (Oct. 6, 2011). Nor is there any merit to their claim that they present a unique "as-applied" challenge to the mandate that is not presented here, simply because they are uninsured and thus do not fall within Judge Sutton's various categories of individuals who are facially regulated by the mandate but "active" in the insurance market. *Id.* 2-4. The Sixth Circuit viewed the *Thomas More* petitioners as bringing only a facial challenge. 2011 WL 2556039, at *5; *id.* at *11 & n.4 (opinion of Martin, J.); *id.* at *23 (Sutton, J., concurring in part). And, more importantly, Private Respondents here are likewise uninsured, Pet.App. 302a-305a, and so they equally present whatever "as-applied" issues are presented in *Thomas More.*

CONCLUSION

Accordingly, this Court should grant review of the first question presented in the Government's certiorari petition here, along with Private Respondents' petition in No. 11-393.

Respectfully submitted,

KAREN R. HARNED
NFIB SMALL BUSINESS
LEGAL CENTER
1201 F St. NW, Suite 200
Washington, DC 20004

PROF. RANDY E. BARNETT
GEORGETOWN UNIV.
LAW CENTER
600 New Jersey Ave. NW
Washington, DC 20001

MICHAEL A. CARVIN
Counsel of Record
GREGORY G. KATSAS
C. KEVIN MARSHALL
HASHIM M. MOOPPAN
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Private Respondents

RESPONDENT'S BRIEF

No. 11-398

In the
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR STATE RESPONDENTS

PAMELA JO BONDI
Attorney General of Florida
SCOTT D. MAKAR
Solicitor General
LOUIS F. HUBENER
TIMOTHY D. OSTERHAUS
BLAINE H. WINSHIP
Office of the Attorney General of Florida
The Capitol, Suite PL-01
Tallahassee, FL 32399
(850) 414-3300

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
BANCROFT PLLC
1919 M Street, N.W.
Suite 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

October 17, 2011 *(Additional Counsel Listed on Inside Cover)*

THOMAS W. CORBETT, JR.
Governor
LINDA L. KELLY
Attorney General
Commonwealth of
Pennsylvania
16th Floor
Strawberry Square
Harrisburg, PA 17120

MARTY J. JACKLEY
Attorney General
of South Dakota
1302 East Highway 14
Pierre, SD 57501

GREGORY F. ZOELLER
Attorney General of Indiana
302 West Washington Street
Indianapolis, IN 46204

SAMUEL S. OLENS
Attorney General of Georgia
40 Capitol Square, SW
Atlanta, GA 30334

MICHAEL DEWINE
Attorney General of Ohio
30 East Broad Street
17th Floor
Columbus, OH 43215

JOSEPH SCIARROTTA, JR.
General Counsel
Office of Arizona Governor
JANICE K. BREWER
TOM HORNE
Attorney General of Arizona
1700 West Washington
Street, 9th Floor
Phoenix, AZ 85007

WAYNE STENEJHEM
Attorney General
of North Dakota
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

BRIAN SANDOVAL
Governor of Nevada
State Capitol Building
101 North Carson Street
Carson City, NV 89701

JOHN J. BURNS
Attorney General of Alaska
P.O. Box 110300
Juneau, AK 99811

DEREK SCHMIDT
Attorney General of Kansas
Memorial Hall
120 SW 10th Street
Topeka, KS 66612

GREG ABBOTT
Attorney General of Texas
BILL COBB
Deputy Attorney General for Civil Litigation
Office of the Attorney General of Texas
P.O. Box 12548
Capitol Station
Austin, TX 78711
(512) 475-0131

JON BRUNING
Attorney General of Nebraska
KATHERINE J. SPOHN
Special Counsel to the Attorney General
Office of the Attorney General of Nebraska
2115 State Capitol Building
Lincoln, NE 68508
(402) 471-2834

ALAN WILSON
Attorney General of South Carolina
P.O. Box 11549
Columbia, SC 29211

MARK L. SHURTLEFF
Attorney General of Utah
Capitol Suite #230
P.O. Box 142320
Salt Lake City, UT 84114

LUTHER STRANGE
Attorney General of Alabama
501 Washington Avenue
Montgomery, AL 36130

JAMES D. "BUDDY" CALDWELL
Attorney General of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804

BILL SCHUETTE
Attorney General of Michigan
P.O. Box 30212
Lansing, MI 48909

JOHN W. SUTHERS
Attorney General of Colorado
1525 Sherman Street,
Denver, CO 80203

ROBERT M. MCKENNA
Attorney General of Washington
1125 Washington Street S.E.
P.O. Box 40100
Olympia, WA 98504

LAWRENCE G. WASDEN
Attorney General of Idaho
P.O. Box 83720
Boise, ID 83720

MATTHEW MEAD
Governor of Wyoming
State Capitol
200 West 24th Street
Cheyenne, WY 82002

WILLIAM J. SCHNEIDER
Attorney General of Maine
Six State House Station
Augusta, ME 04333

J.B. VAN HOLLEN
Attorney General of Wisconsin
114 East State Capitol
Madison, WI 53702

TERRY BRANSTAD
Governor of Iowa
107 East Grand Avenue
Des Moines, IA 50319

QUESTIONS PRESENTED

1. Whether Congress has the power under Article I of the Constitution to enact the minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

2. Whether the suit brought by Respondents to challenge the minimum coverage provision is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a).

PARTIES TO THE PROCEEDING

Petitioners, who were the appellants/cross-appellees below, are the U.S. Department of Health & Human Services; Kathleen Sebelius, Secretary, U.S. Department of Health & Human Services; the U.S. Department of Treasury; Timothy F. Geithner, Secretary, U.S. Department of Treasury; the U.S. Department of Labor; and Hilda L. Solis, Secretary, U.S. Department of Labor.

The State Respondents, who were the appellees/cross-appellants below, are 26 States: Florida, by and through Attorney General Pam Bondi; South Carolina, by and through Attorney General Alan Wilson; Nebraska, by and through Attorney General Jon Bruning; Texas, by and through Attorney General Greg Abbott; Utah, by and through Attorney General Mark L. Shurtleff; Louisiana, by and through Attorney General James D. "Buddy" Caldwell; Alabama, by and through Attorney General Luther Strange; Attorney General Bill Schuette, on behalf of the People of Michigan; Colorado, by and through Attorney General John W. Suthers; Pennsylvania, by and through Governor Thomas W. Corbett, Jr., and Attorney General Linda L. Kelly; Washington, by and through Attorney General Robert M. McKenna; Idaho, by and through Attorney General Lawrence G. Wasden; South Dakota, by and through Attorney General Marty J. Jackley; Indiana, by and through Attorney General Gregory F. Zoeller; North Dakota, by and through Attorney General Wayne Stenehjem; Mississippi, by and through Governor Haley Barbour; Arizona, by and through Governor Janice K. Brewer and Attorney General Thomas C. Horne; Nevada, by and

through Governor Brian Sandoval; Georgia, by and through Attorney General Samuel S. Olens; Alaska, by and through Attorney General John J. Burns; Ohio, by and through Attorney General Michael DeWine; Kansas, by and through Attorney General Derek Schmidt; Wyoming, by and through Governor Matthew H. Mead; Wisconsin, by and through Attorney General J.B. Van Hollen; Maine, by and through Attorney General William J. Schneider; and Governor Terry E. Branstad, on behalf of the People of Iowa. The National Federation of Independent Business, Kaj Ahlburg, and Mary Brown are also Respondents, and were also appellees below.

TABLE CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF CONTENTS iv
TABLE OF AUTHORITIES v
INTRODUCTION 1
OPINIONS BELOW 3
JURISDICTION 3
STATEMENT OF THE CASE 3
A. The Affordable Care Act 3
B. The District Court Proceedings. 5
C. The Eleventh Circuit's Decision 7
ARGUMENT 9
I. The Court Should Grant Plenary Review To Decide Whether the Individual Mandate Is Constitutional And Whether The ACA Can Survive Without It 9
II. If The Court Is Inclined to Consider Whether The Anti-Injunction Act Applies, It Should Do So In This Case 12
CONCLUSION 18

TABLE OF AUTHORITIES

Cases

ASARCO, Inc. v. Kadish,
490 U.S. 605 (1989) 17

Enochs v. Williams Packing & Navigation Co.,
370 U.S. 1 (1962) 13

Goudy-Bachman v. U.S. Dep't of Health & Human Servs., 764 F.Supp.2d 684
(M.D. Pa. 2011) 13

Goudy-Bachman v. U.S. Dep't of Health & Human Servs.,
No. 1:10-CV-763, 2011 WL 4072875
(M.D. Pa. Sept. 13, 2011) 10, 11

Liberty Univ. v. Geithner,
__ F.3d __, 2011 WL 3962915
(4th Cir. Sept. 8, 2011) 10, 13-14

Liberty Univ., Inc. v. Geithner,
753 F.Supp.2d 611 (W.D. Va. 2010) 10, 13

Nixon v. Missouri Mun. League,
541 U.S. 125 (2004) 15

Raygor v. Regents of Univ. of Minn.,
534 U.S. 533 (2002) 15

South Carolina v. Regan,
465 U.S. 367 (1984) 2, 15-16, 17

Thomas More Law Ctr. v. Obama,
651 F.3d 529 (6th Cir. 2011) 10, 13

Thomas More Law Ctr. v. Obama,
720 F. Supp. 2d 882 (E.D. Mich. 2010) 10-11, 13

United States v. Lopez,
514 U.S. 549 (1995) 6

United States v. United Mine Workers,
330 U.S. 258 (1947) 15

U.S. Citizens Ass'n v. Sebelius,
754 F. Supp. 2d 903 (N.D. Ohio 2010) 13

Vt. Agency of Natural Res. v. United States,
529 U.S. 765 (2000) 14-15

Virginia ex rel. Cuccinelli v. Sebelius,
702 F. Supp. 2d 598 (E.D. Va. 2010) 13, 16

Virginia ex rel. Cuccinelli v. Sebelius,
728 F. Supp. 2d 768 (E.D. Va. 2010) 10, 11

Constitutional Provisions

U.S. Const., art. I, § 8, cl. 3 (Commerce Cl.) 6, 7, 9

U.S. Const., art. I, § 8, cl. 18
(Necessary & Proper Cl.) 6, 9

U.S. Const., amend. X 5

Statutes

26 U.S.C. § 5000A(a) 4

26 U.S.C. § 5000A(b)(1) 4

26 U.S.C. § 5000A(c) 4

26 U.S.C. § 5000A(d) 4

26 U.S.C. § 5000A(e) 4

26 U.S.C. § 5000A(f) 17

26 U.S.C. § 7421(a) 2, 5, 12-18

28 U.S.C. § 1254(1) 3

31 U.S.C. § 3733 (*l*)(4) 15

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, *as amended by the* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (ACA) ..... *passim*

ACA § 1201 4

ACA § 1501(a)(2)(D) 3

ACA § 1501(a)(2)(G) 3, 4

ACA § 1501(b) 4

Other Authorities

Richard S. Foster, Estimated Financial Effects of the "Patient Protection and Affordable Care Act," Centers for Medicare & Medicaid Servs., Apr. 22, 2010 17

INTRODUCTION

All parties to this case agree that the Court's review is warranted to resolve the grave constitutional questions surrounding the individual mandate. The federal government correctly points out that the Courts of Appeals are intractably divided as to whether the mandate is constitutional. That question is of self-evident importance both as a practical matter and because it raises questions that go to the heart of our system of constitutional government. The individual mandate calls into question two bedrock principles of our constitutional system—that the very process of enumerating the federal government's powers presupposes a lack of plenary federal authority, and that it is the States, not the federal government, that wield the police power.

The Court of Appeals correctly struck down the mandate as inconsistent with our system of federalism and the liberty it secures. The federal government has sought review, pointing to a circuit split concerning the constitutionality of this critically important federal statute. We are not aware of any comparable situation in which the Court has denied review. The Court should grant plenary review here.

The lower courts are equally divided as to whether and to what extent the Affordable Care Act can stand if the individual mandate falls. This unprecedented challenge—involving over half the States in the Nation—is the ideal vehicle in which to consider both the constitutional question and the severance question that results if the mandate is unconstitutional, as both of the lower courts in this

case addressed both questions, while reaching starkly different outcomes on the severability question. Although the Court presumably could reach the severability question as a necessarily included aspect of the federal government's first question presented, out of an abundance of caution, the Court should either modify that question to make clear that it includes the severability question or grant certiorari on, *inter alia*, the third question in the States' petition in No. 11-400. In all events, this case is the ideal vehicle to examine not only the mandate's constitutionality, but the severability question as well.

To the extent that the Court deems it necessary to consider whether the Anti-Injunction Act ("AIA") applies to challenges to the individual mandate, this is also a particularly appropriate case in which to consider that question. Even assuming—contrary to the holdings of the overwhelming majority of courts and the position of all parties—that the AIA might bar some suits seeking to challenge the mandate, the AIA would not bar the States' suit. It is not clear that the AIA applies to States at all, and it is clear, as this Court has already concluded, that the AIA does not bar a State's suit when the State lacks an alternative means to challenge the offending provision. *See South Carolina v. Regan*, 465 U.S. 367 (1984). Because the States have standing to challenge the mandate, and are not subject to the AIA, this case provides a unique assurance that the Court can reach the merits of the questions presented. The Court should grant plenary review.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet.App.1a) is not yet reported in the Federal Reporter but is available at 2011 WL 3519178. The summary judgment opinion of the District Court for the Northern District of Florida (Pet.App.274a) is not yet reported in the Federal Supplement but is available at 2011 WL 285683. The District Court's motion-to-dismiss opinion (Pet.App.394a) is reported at 716 F. Supp. 2d 1120.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2011. A timely petition for certiorari was filed on September 28, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. The Affordable Care Act

The Affordable Care Act (the "ACA" or "Act") is a massive collection of sweeping changes that impose substantial new federal obligations on every corner of society and compel financial action both from the States and from nearly every citizen of the United States. The Act's core provisions work in tandem to increase both the supply and the demand for health insurance in an attempt to achieve Congress's goal of imposing "near-universal" insurance coverage on the Nation. ACA § 1501(a)(2)(D), (G). The Act also contains hundreds of revenue-raising or cost-cutting provisions intended to help offset the significant new costs of its core provisions.

The ACA mandates that each "applicable individual shall, for each month beginning after 2013, ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month." ACA § 1501(b); 26 U.S.C. § 5000A(a). This mandate to maintain health insurance applies to all individuals except foreign nationals residing here unlawfully, incarcerated individuals, and individuals falling within two narrow religious exemptions. *Id.* § 5000A(d). A covered individual who fails to comply with the mandate is subject to a financial "penalty." *Id.* § 5000A(b)(1), (c). The penalty provision contains its own limited set of exemptions, *id.* § 5000A(e), but exemption from the penalty does not obviate the individual's obligation to comply with the mandate. The two are separate.

The mandate is designed not just to target individuals who consume health care services without paying for them, but also to "broaden the health insurance risk pool to include healthy individuals." ACA § 1501(a)(2)(G). Congress also intended the mandate to counteract the effects of costly insurance industry changes, most prominently, the "guaranteed issue" provision, which requires insurers to enroll every applicant for insurance, and the "preexisting conditions" provision, which prohibits insurers from denying, canceling, capping, or increasing the cost of coverage based on an individual's preexisting health conditions or history. ACA § 1201. Those coverage mandates would have substantially increased the cost of insurance (and presumably would have been strenuously opposed by the insurance industry)

absent the individual mandate's effect of forcing healthy individuals to purchase coverage they would otherwise not obtain. The mandate also forces numerous individuals who qualify for Medicaid under pre-existing law, but for whatever reason have previously declined to participate, to obtain coverage.

B. The District Court Proceedings

Shortly after Congress passed the ACA, Florida and 12 other States brought this action seeking a declaration that the Act is unconstitutional. They have since been joined by 13 additional States, the National Federation of Independent Business ("NFIB"), and individuals Kaj Ahlburg and Mary Brown. The States argued that, *inter alia*, the individual mandate exceeds Congress's enumerated powers. The States maintained the entire Act must be invalidated because the individual mandate cannot be severed. The States also objected to other provisions of the Act on the grounds that they are an impermissible exercise of the spending power and violate the Tenth Amendment. *See* Petition for Certiorari, *Florida v. Dep't of Health & Human Servs.*, No. 11-400.

The federal government initially moved to dismiss the States' challenge to the individual mandate, arguing, *inter alia*, that it is barred by the AIA, 26 U.S.C. § 7421(a). The District Court rejected the argument, holding that the penalty attached to the mandate is not a "tax" for purposes of the AIA. Pet.App.401a–30a. The federal government then abandoned that argument on appeal and agreed with Respondents that the AIA poses no obstacle to Respondents' challenge.

The parties filed cross-motions for summary judgment on, *inter alia*, the constitutionality of the mandate. The District Court granted summary judgment to the States. Pet.App.274a.

The District Court concluded that the Commerce Clause does not grant Congress power to "penalize a passive individual for failing to engage in commerce." Pet.App.324a. If it did, "the enumeration of powers in the Constitution would have been in vain for it would be 'difficult to perceive any limitation on federal power.'" Pet.App.324a (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995)). The court also concluded that the mandate could not be justified under the Necessary and Proper Clause because it undermines "'essential attributes' of the Commerce Clause limitations on the federal government's power." Pet.App.349a. The court also rejected the argument that the mandate is a valid exercise of Congress's taxing power, concluding that the penalty attached to the mandate is not a tax. Pet.App.158a.

The District Court then concluded that the individual mandate is not severable from the rest of the Act. The court first noted the federal government's concession that "the individual mandate and the Act's health insurance reforms ... will rise or fall together," which it found "extremely significant because the various insurance provisions, in turn, are the very heart of the Act itself." Pet.App.350a, 356a. Examining the interplay between the mandate, the insurance provisions, and the rest of the Act, the court concluded that "[i]t would be impossible to ascertain on a section-by-section basis if any particular statutory provision

could stand (and was intended by Congress to stand) independently of the individual mandate," and that any attempt to do so would "be tantamount to rewriting a statute in an attempt to salvage it." Pet.App.361a.

C. The Eleventh Circuit's Decision

The Eleventh Circuit affirmed the District Court's holding that the individual mandate is unconstitutional but reversed the court's holding that the mandate cannot be severed from the rest of the Act. Pet.App.1a.

1. In a joint opinion by Chief Judge Dubina and Judge Hull, the court concluded that "[t]he federal government's assertion of power, under the Commerce Clause, to issue an economic mandate for Americans to purchase insurance from a private company for the entire duration of their lives is unprecedented, lacks cognizable limits, and imperils our federalist structure." Pet.App.155a–56a. The court rejected the theory that "because Americans have money to spend and must inevitably make decisions on where to spend it, the Commerce Clause gives Congress the power to direct and compel an individual's spending in order to further its overarching regulatory goals." Pet.App.103a. The court observed that "Congress has never before exercised this supposed authority," and that "th[is] Court has never ... interpret[ed] the Commerce Clause to allow Congress to dictate the financial decisions of Americans through an economic mandate." Pet.App.105a, 106a.

The Eleventh Circuit also rejected the federal government's attempt to justify the mandate by

aggregating each individual's decision not to purchase health insurance to produce a substantial effect on commerce. The court found that theory "limitless," observing that, "[g]iven the economic reality of our national marketplace, any person's decision not to purchase a good would, when aggregated, substantially affect interstate commerce." Pet.App.113a. The court concluded that "the government's struggle to articulate cognizable, judicially administrable limiting principles only reiterates the conclusion we reach today: there are none." Pet.App.125a. The court also concluded that the mandate could not be justified as essential to a larger regulatory scheme, noting that this Court has never employed that reasoning to sustain a federal regulation "where plaintiffs contend that the entire class of activity is outside the reach of congressional power." Pet.App.145a.

Finally, the court concluded that the mandate cannot be sustained as an exercise of Congress's taxing power because the mandate "is a civil regulatory penalty and not a tax." Pet.App.171a.

2. The Eleventh Circuit reached precisely the opposite conclusion as the District Court on severability: it deemed the mandate entirely severable from the Act; not a single provision beyond the mandate was invalidated. As to the bulk of the Act—including other provisions that the States had challenged—the Eleventh Circuit found it sufficient that "[e]xcising the individual mandate ... does not prevent the remaining provisions from being 'fully operative as a law.'" Pet.App.174a. Examining the guaranteed issue and preexisting conditions provisions in more detail, the court rejected

Congress's finding that the mandate is essential to those provisions and the federal government's concession that they cannot be severed from the mandate. Concluding that "multiple features ... weaken the mandate's practical influence on the two insurance product reforms," the court deemed the interrelatedness of those provisions insufficient to warrant non-severability, "particularly ... because the reforms of the health insurance help consumers who need it the most." Pet.App.183a, 185a.

3. Judge Marcus concurred in the majority's conclusion that the individual mandate cannot be sustained under Congress's taxing power but dissented from its holding that the mandate exceeds Congress's powers under the Commerce and Necessary and Proper Clauses.

ARGUMENT

I. The Court Should Grant Plenary Review To Decide Whether The Individual Mandate Is Constitutional And Whether The ACA Can Survive Without It.

The individual mandate "represents a wholly novel and potentially unbounded assertion of congressional authority: the ability to compel Americans to purchase an expensive health insurance product they have elected not to buy, and to make them re-purchase that insurance product every month for their entire lives." Pet.App.187a. Whether the Constitution grants Congress the power to impose such unprecedented regulation is a question with "far-reaching implications for our federalist structure," as the mandate "is breathtaking in its expansive scope" and "supersedes

a multitude of the states' policy choices in ... key areas of traditional state concern." Pet.App.94a, 119a, 143a. Indeed, the Eleventh Circuit concluded that the mandate could not be upheld "without obliterating the boundaries inherent in the system of enumerated congressional powers." Pet.App.187a.

As all parties agree, it is now clear that the Courts of Appeals are divided as to whether the mandate is constitutional. One court rejected a facial challenge to the mandate through a strained and misguided as-applied analysis, another rejected challenges to the mandate without reaching the merits, and the Court of Appeals here invalidated the mandate as exceeding Congress's power. *See Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 554 (6th Cir. 2011) (opinion of Sutton, J.); *Liberty Univ. v. Geithner*, —— F.3d ——, 2011 WL 3962915 (4th Cir. Sept. 8, 2011); Pet.App.1a. All three decisions have generated separate opinions disagreeing with the majority's analysis. *See Thomas More*, 651 F.3d at 566 (Graham, J., sitting by designation, dissenting); *Liberty Univ.*, 2011 WL 3962915, at *22 (Davis, J., dissenting); Pet.App.189a (Marcus, J., dissenting).

District courts have also continued to divide on the question. *Compare Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, —— F. Supp. 2d ——, 2011 WL 4072875 (M.D. Pa. Sept. 13, 2011) (mandate unconstitutional), Pet.App.274a (same), *and Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010) (same), *with Liberty Univ. v. Geithner*, 753 F. Supp. 2d 611 (W.D. Va. 2010) (mandate constitutional), *and Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich.

2010) (same). Although the States firmly believe the decision below is correct, the States agree with the federal government that the lower courts are intractably divided and the question is of such immense constitutional consequence as to warrant this Court's resolution.

That is all the more true because it is not just the mandate, but the ACA as a whole, that hangs in the balance. The individual mandate is the centerpiece of a "sweeping and comprehensive" Act, Pet.App.20a, that imposes broad-ranging obligations on every corner of society, from States to insurance companies to private employers to individuals. There is a substantial question whether Congress intended any or all of the Act to survive if the individual mandate falls. Indeed, each of the four courts that has struck down the mandate has reached a different result as to the consequences for the balance of the Act. *See Virginia*, 728 F. Supp. 2d at 790 ("sever[ing] only section 1501 [of the ACA] and directly-dependent provisions which make specific reference to [it]"); Pet.App.363a (holding mandate non-severable and invalidating entire Act); Pet.App.186a (severing only the mandate and leaving remainder of Act in place); *Goudy-Bachman*, 2011 WL 4072875, at *21 (severing mandate and guaranteed issue and preexisting conditions provisions).

Given the grave doubt as to the individual mandate's constitutionality, the Court should not only grant the federal government's petition, but also grant review of, *inter alia*, the severance question raised in the States' petition for certiorari in No. 11-400. As set forth in that petition (at 33–

37), this case is the ideal vehicle for addressing both the constitutional question and the severance question, as this is the only case in which both lower courts considered both questions. Moreover, this case alone allows the Court to consider the equally weighty questions whether the Act's Medicaid expansion and employer mandate provisions are also constitutional, questions that are likely to influence resolution of the severability question. Accordingly, the Court should grant both petitions to determine the extent to which the ACA will stand. At a bare minimum, the Court should modify the federal government's first question presented to make clear that the severability question is squarely before the Court.

II. If The Court Is Inclined To Consider Whether The Anti-Injunction Act Applies, It Should Do So In This Case.

The federal government also suggests that, notwithstanding the parties' agreement that the AIA poses no obstacle, the Court direct the parties to address whether the AIA bars Respondents' challenge to the individual mandate. The AIA provides that, with certain exceptions not relevant here, "no suit for the purposes of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). The federal government initially contended that the AIA bars all pre-enforcement challenges to the mandate, including this challenge, but it reversed course before this case reached the Eleventh Circuit and

now agrees with the States and Private Respondents that the AIA does not apply. Pet. 33.

Although the overwhelming majority of courts (including the District Court in this case) have taken the same position, *see, e.g.*, Pet.App.401a–30a; *Thomas More*, 2011 WL 2556039, at *8; *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 627–29 (W.D. Va. 2010); *Virginia v. Sebelius*, 702 F. Supp. 2d 598, 604–05 (E.D. Va. 2010); *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 891 (E.D. Mich. 2010); *Goudy-Bachman v. Dep't of Health & Human Servs.*, 764 F. Supp. 2d 684, 694–96 (M.D. Pa. 2011); *U.S. Citizens Ass'n v. Sebelius*, 754 F. Supp. 2d 903, 909 (N.D. Ohio 2010), a divided panel of the Fourth Circuit recently became the first and only court to hold otherwise. *See Liberty Univ.*, 2011 WL 3962915, at *4–*16. In light of that lopsided split, the federal government suggests that the Court should consider the arguably jurisdictional AIA question. *See* Pet. 33 (citing *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962) for proposition that the AIA "withdraw[s] jurisdiction").

To the extent that this Court agrees that consideration of the AIA question is necessary, the States agree that the Court should instruct the parties in this case to brief the question. Although the federal government suggests that the Court could also grant the petition for certiorari pending in *Liberty University*, No. 11-438, and rely solely on briefs filed in that case to address the AIA question, there is no need to do so and a very good reason not to do so. The procedural postures of this case and of *Liberty University* are identical. In both cases, all parties agree that the AIA is not an obstacle.

Accordingly, if the AIA is not jurisdictional, it should not be at issue in either case. On the other hand, if the AIA is jurisdictional, the courts have an equal obligation to decide the question in both cases.

The only difference between the two cases is that the judgment in *Liberty University* rests on the AIA. But that is not a reason to grant certiorari in that case. As noted, the Court is equally capable of addressing the AIA issue in either case. If the Court is inclined to hear oral argument in defense of the proposition that the AIA is an obstacle, it can appoint an amicus for that purpose in either case. But it would be unusual to limit the briefing in the *Liberty University* case to the AIA issue, and thus granting that petition may raise the prospect of duplicative briefing and argument on the merits of the individual mandate. In short, the Court may wish to grant the petition in *Liberty University* in addition to the petitions in this case for reasons unrelated to the AIA issue, but there is no cause for the Court to grant that petition just to address the AIA issue. This case presents an equally good vehicle to address that question.

Indeed, this case presents a uniquely attractive vehicle for addressing the AIA issue because the AIA does not apply to States in the same manner as it applies to individual taxpayers. Even assuming the AIA might bar some challenges to the mandate (and the States maintain it does not), it would not bar the States' challenge. First, it is not clear that the AIA applies to the States, as its bar against suits brought "by any person" must be read against the "longstanding presumption that 'person' does not include the sovereign." *Vt. Agency of Natural Res. v.*

United States, 529 U.S. 765, 780 (2000); *see also United States v. United Mine Workers*, 330 U.S. 258, 275 (1947); *cf. Nixon v. Missouri Mun. League*, 541 U.S. 125, 132 (2004); *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543 (2002). In keeping with that presumption, when Congress intends the term "person" to include States, it says so explicitly, which it did not do in section 7421(a). *See, e.g.*, 31 U.S.C. § 3733(*l*)(4) (providing that "the term 'person' ... includ[es] any State or political subdivision of a State" for purposes of certain False Claims Act provisions); *cf. Raygor*, 534 U.S. at 543 ("When Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." (internal quotation marks omitted)).

Second, even if the AIA's generic reference to "person" could be read to reach States in some circumstances, under this Court's precedent, it would not bar the States' challenge to the individual mandate. "Congress did not intend the [Anti-Injunction] Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy." *South Carolina v. Regan*, 465 U.S. 367, 378 (1984). Thus, although the AIA bars pre-enforcement suits by individual taxpayers who can bring a refund suit after a tax has been assessed, it does not bar a State's suit to challenge a tax that is not imposed directly on the State, as the State would have no post-assessment means by which to challenge such a tax. *See id.* at 379–80 (AIA did not bar State's challenge to federal tax under which State "will incur no tax liability"). Accordingly, even

assuming the AIA applied to suits challenging the individual mandate, it would not bar the States' suit, as Congress "has not provided an alternative remedy" by which the States could challenge the mandate. *Id.* at 378; *see also Virginia*, 702 F. Supp. 2d at 604 (finding it "clear that the *Regan* exception applies" to State's challenge to individual mandate).

To reach the merits of the States' challenge, the Court also must satisfy itself that the States have standing to challenge the mandate. As is apparent from *Regan*, the fact that the mandate is not imposed directly on the States does not deprive the States of standing to challenge it. Quite the contrary, the States have adequately alleged standing on multiple grounds, the most obvious of which is the effect the mandate will have on States' financial obligations under Medicaid. The mandate requires all individuals to obtain and maintain a minimum level of insurance, including individuals who were previously eligible for Medicaid but declined to enroll. The Act provides no new federal funding to States for those previously eligible but unenrolled individuals forced onto the Medicaid rolls by the mandate. The mandate will therefore substantially increase the States' share of Medicaid funding by forcing enrollment of millions more individuals in Medicaid. To take one uncontested example from the record, Florida projects that, solely as a result of enrolling individuals who are currently eligible but not enrolled, Florida's share of Medicaid costs will increase by more than $500 million annually by the end of the decade. 11th Cir. Record Excerpts 523 ¶18. Surely, a $500 million financial

hit is a sufficient injury in fact for standing purposes.

That inevitable increase in enrollment is not a product of "unfettered choices made by independent actors," *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.), but is a necessary and intended consequence of the mandate itself. *See* 26 U.S.C. § 5000A(f) (providing that enrollment in Medicaid satisfies the individual mandate); *see also* Richard S. Foster, Estimated Financial Effects of the "Patient Protection and Affordable Care Act," Centers for Medicare & Medicaid Servs., Apr. 22, 2010, at 6, *available at* https://www.cms.gov/ActuarialStudies/Downloads/PPACA_2010-04-22.pdf ("Of the additional 34 million people who are estimated to be insured by 2019 as a result of the [individual mandate], a little more than one-half (18 million) would receive Medicaid coverage due to the expansion of eligibility."). The States' injury is essentially no different from the injury suffered by a company with an agreement with the government to provide a product to individuals at a subsidized rate. If the government passed a law making the purchase of that product mandatory, not voluntary, the company would suffer an immediate and enormous financial hit and would clearly have standing to sue. The States suffer an analogous injury here and clearly have standing to challenge the mandate.

Because the States, like the State in *Regan*, have standing to challenge the mandate despite not being the direct taxpayer, this case is the ideal vehicle for review of the AIA issues. The Court can fully explore whether the AIA is jurisdictional and the persuasive arguments that the AIA does not bar

any party's challenge to the mandate. But, in the unlikely event that the Court decides that the AIA is an obstacle to suits by individuals, it can still reach the merits of the mandate's constitutionality by virtue of this extraordinary challenge by over half of the Nation's States.

CONCLUSION

The Court should grant the petitions.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
BANCROFT PLLC
1919 M Street, N.W.
Suite 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

PAMELA JO BONDI
Attorney General of Florida
SCOTT D. MAKAR
Solicitor General
LOUIS F. HUBENER
TIMOTHY D. OSTERHAUS
Deputy Solicitors General
BLAINE H. WINSHIP
Special Counsel
Office of the Attorney General
The Capitol, Suite PL-01
Tallahassee, FL 32399
(850) 414-3300

KATHERINE J. SPOHN
Special Counsel to the Attorney General
Office of the Attorney General
of Nebraska
2115 State Capitol Building
Lincoln, NE 68508

BILL COBB
Deputy Attorney General for Civil Litigation
Office of the Attorney General
of Texas
P.O. Box 12548
Capitol Station
Austin, TX 78711
(512) 475-0131

October 17, 2011 *Counsel for Respondent States*

REPLY BRIEF

No. 11-398

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF AUTHORITIES

Cases: Page

Arbaugh v. *Y&H Corp.*, 546 U.S. 500 (2006) 5
Arkansas v. *Farm Credit Servs.*, 520 U.S. 821 (1997) .. 4, 7
Block v. *North Dakota*, 461 U.S. 273 (1983) 8
Bob Jones University v. *Simon*, 416 U.S. 725 (1974) ... 3, 4
California v. *Grace Brethren Church*, 457 U.S. 393 (1982) 4
Enochs v. *Williams Packing & Navigation Co.*, 370 U.S. 1 (1962) 3, 5
Gardner v. *United States*, 211 F.3d 1305 (D.C. Cir. 2000), cert. denied, 531 U.S. 1114 (2001) 3
Hansen v. *Department of Treasury*, 528 F.3d 597 (9th Cir. 2007) 3
Helvering v. *Davis*, 301 U.S. 619 (1937) 5, 6
Hibbs v. *Winn*, 542 U.S. 88 (2004) 3, 9
Jefferson County v. *Acker*, 527 U.S. 423 (1999) 3
Kowalski v. *Tesmer*, 543 U.S. 125 (2004) 11
LaSalle Rolling Mills, Inc., In re, 832 F.2d 390 (7th Cir. 1987) 3
Liberty University v. *Geithner*, No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011), petition for cert. pending, No. 11-438 (filed Oct. 7, 2011) 2, 3, 6, 7
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) ... 9, 10
Massachusetts v. *EPA*, 549 U.S. 497 (2007) 11
Massachusetts v. *Mellon*, 262 U.S. 447 (1923) 11
Mathes v. *United States*, 901 F.2d 1031 (11th Cir. 1990) 3
McCarthy v. *Marshall*, 723 F.2d 1034 (1st Cir. 1983) 3

Cases—Continued: Page

Ohio v. *Helvering*, 292 U.S. 360 (1934) 8
Pagonis v. United States, 575 F.3d 809 (8th Cir. 2009) 3
Puckett v. *United States*, 556 U.S. 129 (2009) 6
Randell v. *United States*, 64 F.3d 101 (2d Cir. 1995), cert. denied, 519 U.S. 815 (1996) 3
Rosewell v. *LaSalle Nat'l Bank*, 450 U.S. 503 (1981) 4
Sherman v. *Nash*, 488 F.2d 1081 (3d Cir. 1973) 3
Sims v. *United States*, 359 U.S. 108 (1959) 8
South Carolina v. *Regan*, 465 U.S. 367 (1984) 8, 9
Sterling Consulting Corp. v. *United States*, 245 F.3d 1161 (10th Cir. 2001), cert. denied, 534 U.S. 1114 (2002) 3
Sunshine Anthractite Coal Co. v. *Adkins*, 310 U.S. 381 (1940) 6
Thomas More Law Ctr. v. *Obama*, 651 F.3d 529, petition for cert. pending, No. 11-117 (filed July 26, 2011) 1, 3
Vermont Agency of Natural Res. v. *United States*, 529 U.S. 765 (2000) 8
Warth v. *Seldin*, 422 U.S. 490 (1975) 10
Zernial v. *United States*, 714 F.2d 431 (5th Cir. 1983) 3

Constitution and statutes:

U.S. Const.:
Art. I 1
Art. III 10, 11
Amend. X 8

Statutes—Continued: Page

Anti-Injunction Act, 26 U.S.C. 7421(a) 2, 3, 5, 6
Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 1
Tax Injunction Act, 28 U.S.C. 1341 ..... 3, 4, 7
26 U.S.C.A. 5000A 1, 9
28 U.S.C. 1331 5
42 U.S.C. 1396a(a)(8) 10

Miscellaneous:

State of Florida, *Florida KidCare Program: Amendment to Florida's Title XXI Child Health Insurance Plan Submitted to the Centers for Medicare and Medicaid Services* (July 1, 2010), http://www.cms.gov/NationalCHIPPolicy/downloads/FLCurrentStatePlan.pdf 10

In the Supreme Court of the United States

No. 11-398

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

The court of appeals in this case invalidated "a central piece of a comprehensive economic regulatory scheme enacted by Congress" to address a matter of grave national importance. App. 189a (Marcus, J., dissenting). In striking down the minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 26 U.S.C.A. 5000A, the court of appeals created a direct conflict with a decision of the Sixth Circuit concluding that Congress had the power under Article I of the Constitution to enact that provision. See *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 540-549 (2011) (opinion of Martin, J.), *id.* at 554-566 (Sutton, J., concurring in the judgment), petition for cert. pending, No. 11-117 (filed July 26, 2011). The court of appeals' decision in this case is based on fundamental errors regarding the scope of Congress's

commerce and taxing powers and a striking lack of deference to Congress's empirical and policy judgments regarding the appropriate means for responding to the crisis in the national health care market. See Pet. 14-29. This Court's review is plainly warranted, as respondents agree. See State Resp. Br. 1; NFIB Resp. Br. 1.

1. This case is the best vehicle for consideration of the constitutionality of the minimum coverage provision. Unlike the Fourth Circuit in *Liberty University* v. *Geithner*, No. 10-2347, 2011 WL 3962915 (Sept. 8, 2011), petition for cert. pending, No. 11-438 (filed Oct. 7, 2011), the court below reached the merits of that question. And unlike *Thomas More Law Center*, in which the certiorari petition includes no question presented on severability, this case would permit the Court to consider severability issues if it were to invalidate the minimum coverage provision. See Fed. Gov't Resp. Br. 26-33, *National Fed'n of Indep. Bus.* v. *Sebelius*, Nos. 11-393 & 11-400 (Oct. 17, 2011).

2. The Court should address the potential applicability of the Anti-Injunction Act, 26 U.S.C. 7421(a), in the context of this case. See Pet. 32-34. The private respondents contend that there is no need for the Court to consider the Anti-Injunction Act because it is "non-jurisdictional" and, as a result, the federal government's "official position that the [Anti-Injunction Act] does not bar pre-enforcement challenges to the mandate is an express forfeiture of any defense that it may have under the statute." NFIB Resp. Br. 18. The private respondents are mistaken.

a. The Anti-Injunction Act, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," 26 U.S.C. 7421(a), is a limitation on the jurisdiction of

the courts. This Court has said that the statute, when it applies, "depriv[es] courts of jurisdiction over suits brought 'for the purpose of restraining the assessment or collection' of any federal tax." *Jefferson County* v. *Acker*, 527 U.S. 423, 434 (1999) (quoting 26 U.S.C. 7421(a)); see *Bob Jones University* v. *Simon*, 416 U.S. 725, 749 (1974) (affirming judgment "that [the Anti-Injunction Act] deprived the District Court of jurisdiction to issue the injunctive relief [the plaintiff] sought"); *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962) (*Williams Packing*) (Anti-Injunction Act "withdraw[s] jurisdiction from the state and federal courts"). The courts of appeals have likewise unanimously concluded that the Anti-Injunction Act imposes a jurisdictional bar.[1]

The jurisdictional nature of the Anti-Injunction Act is confirmed by this Court's conclusion that the cognate Tax Injunction Act, 28 U.S.C. 1341, is likewise jurisdictional. This Court has observed that "Congress modeled the Tax Injunction Act" on the Anti-Injunction Act. *Jefferson County*, 527 U.S. at 434; see *Hibbs* v. *Winn*, 542 U.S. 88, 102-103 (2004). That similarly worded statute

---

[1] See *Liberty University*, 2011 WL 3962915, at *4; *Thomas More Law Ctr.*, 651 F.3d at 539; *Pagonis* v. *United States*, 575 F.3d 809, 813-815 (8th Cir. 2009); *Hansen* v. *Department of Treasury*, 528 F.3d 597, 600-602 (9th Cir. 2007); *Sterling Consulting Corp.* v. *United States*, 245 F.3d 1161, 1167 (10th Cir. 2001), cert. denied, 534 U.S. 1114 (2002); *Gardner* v. *United States*, 211 F.3d 1305, 1310-1311 (D.C. Cir. 2000), cert. denied, 531 U.S. 1114 (2001); *Randell* v. *United States*, 64 F.3d 101, 106 (2d Cir. 1995), cert. denied, 519 U.S. 815 (1996); *Mathes* v. *United States*, 901 F.2d 1031, 1033 (11th Cir. 1990); *In re LaSalle Rolling Mills, Inc.*, 832 F.2d 390, 392 n.6 (7th Cir. 1987); *McCarthy* v. *Marshall*, 723 F.2d 1034, 1037 (1st Cir. 1983); *Zernial* v. *United States*, 714 F.2d 431, 433-434 (5th Cir. 1983); *Sherman* v. *Nash*, 488 F.2d 1081, 1083 (3d Cir. 1973).

provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. 1341. The Court has squarely held that the Tax Injunction Act is a limitation on the subject-matter jurisdiction of the federal courts. See *Arkansas* v. *Farm Credit Servs.*, 520 U.S. 821, 824, 825-826 (1997) (noting that the Tax Injunction Act is a "broad jurisdictional barrier," and directing dismissal of suit even though court of appeals had not addressed Tax Injunction Act and parties had not raised it in this Court) (citation omitted); *California* v. *Grace Brethren Church*, 457 U.S. 393, 396, 408, 417 n.38 (1982) (holding that Tax Injunction Act "deprived the District Court of jurisdiction" notwithstanding state defendant's contention that it was inapplicable); *Rosewell* v. *LaSalle Nat'l Bank*, 450 U.S. 503, 512, 522 (1981).

b. The private respondents contend that the Anti-Injunction Act cannot be jurisdictional because the Court has created an "equitable exception" to it. NFIB Resp. Br. 17. The case to which they apparently refer, *Williams Packing*, itself characterized the Anti-Injunction Act as jurisdictional, and the Court has done the same since that decision. See p. 3, *supra*. Moreover, while the Court has on occasion characterized *Williams Packing* as having recognized an "exception[]" to the Anti-Injunction Act, *e.g.*, *Bob Jones University*, 416 U.S. at 742, *Williams Packing* is best understood to have merely interpreted the language of the Act as inapplicable in a certain, very limited category of cases. The Court in *Williams Packing* explained that, when "it is clear that under no circumstances could the Government ultimately prevail" in a taxpayer suit, the challenged

"exaction is merely in 'the guise of a tax,'" 370 U.S. at 7 (citation omitted), rather than being an actual "tax," the assessment and collection of which the Anti-Injunction Act would shield. But "[o]therwise," the Court stressed, "the District Court is without jurisdiction, and the complaint must be dismissed." *Ibid.*

Williams Packing's "under no circumstances" test is analogous to the rule that a "claim invoking federal-question jurisdiction under 28 U.S.C. § 1331 * * * may be dismissed for want of subject-matter jurisdiction if it is not colorable, *i.e.*, if it is * * * 'wholly insubstantial and frivolous.'" *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006) (citation omitted). A district court's ability to examine the merits of a claim to that limited extent does not make Section 1331 any less jurisdictional.

c. The private respondents also contend that the Anti-Injunction Act cannot be jurisdictional because this Court in *Helvering* v. *Davis*, 301 U.S. 619 (1937), accepted the Solicitor General's express "waiver of a defense under" the Anti-Injunction Act's predecessor statute. NFIB Resp. Br. 17 (quoting *Davis*, 301 U.S. at 639-640). They also contend that the Court can "accept the Government's express [Anti-Injunction Act] waiver" in this case and forgo adding a question presented on the Anti-Injunction Act. *Id.* at 18. This line of argument is misconceived.

Davis involved "extraordinary features," 301 U.S. at 640, among them an express and extensively explained waiver of the predecessor to the Anti-Injunction Act by the Solicitor General in his merits brief in this Court, see Gov't Br. 22-31, *Davis*, *supra* (No. 36-910). Moreover, the Court did not explain its rationale for accepting that waiver; the opinion's author, Justice Cardozo, believed the remedy sought in that case was "ill con-

ceived," but he was in the minority on that question and thus had the task of characterizing the views of a majority of which he was not a part, see *Davis* at 639-640. He did so with minimal elaboration. See *ibid*. The portion of *Davis* involving the government's waiver does not appear to have been subsequently cited by this Court.[2]

The private respondents are incorrect when they suggest that there has been a *Davis*-type waiver in this case. Neither the federal government's statutory argument that the Anti-Injunction Act does not bar pre-enforcement challenges to the minimum coverage provision, see Pet. 33; Gov't Resp. Br. 16-21, *Liberty University*, *supra*, nor the federal government's decision not to make the contrary argument in the court of appeals constituted a waiver like that in *Davis*—*i.e.*, an express relinquishment of a concededly valid defense. Cf. *Puckett* v. *United States*, 129 S. Ct. 1423, 1430-1431 (2009) (distinguishing "waiver"—an "intentional[] relinquish[ment] or abandon[ment]" of a right—from "forfeiture," which can result from mere "failure to raise [an] argument").

Nor does the Court's acceptance of the government's waiver in *Davis* undermine the Court's subsequent characterization of the Anti-Injunction Act as jurisdictional. See p. 3, *supra*. As noted above (pp. 3-4, *supra*), the Court has held that the Anti-Injunction Act's cognate statute, the Tax Injunction Act, is jurisdictional. The Court has nonetheless concluded that the Tax Injunction

---

[2] In the government's brief in *Sunshine Anthractite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), the Solicitor General noted that "the Government expressly waived 'its objections to the equitable jurisdiction of the court and . . . its defense under Section 3224 of the Revised Statutes,'" the predecessor to the Anti-Injunction Act. Gov't Br. 9, *Sunshine Anthractite Coal Co.*, *supra* (No. 39-804) (citation omitted). The Court's opinion in that case did not discuss the issue.

Act does not bar a suit by the United States, despite the absence of a relevant textual "exception to the jurisdictional bar." *Farm Credit Servs.*, 520 U.S. at 823-824. That conclusion was based on the "well-settled understanding that the Government is not bound by its own legislative restrictions on the exercise of remedial rights unless the intent to bind it is express." *Id.* at 827. The Court in *Davis* could have acted on a comparable understanding that the Anti-Injunction Act, while jurisdictional, allows the federal government itself to expressly waive the jurisdictional bar on those rare occasions when the government formally represents that substantial countervailing interests outweigh the interest in avoiding pre-enforcement tax challenges.

3. The state respondents contend that, "[e]ven assuming the [Anti-Injunction Act] might bar some challenges" to the minimum coverage provision, "it would not bar the States' challenge" because "it is not clear that the [Anti-Injunction Act] applies to the States" and because "it does not bar a State's suit to challenge a tax that is not imposed directly on the State." State Resp. Br. 14-15. The States are incorrect on both points. The federal government nonetheless agrees with the States that it would be preferable to add a question presented on the Anti-Injunction Act in this case, rather than using *Liberty University* as the vehicle for review of that question, so that the Court can more readily consider those state-specific arguments along with other arguments concerning the applicability of the Anti-Injunction Act. See Gov't Resp. Br. 15-16, *Liberty University*, *supra*.

a. The Anti-Injunction Act's use of the word "person" does not render it inapplicable to suits by States. See Fed. Gov't Resp. Br. 20, *National Fed'n of Indep.*

Bus., *supra*. This Court has occasionally applied a presumption that the word "person" in a statute does not include a State in order to avoid an interpretation that would impose civil liability on the States equally with other defendants. See, *e.g.*, *Vermont Agency of Natural Res.* v. *United States*, 529 U.S. 765, 780-781 (2000). There is no basis for application of such a principle when a generally applicable tax provision is at stake, and this Court has thus squarely rejected the contention that the Internal Revenue Code's use of the word "person" does not include States. See *Sims* v. *United States*, 359 U.S. 108, 112 (1959); *Ohio* v. *Helvering*, 292 U.S. 360, 370-371 (1934). And the Anti-Injunction Act simply bars suits by plaintiffs against the United States; its application to bar suits by States, along with all others, works no interference with state sovereignty. Cf. *Block* v. *North Dakota*, 461 U.S. 273, 288-289 (1983).

b. The state respondents also contend that *South Carolina* v. *Regan*, 465 U.S. 367 (1984), supports the inapplicability of the Anti-Injunction Act to their suit because they are "aggrieved parties for whom [Congress] has not provided an alternative remedy" to challenge the minimum coverage provision. State Resp. Br. 15 (quoting *Regan*, 465 U.S. at 378). That contention fails because the States are not "aggrieved parties" within the meaning of *Regan*.

Regan involved a claim by South Carolina that a federal tax statute interfered with its sovereignty in violation of *the State's* Tenth Amendment rights and *the State's* rights under "the doctrine of intergovernmental tax immunity." 465 U.S. at 370; see *id.* at 372. Yet South Carolina could not file a refund action because the tax provision did not impose a tax on the State. See *id.* at 379-380. The Court held that a refund suit by an indi-

vidual taxpayer attempting to assert South Carolina's sovereign interest at issue in the case would be inadequate because "instances in which a third party may raise the constitutional rights of another are the exception rather than the rule." *Id.* at 380.

Regan's "unique" circumstances (*Hibbs*, 542 U.S. at 103 n.6) are absent here. The States do not contend that the minimum coverage provision interferes with their own sovereign functions. Instead, they claim that the provision will unconstitutionally impose burdens on their individual citizens. This case is thus the converse of *Regan*. Here, a refund action by an individual taxpayer would be based on assertion of his own constitutional rights (not those of his State), while it is the States that are attempting to assert the "constitutional rights of another," 465 U.S. at 380, *i.e.*, the individual taxpayer.

c. The state respondents correctly recognize (Br. at 16) that "[t]o reach the merits of the States' challenge, the Court also must satisfy itself that the States have standing to challenge the mandate." But the States lack standing to challenge the minimum coverage provision, which applies to individuals, not States. See 26 U.S.C.A. 5000A; see also *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish.") (citation omitted).

The state respondents contend they have standing based on their contention that the minimum coverage provision will lead "individuals who were previously eligible for Medicaid but declined to enroll" to do so. State Resp. Br. 16. That theory of standing suffers from several defects. First, if an eligible person applies for a

benefit that a State voluntarily provides (such as those available through a State's Medicaid program), the State is not injured in any legally cognizable way. See *Lujan*, 504 U.S. at 560 ("injury in fact" requires "an invasion of a *legally protected* interest") (emphasis added). The state respondents do not claim that they have policies of discouraging eligible individuals from enrolling in Medicaid; to the contrary, lead state respondent Florida last year represented to the federal government that it "has a strong historical commitment to Medicaid outreach" and that it has taken a number of steps to *encourage* eligible individuals to enroll in the program. State of Florida, *Florida KidCare Program: Amendment to Florida's Title XXI Child Health Insurance Plan Submitted to the Centers for Medicare and Medicaid Services* 17 (July 1, 2010); see 42 U.S.C. 1396a(a)(8) (States participating in Medicaid must ensure that "all individuals wishing to make application for medical assistance under the [State's Medicaid] plan shall have opportunity to do so.").

Second, even assuming *arguendo* that the States have a legally protected interest in eligible residents not enrolling in Medicaid (and that their asserted injury is sufficiently nonspeculative to support Article III standing), they lack prudential standing to challenge the minimum coverage provision. "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). The state respondents' challenge to the minimum coverage provision is an assertion of the "legal rights" of "third parties" (*ibid.*), *i.e.*, individuals who

would be subject to the allegedly unconstitutional requirement. Enforcement of the prudential rule against third-party standing is especially important in the context of tax suits; permitting parties to litigate challenges to taxes imposed on others would risk serious disruption of tax administration.

This Court has permitted third-party standing only when the plaintiff makes two showings (in addition to the requisites of Article III): demonstrating that there is "a 'close' relationship with the person who possesses the right" and proving that "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski* v. *Tesmer*, 543 U.S. 125, 130 (2004) (citation omitted). The state respondents cannot make either showing. States do not possess a *parens patriae* relationship with their citizens that would permit them to litigate on their behalf against the federal government, see *Massachusetts* v. *EPA*, 549 U.S. 497, 520 n.17 (2007); *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923), and, as the presence of respondent Mary Brown in this case demonstrates, there is no hindrance to individuals' ability to challenge the minimum coverage provision.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

OCTOBER 2011

AMICUS CURIAE BRIEF

No. 11-398

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL.,

Petitioners,

v.

STATE OF FLORIDA ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF AARP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

(MINIMUM COVERAGE PROVISION)

Stuart R. Cohen
Stacy Canan
AARP FOUNDATION LITIGATION

Michael Schuster
AARP

601 E Street, NW
Washington, DC 20049

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, D.C. 20015
(202) 362-0636
tg@goldsteinrussell.com

QUESTION PRESENTED

This brief will address the following question:

Whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision of the Patient Protection and Affordable Care Act, 26 U.S.C.A. § 5000A.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. The Affordable Care Act Has A Profound Effect On The Ability Of Americans Aged 50 To 64 To Participate In National Health Care, Labor, And Other Interstate Markets. 7

A. For Millions Of Older Americans Approaching Retirement, Health Insurance Has Become Unavailable Or Unaffordable. 8

1. Employer-Sponsored Health Insurance Is Frequently Unavailable Or Unaffordable For Older Americans. 8

2. People Aged 50 to 64 Are Systematically Denied Coverage Or Priced Out Of The Individual Market Because Of Their High Incidences of Pre-Existing Conditions And Chronic Illness. 10

3. Age-Rating Has Made Insurance Premiums Particularly Unaffordable For Those Aged 50 to 64 Who Must Buy Insurance on the Individual Market. 14

4. Annual And Lifetime Caps Further Diminish Access To Insurance Benefits For Older Americans. 16

B. The Lack Of Adequate Health Insurance For Americans Aged 50 To 64 Has A Substantial Effect On The National Economy. 17

1. Lack Of Adequate Insurance Suppresses Mobility In The National Labor Market For Older Workers. 18

2. Older Americans Lacking Adequate Insurance Divert Money From Retirement Savings To Pay For Medical Expenses. 19

3. Medical Debt Is A Significant Source Of Financial Distress Among Older Americans, Causing Many Bankruptcies To The Detriment Of The Broader Economy. 22

II. The Uninsured and Underinsured Have A Substantial Impact On Critical Federal Spending Programs. 24

III. The Minimum Coverage Provision Is A Valid Exercise Of Congress's Article I Powers. 28

A. Congress Reasonably Determined That Encouraging All Americans To Obtain Health Insurance Was Necessary To Make Feasible Other Measures That Removed Barriers To Americans' Access To Health Care Coverage. 29

B. **Congress May Constitutionally Impose A Tax On Those Who Voluntarily Forego Health Insurance And, As A Consequence, Predictably Impose Greater Costs On Federal Spending Programs.** 31

CONCLUSION 35

TABLE OF AUTHORITIES

Cases

Gonzalez v. Raich,
545 U.S. 1 (2005) 28, 29, 34

Lorance & AT&T Tech., Inc.,
490 U.S. 900 (1989) 33

Sabri v. United States,
541 U.S. 600 (2004) 29

Wickard v. Filburn,
317 U.S. 111 (1942) 29

Constitutional and Statutory Provisions

26 U.S.C.A. § 36B(a)-(c) 30

Consolidated Budget Reconciliation Act of 1986
(COBRA), 29 U.S.C. §§ 1161 *et seq.* 10

29 U.S.C. § 1162(2) 10

29 U.S.C. § 1162(2)(A)(i) 10

29 U.S.C. § 1164 10

42 U.S.C.A. § 1396a(a)(10)(A)(i)(VIII) 31

42 U.S.C.A. § 1396d(y)(1) 31

42 U.S.C.A. § 18091(a)(2)(A) 30

42 U.S.C.A. § 300gg 30

42 U.S.C.A. § 300gg(a)(1)(A)(iii) 15, 30

42 U.S.C.A. § 300gg-1(a) 30

U.S. Const. art. I, § 8, cl. 1 28

U.S. Const. art. I, § 8, cl. 3 28

U.S. Const. art. I, § 8, cl. 18 28

Regulations

14 C.F.R. §§ 205.1-205.5 34

Other Authorities

Sue B. from Decatur, Illinois, Statement to the AARP (Jan. 19, 2011) 20

David W. Baker et al., *Lack of Health Insurance and Decline in Overall Health in Late Middle Age*, 345 New Eng. J. Med. 1106 (2001) 25

Jill Bernstein et al., Mathematica Policy Research, Inc., *How Does Insurance Coverage Improve Health Outcomes?* (Apr. 2010) 25

E.S. Browning, *Oldest Baby Boomers Face Jobs Bust*, Wall Street Journal, Dec. 19, 2011 ..... 9, 10

Barbara A. Butrica et al., The Urban Institute, *Do Health Problems Reduce Consumption at Older Ages* (Mar. 2009) 21

Sara R. Collins et al., The Commonwealth Fund, *Help on the Horizon: How the Recession Has Left Millions of Workers Without Health Insurance, and How Health Reform Will Bring Relief* (Mar. 2011) ..... passim

Sara R. Collins et al., The Commonwealth Fund, *Realizing Health Reform's Potential: Adults Ages 50-64 and the Affordable Care Act of 2010* (Dec. 2010) 12, 31

Congressional Budget Office, *Personal Bankruptcy: A Literature Review* (Sept. 2000) 24

Consumer Reports, *Health Insurance: CR Investigates Health Care* (Sept. 2007) 13

Keziah Cook et al., *Does Major Illness Cause Financial Catastrophe?* 45 Health Services Research, No. 2, Apr. 2010 21

Valerie D. from Portsmouth, Virginia, Statement to the AARP (Sept. 17, 2010) 27

Robert W. Fairlie et al., *Is Employer-Based Health Insurance a Barrier to Entrepreneurship?* (Rand Corp., Working Paper No. WR-637-1-EMKF, 2010)..... 19

Sid Groeneman, AARP, *Staying Ahead of the Curve 2007: The AARP Work and Career Study* (Sept. 2008)..... 19

Jonathan Gruber, Ctr. for Am. Progress, *Health Care Reform Without the Individual Mandate* (Feb. 2011)..... 30

David Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study,* 122 Am. J. Med. 741 (2009)..... 17, 24

H.R. Rep. No. 111-443 (2010)..... 10, 13

Gretchen Jacobson et al., Kaiser Family Foundation, *Health Insurance Coverage for Older Adults: Implications of a Medicare Buy-In* (Dec. 2009) 8, 15, 26

Richard W. Johnson et al., AARP Public Policy Inst., *Older Workers on the Move: Recareering in Later Life* (2009) 18

Richard W. Johnson et al., *Older Workers on the Move: Recareering in Later Life* (Apr. 2009)..... 18

Kaiser Family Foundation and Health Research & Educational Trust, *Employer Health Benefits: 2011 Annual Survey* (Sept. 2011) 9

Kaiser Family Foundation, *Individual Market Rate Restrictions*, statehealthfacts.org (2011)..... 15

Kaiser Family Foundation, *Kaiser Health Tracking Poll: Election 2008* (Aug. 19, 2008) 23

Kaiser Family Foundation, *Understanding Individual Health Insurance Markets* (Mar. 17, 1998) 13

Steven Machlin et al., Agency for Healthcare Research and Quality, *Statistical Brief #203: Health Care Expenses for Adults with Chronic Conditions, 2005* (May 2008) 11

Nayla Kazzi & David Madland, *Mixed News for Older Workers*, Center for American Progress (Sept. 4, 2009) 9

J. Michael McWilliams et al., *Health Insurance Coverage and Mortality Among the Near-Elderly*, 23 Health Affairs 223 (2004) 24

J. Michael McWilliams et al., *Impact of Medicare Coverage on Basic Clinical Services for Previously Uninsured Adults*, 290 JAMA 757 (Aug. 2003) 26

J. Michael McWilliams et al., *Use of Health Services by Previously Uninsured Medicare Beneficiaries*, 347 New Eng. J. Med. 143 (2007) 26, 27

Mark Merlis, National Institute for Health Care Reform, *Health Coverage for the High-Risk Uninsured: Policy Options for Design of the Temporary High-Risk Pool* (May 2010) 13

Lynn Nonnemaker, AARP Public Policy Inst., *Beyond Age Rating: Spreading Risk in Health Insurance Markets* (Oct. 2009) 15

Karen Pollitz et al., Georgetown Univ. Inst. For Health Care Research & Policy, *How Accessible is Individual Health Insurance for Consumers in Less-Than-Perfect Health?* (June 2001) 14

PriceWaterhouseCoopers, *Impact of Lifetime Limits: Prepared for National Hemophilia Foundation* (Mar. 2009) 28

Robert Wood Johnson Foundation, *State-Level Trends in Employer-Sponsored Health Insurance* (June 2011) 8

Gerry Smolka et al., AARP Public Policy Inst., *Health Care Reform: What's at Stake for 50- to 64-Year-Olds?* (Mar. 2009) 7, 22

Gerry Smolka et al., AARP Public Policy Inst., *Health Insurance Coverage for 50- to 64-Year-Olds* (forthcoming 2012) 7, 9, 10

Neeraj Sood et al., U.S. Dep't. of Health & Human Servs., *The Effect of Health Care Cost Growth on the U.S. Economy* (Sept. 2007) 21

K.T. Stroupe et al., *Chronic Illness and Health Insurance-Related Job Lock*, 20 J. Policy Analysis and Mgmt. 525 (2000) 18

The Instability of Health Coverage in America: Hearing Before the Subcomm. on Health of H. Comm. on Ways and Means, 110th Cong. (Apr. 15, 2008) 17, 26, 28

Nancy C. Turnbull & Nancy M. Kane, *Insuring the Healthy or Insuring the Sick? The Dilemma of Regulating the Individual Health Insurance Market: Findings from a Study of Seven States* (Feb. 2005) 16

U.S. Bureau of Labor Statistics, *Fatal Occupational Injuries and Nonfatal Occupational Injuries and Illnesses, 2008* 32

U.S. Dep't. of Health & Human Servs., *At Risk: Pre-Existing Conditions Could Affect 1 in 2 Americans*, HealthCare.gov (Jan. 18, 2011) ... 11, 19

U.S. Nat'l Highway Traffic Safety Admin., *Trends in Non-Fatal Traffic Injuries: 1996-2005* (May 2008) 33

Henry A. Waxman & Bart Stupak, U.S. House of Representatives, Comm. on Energy & Commerce, *Memorandum: Coverage Denials for Pre-Existing Conditions in the Individual Health Insurance Market* (Oct. 12, 2010) 12

STATEMENT OF INTEREST[1]

AARP is a nonpartisan, nonprofit organization dedicated to addressing the needs and interests of people aged 50 and older. Since its founding in 1958, AARP has advocated for affordable, accessible health care, as well as improved quality of care and controlled health care costs.

In response to the growing number of older people forgoing health care services and facing financial ruin due to health care and insurance becoming increasingly unaffordable and unavailable, AARP sought legislative solutions that would: protect Medicare benefits; reduce insurance rate disparities based on age or pre-existing conditions; reduce the rate of health care cost increases, including for prescription drugs; and eliminate waste, fraud, and abuse. Since 2007 AARP has collected thousands of personal accounts and testimonials from members and nonmembers describing the emotional and financial devastation they experienced when they were unable to pay for health insurance, were declined for insurance due to a prior illness, were unable to pay medical bills, or worse, were unable to receive necessary treatment or medicine when sick.

---

[1] The parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus or its counsel made a monetary contribution to its preparation or submission.

When Congress was debating health reform legislation, AARP's advocacy focused on six key priorities: 1) Guaranteeing access to affordable coverage for Americans ages 50 to 64 in the individual market who have faced unaffordable insurance based on their age, pre-existing conditions, or health status; 2) Closing the Medicare Part D prescription drug coverage gap ("doughnut hole") so people are not forced to choose between paying for necessary medication and paying for other needed expenses; 3) Lowering drug costs by increasing availability of generic biologics, which are used to treat serious conditions like cancer, multiple sclerosis, anemia, and rheumatoid arthritis, and can cost as much as $10,000 or more per month; 4) Reducing costly hospital readmissions through a Medicare Transitional Care Benefit, which helps people safely transition to home or another setting after a hospital stay; 5) Increasing funding and eligibility for home and community based services for people with chronic conditions, which would save money, improve quality of life for individuals who need these services, and better enable them to live at home; and 6) Helping low-income Americans so that people who saved a small nest egg can still receive assistance with premiums and out-of-pocket health costs.

SUMMARY OF ARGUMENT

The Affordable Care Act's minimum coverage provision is a proper subject of political debate and disagreement. But the Constitution does not render the measure beyond the power of the people's representatives to enact.

I. The Affordable Care Act addresses a complex social and economic problem that affects all Americans, but particularly those ages 50 to 64. Indeed, the Act could be sustained solely on the basis of its effects on older Americans.

A. Individuals within this group face special difficulties in obtaining adequate insurance under the present system but are not yet eligible for Medicare and most do not qualify for Medicaid.

Pre-existing and Chronic Conditions. To start, nearly 75 percent of older Americans have a pre-existing condition or chronic illness before they become eligible for Medicare. The present insurance system systematically denies such individuals adequate, affordable insurance if they do not have access to coverage through an employer group. Often, they are simply denied any coverage at all. Even when they can get a policy, it frequently contains an exclusion for the pre-existing or chronic condition, leaving many without adequate insurance for the very health problems they are most likely to encounter. For their inadequate coverage, individuals in this age group who have pre-existing or chronic conditions must pay "rate-up" premiums of 20 to 80 percent greater than normal. The end result is that 70 percent of adults with pre-existing health conditions find it difficult, or

impossible, to find affordable health insurance in the private individual market.

Age Rating. Even the minority of adults aged 50 to 64 who do not have a pre-existing or chronic health condition are charged higher rates based solely on their age in the individual insurance market. In fact, A 60 year-old typically is charged 3 to 7 times as much as a 20 year-old for the same policy.

Annual and Lifetime Caps. Having paid excessive premiums for years, often for insurance with inadequate coverage, Americans aged 50 to 64 can find their claims denied precisely when they need it the most, due to low annual and lifetime caps on insurance benefits. Many policies have caps that are easily exceeded by a single serious illness, such as cancer or heart disease, or that quickly run out during the course of treatment for a chronic condition, like diabetes.

B. The lack of adequate insurance among members of this pre-Medicare age group has a substantial effect on the national economy. It effectively traps many older workers in their jobs for fear of losing their existing insurance, thereby impeding mobility in the national labor market, discouraging retirement, and preventing many older workers from leaving their jobs to start new businesses at the point in their careers when they have the most to offer as entrepreneurs.

In addition, those without adequate insurance frequently divert money from their retirement savings to pay medical bills, affecting the supply of savings that would otherwise be reinvested in the economy. At

the same time, spending in other areas is reduced, including for basic necessities. Reliance on credit cards and second mortgages also increases, often with ruinous results. Medical bills play a significant role in the majority of personal bankruptcies, an effect that has risen dramatically in recent years. The cost of those bankruptcies is placed on other creditors and businesses, with cascading effects for interstate commerce.

II. The uninsured have a substantial impact on federal spending programs as well, particularly on Medicare. The lack of adequate insurance leads many to forego basic preventative treatment and screenings in the years preceding their entry into the Medicare program. And in all too many cases, the uninsured are forced to postpone expensive treatment until the cost can be paid by the Government. The uninsured enter Medicare in worse health and require more expensive care than those who previously maintained insurance. Those additional costs ultimately are borne by federal taxpayers.

III. Congress was entitled to conclude that encouraging the majority of Americans to obtain insurance, through the imposition of a tax penalty for those who do not, was necessary to remove impediments to older Americans' full participation in the national economy and to account for the costs the uninsured impose on Medicare and other federal spending programs.

Without an increased insurance pool, the provisions of the Affordable Care Act reducing barriers to access to health insurance for people aged 50 to 64 – including those eliminating denials for pre-existing

and chronic conditions, and reducing age-rating disparities – would increase rates and make insurance even more unaffordable for many.

At the same time, Congress understood that those who voluntarily forego insurance, as a group, predictably impose great costs on both the medical system and federal spending programs. Congress could reasonably require those who choose to forego insurance to shoulder some portion of that financial burden through payment of a tax. In this light, the tax penalty associated with the minimum coverage provision is little different from taxes that fund government programs for unemployment insurance or disaster relief, taxes we all must pay whether we ultimately avail ourselves of the funded programs or not. And like a cigarette tax, the penalty for those who choose to forego available health insurance reasonably aims to discourage behavior that imposes enormous costs on our medical system, economy, and the federal budget.

ARGUMENT

I. The Affordable Care Act Has A Profound Effect On The Ability Of Americans Aged 50 To 64 To Participate In National Health Care, Labor, And Other Interstate Markets.

The number of Americans aged 50 to 64 without health insurance is growing at an alarming rate. In just 7 years, between 2000 and 2007, the number of such uninsured individuals grew more than 36 percent, from 5.2 million to 7.1 million persons.[2] By 2010, 8.9 million members of that age group were uninsured.[3] Many more have insurance that is grossly inadequate for their needs, often little better than no insurance at all. The consequences for families and the nation are devastating, distorting labor markets by trapping older workers in their jobs for fear of losing their insurance, draining retirement savings, and plunging families into unsustainable debt and sometimes bankruptcy.

---

[2] Gerry Smolka et al., AARP Public Policy Inst. (PPI), *Health Care Reform: What's at Stake for 50- to 64-Year-Olds?* 1 (Mar. 2009), *available at* http://assets.aarp.org/rgcenter/health/i24_hcr.pdf.

[3] Gerry Smolka et al., AARP PPI, *Health Insurance Coverage for 50- to 64-Year-Olds* (forthcoming 2012) (manuscript at 1) (on file with authors) [hereinafter AARP PPI Report].

A. For Millions Of Older Americans Approaching Retirement, Health Insurance Has Become Unavailable Or Unaffordable.

Until they reach age 65, and become eligible for Medicare, most older Americans must obtain health insurance either from their employer or through the individual health insurance market.[4] For far too many, neither option offers any realistic opportunity to obtain the insurance they need.

1. Employer-Sponsored Health Insurance Is Frequently Unavailable Or Unaffordable For Older Americans.

Increasingly, older Americans cannot count on employers to provide adequate health insurance. Employers (particularly those with smaller businesses) have progressively reduced or eliminated health benefits for their workers.[5] Since 2000, the portion of

---

[4] Most uninsured 50 to 64 year-olds are not eligible for either Medicare, the federal health insurance program for people age 65 or older (and that also covers some people under age 65 with disabilities and end-stage renal disease), or Medicaid, a joint federal and state run insurance program for low-income people with children or older dependents or who are disabled. Gretchen Jacobson et al., Kaiser Family Foundation, *Health Insurance Coverage for Older Adults: Implications of a Medicare Buy-In* 1 (Dec. 2009), *available at* http://www.kff.org/healthreform/upload/7904-02.pdf.

[5] *See, e.g.*, Robert Wood Johnson Foundation, *State-Level Trends in Employer-Sponsored Health Insurance* 24 (June 2011),

older adults with employer-sponsored health insurance has declined by 5.3 percentage points.[6] At the same time, even workers who do have employer-sponsored insurance have encountered rising health insurance costs through higher employee contributions, larger co-pays, or increased deductibles.[7]

Moreover, unemployment among older adults has risen markedly in the past several years.[8] And for the majority of adults who lose their jobs, that means becoming uninsured.[9] This is due in part to the

---

available at http://www.rwjf.org/files/research/72528shadac201106.pdf.

[6] Smolka, AARP PPI Report, *supra* note 3, manuscript at 4 fig.3.

[7] *See, e.g.*, Kaiser Family Foundation and Health Research & Educational Trust, *Employer Health Benefits: 2011 Annual Survey* 67 (Sept. 2011), *available at* http://ehbs.kff.org/pdf/2011/8225.pdf (average monthly premium paid for family coverage rose from $129 in 1999 to $344 in 2011).

[8] Nayla Kazzi & David Madland, *Mixed News for Older Workers*, Center for American Progress (Sept. 4, 2009), http://www.americanprogress.org/issues/2009/09/older_worker.html ("Workers 55 and older have a higher unemployment rate than any time since 1948"); E.S. Browning, *Oldest Baby Boomers Face Jobs Bust*, Wall Street Journal, Dec. 19, 2011, at A1, *available at* http://online.wsj.com/article/SB10001424052970204083204577080421127607002.html (in October 2011, 4.3 million Americans aged 55 to 64 were jobless or underemployed, nearly double the number just five years earlier).

[9] Sara R. Collins et al., The Commonwealth Fund, *Help on the Horizon: How the Recession Has Left Millions of Workers Without Health Insurance, and How Health Reform Will Bring Relief*, at ix (Mar. 2011), *available at* http://www.

extraordinary cost of obtaining individual insurance in the private market – older Americans who purchase health insurance themselves pay, on average, 2.5 times as much for their insurance as do those covered by an employer-provided policy.[10]

2. *People Aged 50 to 64 Are Systematically Denied Coverage Or Priced Out Of The Individual Market Because Of Their High Incidences of Pre-Existing Conditions And Chronic Illness.*

Even when insurance is nominally available in the individual market,. many older Americans are effectively denied coverage by a system designed to minimize insurers' risk by "cherry pick[ing] healthy people" and "weed[ing] out those who are not as healthy." H.R. Rep. No. 111-443, at 990 (2010).

---

commonwealthfund.org/~/media/Files/Publications/Fund%20Report/2011/Mar/1486_Collins_help_on_the_horizon_2010_biennial_survey_report_FINAL_v2.pdf.

[10] Smolka, AARP PPI Report, *supra* note 3, manuscript at 2 tbl.1. Those who lose their jobs may often obtain temporary coverage pursuant to provisions of the Consolidated Budget Reconciliation Act of 1986 (COBRA), 29 U.S.C. §§ 1161 *et seq.* But such coverage is time-limited and expensive, as the individual must pay the full premium, including the former employer's previous share. *See id.* § 1162(2), 1164. During the present recession, more than half of unemployed individuals aged 55 or older have failed to find a job in the 18 months during which COBRA generally extends coverage. *See id.* § 1162(2)(A)(i); Browning, *supra* note 8, at 1A.

As people age, they are more likely to have prior or existing medical conditions. While about one-third of 18 to 34 year-olds have one or more chronic conditions, more than three-quarters of 55 to 64 year-olds suffer from chronic illness.[11] Studies further estimate that between 48 and 86 percent of older individuals have a pre-existing health condition, compared to a rate of between 9 and 35 percent for younger people.[12]

Rather than pooling the risk of the young and the old, the healthy and the not-as-healthy, insurance companies in the individual market systematically deny coverage, limit benefits, or charge excessive premiums to individuals with pre-existing conditions and those older Americans perceived to be high-risk. Nearly 40 percent of people ages 50 to 64 with existing conditions or chronic illness who are seeking insurance in the individual market are either denied insurance,

---

[11] Steven Machlin et al., Agency for Healthcare Research and Quality, *Statistical Brief #203: Health Care Expenses for Adults with Chronic Conditions, 2005*, at 5 (May 2008), *available at* http://www.meps.ahrq.gov/mepsweb/data_files/publications/st203/stat203.pdf.

[12] U.S. Dep't. of Health & Human Servs. (HHS), *At Risk: Pre-Existing Conditions Could Affect 1 in 2 Americans*, at fig.1, HealthCare.gov (Jan. 18, 2011), http://www.healthcare.gov/center/reports/preexisting.html (comparing rates of pre-existing conditions for individuals aged 55 to 64 compared to those aged 18 to 34).

charged a higher price, or have their condition excluded from coverage.[13]

Denial of Coverage. Last year, four of the largest insurance carriers reported to Congress that from 2007 through 2009, they had collectively denied coverage to more than 651,000 people because of their pre-existing conditions.[14] During that same short period, the rate of denials went up dramatically. The number of individuals denied coverage because of a pre-existing condition went up nearly 50 percent, even though applications for enrollment rose only 16 percent.[15]

Exclusion Of Pre-Exiting Conditions. In addition to simply denying coverage, insurers often issue policies with an exclusion or elimination rider under which services for a specific condition are temporarily or permanently excluded.[16] Commonly used exclusion

---

[13] Sara R. Collins et al., The Commonwealth Fund, *Realizing Health Reform's Potential: Adults Ages 50-64 and the Affordable Care Act of 2010*, at 3 (Dec. 2010), *available at* http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2010/Dec/1460_Collins_adults_50_to_64_ACA_reform_brief_v2.pdf.

[14] *See* Henry A. Waxman & Bart Stupak, U.S. House of Representatives, Comm. on Energy & Commerce, *Memorandum: Coverage Denials for Pre-Existing Conditions in the Individual Health Insurance Market* 1 (Oct. 12, 2010), *available at* http://democrats.energycommerce.house.gov/Press_111/20101012/Memo.Pre-existing.Condition.Denials.Individual.Market.2010.10.12.pdf.

[15] *Id.*

[16] Mark Merlis, National Institute for Health Care Reform, *Health Coverage for the High-Risk Uninsured: Policy Options for*

and elimination riders effectively leave people who have acute or chronic illnesses in the same posture as they would be with no insurance. In part because of such exclusions, nearly 30 percent of people with individual insurance have inadequate coverage should they suffer a serious or catastrophic illness.[17]

Rate-Ups. Even when some coverage for pre-existing or chronic conditions is available, it is often offered at an increased, unaffordable cost. The so-called "rate-ups" for those with such conditions typically range from 20 to 80 percent above the base rate, depending on the applicant's medical history.[18] As a result, 70 percent of adults with a pre-existing health problem find it difficult or impossible to find affordable insurance on the individual market.[19]

Design of the Temporary High-Risk Pool 2 (May 2010), *available at* http://www.nihcr.org/High-RiskPools.pdf.

[17] H.R. Rep. No. 111-443, at 980 (citing to Consumer Reports, *Health Insurance: CR Investigates Health Care* (Sept. 2007)).

[18] Kaiser Family Foundation, *Understanding Individual Health Insurance Markets* (Mar. 17, 1998), http://www.kff.org/insurance/1376-barrierspr.cfm.

[19] Collins, *Help on the Horizon*, *supra* note 9, at xi ex.ES-2.

3. *Age-Rating Has Made Insurance Premiums Particularly Unaffordable For Those Aged 50 to 64 Who Must Buy Insurance on the Individual Market.*

Even setting aside pre-existing conditions and chronic illnesses, insurance is unaffordable for many older Americans simply because of their age.[20]

On average, even before health status is taken into account, AARP has found that a 60 year-old will pay between 3 and 7 times more than a 20 year-old for the same plan.[21] For example, AARP's review of premiums for policies starting on July 1, 2009 show that the best-selling insurance plan in Delaware charged a 20 year-old male $41 per month. The same plan cost a 60 year-old male $210 per month. In Florida, a 60 year-old man would pay 7.5 times the rate paid by a 20 year-old man ($286 per month compared to $38 per month). This practice of "age-

---

[20] *See also* Karen Pollitz et al., Georgetown Univ. Inst. For Health Care Research & Policy, *How Accessible is Individual Health Insurance for Consumers in Less-Than-Perfect Health?* at iv (June 2001), *available at* http://www.kff.org/insurance/upload/How-Accessible-is-Individual-Health-Insurance-for-Consumer-in-Less-Than-Perfect-Health-Report.pdf (finding that "[t]he standard rate for a healthy 62-year-old man was three to six times that for a healthy 24-year-old woman.").

[21] To obtain this data, AARP's Public Policy Institute researched rates offered within the various states via www.ehealthinsurance.com. The Institute obtained and then compared the rate for the best-selling plan available to a 60-year-old non-smoking male in a state against the rate for the identical plan when offered to a 20-year-old non-smoking male.

rating" was largely unregulated prior to the enactment of the Affordable Care Act – 32 states and the District of Columbia had no limit on age rating.[22]

Although there is an actuarial basis for charging older people higher premiums, they often are unable to afford the higher rates. Approximately half of uninsured people aged 55 to 64 live below 200 percent of the federal poverty line.[23] And as a group, uninsured older Americans are no better able to afford high premiums than any other age group. An analysis of the March 2008 Current Population Survey found that among uninsured adults, median family income is virtually identical across all age groups. For example, the median family income for uninsured 18 to 24 year-olds was $28,461, whereas it was $30,000 for uninsured 50 to 64 year-olds.[24] Yet, the combined effect of age-rating and increased premiums for those with pre-existing health conditions has meant that older individuals can pay 14 to 17 times as much as a

---

[22] Kaiser Family Foundation, *Individual Market Rate Restrictions*, statehealthfacts.org (2011), http://www.statehealthfacts.org/comparetable.jsp?cat=7&ind=354; 42 U.S.C.A. § 300gg(a)(1)(A)(iii) (limiting age rating starting in 2014).

[23] *See* Jacobson, *supra* note 4, at 3.

[24] Lynn Nonnemaker, AARP Public Policy Inst., *Beyond Age Rating: Spreading Risk in Health Insurance Markets* 3 tbl.1 (Oct. 2009), *available at* http://assets.aarp.org/rgcenter/ppi/healthcare/i35-age-rating.pdf.

younger person for the same policy in the individual insurance market.[25]

4. Annual And Lifetime Caps Further Diminish Access To Insurance Benefits For Older Americans.

Older Americans are also disproportionately disadvantaged by annual and lifetime limits on insurance benefits that often cut off coverage precisely when it is needed the most. For example, Congress heard the following story of a 61 year-old woman from Florida:

> Kay works part time at a large department store earning $13,000 per year. She has insurance through her employer but quickly exceeded the plan's $25,000 annual maximum following her diagnosis with Stage II breast cancer. She has received eight cycles of pre-operative chemotherapy, had a lumpectomy with auxiliary lymph node dissection, and now needs radiation. Kay already has $40,000 in outstanding medical bills from various diagnostic tests that were not covered. Now she's been told that she cannot begin radiation

---

[25] Nancy C. Turnbull & Nancy M. Kane, *Insuring the Healthy or Insuring the Sick? The Dilemma of Regulating the Individual Health Insurance Market: Findings from a Study of Seven States*, at vii (Feb. 2005), *available at* http://www.commonwealthfund.org/usr_doc/771_Turnbull_insuring_healthy_or_sick_findings.pdf.

unless she plans to bring $115,000 with her to the first appointment.[26]

Low annual or lifetime caps can easily be exceeded by a single, common illness or accident. According to one study, "[a]mong common diagnoses, non-stroke neurologic illnesses such as multiple sclerosis were associated with the highest out-of-pocket expenditures (mean $34,167), followed by diabetes ($26,971), injuries ($25,096), stroke ($23,380), mental illnesses ($23,178), and heart disease ($21,955)."[27] Because the frequency of many such medical conditions naturally increases with age, older adults are particularly harmed by insurance caps.

B. The Lack Of Adequate Health Insurance For Americans Aged 50 To 64 Has A Substantial Effect On The National Economy.

The lack of adequate, affordable health insurance for older Americans has a profound effect on the national economy.

---

[26] *The Instability of Health Coverage in America: Hearing Before the Subcomm. on Health of H. Comm. on Ways and Means*, 110th Cong. 89 (Apr. 15, 2008) [hereinafter *Hearings*] (statement of Stephen Finan, Assoc. Dir. of Policy, American Cancer Society).

[27] David Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 Am. J. Med. 741, 744 (2009), *available at* http://download.journals.elsevierhealth.com/pdfs/journals/0002-9343/PIIS0002934309004045.pdf.

1. *Lack Of Adequate Insurance Suppresses Mobility In The National Labor Market For Older Workers.*

The present insurance system distorts interstate labor markets by discouraging workers, especially older workers, from leaving their jobs for fear of losing health care coverage.

Among those aged 51 or older, "nearly a quarter of career changers lose health benefits when they change jobs; only about 10 percent gain insurance."[28] Workers with chronic illnesses or pre-existing conditions – disproportionately older workers – are particularly reluctant to make any job changes that could impact health coverage for themselves, their spouses, or dependent family members. As a consequence, chronically ill workers, for example, are 40 percent less likely to leave their job if they get insurance through work compared to those who do not rely on their employers for coverage.[29]

The increasing concerns about losing insurance deters older workers not only from switching jobs, but even from reducing their hours or retiring. Even for those workers who turn 65 and are eligible for

---

[28] Richard W. Johnson et al., AARP PPI, *Older Workers on the Move: Recareering in Later Life* 18 (2009), *available at* http://assets.aarp.org/rgcenter/ econ/2009_08_recareering.pdf.

[29] K.T. Stroupe et al., *Chronic Illness and Health Insurance-Related Job Lock*, 20 J. Policy Analysis and Mgmt. 525, 525 (2000), *available at* http://surface.syr.edu/cgi/viewcontent.cgi?article=1132&context=cpr.

Medicare, concerns about maintaining health insurance coverage for a younger spouse or dependent child (particularly one with a pre-existing condition) often prevents them from retiring, reducing hours, or switching jobs.[30]

The consequences for a dynamic economy are stark. Some of the nation's most valuable workers are discouraged from redirecting their talents to firms and sectors of the economy where they are most needed. At the same time, older workers are deterred from starting their own businesses for fear of being unable to obtain affordable insur ance, depriving the economy of the benefits of entrepreneurial activity by the most experienced segment of the workforce.[31]

2. *Older Americans Lacking Adequate Insurance Divert Money From Retirement Savings To Pay For Medical Expenses.*

Because they cannot obtain adequate, affordable insurance, many older Americans are forced to divert

---

[30] *See* HHS, *supra* note 12; Sid Groeneman, AARP, *Staying Ahead of the Curve 2007: The AARP Work and Career Study* 23 (Sept. 2008), *available at* http://assets.aarp.org/rgcenter/econ/work_career_08.pdf.

[31] *See* Robert W. Fairlie et al., *Is Employer-Based Health Insurance a Barrier to Entrepreneurship?* 45-47 (Rand Corp., Working Paper No. WR-637-1-EMKF, 2010), *available at* http://www.rand.org/content/dam/rand/pubs/working_papers/2010/RAND_WR637-1.pdf (finding that job-lock has rippling effects in other corners of the economy because the threat of losing coverage restricts the formation of businesses effectively altering who can become entrepreneurs).

money from their retirement savings to pay for unreimbursed medical expenses, with predictable consequences for the national economy.

As they age, workers face an increased need to both set aside money for retirement and pay for medical care. Yet the lack of insurance, high deductibles, excessive co-pays, exclusions, and limits on annual and lifetime coverage make it likely that a great many older Americans will be forced to pay for medical expenses out of money that they otherwise would have been saving for their retirement. As one individual explained to AARP:

> I am 54 years old. Shortly after changing jobs from one I'd been at eight years the insurance company on the new job . . . denied coverage for pre-existing conditions because I was still in the enrollment period of about three months. This caused me to have to withdraw from my IRA and pay the 10% penalty. This money had been my retirement savings. I had to use it to pay the hospital bill.[32]

This experience is far from uncommon. One study estimated that 29 million people have used all of their savings on medical expenses.[33] Among those aged 50 to 64, the median household with a newly ill and

---

[32] Sue B. from Decatur, Illinois, Statement to the AARP (Jan. 19, 2011).

[33] *See* Collins, *Help on the Horizon*, *supra* note 9, at 12.

uninsured member loses between 30 and 50 percent of the household's assets.[34]

This diversion of money from retirement savings naturally affects national credit markets, which depend in no small part on retirement savings to fund investment in our economy. And it inevitably leads to further undesirable effects throughout the economy as those individuals reduce non-health spending or become increasingly reliant on government assistance with housing costs, utilities, or food after retiring, the cost of which is a contributor to budget deficits that themselves have a substantial impact on credit markets and other aspects of our economy.[35]

---

[34] Keziah Cook et al., *Does Major Illness Cause Financial Catastrophe?* 45 Health Services Research, No. 2, Apr. 2010, at 3, *available at* http://www.cfah.org/hbns/archives/viewSupportDoc.cfm?supportingDocID=830.

[35] *See, e.g.*, Barbara A. Butrica et al., The Urban Institute, *Do Health Problems Reduce Consumption at Older Ages*, at v (Mar. 2009), *available at* http://www.urban.org/UploadedPDF/411858_reduce_consumption.pdf (finding that "low-income adults in their fifties and early sixties appear to curtail their nonhealth spending in response to high health care expenses"); Neeraj Sood et al., HHS, *The Effect of Health Care Cost Growth on the U.S. Economy*, at pt. 3.3 (Sept. 2007), http://aspe.hhs.gov/health/reports/08/healthcarecost/report.html#33.

3. *Medical Debt Is A Significant Source Of Financial Distress Among Older Americans, Causing Many Bankruptcies To The Detriment Of The Broader Economy.*

At the same time, the national economy is equally affected when older Americans cannot pay for the medical services they have unavoidably consumed. In addition to the widely-recognized effect of distorting the market for medical services and insurance,[36] crushing medical debt often prevents older adults from paying other expenses, with cascading effects throughout the economy.

More than two-thirds of older adults who participate in the individual insurance market pay more than 10 percent of their income to medical costs.[37] Regardless of coverage status, for many – particularly those with low or modest incomes and with health problems – the financial burden can be much greater. Having to bear even a portion of the cost of many common medical conditions can be financially ruinous. A single illness or accident can easily cost more than the annual post-tax income of many families. Nearly a third of those with two or

---

[36] *See, e.g.*, Pet. App. 11a-12a, 213a.

[37] Smolka, *What's at Stake for 50- to- 64-Year-Olds?*, *supra* note 2, at 2 tbl.1.

more emergency room visits or overnight hospital stays report problems paying the resulting bills.[38]

In the end, "one in four Americans (24 percent) say that paying for health care is a 'serious problem,'"[39] leaving them less able to purchase goods and services in other areas of the economy. One survey found that 22 million Americans report being unable to pay for basic necessities such as food, heat, or rent because of medical bills.[40]

Excessive medical debt also puts other businesses at financial risk. Millions of Americans have secured loans or taken on credit card debt to pay their medical bills.[41] Contributing to the current mortgage crisis, others took out first or second mortgages on their homes, precisely at the time they were least able to afford to pay the money back.[42] Unsurprisingly, in many cases, these desperate measures have resulted in personal bankruptcies.[43] One study found that medical debt caused or played a significant role in more than 62 percent of all bankruptcies in 2007, a

---

[38] Kaiser Family Foundation, *Kaiser Health Tracking Poll: Election 2008*, at 2 (Aug. 19, 2008), *available at* http://www.kff.org/kaiserpolls/upload/7808.pdf.

[39] *Id.*

[40] Collins, *Help on the Horizon*, *supra* note 9, at 12.

[41] *Id.*

[42] *Id.*

[43] *Id.* (estimating 4 million medical-debt-related bankruptcies in 2010).

nearly 50 percent increase from 2001.[44] The financial cost of those bankruptcies is borne by mortgage holders, landlords, car dealers, credit card issuers, utilities, and small businesses throughout the economy. Increases in bankruptcy likewise predictably increase the cost of credit for consumers and small businesses.[45]

II. The Uninsured and Underinsured Have A Substantial Impact On Critical Federal Spending Programs.

The failure of individuals to obtain adequate medical insurance also has profound effects on federal spending programs, particularly Medicare.

By the time they reach age 65, the uninsured and underinsured enter Medicare in worse health, requiring more costly government-financed health care than do those who were previously insured.[46] One study showed that continuously uninsured people ages

---

[44] Himmelstein, *supra* note 28, at 741.

[45] Congressional Budget Office, *Personal Bankruptcy: A Literature Review*, at vii (Sept. 2000), *available at* http://www.cbo.gov/ftpdocs/24xx/doc2421/Bankruptcy.pdf ("Losses stemming from bankruptcy . . . encourage lenders to boost their interest rates, tighten other standards and terms for lending, and reduce the availability of loans.").

[46] *See* J. Michael McWilliams et al., *Health Insurance Coverage and Mortality Among the Near-Elderly*, 23 Health Affairs 223, 227 (2004), *available at* http://content.healthaffairs.org/content/23/4/223.full.pdf+html (finding significantly higher mortality rates among the uninsured near-elderly than among the insured near-elderly).

52 to 61 were 63 percent more likely than insured people to have a decline in their overall health and 23 percent more likely to have a new physical difficulty that affected mobility such as walking or climbing stairs.[47] Even intermittently uninsured participants were at increased risk for declines in overall health and mobility.[48]

These results are unsurprising. Nearly two-thirds of uninsured adults aged 19 to 64 report that in the past year, they had cost-related problems accessing medical care – they failed to fill a prescription; did not see a specialist when needed; skipped a recommended medical test, treatment, or follow-up; or declined to visit a clinic or doctor for a medical problem.[49] Half of those with chronic conditions – such as high blood pressure, diabetes, lung disease, asthma, emphysema, or heart disease – did not fill a prescription or skipped doses of their medication because of cost.[50] Uninsured adults are also less likely than insured adults to receive preventive services or screenings, such as mammograms, pap smears, or prostate screening.[51]

---

[47] David W. Baker et al., *Lack of Health Insurance and Decline in Overall Health in Late Middle Age*, 345 New Eng. J. Med. 1106, 1108 (2001), *available at* http://www.nejm.org/doi/pdf/10.1056/NEJMsa002887.

[48] *Id.* at 1111.

[49] Collins, *Help on the Horizon*, *supra* note 9, at 13 ex.14.

[50] *Id.* at 14 ex.16.

[51] Jill Bernstein et al., Mathematica Policy Research, Inc., *How Does Insurance Coverage Improve Health Outcomes?* 1 (Apr. 2010), *available at* http://www.mathematica-mpr.com/

The financial consequences for federal programs are direct and enormous. Avoidable illness and injury increase costs for Medicaid and the Supplemental Security Income (SSI) program, which provide health services and income support to many low-income individuals with serious health problems. In addition, "[n]ear-elderly adults who were uninsured required more intensive and costlier care in the Medicare program after the age of 65 years than previously insured adults . . . ."[52] "After becoming eligible for Medicare, uninsured adults have a rapid increase in physician visits and hospitalizations that persist for at least seven years after age 65."[53]

Some of the increased cost results from the uninsured or underinsured delaying necessary medical care until they become eligible for Medicare.[54] For example, a woman from Portsmouth, Virginia explained to AARP that:

---

publications/pdfs/health/reformhealthcare_IB1.pdf; Collins, *Help on the Horizon*, *supra* note 9, at 15-17.

[52] J. Michael McWilliams et al., *Use of Health Services by Previously Uninsured Medicare Beneficiaries*, 347 New Eng. J. Med. 143, 151 (2007), *available at* http://www.nejm.org/doi/pdf/10.1056/NEJMsa067712.

[53] *Hearings*, *supra* note 26, at 50 (statement of John Z. Ayanian, MD, Prof. of Med. and Health Care Policy, Harvard Med. School).

[54] Jacobson, *supra* note 4, at 1 (citing J. Michael McWilliams et al., *Impact of Medicare Coverage on Basic Clinical Services for Previously Uninsured Adults*, 290 JAMA 757 (Aug. 2003), *available at* http://jama.ama-assn.org/content/290/6/757.full.pdf+html).

> When I turned 63 my insurer wanted to raise my rate to $934 a month, which I am solely responsible for paying. At the same time my doctor was trying to pin down a diagnosis for some hip pain I've been having. She wanted to do an MRI (cost $3000) but my insurance wouldn't cover it. She put me on a prescription drug to try and ease the pain; again the insurance company wouldn't cover it. . . . So I now pay for almost everything except limited doctor visits and my doctor is trying to control my hip pain until next year when I turn 65 and will be eligible for Medicare.[55]

For many, such delays in treatment lead to deteriorating health, the financial consequences of which are ultimately borne by Medicare.[56] This is particularly true with respect to individuals with hypertension, diabetes, heart disease, or stroke, where prevention and routine care can prevent costly acute care hospitalizations and interventions.[57] Uninsured adults with these chronic conditions report 13 percent more doctor visits, 20 percent more hospitalizations, and 51 percent higher total medical expenditures from ages 65 to 72 than previously insured adults.[58]

---

[55] Valerie D. from Portsmouth, Virginia, Statement to the AARP (Sept. 17, 2010)

[56] McWilliams, *Use of Health Services by Previously Uninsured Medicare Beneficiaries*, *supra* note 52, at 144.

[57] *See id.* at 145.

[58] *Id.* at 143.

Conversely, if more individuals had insurance coverage as they approached age 65, "the cost of covering them could be off-set by better health and potential savings for the Medicare program."[59] A study by PriceWaterhouseCoopers estimates that even taking the modest step of simply raising lifetime limits for private insurance would save Medicaid $11 billion over ten years.[60]

III. The Minimum Coverage Provision Is A Valid Exercise Of Congress's Article I Powers.

Congress has plenary authority to regulate conduct that has a substantial effect on interstate commerce,[61] to create federal spending programs to promote the general welfare,[62] and to impose taxes to pay for those programs.[63] Moreover, Congress retains the power to enact all legislation necessary and proper to implement its enumerated powers,[64] including the authority to regulate individual conduct that interferes with the operation of a comprehensive

---

[59] *Hearings*, *supra* note 27, at 50 (statement of Dr. John Z. Ayanian).

[60] *See* PriceWaterhouseCoopers, *Impact of Lifetime Limits: Prepared for National Hemophilia Foundation* 5 (Mar. 2009), *available at* http://www.hemophilia.org/docs/LifetimeLimitsReport.pdf.

[61] U.S. Const. art. I, § 8, cl. 3; *see also Gonzalez v. Raich*, 545 U.S. 1, 17 (2005).

[62] U.S. Const. art. I, § 8, cl. 1.

[63] *Id.*

[64] U.S. Const. art. I, § 8, cl. 18.

regulatory scheme that, considered as a whole, falls within Congress's authority.[65] While there can be legitimate debate whether the minimum coverage provision is fair or good policy, there is no basis for the court of appeals' conclusion that the Constitution takes the question out of the hands of the people's representatives.

A. Congress Reasonably Determined That Encouraging All Americans To Obtain Health Insurance Was Necessary To Make Feasible Other Measures That Removed Barriers To Americans' Access To Health Care Coverage.

There is no dispute that the health care crisis in our country is a proper subject of federal legislation. As described above and elsewhere, the rising cost of medical care and the inability to obtain adequate health insurance is a quintessentially national economic problem with profound effects on some of the largest and most important federal spending programs and tax expenditures. The minimum coverage provision held unconstitutional by the court of appeals is a necessary and proper component of a comprehensive solution to an intractable national problem.

---

[65] *See, e.g.*, *Raich*, 535 U.S. at 17-18 (discussing Commerce Power and *Wickard v. Filburn*, 317 U.S. 111 (1942)); *Sabri v. United States*, 541 U.S. 600, 605 (2004) (Spending Power).

Individuals' failure to obtain health insurance, either from choice or unaffordability, is both a consequence and a cause of the present dysfunctional healthcare system. Congress rightly determined that it could not feasibly provide all Americans the opportunity to obtain affordable insurance unless it also encouraged them, through tax incentives, to participate in the insurance pool. Critical measures addressing the most significant impediments to health insurance for Americans aged 50 to 64 – including provisions barring insurers from denying coverage because of pre-existing conditions or considering health status in setting premiums,[66] and reducing allowable age-rating disparities[67] – would increase rates and make coverage unaffordable for many if not offset by an expansion of the insurance risk pool accomplished by the minimum coverage provision.[68]

In addition to the minimum coverage provision, Congress' goal of ensuring health insurance coverage for 95 percent of Americans by 2016 is facilitated by providing subsidies through tax credits to individuals who have difficulty affording insurance,[69] and expanding Medicaid coverage, almost entirely at

---

[66] 42 U.S.C.A. §§ 300gg, 300gg-1(a).

[67] *Id.* § 300gg(a)(1)(A)(iii).

[68] *See* 42 U.S.C.A. § 18091(a)(2)(A); *see also, e.g.*, Jonathan Gruber, Ctr. for Am. Progress, *Health Care Reform Without the Individual Mandate* 2 (Feb. 2011), *available at* http://www.americanprogress.org/issues/2011/02/pdf/gruber_mandate.pdf.

[69] 26 U.S.C.A. § 36B(a)-(c).

federal expense.[70] By raising the income threshold, and extending eligibility to low-income adults with no dependent children, the Medicaid expansion is expected to make health coverage available to an estimated 3.3 million Americans aged 50 to 64 who currently have no insurance.[71]

B. Congress May Constitutionally Impose A Tax On Those Who Voluntarily Forego Health Insurance And, As A Consequence, Predictably Impose Greater Costs On Federal Spending Programs.

Congress's imposition of a tax on those who nonetheless forgo health insurance is neither unprecedented nor beyond its power. The federal government has long operated programs that spread common costs or risks to the public at large, financed through general, mandatory taxes. Medicare and Social Security are two examples. Other federal programs – including those that provide unemployment insurance, disability benefits, disaster relief, and drought assistance – similarly provide a form of public insurance that is financed through federal taxes we all must pay simply as a consequence of our residency in this country. No one questions Congress's authority to enact such programs under the

---

[70] 42 U.S.C.A. §§ 1396a(a)(10)(A)(i)(VIII), 1396d(y)(1).

[71] Collins, *Realizing Health Reform's Potential*, *supra* note 13, at 12.

Spending Clause or to pay for them through its Taxing Power.

At the same time, Congress routinely, and justifiably, adjusts fees and taxes in light of the benefits a class of taxpayers receives and the class's responsibility for the cost of federal programs. Congress imposes a tax on cigarettes that both reflect the costs smoking imposes on federal programs like Medicare, and discourages behavior to reduce those costs.

The minimum coverage provision is no different. Those who forgo medical insurance are not penalized for "inactivity." They are instead required to bear some measure of the financial cost they will inevitably impose on others, including taxpayers, when they obtain medical care at government expense under Medicare or Medicaid or at the expense of a great many others if they ultimately require medical services for which they cannot pay.

In reality, all Americans benefit from federal healthcare programs and subsidies that bear the cost of medical care for many of the uninsured, as well as the general legal and moral mandate that no one should be denied critical medical care because of inability to pay. The voluntarily uninsured engage in all manner of conduct – including quintessential interstate economic activity – that risks injury or disease.[72] Even if not immediately realized, that risk

---

[72] *See, e.g.*, U.S. Bureau of Labor Statistics, *Fatal Occupational Injuries and Nonfatal Occupational Injuries and*

is properly seen as having a real and present cost. And the assurance of the future availability of medical care should those inherently risky activities lead to injury or illness is a present benefit.[73]

Congress is not constitutionally obligated to turn a blind eye to the fact that if these risks are not insured, much of their costs inevitably will be borne by taxpayers and the broader economy. That is the same rational economic insight that leads landlords to demand security deposits, homeowners to seek bonded plumbers, and legislatures to require drivers, lawyers, and business owners to carry liability insurance. To be sure, one often can avoid those requirements by declining to engage in certain conduct. But the fact that there is ultimately no way to avoid the risks insured by medical coverage does not change the facts that the risk exists, is costly, and if not insured will all too often end up being paid for by someone else.

Of course, though the number is extremely small, there may be some people who would prefer not to purchase insurance *and* will never, in fact, rely on a

---

Illnesses, 2008, at Chart 15, *available at* http://www.bls.gov/iif/oshwc/osh/os/oshs2008_15.pdf (reporting 3.7 million private sector work-related injuries and illnesses in 2008); U.S. Nat'l Highway Traffic Safety Admin., *Trends in Non-Fatal Traffic Injuries: 1996- 2005*, at 5 (May 2008), *available at* http://www-nrd.nhtsa.dot.gov/Pubs/810944.pdf (estimating more than 2.5 million injuries from traffic accidents in 2005).

[73] *Cf. Lorance & AT&T Tech., Inc.*, 490 U.S. 900, 907 n.3 (1989) (recognizing that insurance policy has present value even if harm it insures against has not yet occurred).

government program or default on a medical bill. But Congress may exercise its Article I power categorically.[74] A smoker is required to pay the cigarette tax whether he personally contributes to increased national health care costs or not. And the Government may require even very careful airlines to carry insurance.[75] Similarly, those who may not anticipate receiving disaster relief, Social Security, Medicaid, or Medicare must still pay taxes that help support those programs.

That Congress has given individuals the choice of avoiding the tax by obtaining insurance that reduces the need for federal expenditures is a virtue, not a vice. Congress rejected proposals that would have established a national medical insurance program, under which all Americans could be required to contribute to its upkeep through general taxes. Congress chose instead to build upon the nation's private system of insurance, affording individuals greater choice.

* * * * *

The minimum coverage provision has been a topic of sustained public attention and political debate. That is as it should be. The Constitution properly leaves the politically accountable branches broad leeway to address complex national problems. It is the role of the people, not the courts, to decide whether Congress has struck the right balance in this case.

---

[74] *See, e.g.*, *Raich*, 545 U.S. at 17.

[75] *See* 14 C.F.R. §§ 205.1-205.5.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Thomas C. Goldstein
Counsel of Record
Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, D.C. 20015
(202) 362-0636
tg@goldsteinrussell.com

Stuart R. Cohen
Stacy Canan
AARP FOUNDATION LITIGATION

Michael Schuster
AARP

601 E Street, NW
Washington, DC 20049

December 22, 2011

AMICUS CURIAE BRIEF

No. 11-398

In The

Supreme Court Of The United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE ADVOCACY FOR PATIENTS WITH CHRONIC ILLNESS, INC. IN SUPPORT OF PETITIONERS

MICHAEL D. LIEDER
Sprenger & Lang, PLLC
1400 Eye Street, N.W.
Suite 500
Washington, DC 20005
MLieder@sprengerlang.com
(202) 772-1159

JENNIFER C. JAFF
Counsel of Record
Nicole Netkin-Collins
Advocacy for Patients with Chronic Illness, Inc.
195 Farmington Ave.
Suite 306
Farmington, CT 06032
Patient_advocate@sbcglobal.net
(860) 674-1370

QUESTION PRESENTED

Beginning in 2014, the minimum coverage provision of the Patient Protection and Affordable Care Act, Pub.L. No. 111-148, 124 Stat. 119, amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, will require non-exempted individuals to maintain a minimum level of health insurance or pay a tax penalty. 26 U.S.C. § 5000A. The question presented is whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision.

Other questions before the Court are not addressed in this brief.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 4

I. CONGRESS ACTED WITHIN ITS "COMMERCE CLAUSE" POWERS TO ADDRESS THE LACK OF ADEQUATE COVERAGE FOR PERSONS WITH PREEXISTING CONDITIONS 4

II. CONGRESS ACTED WITHIN ITS POWERS UNDER THE "NECESSARY AND PROPER" CLAUSE IN ADOPTING THE MINIMUM COVERAGE REQUIREMENT 11

CONCLUSION 15

TABLE OF AUTHORITIES

Constitutional Provisions

U.S. Const. Art. I, Sec. 8, Clause 18.....2, 12

U.S. Const. Art. I, Sec. 8, Clause 3.....1, 10

Cases

Barnett V. Revere Smelting & Refining Corp., 67 F.Supp.2d 378 (S.D.N.Y. 1999).....13

Gonzales v. Raich, 545 U.S. 1 (2005) 13

Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 217-20 (1979).....10

Mescall v. Marra, 49 F.Supp.2d 365 (S.D.N.Y. 1999) 13

Robertson v. Amtrak/Nat'l R.R. Passenger Corp., 400 F. Supp. 2d 612 (S.D.N.Y. 2005).....13

Sabri v. United States, 541 U.S. 600 (2004) 13

Tyndall v. Nat'l Educ. Centers, Inc. of California, 31 F.3d 209 (4th Cir. 1994).....14

United States v. Comstock, 130 S. Ct. 1949 (2010).....13

United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).....10

Statutes

26 U.S.C.A § 5000A 2, 4

26 U.S.C.A. § 36B 2, 4, 12

29 U.S.C. §§ 1161-68 10

29 U.S.C.A. § 1181(a) 6

29 U.S.C.A. § 1181(c)(2)(A) 6

42 U.S.C.A. § 12010, *et seq.* 3

42 U.S.C.A. § 18022 10

42 U.S.C.A. § 18031 10

42 U.S.C.A. § 18091(a)(2)(I) 12

42 U.S.C.A. § 300gg 12

42 U.S.C.A. § 300gg-1(a) 1, 4, 9

42 U.S.C.A. § 300gg-3(a) 4, 9

42 U.S.C.A. § 300gg-41(b) 6

42 U.S.C.A. § 300gg-41(c) 6

Pub. L. 104-191, 110 Stat. 1936 10

Pub. L. 99-272, 100 Stat. 227 10

N.C. Gen. Stat. § 58-50-210 6

36 Okl. Stat. Ann. § 6534.B.3 6

Tex. Ins. Code Ann. § 1506.155 6

Other Authorities

Families USA Foundation, *Health Reform: Help for Americans with Pre-Existing Conditions* at 2 (May 2010) 4, 7

Georgetown University Health Policy Institute Consumer Guides 6

A. Hartocollis, "New York Offers Costly Lessons on Insurance," *New York Times* (April 17, 2010) 11

D. U. Himmelstein, et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, The American Journal of Medicine (2009) 7

J. Jaff, et al., "Living With Chronic Illness: A Prescription for Advocacy," (Advocacy for Patients with Chronic Illness 2011) 8

H. A. Waxman and B. Stupak, Memorandum: Coverage Denials for Pre-Existing Conditions in the Individual Health Insurance Market, U.S. House of Representatives, Committee on Energy and Commerce *(October 12, 2010)* 5

STATEMENT OF INTEREST

Amicus Advocacy for Patients with Chronic Illness, Inc. is a tax exempt organization that provides free information, advice and advocacy services to patients with chronic illnesses nationwide, in areas including health insurance. By definition, all of our clients have pre-existing conditions. The minimum coverage provision is necessary in order to extend affordable insurance to people with pre-existing conditions who, currently, often are unable to obtain individual insurance of any kind for any amount of money. Because we believe that the conversion of the insurance market to a universal guaranteed issue model is perhaps the most important legal advance to benefit people with largely invisible chronic illnesses, we strongly support the minimum coverage provision, and, thus, the Petitioners' position in this case.

SUMMARY OF THE ARGUMENT

The Patient Protection and Affordable Care Act (the Act) will end insurers' heretofore legal discrimination against people with pre-existing conditions by prohibiting them from refusing coverage due to a pre-existing health condition. 42 U.S.C.A. § 300gg-1(a). This is necessary to ensure that health insurance is available to all Americans – clearly a valid exercise of Congress's Commerce powers. U.S. Const. Art. I, Sec. 8, Clause 3.

The unavailability of insurance coverage of people with pre-existing conditions is a tremendous problem in America – the young man living in a motel in rural Idaho after losing his business, his house, even his car, just to pay for health care that might allow him to survive; the entrepreneur afraid to start her own business because she cannot get health insurance for any amount of money; the father with hepatitis C who is wasting away, desperately trying to remain employed to provide for his young child. Congress has the authority under the Commerce Clause to address this injustice by requiring insurers to cover people with pre-existing conditions.

However, in order to achieve this legitimate goal, Congress also had to create the minimum coverage provision, 26 U.S.C.A § 5000A, to ensure that healthy people would be part of the insurance "pool" so as to control the costs of health insurance; and to provide for affordability through community-rating and advance payment tax credits. 42 U.S.C.A. § 300gg; 26 U.S.C.A. § 36B. Because Congress had authority under the Commerce Clause to require coverage of people with pre-existing conditions, these additional provisions, including the minimum coverage provision, were valid Congressional actions under the Necessary and Proper Clause. U.S. Const. Art. I, Sec. 8, Clause 18.

Requiring insurance coverage of people with pre-existing conditions arguably does more to advance the cause of people with largely invisible chronic illnesses than any other law, including the Americans with Disabilities Act. 42 U.S.C § 12010,

et seq. Some of us who are disabled will regain our health and our ability to contribute to society by working and earning our way. Others of us will be rid of unimaginable suffering and fear. Nothing Congress is empowered to do would provide more critical legal protection to people with pre-existing conditions, including chronic illnesses.

Universal guaranteed issue, community-rated insurance is the promise of equal access to health insurance and, thus, health care for the chronically ill. Taking away this promise, to be fulfilled on January 1, 2014, cannot and should not be justified by a construction of the Commerce Clause that does not fully appreciate that the underlying goal of the statutory scheme was to cover the uninsured and, in particular, those with pre-existing conditions. This is life and death for us; it is nowhere near as important for those who complain about having to purchase insurance that will, without doubt, become valuable to them at some point in their lives. The relative weight of these competing interests clearly favors a finding that the minimum coverage provision is constitutional.

We strongly urge the Court to consider the effect of its decision on the millions of Americans with pre-existing conditions whose lives will be touched, one way or another, by the judgment in this case.

ARGUMENT

I. CONGRESS ACTED WITHIN ITS "COMMERCE CLAUSE" POWERS TO ADDRESS THE LACK OF ADEQUATE COVERAGE FOR PERSONS WITH PREEXISTING CONDITIONS

The Patient Protection and Affordable Care Act (the Act), has, at its core, a three-legged stool comprised of the guaranteed issue provision, 42 U.S.C.A. § 300gg-1(a), 300gg-3(a); the minimum coverage provision, 26 U.S.C.A § 5000A; and affordability provisions including the community rating provision, 42 U.S.C.A. § 300gg, and advanced payment tax credits. 26 U.S.C.A. § 36B. This statutory scheme is intended to make insurance available and affordable for the millions of Americans who are uninsured.

The guaranteed issue provision directly addresses the needs of persons with preexisting conditions, in particular. Approximately 57.2 million, 22.4 percent, of all Americans under the age of 65 have a pre-existing condition that could lead to a denial of coverage. Families USA Foundation, *Health Reform: Help for Americans with Pre-Existing Conditions* at 2 (May 2010) (visited November 22, 2011) <http://www.familiesusa.org/assets/pdfs/health-reform/pre-existing-conditions.pdf.> (hereinafter "Families USA"). Every income group and every racial and ethnic group are included in these numbers. *Id.* at 4, 5.

Private insurers regularly and ever more increasingly deny coverage to persons with preexisting conditions, as one Congressional study found:

> *From 2007 through 2009, the four largest for-profit health insurance companies, Aetna, Humana, UnitedHealth Group, and WellPoint, refused to issue health insurance coverage to more than 651,000 people based on their prior medical history.* On average, the four companies denied coverage to one out of every seven applicants based on a pre-existing condition.
>
> . . . .
>
> *From 2007 through 2009, the number of people denied coverage for pre-existing conditions increased at a rapid rate.* The number of individuals denied coverage by Aetna, Humana, UnitedHealth Group, and WellPoint increased from 172,400 in 2007 to 257,100 in 2009, an increase of 49%. During the same period, applications for enrollment increased by only 16%.

H. A. Waxman and B. Stupak, *Memorandum: Coverage Denials for Pre-Existing Conditions in the Individual Health Insurance Market,* U.S. House of Representatives, Committee on Energy and Commerce (October 12, 2010) (emphases in original)

(visited Nov. 23, 2011) <http://democrats.energycommerce.house.gov/Press_111/20101012/Memo.Pre-Existing.Condition.Denials.Individual.Market.2010.10.12.pdf>.

Currently, people with pre-existing conditions cannot obtain insurance unless they meet hyper-technical rules that render them "HIPAA eligible," which means that they are entitled to purchase one of two guaranteed issue options offered in their state.[1] If they fail to meet those requirements, they are shut out of the individual health insurance market entirely; and even under group plans, they must wait as long as twelve months to obtain coverage of their pre-existing conditions. 29 U.S.C.A. § 1181(a)(twelve month waiting period for group plans); 36 Okl. Stat. Ann. § 6534.B.3 (twelve month waiting period for individual high risk pool coverage of pre-existing conditions); Tex. Ins. Code Ann. § 1506.155 (twelve month waiting period for individual high risk pool coverage or pre-existing conditions); N.C. Gen. Stat. § 58-50-210 (twelve

---

[1] To be HIPAA eligible, an individual must have had at least eighteen months of creditable coverage, the last day of which must be in a group health insurance plan; they must have exhausted their COBRA (if any); and they must not have had a break in coverage of sixty-three days or more. 42 U.S.C.A. § 300gg-41(b); 29 U.S.C.A. § 1181(c)(2)(A). Each state is required to designate two guaranteed issue options, unless the state has established a "high risk pool," which then becomes the guaranteed issue option for HIPAA eligibles. 42 U.S.C.A. § 300gg-41(c). A HIPAA eligible individual may purchase one of these two guaranteed issue options or join the state's high risk pool without the waiting period that applies to non-HIPAA eligibles. *See* Georgetown University Health Policy Institute Consumer Guides for each state's option(s) for HIPAA eligibles. (visited Dec. 3, 2011) <http://www.healthinsuranceinfo.net/> .

month waiting period for individual high risk pool coverage of pre-existing conditions). This not only has driven millions of people into "medical bankruptcy," D. U. Himmelstein, et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, The American Journal of Medicine (2009) (*visited Nov.28, 2011*) <http://www.pnhp.org/new_bankruptcy_study/Bankruptcy-2009.pdf>, but it also leaves people with pre-existing conditions – by definition, people who need health care – without the care they need to remain productive and even alive.

Uninsured adults are six times more likely than those with private insurance to go without needed healthcare due to its cost, and seven times more likely than insured adults to have gone without preventive care in the last year. Families USA, *supra*, at 10. Uninsured adults with chronic conditions are particularly at risk. Among uninsured adults with chronic conditions, nearly one-third went without needed medical care; approximately 59 percent delayed care; and 60 percent did not fill a prescription due to cost. *Id.*

Although we counsel patients with chronic illnesses in many areas of law and insurance – from health and disability insurance coverage appeals to employment, school, and housing issues – more than fifteen and one-half percent of Advocacy for Patients with Chronic Illness's caseload consists of people with pre-existing conditions who simply cannot find health insurance. Thirty-five percent of the calls we receive about the inability to access health insurance center on affordability. For a patient with Crohn's

disease, gastroparesis, high blood pressure, and asthma, for example,[2] going without medication for a six to twelve month waiting period (if they are not HIPAA eligible) is unthinkable; indeed, it may result in hospitalization or even death.

These are not just numbers; they are people. In November 2011 alone, we heard from a woman with hepatitis C and cirrhosis of the liver who was laid off from her job of fourteen years. Her insurance was terminated coincident with the termination of her employment, as is the norm. She had to get her weekly injection of interferon, but she had not yet received her COBRA notice and hence was not HIPAA eligible, and she had no way to cover the cost of this injection; the provider would not treat her without active insurance. We spoke with a woman with a genetic illness that affects her blood's clotting who has been unemployed for two years, and although she exhausted her COBRA benefits, she cannot afford her state's guaranteed issue option, which would cost more than $1000 per month, and is no longer HIPAA eligible. She was rejected by Medicaid for having $30 too much in her bank account. A young man called because the local county hospital told him that he probably has Crohn's disease, but he could not receive a definitive

---

[2]It is quite common for people with chronic illnesses to have more than one illness. J. Jaff, et al., "Living With Chronic Illness: A Prescription for Advocacy," (Advocacy for Patients with Chronic Illness 2011)<http:// www.advocacy for patients .org/pdf/Living-with-Chronic-Illness-paper.pdf> (in a survey of 1513 patients with chronic illnesses, sixty-two percent reported that they have more than one chronic illness; forty percent had between two and four chronic illnesses; and twenty-two percent had more than five chronic illnesses).

diagnosis – and, thus, treatment – without a colonoscopy, which he cannot afford. We heard from a woman with reflex sympathetic dystrophy (also known as complex regional pain syndrome) who was diagnosed after her insurance went into effect, but the insurer took the position that she had to wait a full year before any services for her pre-existing condition would be covered. Another woman wrote for her friend whose husband lost his job and, thus, his insurance; her friend has lupus and cannot afford any health care, without which she will die.

This is a small sample of what we hear, day in and day out, from all over the United States. People with pre-existing conditions who do not have insurance are desperate. Although we direct them to prescription drug patient assistance programs, which provide free or discounted medications; federally qualified health centers, which provide free or discounted primary health care; and not-for-profit hospitals, where they may receive "charity care," there is no way to get blood drawn or have a CT scan or undergo surgery when you do not have insurance.

Congress addressed the lack of coverage for persons with pre-existing conditions, including chronic illnesses, primarily through the guaranteed issue provision, scheduled to take effect January 1, 2014. 42 U.S.C.A. § 300gg-1(a), 300gg-3(a). This provision would require insurers to extend insurance coverage to people with pre-existing conditions.[3]

---

[3] For the period prior to January 1, 2014, the Act creates a federal guaranteed issue option, but there is a six month waiting period for coverage under this Pre-existing Condition Insurance Plan. 42 U.S.C.A. § 18001(d)(2).

This requirement that insurance companies cover people with pre-existing conditions constitutes a regulation of the business of insurance. Although states historically have been the primary regulators of the business of insurance, Congress indisputably has the power under the Commerce Clause to regulate the insurance industry. U.S. Const. Art. I, Sec. 8, Clause 3. *See generally Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 217-20 (1979) (discussing *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) and passage of the McCarran-Ferguson Act). Indeed, Congress repeatedly has regulated the health insurance industry, such as through the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 42 U.S.C.), and the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), Pub. L. 99-272, 100 Stat. 227 (codified as amended at 29 U.S.C. §§ 1161-68), and has regulated the industry again in the Act by various provisions not challenged by any party as exceeding the scope of the Commerce Clause. *See, e.g.*, 42 U.S.C.A. § 18031 (requiring states to create health insurance exchanges); 42 U.S.C.A. § 18022 (requiring the Secretary of the Department of Health and Human Services to define an essential benefits package that all insurance sold on an exchange must include).

Thus, Congress acted within its Commerce Clause powers to meet the glaring need for health insurance coverage for people with pre-existing conditions, including people with chronic illnesses.

II. CONGRESS ACTED WITHIN ITS POWERS UNDER THE "NECESSARY AND PROPER" CLAUSE IN ADOPTING THE MINIMUM COVERAGE REQUIREMENT

Requiring coverage of people with pre-existing conditions would not in itself achieve the goal of covering the uninsured because adding only people with pre-existing conditions to the health care "pool" would drive up the cost of insurance to unaffordable levels, and drive healthy people out of the pool when they realize they are subsidizing the ill. For example, beginning in 1973, New York required insurers to cover people with pre-existing conditions and, as a result, premiums increased and healthy people dropped out of the plans, leaving only people with "high health care needs," which led to "skyrocket[ing]" premiums. A. Hartocollis, "New York Offers Costly Lessons on Insurance," *New York Times* (April 17, 2010) (visited November 28, 2011) <http://www.nytimes.com/2010/04/18/nyregion/18insure.html?scp=2&sq=preexisting+conditions&st=nyt>. In order to spread the cost of covering people with pre-existing conditions, healthy people also must be included in the "pool" without the option of opting out, and, thus, minimum coverage must be required of all Americans.[4] Otherwise, not only would people with pre-existing conditions drive up the cost of insurance, but "many individuals [would]

[4]There are, of course, other excellent reasons to require everybody to purchase insurance, memorialized in Congressional findings and explained in detail in Petitioners' brief. *See, e.g.*, 42 U.S.C.A. § 18091(a)(2)(I).

wait to purchase health insurance until they needed care." 42 U.S.C.A. § 18091(a)(2)(I).

Thus, Congress built the second leg of the stool: the minimum coverage requirement. It found that the requirement is "essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." 42 U.S.C.A. § 18091(a)(2)(I).

Finally, Congress had to construct the third leg. If Congress is to require Americans to buy insurance that many find unaffordable, there must be mechanisms to ensure that they can afford the insurance they are required to buy. Thus, Congress created the affordability provisions: the community rating provision, 42 U.S.C.A. § 300gg; and advanced payment tax credits that work as a subsidy to assist low-income individuals and families to purchase insurance. 26 U.S.C.A. § 36B.

Without the minimum coverage provision, the stool could not stand. And stand it must if people with largely invisible chronic illnesses are to be able to purchase and afford health insurance.

Because the minimum coverage provision is necessary to the requirement that insurers offer coverage of pre-existing conditions, its adoption was within Congress's power under the Necessary and Proper Clause. U.S. Const. Art. 1, Sec. 8, Clause 18. That clause "grants Congress the legislative authority to enact a . . . statute . . . that is rationally

related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (citing *Sabri v. United States*, 541 U.S. 600, 605 (2004)). The Necessary and Proper Clause extends to statutes adopted to regulate commerce under the Commerce Clause. *See Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (holding that because "Congress had a rational basis" for concluding that a statute implements Commerce Clause power, the statute falls within the scope of congressional "authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce . . . among the several States' " (ellipsis in original)).

Indeed, even if the test were not "rational[ ] relat[ionship]," but a balancing test, the adoption of the minimum coverage provision would be appropriate under the Necessary and Proper Clause. For people with largely invisible chronic illnesses, the guaranteed issue provision is the most important legal protection to be enacted – ever. It is more important than the Americans with Disabilities Act, which, for the most part, does not protect people who are too sick to work on a regular basis.[5] Indeed,

---

[5] The ADA provides protection only if one is able to perform the "essential functions" of one's job, and the courts have held that attendance is an "essential function," so people with chronic illnesses often are fired for disability-based absenteeism. *Robertson v. Amtrak/Nat'l R.R. Passenger Corp.*, 400 F. Supp. 2d 612, 627 (S.D.N.Y. 2005) (holding an employee who is excessively absent is not performing the essential functions of his job); *Barnett V. Revere Smelting & Refining Corp.*, 67 F.Supp.2d 378, 392 (S.D.N.Y. 1999) (except in the unusual case in which an employee effectively can perform all work-related duties at home, an employee who doesn't come to work cannot perform any of his job functions, essential or otherwise); *Mescall v. Marra*, 49 F.Supp.2d 365, 374 (S.D.N.Y. 1999)

universal guaranteed issue insurance will allow people afflicted by chronic illness to stay employed, get off disability – live. For the first time, people with chronic illnesses will have equal access to insurance, which, in turn, will provide them with the ability to obtain the care they need.

Obviously, the minimum coverage provision places a burden on people to pay for insurance, even with the affordability provisions. But that burden consists only of the obligation to purchase insurance that will, without doubt, become valuable to the purchasers at some point in their lives. That burden is far less weighty than the life or death issue that coverage for pre-existing conditions is for us with chronic illnesses. No Respondent in this case has a stronger countervailing interest.[6]

(absenteeism is permissible motive for adverse employment decision); *Tyndall v. Nat'l Educ. Centers, Inc. of California*, 31 F.3d 209, 213 (4th Cir. 1994) ("in addition to possessing the skills necessary to perform the job in question, an employee must be willing and able to demonstrate those skills by coming to work on a regular basis.").

[6] We also agree with Petitioners that Congress also had the power to adopt the minimum coverage provision under the Commerce Clause, but believe that the power to adopt the provision under the Necessary and Proper Clause is at least equally certain.

CONCLUSION

For all of these reasons, the decision of the United States Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

Jennifer C. Jaff
Counsel of Record
Nicole Netkin-Collins
Advocacy for Patients with
Chronic Illness, Inc.
195 Farmington Avenue
Suite 306
Farmington, CT 06032
Patient_advocate@sbcglobal.net
(860) 674-1370

Michael D. Lieder
Sprenger& Lang, PLLC
1400 Eye Street, N.W.
Suite 500
Washington, DC 20005
MLieder@sprengerlang.com
(202) 772-1159

December 9, 2011

AMICUS CURIAE BRIEF

Nos. 11-393, 11-398, and 11-400

In The Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, *ET AL.*,

Petitioners,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH & HUMAN SERVICES, *ET AL.*

DEPARTMENT OF HEALTH & HUMAN SERVICES, *ET AL.*,

Petitioners,

v.

FLORIDA, *ET AL.*

FLORIDA, *ET AL.*,

Petitioners,

v.

DEPARTMENT OF HEALTH & HUMAN SERVICES, *ET AL.*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMERICA'S HEALTH INSURANCE PLANS AS *AMICUS CURIAE* IN PARTIAL SUPPORT OF CERTIORARI REVIEW

JOSEPH MILLER
JULIE SIMON MILLER
AMERICA'S HEALTH INSURANCE PLANS
601 Pennsylvania Avenue, N.W.
South Building, Suite 500
Washington, DC 20004
(202) 778-3200

PATRICIA A. MILLETT
Counsel of Record
KEVIN R. AMER
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., N.W
Washington, DC 20036
(202) 887-4000
pmillett@akingump.com

QUESTIONS PRESENTED

Amicus curiae, America's Health Insurance Plans, submits this brief in support of this Court's review of the following questions:

I. Whether Congress had the legislative power under Article I of the Constitution to enact the minimum individual insurance coverage mandate, 26 U.S.C. § 5000A, of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. [This is Question I in No. 11-398 and is Question III in No. 11-400.]

II. Whether, if the minimum individual insurance coverage mandate exceeds congressional power, the mandate is severable in whole or in part from the balance of the Act. [This is the only Question Presented in No. 11-393 and is Question III in No. 11-400.]

TABLE OF CONTENTS

QUESTIONS PRESENTED i

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. A DEFINITIVE RULING BY THIS COURT IS URGENTLY NEEDED BECAUSE HEALTH PLANS ARE REQUIRED TO TAKE COMPLIANCE MEASURES AMID DEEP UNCERTAINTY ABOUT THE CONSTITUTIONALITY OF THE INDIVIDUAL MANDATE 5

II. THE COURT SHOULD OBTAIN BRIEFING ON AND, IF NECESSARY, CONCLUSIVELY RESOLVE THE QUESTION OF SEVERABILITY 10

A. The Severability Question Has Produced Sharply Different Court Rulings 11

B. Severability Analysis Must Be Undertaken Against the Backdrop, Well Known to Congress, of Prior, Failed Legislative Efforts to Enforce Market Reforms Without an Individual Mandate 15

1. ACA's Market Reforms Require an Individual Mandate to Prevent Economically Unviable Adverse Selection and Cost-Shifting 15

2. Congress Was Aware That States' Efforts To Implement Similar Market Reforms Without an Individual Mandate Had Largely Failed 19

C. Severability Is a Question of Surpassing Importance and Its Prompt Resolution Is of Paramount Importance to the Health Care Industry 23

CONCLUSION 25

TABLE OF AUTHORITIES

Cases:

Aetna Health Inc. v. Davila,
542 U.S. 200 (2004) 2

Alaska Airlines, Inc. v. Brock,
480 U.S. 678 (1987) 11, 13, 15

Goudy-Bachman v. United States Department of Health & Human Services, No. 1:10-CV-763 — F. Supp. 2d —, 2011 WL 4072875 (M.D. Pa. Sept. 13, 2011) 12

Health Care Service Corp. v. Pollitt, cert. granted, 130 S. Ct. 396 (2009) (No. 09-38), *cert. dismissed*, 130 S. Ct. 1574 (2010) 2

Metropolitan Life Ins. Co. v. Glenn,
554 U.S. 105 (2008) 2

Pollock v. Farmers' Loan & Trust Co.,
158 U.S. 601 (1895) 13, 23

Randall v. Sorrell,
548 U.S. 230 (2006) 13

United States v. Booker,
543 U.S. 220 (2005) 13, 14

Virginia ex rel. Cuccinelli v. Sebelius,
728 F. Supp. 2d 768 (E.D. Va. 2010) 12

Statutes:

26 U.S.C.
§ 4980H(a) 9
§ 5000A i
§ 6056 9

29 U.S.C. § 218a 9

42 U.S.C.
§ 300gg 17
§ 300gg(a)(1)(A) 7
§ 300gg–1 ..... 7, 17
§ 300gg–2 ..... 7, 17
§ 300gg–3 ..... 7, 17
§ 300gg–4 17
§ 300gg–7 17
§ 300gg–11(a)(1)(A) 6
§ 300gg–14(a) 6
§ 300gg–18(b) 7
§ 300gg–94(a)(1) 7
§ 18031 9
§ 18091(a)(2)(I) 14, 22

Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 ..... i, 2

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ..... i, 2

Other Authorities:

Blumberg, Linda & John Holahan, *Do Individual Mandates Matter? Timely Analysis of Immediate Health Policy Issues* (Jan. 2008), *available at* http://www.urban.org/uploadedpdf/411603_individual_mandates.pdf 16

Congressional Budget Office, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* (June 16, 2010) 19

Feldvebel, Alexander K. & David Sky, *A Regulator's Perspective on Other States' Experiences*, 25 J. Health Politics, Policy & Law 197 (2000) 22

Gorman, B., *et al.*, *Reform Options for Maine's Individual Health Insurance Market: An Analysis Prepared for the Bureau of Insurance* (May 30, 2007), *available at* http://www.maine.gov/pfr/legislative/documents/ReformOptionsIndHealth2007.pdf 20

Hall, Mark A., *An Evaluation of New York's Reform Law*, 25 J. Health Politics, Policy & Law 71 (2000) 22

Henry J. Kaiser Family Foundation, Health Reform Source, http://healthreform.kff.org/the-states.aspx. 9

Henry J. Kaiser Family Foundation, *The Uninsured, A Primer: Key Facts About Americans Without Health Insurance* (Dec. 2010), *available at* http://www.kff.org/uninsured/upload/7451-06.pdf 15

Herring, Bradley, *An Economic Perspective on the Individual Mandate's Severability from the ACA*, New Eng. J. Med. (Mar. 10, 2011), *available at* http://www.nejm.org/doi/full/10.1056/NEJMpv1101519 19

Kirk, Adele M., *Riding the Bull: Experience With Individual Market Reform in Washington, Kentucky, and Massachusetts*, 25 J. Health Politics, Policy & Law 133 (2000) 21, 22

Linehan, Kathryn, *Underwriting in the Non-Group Health Insurance Market: The Fundamentals* (June 4, 2009), *available at* http://www.nhpf.org/library/background-papers/BP69_UnderwritingNonGroup_06-04-09.pdf 16, 17

Maine Bureau of Insurance, *White Paper: Maine's Individual Health Insurance Market* (Jan. 22, 2001), *available at* http://www.maine.gov/pfr/legislative/documents/indiv_health_2001.pdf 20

Monheit, Alan C., *et al.*, *Community Rating and Sustainable Individual Health Insurance Markets in N.J.*, 23 Health Affairs 167 (2004) ... 18, 21

N.M. Senate Executive Message No. 53 (Apr. 8, 2011), *available at* http://www.governor.state.nm.us/uploads/FileLinks/1ea65343013a47f9a948cb019fc237b5/SenateExecutiveMessage53.pdf 10

Reinhardt, Uwe E., *The Case for Mandating Health Insurance*, N.Y. Times, Oct. 23, 2009 19

Robert Wood Johnson Foundation, *Issue Brief: Recognizing Destabilization in the Individual Health Insurance Market* (July 2010), *available at* http://www.hcfo.org/files/hcfo/HCFO%20Policy%20Brief%20July%202010.pdf 22

Schulte, Grant, *Heineman: Nebraska will wait for health care ruling*, Associated Press, Oct. 3, 2011, *available at* http://www.businessweek.com/ap/financialnews/D9Q52MF00.htm 9

Sky, David, *High Risk Pool Alternatives: A Case Study of New Hampshire's Individual Health Insurance Market Reforms*, 16 J. Ins. Reg. 399 (Summer 1998) 23

Stark, Roger, *Overview of the Individual Health Insurance Market in Washington State* (Jan. 2011), *available at* http://www.washingtonpolicy.org/sites/default/files/Individual-Health-Insurance-Market.pdf 22

Suderman, Peter, *The Lesson of State Health-Care Reforms*, Wall St. J., Oct. 15, 2009 21

Wicks, Elliott K., *The Individual Market in Vermont: Problems and Possible Solutions* (Dec. 2006), *available at* http://www.ahip.org/redirect/vermontindividualmarketstudy.pdf 22

Wulsin, Lucien, Jr. & Adam Dougherty, *Individual Mandate: A Background Report* (Apr. 2009), *available at* http://www.library.ca.gov/crb/09/09-007.pdf 16

In The
Supreme Court of the United States

No. 11-393

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, *ET AL.*,

Petitioners,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH & HUMAN SERVICES, *ET AL.*

No. 11-398

DEPARTMENT OF HEALTH & HUMAN SERVICES, *ET AL.*,

Petitioners,

v.

FLORIDA, *ET AL.*

No. 11-400

FLORIDA, *ET AL.*,

Petitioners,

v.

DEPARTMENT OF HEALTH & HUMAN SERVICES, *ET AL.*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF AMERICA'S HEALTH INSURANCE PLANS AS *AMICUS CURIAE* IN PARTIAL SUPPORT OF CERTIORARI REVIEW

INTEREST OF THE *AMICUS CURIAE*[1]

America's Health Insurance Plans ("AHIP") is a national trade association representing companies that provide health insurance coverage to more than 200 million Americans. Its members offer a wide range of insurance options to consumers, employers of all sizes, and governmental purchasers nationwide, providing AHIP with a unique understanding of how the Nation's health care and health insurance processes work.

---

[1] All parties have consented to the filing of this brief through universal letters of consent on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person other than amicus made a monetary contribution intended to fund the preparation or submission of this brief.

Health insurance plans are among the entities most directly and extensively regulated by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 ("ACA" or "Act"). AHIP therefore has a unique perspective on both the practical impact of the Act and the measures necessary to achieve compliance with its requirements. In addition, given its members' extensive experience working with affected parties throughout every sector of the health care system, AHIP is uniquely positioned to address the highly complex and interdependent nature of ACA's various provisions, including the relationship between the individual mandate and ACA's market reforms.

AHIP has previously appeared as *amicus curiae* before this Court in other cases involving issues of particular importance to the health insurance industry. *See, e.g., Health Care Service Corp. v. Pollitt, cert. granted*, 130 S. Ct. 396 (2009) (No. 09-38) (removability to federal court of suits under the Federal Employees Health Benefits Act), *cert. dismissed*, 130 S. Ct. 1574 (2010); *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008) (judicial review of benefit determinations by ERISA plan administrators); *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004) (ERISA preemption of state-law claims against health maintenance organizations) (brief filed as AAHP-HIAA).

SUMMARY OF THE ARGUMENT

The parties' certiorari briefs extensively address the legal questions surrounding the constitutionality

of ACA's individual mandate provision. AHIP therefore submits this brief to focus on two issues of utmost concern to AHIP and its members: (i) the urgency of this Court's consideration and resolution of that constitutional question this Term, and (ii) the vital importance of the Court obtaining full briefing on the severability question to ensure that, should the mandate be struck down, this Court can also comprehensively consider and resolve this Term the question of the mandate's severability from the balance of the Act and the scope of statutory invalidation.

At the root of this litigation are the individual mandate and its relationship to ACA's remaining provisions. Taken together, those provisions will fundamentally shift the way that health insurance is configured, financed, marketed, and sold, eliminating many of the risk management measures upon which insurers have relied for decades. The magnitude of those changes means that health plans must make and implement numerous critical decisions now to ensure their ability to comply as requirements come into effect in the coming years. Those comprehensive compliance efforts, however, are being conducted in a cloud of uncertainty about the durability of the monumental changes being made and the legal regime that will govern insurance plans going forward. Only a prompt and definitive ruling by this Court on the individual mandate's constitutionality can restore needed certainty to the health care market.

The widely divergent conclusions reached by the lower courts that have addressed the individual mandate's severability from the balance of the Act

have compounded the uncertainty under which health plans are laboring. The health insurance industry cannot meaningfully predict whether, if the mandate were to be struck down, its business operations should be reformulated to comply with an Act in which the mandate would be severed completely from the Act (as the Eleventh Circuit held), or partially severed (as two district courts have held), or is inseverable and the entire statute falls (as one district court has held).

Definitive resolution of these issues is a matter of vital importance to the health care industry. Since ACA's enactment, health plans have made extensive efforts to bring their businesses, products, and services into compliance with the Act's provisions as they have come into effect. But now, given the conflicting court decisions, they are confronted with four potential and very different regulatory scenarios under which they must be prepared to meet vital health insurance needs in short order: (i) under ACA; (ii) without ACA; (iii) in a world where there is no individual mandate, but the rest of ACA remains intact; and (iv) in a world in which the individual mandate is stricken from ACA along with some other, as-yet unknown subset of provisions. Each of those scenarios would present a vastly different set of obligations for health care plans. Thus, if the Court were to rule that the individual mandate is unconstitutional, the Court's fully considered analysis of the severability question this Term will be necessary to resolve the interconnectedness and workability of the remaining provisions.

As important as definitive resolution of the severability question is to the insurance industry, the

question is also complex. Severability analysis must take into account the background against which Congress legislated, which included substantial experiential evidence that decoupling the individual mandate from market reforms could destabilize the individual insurance market. As Congress was aware, each of the eight States that had enacted market reforms without a mandate experienced severe market disruptions in the form of higher premiums, lower enrollment, and a general failure to achieve the goals articulated by the state legislatures. To ensure that it has the benefit of the parties' full analysis of whether Congress would have enacted the market reforms and other provisions of ACA in the absence of an individual mandate, AHIP agrees with the United States that the Court should direct the parties to include focused briefing on the question of severability.

Accordingly, AHIP respectfully requests that the Court grant review of the single question presented in No. 11-393, the first question presented in No. 11-398, and the third question presented in No. 11-400.

ARGUMENT

I. A DEFINITIVE RULING BY THIS COURT IS URGENTLY NEEDED BECAUSE HEALTH PLANS ARE REQUIRED TO TAKE COMPLIANCE MEASURES AMID DEEP UNCERTAINTY ABOUT THE CONSTITUTIONALITY OF THE INDIVIDUAL MANDATE

ACA legislated a sweeping transformation of the health care market, requiring fundamental changes in the way health insurance is configured, financed,

marketed, and sold. The continuing uncertainty over which, if any, of the statute's requirements will ultimately be implemented is heavily straining the good-faith efforts of the member companies to prepare for compliance with ACA and its comprehensive overhaul of the insurance industry. As more and more resources and planning have been poured into rapidly cascading obligations, the legal landscape has grown increasingly unstable and unpredictable. A definitive resolution of the individual mandate's constitutionality thus is crucial to the ability of health plans to timely bring their operations and insurance products into compliance.

Beyond that, the health care market represents over 17% of the national economy. Stability in the governing legal regime and certainty as to whether ACA remains effective in whole or in part going forward thus is critical to the Nation's economic health and is urgently needed by not just the member companies, but also their individual customers, business clients, and state government regulators.

ACA provides for its manifold requirements to be implemented in accelerated stages. The initial provisions became effective within the first six months of enactment and include, *inter alia*, a requirement that health plans provide coverage for dependent adult children until age 26, 42 U.S.C. § 300gg–14(a), and a prohibition on the imposition of lifetime dollar limits for essential health benefits, *id.* § 300gg–11(a)(1)(A).

Additional provisions took effect in 2011, including a requirement that health plans provide rebates to consumers when the plans' medical loss

ratios fall below specified thresholds, 42 U.S.C. § 300gg–18(b), and the establishment of a federal and state review process for unreasonable premium increases, *id.* § 300gg–94(a)(1). Compliance with these requirements has necessitated substantial changes in health plans' existing business operations and involves significant ongoing costs.

While bringing themselves into compliance with those provisions already in effect, member companies also have had to prepare for the seismic changes that will occur with the ACA provisions that go into effect on January 1, 2014 and beyond. Among the most significant of those requirements are market reforms that will transform the way that insurance contracts are written, priced and sold, especially in the individual and small group markets. Those changes include "guaranteed issue" and "guaranteed renewability" provisions requiring insurers to issue and renew health care coverage for any individual who applies, 42 U.S.C. §§ 300gg–1, 300gg–2; a "community rating" system that prohibits health plans from adjusting premium prices based on an applicant's health status, and that sharply limits the degree to which premium rates can be varied on the basis of age and tobacco use, *id.* § 300gg(a)(1)(A); and a prohibition on exclusions from coverage on the basis of an applicant's preexisting conditions, *id.* § 300gg–3.

Collectively, those requirements will fundamentally change the existing health insurance market. They will also bring about a dramatic shift in the way health insurers account for and spread risk in the individual insurance market. Under the current system, insurers assess and control costs

through the use of underwriting mechanisms that take into account the risk factors and projected treatment needs of individual applicants. Those practices enable health plans to offer lower-priced premiums to younger and healthier individuals, which attract such individuals into the health insurance market and, in turn, create a broader coverage pool across which risk can be spread. *See* Part II.B.1, *infra*. By prohibiting those practices as of January 1, 2014, ACA is requiring health plans to undertake a wholesale and fundamental overhaul of their methods for offering insurance. The sheer magnitude of those changes is requiring an enormous degree of advance planning and resource commitment by health plans to ensure compliance by the statutory effective date.

What is more, the changes that member companies must make to their business operations are fundamental and far-reaching, making it virtually impossible for them to try to unscramble the egg after the fact should a final resolution of the constitutional question not be issued until 2013 or beyond. A scenario in which health plans must restructure every level of their business practices to achieve compliance and then, on the eve of implementation, throw the entire process into reverse, would impose crushing burdens on the insurance industry that would affect every level of the health care system nationwide.

Other health care stakeholders face similar challenges. Employers, for example, will be required by January 1, 2014 to meet a broad range of substantive and administrative obligations, including offering minimum essential coverage to all full-time

employees and their dependents, 26 U.S.C. § 4980H(a); automatically enrolling full-time employees in coverage, 29 U.S.C. § 218a; and providing detailed reports to the Department of Health and Human Services, 26 U.S.C. § 6056.

Within that same timeframe, the States must undertake the massive administrative task of establishing Health Insurance Exchanges to facilitate the purchase of insurance in both the individual and small group markets. 42 U.S.C. § 18031. With the implementation date just over two years away, these stakeholders must make critical budgetary, investment, and employment decisions now and in the near future to have any realistic hope of achieving compliance.

Unfortunately, those decisions are being made within an environment of significant uncertainty. Additionally, given the possibility that this Court might hold the individual mandate unconstitutional and inseverable, in whole or in part, the uncertainty extends to the future application and workability of the remaining interrelated provisions of ACA.

For the member companies, the effect of this ongoing uncertainty is particularly manifest in the action (or inaction) of their state governmental regulators. As of September 2011, fewer than half the States had taken steps to create a Health Insurance Exchange, *see* Henry J. Kaiser Family Foundation, Health Reform Source, http://healthreform.kff.org/the-states.aspx. For at least some States, that inaction is partly attributable to uncertainty over the outcome of this litigation and other challenges to the ACA. *See, e.g.*, Grant Schulte,

Heineman: Nebraska will wait for health care ruling, Associated Press, Oct. 3, 2011 ("Nebraska will not enact a health care exchange mandated by the federal health care overhaul until officials know for sure whether the measure is constitutional."); N.M. Senate Executive Message No. 53 (Apr. 8, 2011) (vetoing bill to implement exchange structure on ground that legislation was "premature" and noting that "challenges to specific components of the federal law have been brought in several federal and district courts and are ongoing").

All of this paralyzing uncertainty—among health plans, employers, government regulators, and others—underscores the vital need for a prompt and conclusive resolution of the constitutional challenge to the individual mandate. AHIP therefore respectfully urges the Court to grant review of that issue and to resolve it this Term.

II. THE COURT SHOULD OBTAIN BRIEFING ON AND, IF NECESSARY, CONCLUSIVELY RESOLVE THE QUESTION OF SEVERABILITY

ACA is a 2,700-page statute consisting of hundreds of interrelated requirements, making the question of severability one of enormous importance to the insurance industry. Any decision invalidating the individual mandate could have profound implications for the workability of many other requirements and for the member companies' practical ability to implement the law's obligations. In particular, the historic experience under State laws documents that the economic viability and sustainability of the market reforms—*e.g.*, the

guaranteed issue, community rating requirements, and preexisting condition provisions—can be materially affected by the existence (or not) of an individual mandate. Having witnessed what occurred in States that had enacted market reforms without an individual mandate, Congress legislated against a backdrop of powerful proof that decoupling the mandate from those other requirements would destabilize the insurance market throughout the Nation.

Accordingly, AHIP joins the United States' request (Consol. Response Br. 10-11) that, if the Court grants review on the underlying constitutional question, the Court also order supplemental briefing devoted to analysis of the severability question. That will ensure that, if the Court were to invalidate the mandate, the Court could in this same case conclusively and timely resolve the impact of that invalidation on the balance of ACA's provisions, rather than leave companies in a profound state of confusion and instability during the critically important months and years ahead.

A. The Severability Question Has Produced Sharply Different Court Rulings

Four courts have analyzed the severability question and have reached four different answers. Each of those courts determined that the severability analysis is governed by this Court's decision in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), but they divided sharply on the proper application of that test in ACA's unique context. *See generally* States' Petition for Certiorari at 29-33 (No. 11-400) (discussing the conflicting rulings).

The district court in *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010), found it "virtually impossible within the present record to determine whether Congress would have passed this bill" in the absence of the mandate, *id.* at 789, and accordingly severed only those provisions that "make specific reference to" the mandate, *id.* at 790.

Reaching a somewhat different conclusion, the court in *Goudy-Bachman v. United States Department of Health & Human Services*, No. 1:10-CV-763, — F. Supp. 2d —, 2011 WL 4072875 (M.D. Pa. Sept. 13, 2011), recently ruled that the guaranteed issue and preexisting condition provisions could not be severed from the individual mandate, but that all other provisions could remain in place, *id.* at *21.

In contrast, the district court in this case held that the individual mandate is "inextricably bound together in purpose" with the remaining provisions, and that the invalidation of the mandate therefore required striking down ACA in its entirety. U.S. Pet. App. 363a.

The Eleventh Circuit, however, reversed that holding, concluding that the strong "presumption of severability" dictated that all provisions of ACA other than the mandate should remain intact. U.S. Pet. App. 184a. Despite the United States' concession that the guaranteed issue and community rating provisions (including the ban on preexisting condition exclusions) would have to be severed with the mandate, the court of appeals determined that those provisions and the balance of the statute could be "'fully operative as a law,'" and on that basis ruled

that the mandate was fully severable. U.S. Pet. App. 174a. The court, however, did not address the further question, required by *Alaska Airlines*, of whether a mandate-free ACA would "function in a manner consistent with * * * the original legislative bargain," 480 U.S. at 685 (emphasis omitted), or whether Congress would "have been willing * * * to enact" the law without the mandate, *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 636 (1895) (citation omitted).

In addition, the Eleventh Circuit relied on what it viewed as a "paucity" of modern precedents in which this Court determined that a constitutionally invalid provision of a law could not be severed from *any* portion of the law. U.S. Pet. App. 173a. That empirical observation, however, is not only mistaken, but also irrelevant because it says nothing about the proper outcome of this Court's severability analysis in any given case and, in particular, as applied to a statute as complex, interconnected, and painstakingly legislated as ACA.[2]

---

[2] The Eleventh Circuit's observation overlooked two relatively recent decisions in which this Court held that a constitutionally invalid provision of a law could not be completely severed. In *Randall v. Sorrell*, 548 U.S. 230 (2006), this Court held that an unconstitutional Vermont campaign finance statute was not severable from other constitutionally valid contribution limits because severance would have required the Court "to write words into the statute," *id.* at 262. And in *United States v. Booker*, 543 U.S. 220 (2005), the Court held that the unconstitutional scheme of enhanced sentences under the federal Sentencing Guidelines could not be severed from the provisions of the statute that made the Guidelines mandatory and that called for *de novo* appellate review of departures by

That widespread divergence in the outcome of the courts' severability analyses, by itself, underscores the complexity of the severability question under ACA and thus the particularized need for this Court to order briefing devoted to the question.[3] The necessity of such cautious deliberation and focused briefing is amplified still further by the position of the United States (Consol. Response Br. 31) that the mandate is not entirely severable from ACA's market reforms (*i.e.*, the guaranteed issue and community rating provisions), and Congress's own finding that the mandate "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold," 42 U.S.C. § 18091(a)(2)(I).

---

district courts, because both of those provisions necessarily depended on the existence of the Guidelines enhancement scheme, *id.* at 259-260.

[3] To be sure, this Court does not commonly consider conflicting district court decisions in its certiorari calculus. But in this case, the severability issue is automatically embedded in the constitutional question on which the circuits are in plain conflict. The conflicting lower courts decisions thus are relevant to the subsidiary question of whether the complexity of the severability analysis in this case merits focalized briefing.

B. Severability Analysis Must Be Undertaken Against the Backdrop, Well Known to Congress, of Prior, Failed Legislative Efforts to Enforce Market Reforms Without an Individual Mandate

1. ACA's Market Reforms Require an Individual Mandate to Prevent Economically Unviable Adverse Selection and Cost-Shifting

To determine whether a law can "function in a manner consistent with * * * the original legislative bargain," *Alaska Airlines*, 480 U.S. at 685 (emphasis omitted), courts must consider the experiential backdrop against which Congress legislated. Here, that history of failed legislative efforts to implement market reforms without an adequate individual mandate should substantially inform the question whether Congress intended the guaranteed issue, preexisting condition, and community ratings provisions, along with the Act's other health insurance market reforms, to continue to operate if the individual mandate were invalidated.

By way of background, health insurance is generally sold in three markets: non-group (also known as the individual market), small group, and large group. Approximately 14 million Americans purchase health insurance on the individual market. Henry J. Kaiser Family Foundation, *The Uninsured, A Primer: Key Facts About Americans Without Health Insurance*, 31 (Dec. 2010).

Under the current system, the individual market is particularly susceptible to the economic phenomenon of "adverse selection" and the closely-

related problem of cost-shifting. *See* Kathryn Linehan, *Underwriting in the Non-Group Health Insurance Market: The Fundamentals* 4 (June 4, 2009). Adverse selection occurs because individuals with higher anticipated health care costs—generally less healthy or older individuals—are more likely than healthy, younger people to enter an insurance market. Members of the latter group, for whom the risk of significant health care needs and expenses is more remote, are more likely as a consequence to wait to purchase coverage until they suffer from an illness or expect to need medical treatment.

Such adverse selection increases costs for all participants in the insurance pool. Because insurers generally set premiums according to the expected medical costs of those participating in a coverage pool, premiums increase for all participants when individuals with higher expected health care costs constitute a majority of the pool. Linda Blumberg & John Holahan, *Do Individual Mandates Matter? Timely Analysis of Immediate Health Policy Issues* 2 (Jan. 2008). The result is that healthy people become even less inclined to purchase coverage. Indeed, up to 20% of uninsured individuals have the financial means to obtain coverage but forgo it, relying instead on emergency care when they need medical treatment. Lucien Wulsin, Jr. & Adam Dougherty, *Individual Mandate: A Background Report* 3-4 (Apr. 2009). Those costs, in turn, are shifted to the insured in the form of higher premiums. Such cost-shifting creates a "hidden tax" ranging from two to ten percent of private premiums. *Id.* at 4.

To combat those problems of adverse selection and cost-shifting, many States allow for premium

rates in the individual market to be set through the actuarial mechanism of underwriting. That process allows insurers to manage costs by assessing each applicant's health and making an actuarial judgment about the amount and types of medical services he or she is likely to need. Based on that determination, the insurer might exclude coverage for an applicant's known preexisting conditions, impose a waiting period, adjust the applicant's premium, or deny coverage altogether. *See* Linehan, *supra*, at 4-6. Those underwriting practices allow insurers to offer lower premiums to younger, healthier people, thereby reducing the incentives for such individuals to postpone obtaining coverage until they need medical treatment. *Ibid.*

ACA's market reform provisions eliminate many of those risk management tools. For example, the guaranteed issue and guaranteed renewability provisions require insurers to issue and renew health care coverage for all applicants and enrollees who are able to pay the premium. 42 U.S.C. §§ 300gg–1, 300gg–2. The community rating system prohibits insurers from pricing policies according to an applicant's health status. *Id.* § 300gg. And insurers will no longer be permitted to make exclusions on the basis of preexisting conditions, *id.* § 300gg–3; to base coverage eligibility on an applicant's health status, medical condition, or related factors, *id.* §§ 300gg–1, 300gg–4; or to establish a waiting period of more than 90 days, *id.* § 300gg–7.

The effect of those reforms is to alter fundamentally the insurance business and, in particular, the mechanisms employed for spreading risk and controlling premium prices. Without more,

prohibiting reliance on the traditional tools of underwriting would make participation in the individual insurance market more attractive for individuals with higher expected health care costs, thereby increasing the pressure on premiums, which in turn renders the insurance market less attractive for those with lower expected costs. That deep imbalance in the pool of insurance customers can create a "marketwide adverse-selection death spiral" in the individual insurance market.[4]

Congress enacted the individual mandate as a counterweight to those economically crippling adverse-selection and cost-shifting problems. The mandate ensures that the individual market includes larger, more representative participant pools across which insurers can viably spread risk. Were the market reforms to be implemented in the absence of the mandate, healthy individuals would have every incentive to take a "wait-and-see" approach to participation in the insurance market. Indeed, since health plans could neither exclude applicants based on preexisting conditions nor increase premiums based on health status, it would be an entirely rational economic decision for healthy and low-medical-risk individuals to forgo obtaining insurance coverage until their medical circumstances changed. At the same time, the most unhealthy or medically risky individuals would have every incentive to flood into the market. As a result, the risk pool would skew toward individuals with higher health care

---

[4] Alan C. Monheit, *et al.*, *Community Rating and Sustainable Individual Health Insurance Markets in N.J.*, 23 Health Affairs 167, 169 (2004).

costs. *See* Uwe E. Reinhardt, *The Case for Mandating Health Insurance*, N.Y. Times, Oct. 23, 2009.

Congress, moreover, was fully aware of the adverse implications of adopting market reforms unaccompanied by an individual mandate. The Congressional Budget Office advised that, if the market reforms were to be implemented in the absence of the individual mandate, increased adverse selection in the individual market would increase premiums for new policies by approximately 15 to 20 percent. *See* Congressional Budget Office, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* 2 (June 16, 2010). Similarly, while ACA is projected to expand coverage to 32 million previously uninsured individuals, estimates are that only 8 million of the currently uninsured would obtain coverage if the statute contained no mandate. *See* Bradley Herring, *An Economic Perspective on the Individual Mandate's Severability from the ACA*, New Eng. J. Med. (Mar. 10, 2011). Empirical evidence thus strongly indicates that a system of market reforms unaccompanied by an individual mandate would create widespread and potentially economically disabling instability in the insurance market and, over time, would substantially reduce access to affordable coverage.

2. *Congress Was Aware That States' Efforts to Implement Similar Market Reforms Without an Individual Mandate Had Largely Failed*

Congress was not writing on a clean slate with ACA. Instead, Congress knew that, when individual

States had attempted to undertake similar insurance market reforms unaccompanied by an individual mandate, the result was substantial economic destabilization and spiraling health care costs. That background must be factored into any severability determination.

In the 1990s, eight States enacted market reforms, including guaranteed issue and community ratings requirements, without an individual mandate. The result in each State was a general destabilization of individual markets, increases in premiums, and declines in enrollment.

For example, Maine enacted guaranteed issue and modified community rating reforms for its individual market in 1993, allowing limited price variation only for age, occupation or industry, and geographic location. *See* B. Gorman, *et al.*, *Reform Options for Maine's Individual Health Insurance Market: An Analysis Prepared for the Bureau of Insurance* 5 (May 30, 2007). According to the Maine Bureau of Insurance's report analyzing the ensuing problems in the individual insurance market, the "market for individual HMO coverage" as of January 2001 "appear[ed] to be in a death spiral." Maine Bureau of Insurance, *White Paper: Maine's Individual Health Insurance Market* 4 (Jan. 22, 2001). Premiums for indemnity coverage increased dramatically, and coverage rates plummeted as a result. *Ibid.* State regulators attributed those trends in part to the modified community rating requirement, which "result[ed] in the risk pool having a higher average age and therefore higher costs." *Id.* at 10.

New Jersey's reform efforts tell a similar story. In 1993, New Jersey implemented the Individual Health Coverage Program, which required guaranteed issue, guaranteed renewal, and pure community rating of individual health policies. *See* Alan C. Monheit, *et al.*, *Community Rating and Sustainable Individual Health Insurance Markets in N.J.*, 23 Health Affairs 167, 167 (2004). One study examining the impact of New Jersey's reforms found that, as of 2004, the individual market was "heading for collapse." *Id.* at 168. More than half of the enrollees had left the individual market between 1995 and 2001, and premiums had increased two or three times above their early levels. *Ibid.*

Faced with similar market disruptions after it enacted reforms, Washington succeeded in reversing some of the adverse trends by returning to a more carrier-friendly system. In 1993, Washington enacted comprehensive insurance market reforms, including a guaranteed issue provision, a phased-in community rating requirement, and limits on pre-existing condition exclusions. *See* Adele M. Kirk, *Riding the Bull: Experience With Individual Market Reform in Washington, Kentucky, and Massachusetts*, 25 J. Health Politics, Policy & Law 133, 136-137 (2000). In the ensuing three years, premiums in the individual market rose by as much as 78 percent. *See* Peter Suderman, *The Lesson of State Health-Care Reforms*, Wall St. J., Oct. 15, 2009. Over the same period, enrollment in Washington's individual market fell by 25 percent. *Ibid.*

As a result, the Washington legislature repealed the market reforms, and subsequently enacted legislation to encourage carriers to reenter

Washington's individual market. *See* Robert Wood Johnson Foundation, *Issue Brief: Recognizing Destabilization in the Individual Health Insurance Market* 4 (July 2010). Today, there are five insurance companies participating in the individual market, compared to the two that remained before the 1993 reforms were repealed. Roger Stark, *Overview of the Individual Health Insurance Market in Washington State* (Jan. 2011).[5]

All of that evidence underscores the very real likelihood that implementation of ACA's market reforms in the absence of the individual mandate would confound the legislation's central goal of increasing the availability of affordable health care coverage. Congress, moreover, enacted the individual mandate in conjunction with its market reforms because it was acutely aware of the widespread difficulties that had arisen from the efforts of States to implement similar insurance market reforms without the economic counterbalance of an individual mandate. *See* 42 U.S.C. § 18091(a)(2)(I) ("[I]f there were no [mandate] requirement, many individuals would wait to purchase health insurance until they

---

[5] Other States that enacted market reforms in the 1990s experienced similar destabilization. *See* Kirk, *supra*, at 158, 167-168 (Kentucky and Massachusetts); Alexander K. Feldvebel & David Sky, *A Regulator's Perspective on Other States' Experiences*, 25 J. Health Politics, Policy & Law 197, 198-199 (2000) (New Hampshire); Mark A. Hall, *An Evaluation of New York's Reform Law*, 25 J. Health Politics, Policy & Law 71 (2000) (New York); Elliott K. Wicks, *The Individual Market in Vermont: Problems and Possible Solutions* (Dec. 2006) (prepared for Vermont Department of Banking, Insurance, Securities and Health Care Administration).

needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums.").

In determining whether Congress would "have been willing * * * to enact," *Pollock*, 158 U.S. at 636, ACA without an individual mandate, the Eleventh Circuit's severability analysis failed to grapple with the implications of that experiential history and the proven, substantial risk of profound economic displacement and a "market-wide antiselection spiral."[6] Directing the parties to brief the severability issue, however, would give the Court the benefit of comprehensive analysis and consideration of all the pertinent factors in determining whether or not Congress would have enacted ACA's market reforms in the absence of the individual mandate provision.

C. Severability Is a Question of Surpassing Importance and Its Prompt Resolution Is of Paramount Importance to the Health Care Industry

Should this Court determine that the individual mandate exceeds congressional power (a question on which AHIP takes no position), then the instability and uncertainty surrounding the question of the mandate's severability and the scope of constitutional invalidation would be every bit as economically

---

[6] David Sky, *High Risk Pool Alternatives: A Case Study of New Hampshire's Individual Health Insurance Market Reforms*, 16 J. Ins. Reg. 399, 401 (Summer 1998).

destabilizing and suffocating for business planning as the current uncertainty surrounding the legality of the mandate itself. The difference between developing measures to implement a mandate-less ACA (i) with market reforms intact, and (ii) without some or many of those market reforms is night and day.

AHIP's request that this Court order briefing focused on the severability question thus is an honest reflection of the imperative for the insurance industry that severability be resolved now, rather than remanded or even postponed until the next Term. Any delay would deprive businesses and consumers of desperately needed certainty about the profound changes in health care adopted by ACA until, in all likelihood, less than a year before the market reforms' effective date on January 1, 2014. *See* U.S. Consolidated Response Br. 10-11 (noting the "importance of severability issues in this case" and urging review). AHIP accordingly respectfully requests that this Court ensure that any resolution of the constitutional challenge to the individual mandate this Term offer a viable measure of certainty and closure to these debates, rather than perpetuate business instability and confusion for both member companies and their customers.

CONCLUSION

For the foregoing reasons, this Court should grant review of the single question presented in No. 11-393, the first question presented in No. 11-398, and the third question presented in No. 11-400.

Respectfully submitted.

Joseph Miller
Julie Simon Miller
AMERICA'S HEALTH INSURANCE PLANS
601 Pennsylvania Avenue, N.W.
South Building, Suite 500
Washington, DC 20004
(202) 778-3200

Patricia A. Millett
Counsel of Record
Kevin R. Amer
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Avenue, N.W.
Washington, DC 20036
(202) 887-4000
pmillett@akingump.com

October 25, 2011

AMICUS CURIAE BRIEF

No. 11-398

IN THE
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

STATE OF FLORIDA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE AMERICAN HOSPITAL ASSOCIATION ET AL. AS AMICI CURIAE IN SUPPORT OF FEDERAL PETITIONERS

SHEREE R. KANNER
CATHERINE E. STETSON*
DOMINIC F. PERELLA
MICHAEL D. KASS
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5719
cate.stetson@hoganlovells.com

Counsel for Amici Curiae
**Counsel of Record*

(additional amicus representatives listed on inside cover)

Additional amicus representatives:

MELINDA REID HATTON
MAUREEN D. MUDRON
American Hospital Association
325 Seventh Street, N.W.
Suite 700
Washington, D.C. 20001
(202) 638-1100

IVY BAER
Association of American Medical Colleges
2450 N Street, N.W.
Washington, D.C. 20037
(202) 828-0499

JEFFREY G. MICKLOS
Federation of American Hospitals
801 Pennsylvania Ave.
Suite 245
Washington, D.C. 20004
(202) 624-1521

BARBARA EYMAN, Counsel
LARRY GAGE, Counsel
National Association of Public Hospitals and Health Systems
1301 Pennsylvania Ave., N.W.
Suite 950
Washington, D.C. 20004
(202) 585-0100

LISA GILDEN
Vice President, General Counsel/Compliance Officer
The Catholic Health Association of the United States
1875 Eye Street, N.W.
Suite 1000
Washington, D.C. 20006
(202) 296-3993

National Association of Children's Hospitals
401 Wythe Street
Alexandria, VA 22314
(703) 684-1355

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. PROMPT REVIEW WILL RESOLVE BUSINESS UNCERTAINTY, ALLOW UNCONTROVERSIAL ACA PROVISIONS TO MOVE FORWARD, AND BEGIN ADDRESSING THE CRISIS OF UNINSURANCE 5

A. ACA Litigation Uncertainty Is Impeding Implementation Of Even Uncontroversial Parts Of The Law 5

B. Review And Reaffirmance Of The ACA's Constitutionality Would Begin The Process Of Alleviating The Crisis Of Uninsurance 9

II. THE COURT SHOULD DENY CERTIORARI WITH RESPECT TO THE ACA'S MEDICAID AMENDMENTS 11

CONCLUSION 17

TABLE OF AUTHORITIES

Page

***Cases*:**

California v. *United States*,
104 F.3d 1086 (9th Cir. 1997) 12, 14

Charles C. Steward Mach. Co. v. *Davis*,
301 U.S. 548 (1937)..... 12, 14, 15

Harris v. *McRae*,
448 U.S. 297 (1980)..... 15

*Jim C. ex rel. J.C.*v. *United States*,
235 F.3d 1079 (8th Cir. 2000) 12

Madison v. *Virginia*,
474 F.3d 118 (4th Cir. 2006) 12

M'Culloch v. *Maryland*,
17 U.S. 316 (1819) 17

New York v. *United States*,
505 U.S. 144 (1992)..... 11

Padavan v. *United States*,
82 F.3d 23 (2d Cir. 1996)..... 12

South Dakota v. *Dole*,
483 U.S. 203 (1987)..... 13, 14

Thomas More Law Center v. *Obama*,
651 F.3d 529 (6th Cir. 2011) 10

***Constitution*:**

U.S. Const. art. 1, § 8, cl. 1 11

U.S. Const. art. 1, § 8, cl. 3.. 10

***Statutes*:**

42 U.S.C. § 1304..... 13

42 U.S.C. § 1315a..... 5

42 U.S.C. § 1395ww(o) 6

TABLE OF AUTHORITIES—Continued

Page

42 U.S.C. § 1395ww(p)-(q) 6

42 U.S.C. § 18031(b) 7

Omnibus Reconciliation Act of 1980, Pub. L. No. 96-4999 16

Regulations:

45 C.F.R. pts. 155 8

45 C.F.R. pts. 156 8

76 Fed. Reg. 41886 (July 15, 2011) 8

Rules:

S. Ct. R. 10(c) 15

S. Ct. R. 37.6 1

Other Authorities:

American Hosp. Ass'n, *Uncompensated Hospital Care Cost Fact Sheet* (Dec. 2010) 3

Congressional Res. Serv., *How Medicaid Works: Program Basics* (Mar. 16, 2005) 16

Deloitte Center for Health Care Solutions, *Value-based Purchasing: A Strategic Overview for Health Care Industry Stakeholders* (2011) 6, 7

E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, *Supreme Court Practice* (9th ed. 2007) 4, 14

J. Hadley *et al.*, *Covering The Uninsured In 2008: Current Costs, Sources Of Payment, And Incremental Costs, Health Affairs* (Aug. 25, 2008) 3, 10

TABLE OF AUTHORITIES—Continued

Page

Kaiser Comm'n on Medicaid & The Uninsured, *The Medicaid Resource Book* (App'x 1) (2002) 16

K. Koster, *In the Eye of the Storm*, Employee Benefit Adviser (Mar. 1, 2011) 7

M. LaPointe, *Health Care Reform in Limbo*, Business NH Magazine (Oct. 5, 2011) 7, 8

B. Larrabee, *Florida Might Try to Withdraw from Medicaid*, Florida Times-Union (Feb. 16, 2011) 13

New Models for Delivering & Paying for Medicare Services: Hearing before the H. Comm on Ways & Means, 112 Cong. (May 12, 2011) 6

J.E. O'Neill & D.M. O'Neill, *Who Are the Uninsured? An Analysis of America's Uninsured Population, Their Characteristics & Their Health* (2009) 9

E. Ramshaw, *Texas Considers Medicaid Withdrawal*, New York Times (Nov. 6, 2010) 13

IN THE

Supreme Court of the United States

No. 11-398

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

STATE OF FLORIDA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE AMERICAN HOSPITAL ASSOCIATION ET AL. AS AMICI CURIAE IN SUPPORT OF FEDERAL PETITIONERS

STATEMENT OF INTEREST[1]

The American Hospital Association, Association of American Medical Colleges, Catholic Health Association of the United States, Federation of American Hospitals, National Association of Children's Hospitals, and National Association of Public Hospitals and Health Systems respectfully submit this brief as *amici curiae*.

[1] Pursuant to Rule 37.6, counsel certifies that no party, or counsel for a party, authored or paid for this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. No person other than *amici*, their members, or their counsel made a monetary contribution to the brief. This brief is filed with the consent of all parties.

The American Hospital Association represents nearly 5,000 hospitals, health care systems, and networks, plus 37,000 individual members. AHA members are committed to improving the health of communities they serve and to helping ensure that care is available to, and affordable for, all Americans. The AHA educates its members on health care issues and advocates to ensure that their perspectives are considered in formulating health care policy.

The Association of American Medical Colleges represents about 300 major non-federal teaching hospitals, all 135 accredited medical schools, and the clinical faculty and medical residents who provide care to patients there.

The Catholic Health Association of the United States is the national leadership organization for the Catholic health ministry. CHA's more than 2,000 members operate in all 50 states and offer a full continuum of care, from primary care to assisted living. CHA works to advance the ministry's commitment to a just, compassionate health care system that protects life.

The Federation of American Hospitals is the national representative of investor-owned or managed community hospitals and health systems. FAH has nearly 1,000 member hospitals in 46 states and the District of Columbia. These members include rural and urban teaching and non-teaching hospitals and provide a wide range of acute, post-acute, and ambulatory services.

The National Association of Children's Hospitals supports its 221 hospital members in addressing public policy issues. N.A.C.H.'s mission is to promote the health and well-being of children and their

families through support of children's hospitals and health systems. Medicaid is the single largest insurer of children and the largest payer for children's hospitals. On average, 50 percent of the patients at children's hospitals are enrolled in Medicaid.

The National Association of Public Hospitals and Health Systems is comprised of some 140 of the nation's largest metropolitan safety net hospitals and health systems, committed to providing health care to all without regard to ability to pay. NAPH represents members' interests in matters before Congress, the Executive Branch, and the courts.

The six Hospital Associations represent virtually every hospital and health system in the country—public and private; urban and rural; teaching and children's hospitals; investor-owned and non-profit. Their members will be deeply affected by the outcome of this case. American hospitals are committed to the well-being of their communities. As part of that mission, they treat tens of millions of uninsured individuals each year, and most of that care is uncompensated. In 2009 alone, hospitals provided more than $39 billion in uncompensated care to the uninsured and under-insured. American Hosp. Ass'n, *Uncompensated Hospital Care Cost Fact Sheet* 4 (Dec. 2010) ("*Fact Sheet*");[2] *see also* J. Hadley *et al.*, *Covering The Uninsured In 2008: Current Costs, Sources Of Payment, And Incremental Costs* 403, Health Affairs (Aug. 25, 2008) ("*Covering The Uninsured*").[3] And while hospitals do all they can to

---

[2] *Available at* http://www.aha.org/aha/content/2010/pdf/10 uncompensatedcare.pdf.

[3] *Available at* http://content.healthaffairs.org/cgi/reprint/27/5/w399.

assist patients, burdens on uninsured individuals remain heavy. Millions of families are just one major illness from financial ruin.

That is why the Hospital Associations favored enactment of the Patient Protection and Affordable Care Act ("ACA"). And it is why this Court should promptly grant the Government's petition for certiorari and hold that the ACA is a constitutional exercise of Congress's Commerce Clause power. The uncertainty that has swirled around the ACA for a year has slowed development of the architecture needed to make the ACA's reforms a reality. The uncertainty should be resolved so that Congress's response to this country's health care crisis can move forward to full implementation.

SUMMARY OF ARGUMENT

1. This Court should grant the Government's petition. The criteria for certiorari review are, of course, met in spades here. *See* E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, SUPREME COURT PRACTICE 242 (9th ed. 2007) ("Stern & Gressman") (Court regularly grants certiorari to resolve circuit splits); *id.* at 245 (grant is even more likely where issue is "important and recurring"); *id.* at 264 (certiorari usually granted where "the decision below holds a federal statute unconstitutional"). But prompt review is important for two additional reasons. *First*, uncertainty over the ACA's constitutionality impedes beneficial (and non-controversial) elements of the law and slows progress on labor-intensive initiatives like the development of state insurance exchanges. *Second*, it is crucial for the ACA's constitutionality to be reviewed—and reaffirmed. Only then can the crisis of uninsurance, with its rampant

cost-shifting and potentially devastating effects on the uninsured, begin to be addressed.

2. The Court should deny the States' petition to the extent it seeks review of the ACA's Medicaid amendments. The Eleventh Circuit properly applied settled law in rejecting the States' challenge to those amendments. And unlike with the individual mandate, the constitutionality of the Medicaid amendments is not the subject of a circuit split; no federal court has struck them down. The States' petition should be rejected.

ARGUMENT

I. PROMPT REVIEW WILL RESOLVE BUSINESS UNCERTAINTY, ALLOW UNCONTROVERSIAL ACA PROVISIONS TO MOVE FORWARD, AND BEGIN ADDRESSING THE CRISIS OF UNINSURANCE.

This Court should promptly grant the writ because lingering uncertainty over the ACA's constitutionality is adversely affecting the law's implementation and the health care system as a whole.

A. ACA Litigation Uncertainty Is Impeding Implementation Of Even Uncontroversial Parts Of The Law.

1. The cloud hanging over the ACA is impeding even non-controversial, efficiency-promoting provisions of the law from moving forward. For example, the ACA authorizes the Centers for Medicare and Medicaid Services ("CMS") to work with hospitals and other care providers to implement "demonstration projects"—i.e., experimental care delivery and payment models—that are exempt from many CMS regulations. *See, e.g.*, 42 U.S.C. § 1315a (describing demonstration projects authorized by the ACA). The

idea is to try innovative solutions to "bend[ ] the Medicare cost curve," improving quality of care and reducing spending. *See New Models for Delivering & Paying for Medicare Services: Hearing before the H. Comm on Ways & Means*, 112 Cong., May 12, 2011.[4] But the demonstration projects generally require substantial commitments of time and money to launch. As a result, hospitals have been reluctant to commit to them while the ACA's future remains up in the air; they simply cannot justify shouldering high start-up costs when the ACA could be struck down, and the demonstration terminated, before any offsetting cost savings could be realized. The uncertainty surrounding the ACA thus dampens hospital participation in a program designed to find solutions to our country's unsustainable Medicare cost spiral.

The litigation uncertainty is creating difficulties for hospitals in other ways too. For example, under the ACA, CMS will make incentive payments to hospitals that meet or exceed certain standards. 42 U.S.C. § 1395ww(o). Conversely, CMS will reduce payments to hospitals with the most "hospital acquired conditions"—i.e., illnesses attributable to a patient's stay in the hospital—and to those with a high percentage of patients who require readmission within a specified time following discharge. *Id.* § 1395ww(p)-(q). These programs are designed to improve patient care through a "carrot-and-stick" approach to hospital reimbursements. *See* Deloitte Center for Health Care Solutions, *Value-based Purchasing: A Strategic Overview for Health Care*

---

[4] *Available at* http://waysandmeans.house.gov/News/DocumentSingle.aspx?DocumentID=261534.

Industry Stakeholders 1 (2011).[5] Hospitals must expend—and are already expending—substantial resources to prepare for CMS's implementation of these programs. And yet they recognize that if the ACA is invalidated, these programs may not be able to accomplish their objectives. Only prompt action from this Court can help mitigate that impact.

2. Separately, uncertainty surrounding the ACA has prompted some states to drag their feet in preparing for full implementation. To take just one example: "By January 1, 2014, all states must establish 'American Health Benefit Exchanges' and 'Small Business Health Options Program Exchanges,' which are insurance marketplaces where individuals, families, and small employers can shop for the Act's new insurance products." Pet. App. 32a (citing 42 U.S.C. § 18031(b)). Creating those exchanges is a complex and time-consuming task—and yet many objecting states have not even begun the process, instead "taking a wait-and-see approach and holding off on establishing exchanges until the legal issues are resolved." M. LaPointe, *Health Care Reform in Limbo*, Business NH Magazine (Oct. 5, 2011);[6] *accord* K. Koster, *In the Eye of the Storm*, Employee Benefit Adviser (Mar. 1, 2011) (while some states have begun to design insurance exchanges,

---

[5] *Available at* http://www.deloitte.com/assets/Dcom-UniteStates/Local%20Assets/Documents/Health%20Reform%20Issues%20Briefs/US_CHS_ValueBasedPurchasing_031811.pdf.

[6] *Available at* http://millyardcommunications.com/index.php?src=news&srctype=detail&category=News&refno=2616.

"[o]ther states are cautious and waiting for * * * the judicial challenges to PPACA to be resolved").[7]

That approach, ironically, may produce a degree of health-care federalization that those very states no doubt would decry. "Under the PPACA, the federal government will evaluate each state's progress during 2013. If federal regulators determine that a state exchange will not be implemented by the [2014] deadline, a federally operated exchange will be implemented." *Health Care Reform in Limbo, supra.* And "[m]any health policy experts say states are not moving fast enough to set up the exchanges to meet the 2014 deadline." *Id.* As a result, the Department of Health and Human Services has been forced to propose starting a federal exchange on January 1, 2014 and transitioning its functions and enrollees to states one by one through a year-long process as they come into compliance. Establishment of Exchanges and Qualified Health Plans, 76 Fed. Reg. 41886, 41871, 41913 (proposed July 15, 2011) (to be codified at 45 C.F.R. pts. 155 and 156). Thus further delay in resolving this case "risk[s] having federally-run exchanges" in greater numbers than would otherwise be necessary, *Health Care Reform in Limbo, supra*, needlessly consumes state and federal resources, and needlessly complicates exchange enrollment for the Americans most in need of stable health coverage. *See* Establishment of Exchanges and Qualified Health Plans, 76 Fed. Reg. at 41871, 41913 (outlining the process for a state exchange to take over the functions of the federal one in that state and noting that the qualified health

---

[7] *Available at* http://eba.benefitnews.com/news/eye-storm-2685251-1.html.

plans in the state exchange may differ from the federal one).

B. Review And Reaffirmance Of The ACA's Constitutionality Would Begin The Process Of Alleviating The Crisis Of Uninsurance.

The Court should grant certiorari, and reaffirm the ACA's constitutionality, for a second reason: The ACA's reforms must move forward if the Nation is to address a crisis of uninsurance that will not disappear on its own. Approximately *50 million* American residents, including more than 7 million children, were without health insurance for all of 2010. U.S. Census Bureau, *Income, Poverty, & Health Insurance Coverage in the United States: 2010* at 23-26 (Sept. 2011).[8] The vast majority of these millions of uninsured individuals—at least 94 percent—seek and receive health care services at some point, with the majority obtaining care each year. J.E. O'Neill & D.M. O'Neill, *Who Are the Uninsured? An Analysis of America's Uninsured Population, Their Characteristics & Their Health* 20-21 & Tbl. 9 (2009).[9] Indeed, in 2008 alone, those uninsured Americans received some *$86 billion* worth of health care from all providers. *Covering the Uninsured* 399, 402-403.

Those figures are massive and growing. And they come at a steep cost to everyone—the uninsured themselves, hospitals, health systems, insurers, and America's taxpayers. Of the $86 billion in care the uninsured received in 2008, about $56 billion came in the form of uncompensated care provided by

---

[8] *Available at* http://www.census.gov/prod/2011pubs/p60-239.pdf.

[9] *Available at* http://epionline.org/studies/oneill_06-2009.pdf.

hospitals, doctors, clinics, and health-care systems.[10] Supplemental Medicare and Medicaid payment programs—in other words, American taxpayers—end up footing part of that bill. *Covering The Uninsured* 403-404. State and local governments—taxpayers again—likewise pay a share. *Id.* at 405. And insured patients (and their insurers) end up effectively paying a portion of the bill more directly: As hospitals and other providers absorb costs of uncompensated care, they have fewer funds to reinvest and to cover ongoing expenses, which in turn drives costs higher. *Id.* at 406.

In short, the vast majority of uninsured Americans obtain health care, and most of the steep cost of that care is borne by the rest of the nation. As the Hospital Associations are prepared to explain in detail at the merits stage, these facts doom petitioners' Commerce Clause arguments: Even assuming the coherence of petitioners' activity/inactivity distinction, the uninsured are "active" in both the health *care* market—because they obtain care—and in the health *insurance* market—because even those who do not obtain access to that market in a given year are obtaining the free, present benefit of an insurance-funded infrastructure waiting to care for them when they need it. *See Thomas More Law Center* v. *Obama*, 651 F.3d 529, 557 (6th Cir. 2011) (Sutton, J., concurring) ("Congress could reasonably conclude that the decisions and actions of the self-insured substantially affect interstate commerce" because

---

[10] This is derived by subtracting $30 billion in uninsured self-payment from the $86 billion total. *See Covering the Uninsured* 399-403. Of the $56 billion in uncompensated care, the bulk is provided by hospitals, and the rest by doctors, clinics, and other providers. *Id.* at 402-403.

one way to self-insure "is to save nothing and to rely on something else—good fortune or the good graces of others—when the need arises."). But they are relevant at the petition stage too because they underscore the need to eliminate the uncertainty surrounding the ACA. While the legislation is not perfect, it would extend coverage to millions more Americans and would eliminate costly market distortions. To undo the ACA now would be to maintain an unacceptable status quo.

II. THE COURT SHOULD DENY CERTIORARI WITH RESPECT TO THE ACA'S MEDICAID AMENDMENTS.

The plaintiff States have sought review of several additional questions, chief among them whether the ACA's amendments to Medicaid unconstitutionally "coerce[ ] States into accepting onerous conditions that [Congress] could not impose directly[.]" States' Pet. 1. The Court should decline the States' invitation to review this issue. The Eleventh Circuit applied settled law in rejecting the States' Medicaid argument, and there is no divide between the circuits. Review should be limited to the individual mandate and issues logically intertwined with it.

1. The States argue that "[t]he decision below cannot be reconciled with this Court's precedent concerning the scope of Congress's spending power." States' Pet. 16. But they fail to support that assertion. In the pages that follow, they cite only inapposite dicta from cases such as *New York* v. *United States*, 505 U.S. 144 (1992)—which is not a Spending Clause coercion case at all—and snippets from various court of appeals cases that, by and large, do not support their legal theory. States' Pet. 17-20.

In fact, the Eleventh Circuit's decision rejecting the States' coercion claim is consistent with both *South Dakota* v. *Dole*, 483 U.S. 203 (1987), and with the intermediate appellate decisions that have applied that case. This Court in *Dole* suggested that there could be circumstances in which "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 211 (quoting *Charles C. Steward Machine Co.* v. *Davis*, 301 U.S. 548, 589-590 (1937)). But it simultaneously recognized that every federal spending statute "'is in some measure a temptation" and that " 'to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties.'" *Id.* (quoting *Steward Mach.*, 301 U.S. at 590). The Courts of Appeals, applying the *Dole* dicta, regularly have held that conditions on Medicaid and other federal grants are not rendered impermissibly coercive just because a significant grant is at stake. *See Jim C. ex rel. J.C.* v. *United States*, 235 F.3d 1079, 1082 (8th Cir. 2000) (education grant); *California* v. *United States*, 104 F.3d 1086, 1092 (9th Cir. 1997) (Medicaid grant); *Padavan* v. *United States*, 82 F.3d 23, 29 (2d Cir. 1996) (Medicaid grant). Instead, they have recognized that "hard choices do not alone amount to coercion," *Madison* v. *Virginia*, 474 F.3d 118, 128 (4th Cir. 2006), and that putting states to those hard choices does not create the sort of "undue influence" that could cross the line. *Steward Mach.*, 301 U.S. at 590.

The decision below is in accord with those precedents. The panel recognized that "the Medicaid-participating states were warned from the beginning of the Medicaid program that Congress reserved the right to make changes to the program." Pet. App.

60a (citing 42 U.S.C. § 1304). It recognized that "states have the power to tax and raise revenue, and therefore can create and fund programs of their own if they do not like Congress's terms." *Id.* 62a. It observed that "states have plenty of notice * * * to decide whether they will continue to participate in Medicaid by adopting the expansions or not," thus giving them the time to develop replacement programs if they so choose. *Id.* It recognized that Congress has amended Medicaid time and again and that "[n]one of these amendments has been struck down as unduly coercive." *Id.* 61a. And it found that "the federal government will bear nearly all of the costs" associated with the ACA's expansion of Medicaid; as a result, "the idea that states are being coerced into spending money in an ever-growing program" struck the panel as " 'more rhetoric than fact.' " *Id.* 61a-62a (quoting *Dole*, 483 U.S. at 211).

With those considerations in mind, the Eleventh Circuit concluded that "the Medicaid-participating states have a real choice—not just in theory but in fact—to participate in the Act's Medicaid expansion,"[11] and that "[w]here an entity has a real choice, there can be no coercion." Pet. App. 63a. That conclusion is correct under *Dole* and *Steward Ma-*

---

[11] That conclusion draws support from facts on the ground: Lawmakers in a number of petitioner states have pondered the very move—"dropping out of the federal Medicaid program"—that petitioners assure the Court is impossible. *E.g.*, E. Ramshaw, *Texas Considers Medicaid Withdrawal*, New York Times (Nov. 6, 2010), *available at* http://www.nytimes.com/2010/11/07/us/politics/07ttmedicaid.html?partner=rss&emc=; B. Larrabee, *Florida Might Try to Withdraw from Medicaid*, Florida Times-Union (Feb. 16, 2011), *available at* http://jacksonville.com/news/florida/2011-02-16/story/florida-might-try-withdraw-medicaid.

chine and comfortably in the heartland of the intermediate appellate courts' Spending Clause decisions. *Compare California*, 104 F.3d at 1092 (no coercion despite state's claim that it had "no choice" but to accept Medicaid grant "to prevent a collapse of its medical system").

2. Unable to demonstrate that the Eleventh Circuit's decision is at odds with this Court's precedent, and unable to point to a circuit split on the question whether the ACA's Medicaid amendments are unduly coercive, the States offer several ancillary arguments in support of review. They first hint at a more abstract circuit split, suggesting that the appellate courts are "deeply divided" over the coercion doctrine in general. States' Pet. 17. That purported "deep divide," it turns out, consists merely of various courts' views about whether the judiciary is well-positioned to identify the point when pressure becomes compulsion. *Id.* 17-20. But even the courts suggesting that the judiciary is *not* well-positioned to make that determination would have reached the same outcome—no coercion—as the Eleventh Circuit did here. That does not a circuit split make. As the leading treatise observes: "A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways * * * [A]ny effort to mislead the Court into viewing a conflict in principle as a real conflict is almost invariably futile." Stern & Gressman 242.

The States next take issue with the Eleventh Circuit's rationale for rejecting their coercion claim. This approach is a non-starter because it amounts to a claim of "misapplication of a properly stated rule of law"—not normally a ground for certiorari review.

See S. Ct. R. 10(c). But in any event, the States' critiques are unfounded. They say the fact that states have years of advance notice of the ACA's Medicaid changes is irrelevant to the coercion analysis because "notice of a coercive choice does not make it less coercive." States' Pet. 23. Quite the contrary: The Eleventh Circuit observed that when a state has ample notice, that gives it the time to develop its *own* program and abandon the federal version. Pet. App. 62a. It is self-evident that that opportunity increases the degree to which the state has a choice. And choice is the key to the coercion analysis. *See Steward Mach.*, 301 U.S. at 590.

The States also argue that the fact that Congress reserved the right to amend Medicaid is irrelevant to the coercion inquiry because "the States are not arguing that Congress may not make changes to Medicaid. They are arguing that Congress may not *force* changes upon the States by threatening them with the loss of billions of federal dollars." States' Pet. 24. That is nonsensical. Congress has always made compliance with Medicaid changes a condition of continued state participation. *Harris* v. *McRae*, 448 U.S. 297, 301 (1980). Thus *every* "change[ ] to Medicaid" is a "force[d] change," under plaintiffs' view. States' Pet. 24. The distinction they attempt to draw cannot bear weight.

3. Finally, it is important to understand the practical consequences of the doctrine the States advance—consequences that, no doubt, go far towards explaining why no court has accepted their argument. If the States' theory were law, Congress could not adjust Medicaid to respond to changes on the ground (demographic developments, innovations in the medical delivery system, and the like) unless

every participating state agreed to Congress' proposed modification.

As the court below recognized, Pet. App. 60a, Congress has seen fit to modify Medicaid dozens of times over the decades to expand eligibility, expand or contract states' flexibility regarding coverage and payments, and ensure that healthcare providers are fairly compensated when they treat Medicaid recipients. In 1980, for example, Congress enacted the "Boren Amendment" (later repealed), which required states to pay " 'reasonable and adequate' [payment] rates" to healthcare providers for the nursing home and hospital services they offer to Medicaid patients. Kaiser Comm'n on Medicaid & The Uninsured, *The Medicaid Resource Book* 175 (App'x 1) (2002);[12] *see* Omnibus Reconciliation Act of 1980, Pub. L. No. 96-4999. And between 1986 and 1991, Congress amended Medicaid to require states to cover pregnant women and young children with family incomes below 133% of the federal poverty level. Congressional Res. Serv., *How Medicaid Works: Program Basics* 4 (Mar. 16, 2005).[13] Congress presumably enacted these and many similar modifications because it concluded that they were necessary to keep the system running smoothly and fairly. But if the states' "coercion" theory were credited, any one participant state could have blocked all of these improvements—or, perhaps more likely, could have blocked the ones that increased the state's costs and allowed others to stand.

---

[12] *Available at* http://www.kff.org/medicaid/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=14255.

[13] *Available at* http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL3227703162005.pdf.

This heckler's veto flips the Constitution on its head. *See M'Culloch* v. *Maryland*, 17 U.S. 316, 330 (1819) ("[I]f the law of congress * * * be a constitutional act, it must have its full and complete effects. Its operation cannot be either defeated or impeded by acts of state legislation. To hold otherwise, would be to declare, that congress can only exercise its constitutional powers, subject to the controlling discretion, and under the sufferance, of the state governments."). And it has the potential to wreak havoc on America's hospitals and the patients they serve. If Congress were to determine, for example, that hospitals are being undercompensated for treating a category of Medicaid patients, or that certain Medicaid recipients need additional services, it must have the prerogative to revise the program accordingly. The patients have nowhere else to turn for treatment, and the healthcare providers have nowhere else to turn for payment. Congress' best judgment on these matters cannot be held hostage at the whim of some objecting states.

CONCLUSION

For the foregoing reasons, the Government's petition for a writ of certiorari should be granted and the States' petition should be denied in part.

Respectfully submitted,

MELINDA REID HATTON
MAUREEN D. MUDRON
American Hospital Association
325 Seventh Street, N.W.
Suite 700
Washington, D.C. 20001
(202) 638-1100

SHEREE R. KANNER
CATHERINE E. STETSON*
DOMINIC F. PERELLA
MICHAEL D. KASS
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5719
cate.stetson@hoganlovells.com

IVY BAER
Association of American
Medical Colleges
2450 N Street, N.W.
Washington, D.C. 20037
(202) 828-0499

JEFFREY G. MICKLOS
Federation of American
Hospitals
801 Pennsylvania Ave.
Suite 245
Washington, D.C. 20004
(202) 624-1521

National Association of
Children's Hospitals
401 Wythe Street
Alexandria, VA 22314
(703) 684-1355

BARBARA EYMAN, Counsel
LARRY GAGE, Counsel
National Association of Public
Hospitals and Health Systems
1301 Pennsylvania Ave., N.W.
Suite 950
Washington, D.C. 20004
(202) 585-0100

LISA GILDEN
Vice President, General
Counsel/Compliance Officer
The Catholic Health
Association of the
United States
1875 Eye Street, N.W.
Suite 1000
Washington, D.C. 20006
(202) 296-3993

Counsel for Amici Curiae
**Counsel of record*

October 27, 2011

AMICUS CURIAE BRIEF

No. 11-398

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners,

v.

STATE OF FLORIDA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE CALIFORNIA ENDOWMENT AS *AMICUS CURIAE* SUPPORTING PETITIONERS

KATHLEEN M. SULLIVAN
Counsel of Record
WILLIAM B. ADAMS
DAVID B. SCHWARTZ
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue
22nd Floor
New York, NY 10010
(212) 849-7000
kathleensullivan@quinnemanuel.com

Counsel for Amicus Curiae

October 28, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. REVIEW IS WARRANTED BECAUSE THE MINIMUM COVERAGE REQUIREMENT IS A PROPER EXERCISE OF CONGRESS'S COMMERCE CLAUSE POWER	5
A. An Individual's Uninsured Status Creates A "Tangible Link To Commerce"	5
B. Uncompensated Care Also Substantially Affects Interstate Commerce	9
II. REVIEW IS WARRANTED TO REAFFIRM THAT PROVISIONS LIKE THE MINIMUM COVERAGE REQUIREMENT ARE WITHIN CONGRESS'S AUTHORITY WHEN THEY ARE AN ESSENTIAL PART OF A COMPREHENSIVE REGULATORY SCHEME	12
CONCLUSION	16

TABLE OF AUTHORITIES

CASES Page

Florida v. United States Dep't of Health & Human Services, 648 F.3d 1235 (11th Cir. 2011) ... 3, 4, 8, 11, 13, 15

Gonzales v. Raich, 545 U.S. 1 (2006) 4, 5, 8, 11, 12, 13, 14

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 12, 13, 15

Sabri v. United States, 541 U.S. 600 (2004) 15

United States v. Comstock, 130 S. Ct. 1949 (2010) 4, 5, 8, 12, 13, 14, 15

United States v. Lopez, 514 U.S. 549 (1995) 8, 9, 11, 13

United States v. Se. Underwriters Ass'n, 322 U.S. 533 (1944) 5, 12

STATUTES/RULES

42 U.S.C.A. § 1395dd(a) 7, 9

42 U.S.C.A. § 18091(a)(2)(F) 9, 10, 11

42 U.S.C.A. § 18091(a)(2)(I) 3, 11, 15

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ... 1

§ 1001 2

§ 1201 2

§ 1311 2

§ 1312 2

TABLE OF AUTHORITIES—Continued

Page

§§ 1401-1421 2

§ 1511 1

§ 1513 2

§ 2001 1

§ 2501 2

§ 4104 2

Health Care & Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010). 1

OTHER AUTHORITIES

Amicus Brief of the Governor of Washington Christine Gregoire in Support of Defendants/Appellants, *Florida v. U.S. Dep't of Health & Human Services*, 648 F.3d 1235 (11th Cir. 2011) 11

California Hospital Ass'n, *A Report on California Hospitals, the Economy, and Health Care Reform*, Aug. 2009 ..... 6, 7

Congressional Budget Office, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance*, June 16, 2010..... 14

Families USA, *Hidden Health Tax: Americans Pay a Premium*, May 2009.....7, 9, 10

Ben Furnas & Peter Harbage, *The Cost Shift from the Uninsured* (Center for American Progress), Mar. 24, 2009 10

TABLE OF AUTHORITIES—Continued

Page

Jonathan Gruber, *Health Care Reform Is A "Three-Legged Stool"* (Center for American Progress), Aug. 2010 ..... 3, 11, 14, 15

Jonathan Gruber, *Health Care Reform without the Individual Mandate* (Center for American Progress), Feb. 2011 ..... 14, 15

Peter Harbage & Len M. Nichols, *A Premium Price: The Hidden Costs All Californians Pay in Our Fragmented Health Care System*, HEALTH POLICY PROGRAM ISSUE BRIEF #3 (New America Foundation), Dec. 2006 ..... 7, 9, 10

Shana Alex Lavarreda & Livier Cabezas, *Two Thirds of California's Seven Million Uninsured May Obtain Coverage Under Health Care Reform*, UCLA HEALTH POLICY RESEARCH BRIEF, Feb. 2011 ..... 2, 6, 14

Peter Long & Jonathan Gruber, *Projecting the Impact of the Affordable Care Act on California*, 30:1 HEALTH AFFAIRS 63 (Jan. 2011) 14

Elizabeth Mendez, *State of the States: Texans Most Likely to Be Uninsured, Mass. Residents Least* (Gallup), Mar. 11, 2011 6

Elizabeth Mendez, *State of the States: Texas and Mass. Still at Health Coverage Extremes in U.S.* (Gallup), Sept. 6, 2011 6

BRIEF OF THE CALIFORNIA ENDOWMENT AS *AMICUS CURIAE* SUPPORTING PETITIONERS

INTEREST OF *AMICUS CURIAE* [1]

The California Endowment ("TCE") has an important interest in the questions presented by this case and the related cases challenging the constitutionality of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010).[2] TCE is a private foundation committed to the expansion of affordable, quality health care for all Californians, with an emphasis on providing health care to underserved and low income communities. As part of this goal, TCE funds a variety of social science and public policy research in an effort to show both policymakers and health care consumers the benefits of expanding the scope of health insurance.

TCE thus supports the enactment and implementation of the ACA. The ACA is a comprehensive, multifaceted legislative scheme aimed at achieving near-universal and affordable health care coverage for every American citizen. It expands Medicaid coverage, ACA § 2001; requires large employers to provide health care coverage for their workers, ACA §§ 1511,

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution toward the preparation or submission of this brief. On October 7 and 11, 2011, all parties filed letters with the Clerk of Court reflecting their blanket consent to the filing of *amicus* briefs; in light of Supreme Court Rule 37.2(a), *amicus curiae* nonetheless thereafter notified counsel of record for all parties of its intent to file this brief.

[2] As amended by the Health Care & Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

1513; creates new health benefit exchanges for individuals and small businesses, ACA §§ 1311, 1312; provides tax credits to allow a broad range of individuals and families to purchase health insurance, ACA §§ 1401-1421; eliminates Medicare copayments for a wide variety of preventive services (*e.g.*, screening for cancer), ACA § 4104; and strengthens the Medicare Part D prescription drug program by filling in the "donut hole," ACA § 2501.

An essential keystone of this comprehensive regulatory program is the ACA's reform of the interstate health insurance industry. The ACA requires insurers to accept all applicants, regardless of pre-existing conditions, and prohibits insurance companies from charging premiums based on an individual applicant's medical condition. ACA §§ 1001, 1201. These health insurance reforms, working in concert with the ACA's other regulatory changes, will vastly expand eligibility for health care: TCE-funded research shows that, in California alone, the ACA will enable almost 5.9 million of California's nearly 7.1 million non-elderly uninsured individuals to purchase and maintain affordable health insurance.[3]

The ACA also recognizes that its reforms of the interstate health insurance industry will work only if individuals are required to have health insurance before they require medical care. As Congress expressly found, the ACA's minimum coverage requirement ("MCR") will minimize the "adverse selection" effect of healthy individuals foregoing coverage,

---

[3] Shana Alex Lavarreda & Livier Cabezas, *Two Thirds of California's Seven Million Uninsured May Obtain Coverage Under Health Care Reform* 1, UCLA HEALTH POLICY RESEARCH BRIEF, Feb. 2011, http://www.healthpolicy.ucla.edu/pubs/Publication.aspx?pubID=478.

which will both broaden the health insurance risk pool and lower health insurance premiums. 42 U.S.C.A. § 18091(a)(2)(I). The MCR is critical to the ACA's reform of the interstate health insurance market: in the absence of the MCR, Congress's goal of providing near universal health care will be obstructed, creating a potential "death spiral" of high prices and limited coverage.[4]

TCE therefore has a strong interest in supporting the constitutionality of the MCR, and the ACA in general. The Eleventh Circuit's ruling in *Florida v. United States Department of Health & Human Services*, 648 F.3d 1235 (11th Cir. 2011), throws the efficacy of the ACA into question and thus disrupts TCE's efforts to help effectively implement and publicize the ACA. TCE submits this brief to provide the Court with additional justifications and empirical support for the petitioners' arguments that this Court should grant the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The Eleventh Circuit's decision deserves review by this Court for numerous reasons, several of which are explained by the Government in its petition for a writ of certiorari. TCE writes to further explain two independent errors by the Eleventh Circuit that warrant this Court's review.

First, the Eleventh Circuit erred when it concluded, contrary to Congress's judgment and this Court's precedents, that the MCR is unconstitutional because it "does *not* regulate behavior at the point of

---

[4] Jonathan Gruber, *Health Care Reform Is A "Three-Legged Stool"* 2 (Center for American Progress), Aug. 2010, http://www.americanprogress.org/issues/2010/08/pdf/repealing_reform.pdf.

consumption." *Florida*, 648 F.3d at 1295. Contrary to this statement, the MCR does aim at the consumption of economic resources: it seeks to shift the point at which the uninsured and underinsured enter the health care market so that they purchase health insurance before they consume health care services at significantly higher cost than they would if insured. Empirical research, including data reflecting California's health care experience, helps demonstrate this "tangible link to commerce," which is all that is necessary under the Commerce Clause for Congress to regulate the means by which individuals consume health care. *United States v. Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring in the judgment); *accord Gonzales v. Raich*, 545 U.S. 1, 17-19 (2006).

Second, the Eleventh Circuit erred when it invalidated the MCR despite concluding that the MCR "counteract[s] the significant regulatory costs on insurance companies and adverse consequences stemming from the fully executed reforms." *Florida*, 648 F.3d at 1310. This Court's precedents teach that the Necessary and Proper Clause "empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation." *Raich*, 545 U.S. at 39 (Scalia, J., concurring in the judgment); *accord Comstock*, 130 S. Ct. at 1956-57. Empirical research, including California-focused research, buttresses Congress's rational judgment that the MCR is necessary for the ACA to function properly.

ARGUMENT

I. REVIEW IS WARRANTED BECAUSE THE MINIMUM COVERAGE REQUIREMENT IS A PROPER EXERCISE OF CONGRESS'S COMMERCE CLAUSE POWER

Nearly seventy years ago, this Court explained that the Commerce Clause "power, as held by this Court from the beginning, is vested in Congress, available to be exercised for the national welfare as Congress shall deem necessary." *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 552-53 (1944). This Court continued: "No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance." *Id.* at 553. By holding that the MCR is unconstitutional because Congress chose not to regulate the health insurance and health care industries "at the point of consumption," the Eleventh Circuit ignored the key lessons of this Court's Commerce Clause jurisprudence.

A. An Individual's Uninsured Status Creates A "Tangible Link To Commerce"

For a statute to constitute a valid exercise of Congress's authority under the Commerce Clause, there need only be "a 'rational basis'" for concluding that an individual's "activities, taken in the aggregate, substantially affect interstate commerce." *Raich*, 545 U.S. at 22. This "rational basis referred to in the Commerce Clause context is a demonstrated link in fact, based on empirical demonstration." *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring in the

judgment). In this case, the "tangible link to commerce," *id.*, is easily demonstrated.

Evidence from the State of California provides particularly strong confirmation of Congress's judgment. While Congress was considering legislation that ultimately became the ACA, TCE-sponsored research found that "seven million Californians reported being uninsured for all or part of 2009."[5] The recent recession has exacerbated this problem, as California's ranks of the uninsured have swelled from 18.9% of the State's population in 2008 to 21.9% of its population in 2011.[6] California currently ranks sixth highest in the Nation in terms of percentage of uninsured residents.[7]

Congress rationally could have concluded that individuals' failure to obtain health insurance is an economic choice that substantially affects interstate commerce. "Individuals without a routine source of health care often use hospital emergency departments as the entry point to primary and other health care services."[8] Indeed, "[u]ninsured adults are nearly eight times as likely as the privately insured to go

---

[5] Lavarreda & Cabezas, *supra* n.3, at 3.

[6] Elizabeth Mendez, *State of the States: Texas and Mass. Still at Health Coverage Extremes in U.S.* (Gallup), Sept. 6, 2011, http://www.gallup.com/poll/149321/texas-mass-health-coverage-extremes.aspx; Elizabeth Mendez, *State of the States: Texans Most Likely to Be Uninsured, Mass. Residents Least* (Gallup), Mar. 11, 2011, http://www.gallup.com/poll/146579/Texans-Likely-Uninsured-Mass-Residents-Least.aspx.

[7] Mendez, *supra* n.6.

[8] California Hospital Ass'n, *A Report on California Hospitals, the Economy, and Health Care Reform* 3, Aug. 2009, http://www.calhospital.org/public/report-california-hospitals-economy-and-health-care-reform (hereinafter "CHA").

without needed care due to cost," and "are nearly seven times more likely to have gone without any preventive care in the last year than insured adults."[9] "In California, the best estimates are that the average uninsured person gets less than 40 percent of the care received by the average insured person."[10] Critically, hospital emergency departments "are the *most expensive* and often the *least efficient* point of entry into the system when primary and preventive care would have helped the patient if they had been available."[11]

Exacerbating this problem is the fact that California health care providers are legally required to treat individuals who decide to consume health care in this expensive and inefficient manner. Under federal law, a California hospital must treat any uninsured who comes into its emergency room, regardless of residency or ability to pay. *See* 42 U.S.C.A. § 1395dd(a). This scheme results in California hospitals, like other hospitals nationwide, providing treatment even where it is not cost-effective to do so.

These two forces create the necessary "tangible link" between regulating the choice to forego health insurance and interstate commerce. Because the uninsured are empirically more likely to need more expensive care, and because health care providers

---

[9] Families USA, *Hidden Health Tax: Americans Pay a Premium* 4, May 2009, http://familiesusa2.org/ assets/pdfs/hidden-health-tax.pdf.

[10] Peter Harbage & Len M. Nichols, *A Premium Price: The Hidden Costs All Californians Pay in Our Fragmented Health Care System* 2, HEALTH POLICY PROGRAM ISSUE BRIEF #3 (New America Foundation), Dec. 2006, http://www.newamerica.net/ files/naf migration/HealthIBNo3.pdf.

[11] CHA, *supra* n.8 (emphasis added).

may not refuse to treat such individuals, Congress could rationally enact the MCR to ensure that individuals purchase health care in a more efficient and significantly less expensive manner.

The Eleventh Circuit, however, rejected this empirical logic and held that Congress may regulate the uninsured only when they "actually enter the stream of commerce and consume health care." *Florida*, 648 F.3d at 1295. This is incorrect. Congress is well within its constitutional authority under the Commerce Clause when it makes a judgment that such a time is too late: at that point, interstate commerce has already been substantially affected by uninsured individuals' use of hospital emergency departments—the *most expensive* and *least efficient* form of health care.

The Eleventh Circuit's failure to cite any authority to support its assertion is telling, because there is no basis in the Constitution or this Court's precedents to so tie Congress's hands. Rather, where there "is a demonstrated link in fact, based on empirical demonstration," *Comstock*, 130 S. Ct. at 1969 (Kennedy, J., concurring in the judgment), then "the Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise," *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring); *see also Raich*, 545 U.S. at 22. This Court therefore should grant the petition in order to review the Eleventh Circuit's rejection of Congress's empirical judgment that a lack of insurance directly affects interstate commerce.

B. Uncompensated Care Also Substantially Affects Interstate Commerce

Beyond the empirical fact that uninsured individuals consume health care in the *least efficient* and *most expensive* manner possible, Congress also rationally could have found a "tangible link to commerce" based on "[t]he cost of providing uncompensated care to the uninsured[, which] was $43,000,000,000 in 2008." 42 U.S.C.A. § 18091(a)(2)(F). In rejecting Congress's conclusion as insufficient to support Commerce Clause authority, the Eleventh Circuit "return[ed] to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system." *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring). This Court should grant review to reaffirm the principle that measures like the MCR are justified by the substantial effects they have on interstate commerce in the health care market.

When an uninsured or underinsured individual obtains medical care—which health care providers are required to give under federal law, *see* 42 U.S.C.A. § 1395dd(a)—they consume health care services for which they cannot pay. Nationally, uninsured individuals pay for approximately 37 percent of their care; third-party sources, such as government programs and charities, pay for another 26 percent; and the remaining 37 percent, nearly $43 billion in 2008, is "uncompensated care."[12] In California alone, uncompensated care totaled $9.6 billion in 2006.[13]

---

[12] Families USA, *supra* n.9, at 2.

[13] Harbage & Nichols, *supra* n.10, at 2.

Uncompensated care must be paid somehow—"[p]roviders do not have unlimited pockets to secretly finance the health care provided to millions of uninsured (and underinsured) patients."[14] Providers thus recover these missing billions "primarily by increasing charges for those with private insurance."[15] Insurers pass these costs along to individuals and families who purchase private insurance.[16] Nationwide, "this translated into a surcharge of $368 for individual premiums and a surcharge of $1,017 for family premiums in 2008 due to uncompensated care."[17] In 2006, this "cost-shift" resulted in an additional $455 in premiums for California individuals and an additional $1,186 for California families;[18] by 2009, those costs had risen to $500 and $1,400, respectively.[19] Congress's findings are consistent with this empirical data: "[C]ost-shifting increases family premiums by on average over $1,000 a year." 42 U.S.C.A. § 18091(a)(2)(F).

Congress concluded that the MCR would help to solve these economic problems: "By significantly reducing the number of the uninsured, the [MCR], together with the other provisions of this Act, will

---

[14] *Id.*

[15] Families USA, *supra* n.9, at 6. Health care providers cannot turn to state and federal government programs to cover the cost, since those programs use regulations and contracts to set provider payments in advance. *Id.*

[16] *Id.*

[17] *Id.* at 7.

[18] Harbage & Nichols, *supra* n.10, at 2.

[19] Ben Furnas & Peter Harbage, *The Cost Shift from the Uninsured* 2 (Center for American Progress), Mar. 24, 2009, http://www.americanprogressaction.org/issues/2009/03/pdf/cost_shift.pdf.

lower health insurance premiums." 42 U.S.C.A. § 18091(a)(2)(F). The resulting "broad distribution of health risks in the market" substantially reduces this cost-shifting problem, decreasing premiums for all.[20] For example, one analysis estimates that the MCR will reduce premiums by over 20 percent for individuals and over 10 percent for families.[21]

Without the MCR, this cost-shifting problem would be exacerbated: as evidence from multiple States has shown, when there is a prohibition on denying coverage due to pre-existing conditions but no MCR, healthy individuals stay out of the market, creating a "death spiral" of rapidly rising insurance costs and lower rates of health coverage.[22] Congress recognized this problem, and explicitly sought to address it in enacting the MCR. 42 U.S.C.A. § 18091(a)(2)(I).

Despite this well-documented link between the problem of high percentages of uninsured individuals and the affordability of health care, the Eleventh Circuit held that, "[a]t best, we can say that the uninsured *may*, at some point in the *unforeseeable future*, create that cost-shifting consequence." *Florida*, 648 F.3d at 1302. But this Court has consistently rejected a mode of analysis where a court substitutes its own empirical judgment for Congress's. *See, e.g.*, *Raich*, 545 U.S. at 22; *Lopez*, 514 U.S. at 574

---

[20] Gruber, *supra* n.4, at 3.

[21] *See id.* at 4.

[22] *See* Amicus Brief of the Governor of Washington Christine Gregoire in Support of Defendants/Appellants 11-12, *Florida v. U.S. Dep't of Health & Human Services*, 648 F.3d 1235 (11th Cir. 2011) (describing Washington's experience of enacting health reforms without an MCR, where "the major carriers in Washington stopped selling individual plans, leading to the virtual destruction of the individual insurance market").

(Kennedy, J., concurring). Congress carefully considered and relied upon evidence of the "tangible link to commerce" that is required under this Court's precedents. *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring in the judgment). This Court should grant certiorari to review the Eleventh Circuit's decision so that the proper standard of review of Congress's empirical judgments may be reaffirmed.

II. REVIEW IS WARRANTED TO REAFFIRM THAT PROVISIONS LIKE THE MINIMUM COVERAGE REQUIREMENT ARE WITHIN CONGRESS'S AUTHORITY WHEN THEY ARE AN ESSENTIAL PART OF A COMPREHENSIVE REGULATORY SCHEME

The Eleventh Circuit's decision also warrants review for the independent reason that it limits Congress's authority under the Necessary and Proper Clause, read together with the Commerce Clause, in ways that are inconsistent with this Court's precedents. The MCR is within Congress's authority because it is an essential part of the ACA's comprehensive regulation of the interstate health insurance industry.

It is undisputed that Congress may regulate the business of insurance under its Commerce Clause authority. *Se. Underwriters Ass'n*, 322 U.S. at 552-53. Moreover, the Necessary and Proper Clause "empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation." *Raich*, 545 U.S. at 39 (Scalia, J., concurring in the judgment) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421-22 (1819)); *see also Comstock*, 130 S. Ct. at 1956 ("[T]he Necessary and Proper Clause makes clear

that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" (quoting *McCulloch*, 17 U.S. at 413, 418)). This authority applies fully where, as here, the statutory provision at issue is one of the "essential parts of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the [activity at issue] were regulated." *Raich*, 545 U.S. at 24-25 (brackets and internal quotation marks omitted) (quoting *Lopez*, 514 U.S. at 561). Congress therefore was authorized to enact the MCR as "a means that is rationally related to the implementation of a constitutionally enumerated power." *Comstock*, 130 S. Ct. at 1956.

The Eleventh Circuit thus erred in holding that the MCR was insufficiently encompassed within Congress's authority even though it "counteract[s] the significant regulatory costs on insurance companies and adverse consequences stemming from the fully executed reforms," *Florida*, 648 F.3d at 1310. By counteracting those costs and adverse consequences, the MCR is an essential part of the larger regulatory scheme by which the ACA reforms the health care and health insurance markets.

California's recent experience with the ACA helps to illustrate the Eleventh Circuit's error. As described above and in the Government's petition, the ACA's interlocking provisions expand public provision of health care, create new health benefit exchanges, and provide subsidies for the purchase of health insurance. *See* Petition for Certiorari at 2-5, *Dep't of Health & Human Services v. Florida*, No. 11-398 (Sept. 28, 2011). TCE-funded research predicts

that these reforms will expand eligibility for over 84 percent of California's uninsured, with the vast majority of these obtaining some sort of federal or state subsidy.[23]

Yet the MCR is the critical piece necessary to getting nearly 6 million California residents to obtain health insurance. As one recent model of California's uninsured reported, "the reach of the mandate will be a key determinant of [the ACA's] success in increasing insurance coverage."[24] The Congressional Budget Office likewise concluded that, nationwide, the MCR would bring 16 million nonelderly residents into the pool of the insured.[25] Because the MCR is thus an essential cornerstone for ACA's reforms, the Eleventh Circuit's decision to strike it down "will critically undercut gains from reform."[26] Congress therefore was constitutionally authorized to enact the MCR under the Necessary and Proper Clause in conjunction with the Commerce Clause. *See, e.g.*, *Comstock*, 130 S. Ct. at 1956-57; *Raich*, 545 U.S. at 24-25; *id.* at 39 (Scalia, J., concurring in the judgment).

---

[23] Lavarreda & Cabezas, *supra* n.3, at 2 & Ex. 1.

[24] Peter Long & Jonathan Gruber, *Projecting the Impact of the Affordable Care Act on California*, 30:1 HEALTH AFFAIRS 63, 67 (Jan. 2011).

[25] Congressional Budget Office, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* 2, June 16, 2010, http://www.cbo.gov/ftpdocs/113xx/doc11379/Eliminate_Individual_Mandate_06_16.pdf. Other estimates put the number higher, with one finding that the MCR would be responsible for creating 24 million insured nonelderly residents. Jonathan Gruber, *Health Care Reform without the Individual Mandate* 2 (Center for American Progress), Feb. 2011, http://www.americanprogress.org/issues/2011/02/pdf/gruber_mandate.pdf.

[26] Gruber, *supra* n.4, at 3.

The MCR creates other economic benefits that likewise justify Congress's exercise of its authority under the Necessary and Proper Clause. The MCR is conducive to the regulation of interstate commerce because it provides significantly higher "bang for the buck," raising health insurance coverage rates by 50 to 75 percent for only a 25 to 30 percent increase in costs.[27] And by reducing cost-shifting, the MCR helps significantly lower health insurance premiums—one of the ACA's key goals, *see* 42 U.S.C.A. § 18091(a)(2)(I)—by approximately 10 percent for families and approximately 20 percent for individuals.[28] Moreover, the MCR is conducive to the prudent expenditure of public funds under the Spending Clause; Congress is entitled to legislate so that its money is spent efficiently and "not frittered away." *Sabri v. United States*, 541 U.S. 600, 605 (2004). Congress thus was empowered to enact the MCR under its longstanding authority "to enact laws that are 'convenient, or useful' or 'conducive' to [an enumerated] authority's 'beneficial exercise.'" *Comstock*, 130 S. Ct. at 1956 (quoting *McCulloch*, 17 U.S. at 413, 418).

The Eleventh Circuit recognized that the MCR "counteract[s] the significant regulatory costs on insurance companies," *Florida*, 648 F.3d at 1310, but drew the opposite conclusion from the one this Court's precedents demand. Accordingly, this Court should grant the Government's petition so that it may consider whether the MCR is a constitutional exercise of Congress's authority under the Necessary and Proper Clause, read together with the Commerce Clause.

---

[27] Gruber, *supra* n.25, at 2.

[28] Gruber, *supra* n.4, at 4.

CONCLUSION

For the foregoing reasons, and for those stated by the petitioners, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

KATHLEEN M. SULLIVAN
Counsel of Record
WILLIAM B. ADAMS
DAVID B. SCHWARTZ
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue
22nd Floor
New York, NY 10010
(212) 849-7000
kathleensullivan@
quinnemanuel.com

Counsel for Amicus Curiae

October 28, 2011

AMICUS CURIAE BRIEF

Nos. 11-393, 11-398 & 11-400

IN THE

Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, ET AL., PETITIONERS

v.

KATHLEEN SEBELIUS, ET AL.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATES OF FLORIDA, ET AL.

STATES OF FLORIDA, ET AL., PETITIONERS

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR CERTIORARI

(Counsel listed on inside cover)

ROBIN S. CONRAD
SHANE B. KAWKA
KATHRYN COMERFORD TODD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

K. LEE BLALACK II
(*Counsel of Record*)
lblalack@omm.com
BRIAN D. BOYLE
ANTON METLITSKY
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

REASONS FOR GRANTING THE PETITIONS 7

A. The Viability Of The Entire PPACA, And Not Only The Individual Mandate, Is A Question Of Overriding Importance To The Business Community, And To The Nation 7

B. The Eleventh Circuit's Severability Analysis Is Clearly Incorrect, And Will Have Disastrous Consequences For The Health Insurance Market If Left Standing 11

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES

Alaska Airlines, Inc. v. Brock,
480 U.S. 678 (1987) 12, 14

Carter v. Carter Coal Co.,
298 U.S. 238 (1936) 17

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,
130 S. Ct. 3138 (2010) 12

Goudy-Bachman v. U.S. Dep't of Health and Human Servs., __ F. Supp. 2d __, No. 1:10-CV-763, 2011 WL 4072875 (M.D. Pa. Sept. 13, 2011) 10

Virginia ex rel. Cuccinelli v. Sebelius,
728 F. Supp. 2d 768 (E.D. Va. 2010) 10

FEDERAL STATUTES

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(a), 124 Stat. 119, 244 (codified at 26 U.S.C. § 5000A(a)) 3, 13, 14

42 U.S.C. § 300gg-4(a) 12

42 U.S.C. § 300gg(a)(1) 13

42 U.S.C. § 18091(a)(2)(I) 3, 14, 17

STATE STATUTES

Ky. Rev. Stat. Ann. § 304.17A-060(2)(A) (1994) (repealed 1998) 16

Me. Rev. Stat. tit. 24-A, § 2736-C(3) 16

N.H. Rev. Stat. § 420-G:6 16

TABLE OF AUTHORITIES
(continued)

Page(s)

N.J. Stat. § 17B:27A-22 16

N.Y. Ins. L. § 3231 16

N.Y. Ins. L. § 3232 16

Vt. Stat. Ann. tit. 8, § 4080B(d)(1) 16

Wash. Code § 48.43.012(1) 16

OTHER AUTHORITIES

Scott R. Baker et al., *Policy Uncertainty Is Choking Recovery*, Bloomberg News (Oct. 5, 2011) 9

Jonathan Gruber, *Why We Need the Individual Mandate: Without a Mandate, Health Reform Would Cover Fewer With Higher Premiums*, Center for American Progress (Apr. 8, 2010) 15

Mark A. Hall, *An Evaluation of New York's Reform Law*, 25 J. Health Pol., Pol'y & L. 71 (2000) 16

Bradley Herring, *An Economic Perspective on the Individual Mandate's Severability from the PPACA*, 364 New Eng. J. Med. 16e (Mar. 10, 2011) 15

Adele M. Kirk, *Riding the Bull: Experience with Individual Market Reform in Washington, Kentucky and Massachusetts*, 25 J. Health Pol., Pol'y & L. 133 (2000) 16

TABLE OF AUTHORITIES
(continued)

Page(s)

Anthony T. Lasso, *Community Rating and Guaranteed Issue in the Individual Health Insurance Market*, National Institute for Health Care Management Foundation (Jan. 2011) 15

Dennis P. Lockhart, *Business Feedback on Today's Labor Market* (Nov. 11, 2010) 9

Roberta B. Meyer, *Justification for Permitting Life Insurers to Continue to Underwrite on the Basis of Genetic Information and Genetic Test Results*, 27 Suffolk U. L. Rev. 1271 (1993) 16

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONS FOR CERTIORARI

This brief is submitted on behalf of the Chamber of Commerce of the United States of America in support of the petitions for certiorari.[1]

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing the interests of 300,000 direct members and indirectly representing an underlying membership of three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. More than 96 percent of the Chamber's members are small businesses with one hundred or fewer employees. The Chamber advocates on issues of vital concern to the nation's business community and has frequently participated as *amicus curiae* before this Court and other courts. And in particular, the Chamber has participated as *amicus curiae* in litigation concerning the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 ("PPACA") in the

---

[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, *amicus* states that all counsel of record for all parties were timely notified of the intent to file this brief; the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

Courts of Appeals for the Fourth, Eleventh, and District of Columbia Circuits.

Resolution of the fate of the PPACA is of critical importance to Chamber members. The majority of the Chamber's members provide health insurance to their employees. Indeed, employers are the country's largest providers of health benefits, providing coverage for more than 160 million people and more than 60 percent of nonelderly Americans. More generally, the PPACA imposes a myriad of costly obligations on the business community—as well as on states and consumers. Uncertainty over the future of the PPACA seriously undermines the ability of American businesses to plan for the future, and to make informed decisions concerning investment in growth and hiring. Accordingly, both swift resolution of the constitutionality of the individual mandate, and clarification as to which portions of the PPACA, if any, will remain if the individual mandate falls, are crucial to Chamber members.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010 ("PPACA" or "the Act"), contains an extensive set of reforms primarily intended to make health insurance available to millions of uninsured Americans and to increase the quality of health insurance for all Americans. The Act's insurance reforms are interdependent and built upon one central provision: the requirement to maintain minimum essential coverage under Section 1501.

PPACA, Pub. L. No. 111-148, § 1501(a), 124 Stat. 119, 244 (codified at 26 U.S.C. § 5000A(a)).

The individual mandate is indispensible to the operation of the PPACA's health insurance reforms. Congress understood that simply requiring insurers to provide coverage to all applicants at the same price without regard to their health status could not occur unless healthy individuals were also incented or required to purchase coverage. Standing alone, these new insurance requirements (the core of which is known as the guaranteed-issue and community-rating reforms) would lead to less affordable health insurance because individuals would wait to purchase health insurance until they absolutely need it, forcing insurers to raise premiums for everyone else. To prevent such behavior, often referred to as "adverse selection," Congress included a minimum essential coverage requirement in the PPACA—the so-called individual mandate.

By requiring individuals to maintain a minimum level of health insurance coverage, the law was drafted to prevent the adverse selection that would otherwise undermine the new insurance requirements. Through the individual mandate, the law was structured to allow guaranteed-issue, community-rating, and other insurance reforms to function without adverse selection, as Congress intended. The PPACA would not have been enacted without it. As Congress explained in the Act, the individual mandate "is essential to creating effective health insurance markets in which improved health insurance products that ... do not exclude coverage of pre-existing conditions can be sold." 42 U.S.C. § 18091(a)(2)(I).

Although the Chamber takes no position on the constitutionality of the individual mandate,[2] there should be no dispute that the mandate's constitutional validity is a question of overriding national importance to the business community—as well as to the federal and state governments and to consumers. The circuit conflict that has developed concerning that question should be resolved by this Court in this case. The constitutionality of the mandate, however, is only the first half of the important issue at stake. The second half of the issue—of crucial importance to the business community and to the Nation as a whole—is whether, and to what extent, the remainder of the PPACA will remain in force if the individual mandate is invalidated.

The business community has a tremendous interest in assuring that, if the mandate is struck down, the fate of the remaining provisions of the Act is resolved quickly. Numerous PPACA provisions impose substantial requirements and costs on American businesses. As a result, businesses will have to change their practices and make important decisions to comply with the new requirements. But businesses cannot make rational decisions concerning how to comply with the law and budget for its costs without knowing what the law is and how it will be enforced and applied in the future. Certainty is necessary before businesses can make decisions concerning investment in growth and in jobs.

---

[2] The Chamber also takes no position on whether the first and second questions presented in the petition for certiorari filed by several States, in case No. 11-400, should be granted, or on the merits of those questions.

Thus, the Chamber strongly urges the Court not to limit its review to the constitutionality of the mandate, but also to consider as a separate question which additional provisions of the PPACA are considered non-severable from the individual mandate, and thus fall with it, if the mandate is held unconstitutional. Putting off consideration of the severability question will only extend the cloud of uncertainty hanging over American businesses and our economy.

This Court's immediate review of the severability question is also critical because the Eleventh Circuit's incorrect severability decision will wreak havoc on the health insurance market if left to stand. While the court of appeals held the individual mandate unconstitutional, it further held that the mandate could be severed from the remainder of the Act. That position is untenable. If the PPACA's remaining insurance reform provisions were left standing in the absence of the mandate, individuals and employers who sponsor health insurance coverage for their employees would encounter real and significant market disruption. Health care costs would rise and fewer individuals would obtain coverage—precisely the opposite of Congress's intentions. A proper application of this Court's severability jurisprudence therefore requires a finding that, at the very least, the health insurance reform provisions in the PPACA are non-severable from the individual mandate and must necessarily fall with it.

For instance, the United States has explained that two of the principal health insurance reforms in the PPACA—the guaranteed-issue and community-rating reforms—would necessarily fall with the minimum coverage mandate. *See* Consolidated Brief

for Respondents at 10, *Nat'l Fed'n of Indep. Bus. v. Sebelius* and *Florida v. Dep't of Health and Human Servs.* (Nos. 11-393 & 11-400) (U.S.) ("[T]he [Eleventh Circuit's] conclusion that the guaranteed-issue and community-rating provisions could be severed from the minimum coverage provision was incorrect."). In the absence of the mandate, individuals will have no reason to purchase insurance until they become sick, which will drive up insurance premiums for the remaining consumers. The increase in premiums would in turn cause healthy individuals to stop purchasing (or refrain from obtaining) health insurance, causing premiums to rise still further. This "premium spiral" has been experienced in various states—such as New York, Kentucky, and Washington—where similar health insurance reforms were enacted without an accompanying minimum coverage mandate. The legislative record confirms that Congress understood this market dynamic and would not have enacted guaranteed-issue and community-rating reforms in the absence of the individual mandate. Yet if the court of appeals' decision is allowed to stand, all the negative consequences that Congress sought to avoid by enacting the individual mandate would necessarily come to pass.

The Chamber also submits that the severability inquiry does not end with the guaranteed-issue and community-rating reforms alone. Rather, the other insurance reform requirements in the PPACA, beyond guaranteed-issue and community-rating, also depend on the existence of a fully insured marketplace. Invalidating the individual mandate while retaining these other provisions would similarly un-

dermine the purpose of the Act and disrupt the market for health insurance.

At the certiorari stage, however, it is not necessary for the Court to conduct an in-depth severability analysis of the entire Act. The Court need only recognize that swift determination not only of the mandate's constitutionality, but of the viability of the remainder of the Act, is critical. The conclusion of the court of appeals—that the individual mandate is unconstitutional, but that the remainder of the PPACA will function as Congress intended and thus should remain standing—would have disastrous consequences for the health insurance market, and requires this Court's immediate attention. Indeed, all parties agree that the court of appeals' severability analysis was erroneous, and should be considered by this Court. American businesses need certainty now. This need for certainty will not be satisfied merely by swift review of the constitutionality of the individual mandate, although this first step is essential. The Court should also seek full briefing on a separate and equally important question presented: whether that mandate, if unconstitutional, is severable from the remainder of the Act.

REASONS FOR GRANTING THE PETITIONS

A. The Viability Of The Entire PPACA, And Not Only The Individual Mandate, Is A Question Of Overriding Importance To The Business Community, And To The Nation.

The PPACA is one of the most significant and complicated congressional enactments in decades. It "comprehensively reform[s] and regulate[s] more

than one-sixth of the national economy," "via several hundred statutory provisions and thousands of regulations that put [a] myriad [of] obligations and responsibilities on individuals, employers, and the states." Appendix to the Petition for Certiorari in *Nat'l Fed'n of Indep. Bus., et al. v. Sebelius, et al*, No. 11-393 ("NFIB Pet. App.") 491a.

The PPACA's numerous provisions—and the "myriad [of] obligations and responsibilities" they impose—will have an enormous effect on American businesses. Businesses—large and small alike—will have to significantly alter their investment and hiring decisions not only to comply with the Act's requirements, but also to absorb the costs that such compliance will impose.

Continued uncertainty over the fate not only of the individual mandate, but also of all the other PPACA provisions, will seriously undermine the business community's ability to make informed decisions, thereby undermining the growth of the Nation's economy. Businesses must plan. They must plan how and when to grow. They must plan whether to create jobs or allocate capital to comply with other mandates. As long as the viability of the PPACA remains in serious question, this planning must incorporate risks of legal uncertainty that are too extensive for the average business to bear without sacrificing growth. And while risks associated with legal uncertainty always represent a significant cost, those costs—for American businesses, and the American economy—are particularly high given the breadth and complexity of the PPACA. Indeed, commentators have noted that uncertainty concerning the future of PPACA is contributing to the slow

pace of the economic recovery in the United States.[3] For this reason alone, the Court should grant the petitions for certiorari and resolve whether the individual mandate is constitutional and, if it is not, to what extent the remainder of the legislation built upon the individual mandate can survive.

Moreover, the high cost of uncertainty over the PPACA's validity is not limited to the business community. Businesses are not the only entities struggling to comply with the law. Individuals and governments (including the federal government) are also currently struggling to meet the complicated and numerous new requirements of the Act. If the Court were to invalidate the individual mandate, but withhold consideration of the severability question, the processes of compliance and implementation would only become more advanced. And later decisions as to whether all or a significant part of the PPACA falls with the mandate would be all the more costly and difficult, with implementation even further under way. The longer the fate of the PPACA

---

[3] *See, e.g.*, Dennis P. Lockhart, *Business Feedback on Today's Labor Market* (Nov. 11, 2010) (President of Federal Reserve Bank of Atlanta explaining that "a number of ... factors ... are impeding hiring. Prominent among these is the lack of clarity about the cost implications of the recent health care legislation. We've frequently heard strong comments to the effect of 'my company won't hire a single additional worker until we know what health insurance costs are going to be.'"), *available at* http://www.frbatlanta.org/news/speeches/lockhart_111110.cfm; Scott R. Baker et al., *Policy Uncertainty Is Choking Recovery*, Bloomberg News (Oct. 5, 2011) (explaining that uncertainty about the future of the PPACA is a major factor in slowing economic recovery), *available at* http://www.bloomberg.com/news/2011-10-06/policy-uncertainty-is-choking-recovery-baker-bloom-and-davis.html.

remains undecided, the more costly it will be to comply with whatever resolution of the severability question this Court eventually reaches.

Finally, while the reasons in favor of considering the severability question are overwhelming, there is no compelling reason for denying review of that question. The severability issue was litigated and decided below, and all parties agree that the individual mandate's severability should be considered as a separate question presented. Moreover, denying review of the severability question now would not prevent this Court from having to review it eventually. Past experience in the lower courts demonstrates that those courts are unlikely to agree on a uniform approach to severability in the future.

Four lower courts have thus far found the mandate unconstitutional, and they have settled on four completely different severability outcomes. *See* NFIB Pet. App. 179a-194a (Eleventh Circuit opinion below) (holding the individual mandate is severable from the remainder of the PPACA); NFIB Pet. App. 365a-379a (district court opinion below) (holding the mandate is non-severable from the remainder of the PPACA); *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 790 (E.D. Va. 2010) (severing the individual mandate "and directly-dependent provisions which make specific reference to [it]" from the remainder of the PPACA); *Goudy-Bachman v. U.S. Dep't of Health and Human Servs.*, __ F. Supp. 2d __, No. 1:10-CV-763, 2011 WL 4072875, at *21 (M.D. Pa. Sept. 13, 2011) (holding the mandate non-severable from the guaranteed-issue and community-rating condition provisions, but leaving the remainder of the PPACA intact). There is no reason to believe

that, in the absence of additional guidance from this Court, further percolation of the severability question would help resolve this disagreement among the lower courts on the proper application of this Court's severability principles to the PPACA. The question of severability will therefore eventually fall to this Court. Given that this Court will ultimately be forced to decide how to apply severability principles to the PPACA's complex provisions (if the mandate is held unconstitutional), there is especially little reason to decline to address the severability issue in tandem with the Court's consideration of the mandate's constitutionality.

B. The Eleventh Circuit's Severability Analysis Is Clearly Incorrect, And Will Have Disastrous Consequences For The Health Insurance Market If Left Standing.

The importance of resolving the uncertainty over which provisions of the PPACA, if any, will remain if the mandate is struck down is by itself sufficient to warrant this Court's review of the severability question. But this Court should also review that question because the Eleventh Circuit's severability decision is contrary to this Court's precedent, and will have disastrous consequences for the health insurance market if allowed to stand.

1. This Court has explained that when a court strikes down a particular statutory provision on the grounds that it exceeds Congress's constitutional powers, the remaining provisions in the act will remain standing "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that

which is not." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quotation marks omitted); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010). In short, the question is whether Congress would have enacted the remaining provisions in the absence of the invalid one. *See Alaska Airlines*, 480 U.S. at 685 ("The final test" for severability holds that "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted."). That overarching question turns on an assessment of whether the remaining provisions "will function in a *manner* consistent with the intent of Congress" in the absence of the invalidated provision. *Id.*

A proper application of these established principles demonstrates that the court of appeals erred in holding the individual mandate severable from the remainder of the PPACA. While an exhaustive survey of the proper scope of severability is unnecessary at the certiorari stage, the Eleventh Circuit's error—and the disastrous adverse consequences for the health insurance market that will result if the decision stands—is perhaps best illustrated through a brief analysis of the Act's guaranteed-issue and community-rating provisions.

The PPACA's guaranteed-issue provisions bar health insurers from denying coverage based on a subscriber's preexisting conditions or medical history. *See, e.g.*, 42 U.S.C. § 300gg-4(a) ("A group health plan and a health insurance issuer offering group or individual health insurance coverage may not establish rules for eligibility (including continued eligibility) of any individual to enroll under the

terms of the plan or coverage based on any of the following health status-related factors...."). The PPACA's community-rating provisions prescribe that insurers may not charge higher premiums based on preexisting conditions and certain other factors. *See, e.g.*, 42 U.S.C. § 300gg(a)(1). Those provisions therefore preclude health insurers from increasing premiums due to any condition other than age, geography, and tobacco use. The provisions also establish limits on the extent of permissible variations in premiums based on those three factors. *Id.* § 300gg(a)(1)(A)(ii)–(iv).[4]

The United States has conceded, as it must, that the PPACA's guaranteed-issue and community-rating provisions cannot survive without the individual mandate. *See, e.g.*, Consolidated Brief for Respondents at 10 ("[T]he [Eleventh Circuit's] conclusion that the guaranteed-issue and community-rating provisions could be severed from the minimum coverage provision was incorrect.").[5] Those insurance reforms prohibit denying coverage or raising

---

[4] Both the guaranteed-issue and community-rating provisions are found in Title I, Section 1201 of the PPACA. PPACA § 1201 (codified at 42 U.S.C. §§ 300gg – 300gg-7).

[5] The United States took the same position in the lower courts in this litigation. *See* Response/Reply Brief for the United States at 58, *Florida v. Dep't of Health & Human Servs.*, Nos. 11-11021, 11-11067 (11th Cir. May 18, 2011) ("[T]he guaranteed-issue and community-rating provisions ... cannot be severed from the minimum coverage requirement."); Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment at 40, *Florida v. Dep't of Health & Human Servs.*, No. 3:10-cv-91 (N.D. Fla. Nov. 23, 2010) ("As defendants have made clear ... the guaranteed-issue and community insurance industry reforms in Section 1201 will stand or fall with the minimum coverage mandate.").

premiums based on preexisting conditions, and in the absence of the mandate, they would not "function in a *manner* consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685.

Congress also fully recognized the interrelationship between those reforms and the mandate in the express terms of the Act:

> [I]f there were no [minimum coverage] requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.

PPACA § 1501(a)(2)(I), 42 U.S.C. § 18091(a)(2)(I). In light of Congress's own explanation of its intent, the guaranteed-issue and community-rating provisions are plainly non-severable from the individual mandate.

As the United States has starkly explained, "'[i]t is well known that community-rating and guaranteed issue, coupled with voluntary insurance, tends to lead to a death spiral of individual insurance.'"

Consolidated Brief for Respondents at 32 (quoting Uwe E. Reinhardt, Prepared Statement for Making Health Care Work for American Families: Ensuring Affordable Coverage: Hearing Before the Subcomm. on Health of the H. Comm. on Energy & Commerce, 111th Cong. 11 (Mar. 17, 2009), *available at* http://democrats.energycommerce.house.gov/Press_111/20090317/testimony_reinhardt.pdf).[6]

Congress's concerns about an "implosion" of the health insurance markets are further reinforced by the actual experience of various states that have implemented comparable community-rating and guar-

---

[6] Experts in the health care field share the view that the individual mandate is essential to the intended operation of the PPACA's guaranteed-issue and community-rating provisions. *See, e.g.*, Bradley Herring, *An Economic Perspective on the Individual Mandate's Severability from the PPACA*, 364 New Eng. J. Med. 16e (Mar. 10, 2011), *available at* http://www.nejm.org/doi/full/10.1056/NEJMpv1101519?ssource=hcrc ("Although they are politically popular, these community-rating and guaranteed-issue provisions can reduce the stability of private health insurance markets.... The primary purpose of the individual mandate is to mitigate this adverse selection...."); Anthony T. Lasso, *Community Rating and Guaranteed Issue in the Individual Health Insurance Market*, National Institute for Health Care Management Foundation, at 2 (Jan. 2011), *available at* http://nihcm.org/pdf/EV-LoSassoFINAL.pdf (stressing the "distortions that can result from community rating and guaranteed issue regulations in the non-group market when there are no provisions in place to keep people enrolled in coverage"); Jonathan Gruber, *Why We Need the Individual Mandate: Without a Mandate, Health Reform Would Cover Fewer With Higher Premiums*, Center for American Progress, at 1 (Apr. 8, 2010), *available at* http://www.americanprogress.org/issues/2010/04/pdf/individual_mandate.pdf ("Without the individual mandate, the entire structure of reform would fail.").

anteed-issue provisions without an individual mandate. Seven states have enacted guaranteed-issue laws without an accompanying mandate. Ky. Rev. Stat. Ann. § 304.17A-060(2)(A) (1994) (repealed 1998); Me. Rev. Stat. tit. 24-A, § 2736-C(3); N.H. Rev. Stat. § 420-G:6; N.J. Stat. § 17B:27A-22; N.Y. Ins. L. §§ 3231, 3232; Vt. Stat. Ann. tit. 8, § 4080B(d)(1); Wash. Code § 48.43.012(1). Studies in those states reveal precisely the type of adverse selection problems that Congress sought to avoid in the PPACA. *See* Mark A. Hall, *An Evaluation of New York's Reform Law*, 25 J. Health Pol., Pol'y & L. 71, 97 (2000) ("Following reform, the overall percentage of the population with insurance has worsened...."); Roberta B. Meyer, *Justification for Permitting Life Insurers to Continue to Underwrite on the Basis of Genetic Information and Genetic Test Results*, 27 Suffolk U. L. Rev. 1271, 1291 (1993) (New York's community rating requirement "has led to an increase in rates for young, healthy insureds" and "many of them have dropped their health insurance coverage"). Indeed, the Kentucky market reforms were repealed because they destabilized the health insurance market. *Cf.* Adele M. Kirk, *Riding the Bull: Experience with Individual Market Reform in Washington, Kentucky and Massachusetts*, 25 J. Health Pol., Pol'y & L. 133, 151 (2000) ("The Kentucky reform experience has become notorious for the mass exit of insurers from its market.").

For those reasons, there is no basis to doubt Congress's express understanding that the individual mandate is "essential" to the proper functioning of a health insurance market that includes the PPACA's guaranteed-issue and community-rating provisions.

42 U.S.C. § 18091(a)(2)(I). The individual mandate and those reforms are a tightly interwoven group, which must stand or fall together. *Cf. Carter v. Carter Coal Co.*, 298 U.S. 238, 315-16 (1936) ("These two sets of requirements are not like a collection of bricks, some of which may be taken away without disturbing the others, but rather are like the interwoven threads constituting the warp and woof of a fabric, one set of which cannot be removed without fatal consequences to the whole.").

2. Although the PPACA severability analysis cannot end with the guaranteed-issue and community-rating provisions—and indeed, the Chamber submits that *all* the Act's insurance reform provisions are non-severable from the mandate—the severability analysis concerning those two provisions demonstrates not only the court of appeals' legal error, but also the dire consequences for both purchasers and sellers of health insurance if that error is not corrected. If, for example, the mandate falls while the guaranteed-issue and community-rating provisions remain, many will wait to purchase health insurance until they need health care services. Then—as the United States has repeatedly explained—health insurance premiums will spiral out of control, causing others to drop their existing coverage or forego the purchase of coverage.

Indeed, the turmoil in the health insurance market that would result from the Eleventh Circuit's decision is the precise consequence that Congress sought to avoid by including an individual mandate in the first place. This reality renders it all the more crucial that this Court review the Eleventh Circuit's severability analysis. This Court's review is the only

meaningful avenue for avoiding the inevitable market disruption that the Eleventh Circuit's decision will produce. Accordingly, along with review of the individual mandate's constitutionality, this Court should also consider, as a separate question presented, whether the individual mandate—if unconstitutional—is severable from the remainder of the Act.

CONCLUSION

The petitions for a writ of certiorari should be granted insofar as they present the questions whether the individual mandate in the PPACA is constitutional, and if not, whether it is severable from the remainder of the Act.

Respectfully submitted,

ROBIN S. CONRAD
SHANE B. KAWKA
KATHRYN COMERFORD TODD
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

K. LEE BLALACK II
(*Counsel of Record*)
lblalack@omm.com
BRIAN D. BOYLE
ANTON METLITSKY
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

October 2011

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
OCT 28 2011
OFFICE OF THE CLERK

No. 11-398

IN THE

Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

FLORIDA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (CASE NOS. 11-11021, 11-11067)

BRIEF OF *AMICUS CURIAE* WESTERN CENTER FOR JOURNALISM IN SUPPORT OF RESPONDENTS

GARY G. KREEP, ESQ.
Counsel of Record
UNITED STATES JUSTICE FOUNDATION
932 "D" Street, Suite 2
Ramona, California 92065
(760) 788-6624
usjf@usjf.net

Attorney for Amicus Western Center for Journalism

238840

Library of Congress
Law Library

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF APPENDICES	ii
TABLE OF CITED AUTHORITIES	iii
BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER	1
INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	4
I. THE INDIVIDUAL MANDATE IS OUTSIDE THE POWER OF CONGRESS TO ENACT	4
II. FEDERAL LEGISLATION, TO BECOME LAW, MUST BE SIGNED BY A SITTING PRESIDENT	8
CONCLUSION	16

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE SUPREME COURT OF ARKANSAS, DATED JULY 6, 1942 ..... 1a

APPENDIX B — SENATE RESOLUTION 511, CONGRESSIONAL RECORD — SENATE, DATED APRIL 10, 2008 ..... 15a

TABLE OF CITED AUTHORITIES

Page

SUPREME COURT CASES

Baker v. Carr,
(1962) 369 U.S. 186 13

Central Bank, N.A. v. First Interstate Bank, N.A.,
(1994) 511 U.S. 164 9

Gonzalaz v. Raich,
(2005) 545 U.S. 1 6

La Abra Silver Mining Co. v. United States,
(1899) 175 U.S. 423 9

NLRB v. Jones & Laughlin Steel Corp.,
(1937) 301 U.S. 1 6

Perez v. United States,
(1971) 402 U.S. 146 6

United States v. Darby,
(1941) 312 U.S. 100 6

United States v. Lopez,
(1995) 514 U.S. 549 ..... 5, 6

United States v. Morrison,
(2000) 529 U.S. 598 ..... 5, 6

Page

Wickard v. Filburn,
(1942) 317 U.S. 111. 6

FEDERAL CASES

Irby v. Barrett,
(AK, 1942) 163 S.W.2d 512 . . . . . 13, 14, 15

OTHER CASES

Drake, et al. v. Obama et al.,
9th Circuit Case No. C062321
(C.D. Cal. filed January 20, 2009) 3

UNITED STATES CONSTITUTION

U.S. Const. Amend. 12 10

U.S. Const. Amend. 12, Cl. 3 10

U.S. Const. Art. I, § 7, Cl. 2 . . . . . 8, 9

U.S. Const. Art. II. 11

U.S. Const. Art. II, § 1, Cl. 5 11

U.S. Const. Art. V 11

Page

OTHER AUTHORITIES

Gun Free School Zones Act of 1990 5

"The Patient Protection and Affordable Care Act," Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) 4, 7

Robert L. Stern, *That Commerce Which Concerns More States than One* (1934) 47 Harv. L. Rev. 1335 6

Senate Resolution 511 (2008) 13

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICUS CURIAE*

Founded in 1991 by Joseph Farah and James H. Smith, the Western Center for Journalism has been sponsoring investigative journalism for over eighteen years.

Today, the Center is led by columnist and veteran broadcaster Floyd Brown. The Western Center for Journalism is a vigorous watchdog that keeps a check on government abuse and the media. The Center believes strongly in open public debate. It also believes that informed public debate requires quality journalism and reporting.

The Center is working to provide quality journalism and reporting by exposing bias and falsehoods in the mainstream media so that accurate information on important issues will be available to the public. The Western Center for Journalism website covers a wide variety of topics, from media bias, to media industry news, and to articles about online news sources and the impact of "Citizen Journalists".

---

1. It is hereby certified that the parties have consented to the filing of this brief ; no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief and; no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

In addition, the Center trains individuals to become "Citizen Journalists" and bloggers. These individuals are provided with technical training and practical advice on quality reporting and commentary.

The issue of whether the Federal government may constitutionally mandate that its citizens purchase health insurance is of great concern to *Amicus*, because, if the Federal government can mandate the purchase of one particular good or service, then it could mandate that its citizens must purchase any number of goods and/or services, thus compelling its citizens to conduct specific acts, and take specified actions, contrary to their freedoms, and to their best interests, and contrary to their Constitutional right to pursue life, liberty, and the pursuit of happiness according to their own desires.

In addition, the issue of whether such legislation may be signed into law by an occupant of the White House who may not be Constitutionally eligible to serve as President of the United States is of great concern to *Amicus*. The current occupant of the Oval Office was not be required to conclusively prove his birth status, and, if individuals who are not Constitutionally eligible to serve as President are, nonetheless, elected to that post, simply because of their popularity, and without clear guidelines regarding proof of birth status as it pertains to eligibility to run for and serve in various elected positions, then the people of the United States will be made subject to laws that were never properly signed into law by a sitting President of the United States.

STATEMENT OF THE CASE

Barack Obama, on March 23, 2010, signed the legislation entitled "The Patient Protection and Affordable Health Care Act" (hereinafter referred to as "OBAMACARE"). The underlying case was brought against the Department of Health and Human Services by the State of Florida on March 23, 2010, seeking to nullify OBAMACARE as unconstitutional. On January 31, 2011, the trial court ruled that the health insurance mandate in Section 1501 falls outside the authority granted to Congress in the Constitution, that the mandate provision could not be severed from the remainder of the act, and, as a result, the Court struck down OBAMACARE, in its entirety, as unconstitutional. On August 12, 2011, the 11th Circuit Court of Appeals affirmed the trial court's decision in part: the court agreed that the mandate was unconstitutional, but held that it could be severed, allowing the rest of OBAMACARE to remain in force.

Amicus brings the following arguments in support of Respondent, based, in part, on *Drake, et al. v. Obama, et al.*, 9th Circuit Case No. C062321 (C.D. Cal. filed January 20, 2009), a case currently pending before the U. S. Ninth Circuit Court of Appeals, which addresses issues concerning Barack Hussein Obama's eligibility to serve in the office of President of the United States. In addition, *Amicus* believes that the individual mandate required under OBAMACARE is not Constitutional under the Commerce Clause, and, because the individual mandate is essential to OBAMACARE as a whole, the entire act is unconstitutional.

SUMMARY OF ARGUMENT

The individual mandate is essential to all other provisions of OBAMACARE. However, the individual mandate is not constitutional, not being within the purview of Congress' authority under the Commerce Clause. In addition, even if the individual mandate was proper, only a constitutionally eligible, sitting, President of the United States can sign legislation passed by both houses of Congress into law. If Barack Hussein Obama, Jr., is not eligible to serve as President of the United States, pursuant to Article II, Section 1, Clause 5, then, and in that event, OBAMACARE is of no force and effect, never having been lawfully enacted.

ARGUMENT

I. THE INDIVIDUAL MANDATE IS OUTSIDE THE POWER OF CONGRESS TO ENACT

It would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause. If Congress has the power to compel an otherwise passive individual into a commercial transaction with a third party merely by asserting, as was done in OBAMACARE, that compelling the actual transaction is *itself* "commercial and economic in nature, and substantially affects interstate commerce" [*see* "The Patient Protection and Affordable Care Act." Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) § 1501(a)(1) (hereinafter referred to as "Act")], it is not hyperbole to suggest that Congress could do almost anything that it wanted. It is

difficult to imagine that a nation which began, at least in part, as the result of opposition to a British mandate giving the East India Company a monopoly, and imposing a nominal tax on all tea sold in America, would have set out to create a government with the power to force people to buy tea in the first place. If Congress can penalize a passive individual for failing to engage in commerce, the enumeration of powers in the Constitution would have been in vain, for it would be "difficult to perceive any limitation on federal power" (*United States v. Lopez* (1995) 514 U.S. 549, 564), and we would have a Constitution in name only. Surely this is not what the Founding Fathers could have intended. *See id.* at 592 (quoting Hamilton at the New York Convention that there would be just cause to reject the Constitution if it would allow the federal government to "penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals") (Thomas, J., concurring). In *Lopez*, the Supreme Court struck down the Gun Free School Zones Act of 1990, after stating that, if the statute were to be upheld, "we are *hard pressed* to posit any *activity* by an individual that Congress is without power to regulate." *See id.* at 564., (emphasis added). If some type of already-existing activity or undertaking were not considered to be a prerequisite to the exercise of Congressional power under the Commerce Clause, it would be virtually *impossible* to posit *anything* that Congress would be without power to regulate.

The U.S. Supreme Court has uniformly and consistently declared that the Commerce Clause applies to "three broad categories of *activity*." *Lopez, supra*, 514 U.S. at 558 (emphasis added); *accord United States v. Morrison* (2000) 529 U.S. 598, 608. The Supreme Court has further described the third category as "the power to regulate

those *activities* having a substantial relation to interstate commerce." *Lopez, supra,* 514 U.S. at 558-59 (emphasis added); *accord Morrison*, supra, 529 U.S. at 609; *see also Gonzales v. Raich* (2005) 545 U.S. 1, 17; *Perez v. United States* (1971) 402 U.S. 146, 150; *Wickard v. Filburn* (1942) 317 U.S. 111, 124; *United States v. Darby* (1941) 312 U.S. 100, 119-20; *NLRB v. Jones & Laughlin Steel Corp.* (1937) 301 U.S. 1, 37. Existing case law thus extends only to those "activities" that have a substantial relationship to, or substantially affect, interstate commerce. Only the U.S. Supreme Court, not Congress, can redefine interstate commerce or expand the concept further. *See* Robert L. Stern, *That Commerce Which Concerns More States than One* (1934) 47 Harv. L. Rev. 1335, 1363 (stating that the Supreme Court had, at one point in time, only talked about "movement" of goods across state lines under the Commerce Clause, because it was necessary to decide those earlier cases, and there had "been no need for a broader definition" of commerce; going on to opine that "it would seem timely that the Supreme Court" expand the definition, as "the time has now arrived for the [Supreme] Court to cut loose from the 'old' approach and to select the 'new' one").

The Commerce Clause originally applied to the trade and exchange of goods, as it sought to eliminate trade barriers by and between the states. Over the years, the Clause's reach has been expanded from covering actual interstate commerce (and its channels and instrumentalities) to intrastate activities that substantially affect interstate commerce. It has even been applied to activities that involve the mere consumption of a product (even if there is no legal commercial interstate market for that product). To now hold that Congress may

regulate the so-called "economic decision" to not purchase a product or service, in anticipation of future consumption, is a "bridge too far." It is without logical limitation and far exceeds the existing legal boundaries established by Supreme Court precedent.

Finally, Congress has acknowledged, in the Act itself, that the individual mandate is absolutely "essential" to the Act's overarching goal of expanding the availability of affordable health insurance coverage, and protecting individuals with pre-existing medical conditions:

> [I]f there were no [individual mandate], many individuals would wait to purchase health insurance until they needed care . . . the [individual mandate] is *essential* to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.

Act § 1501(a)(2)(I) (emphasis added).

In other words, the individual mandate is indisputably necessary to OBAMACARE's insurance market reforms, which are, in turn, indisputably necessary to the purpose of OBAMACARE.

Since the individual mandate is unconstitutional under the Commerce Clause, and, because, in the words of Congress, the individual mandate is "essential" to OBAMACARE as a whole, OBAMACARE is wholly invalid, unconstitutional, and unenforceable. For this reason, *Amicus* respectfully request that this Court grant Petitioner's writ of certiorari.

II. FEDERAL LEGISLATION, TO BECOME LAW, MUST BE SIGNED BY A SITTING PRESIDENT

The underlying action herein is a dispute over the Constitutionality of legislation purportedly signed into law by Barack Obama, acting as President of the United States. However, pursuant to Article I, Section 7, Clause 2, of the U. S. Constitution, legislation passed by both houses of Congress does not become law unless and until it is signed into law by a sitting U.S. President, or both houses of Congress override a sitting President's veto by a two-thirds vote. If there was no sitting U.S. President when OBAMACARE was purportedly signed into law, then the law was never properly enacted, and it is of no force and effect, being void *ab initio*.

The United States Constitution specifies the legislative process by which a law is enacted:

> "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be

> determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."

U.S. Constitution, Article I, Section 7, Clause 2.

Enactment of Federal legislation may not constitutionally be conducted by any other means. ("Under Article I, § 7, cl 2 of Constitution, Congress may legislate only through passage of bill which is approved by both Houses and signed by President." *Central Bank, N.A. v First Interstate Bank, N.A.* (1994) 511 US 164.). Further, a piece of legislation immediately becomes law when the President signs it:

> "Where Congress meets in regular session at time appointed, President may sign bill when Congress is in recess for specified time, but within ten days, Sundays excepted, after it is presented to him; act of Congress having been presented to President while Congress was sitting, and having been signed by him when Congress was in recess for specified time, but within ten days, Sundays excepted, after it was so presented to him, was effectively approved, and immediately became law." *La Abra Silver Mining Co. v United States* (1899) 175 US 423.)

Since a piece of legislation becomes law immediately upon the signature of the President, then there must be an eligible person sitting in the office of President of the United States to sign it. There are two requirements for a person to be eligible to hold the office of President of the United States: (1) having either received a majority of the Electoral College votes, or having succeeded a prior President following his, or her, death or constitutional disability, and (2) meeting the minimum eligibility for the office. The 12th Amendment specifies the election and succession of U.S. Presidents:

> "The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President."

U.S. Constitution, Amendment 12, Clause 3.

In addition, the three requirements for minimum eligibility for the office of President of the United States are specified in Article II of the United States Constitution:

> "No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States."

U.S. Constitution, Article II, Section 1, Clause 5.

Here, there is no question as to whether Mr. Obama received the requisite votes from the Electoral College. However, Mr. Obama has not yet verified whether he meets all of the requirements for minimum eligibility, namely whether he is a natural born citizen.

A provision of the U.S. Constitution may not be disregarded by means of a popular vote of the people, as there are specific guidelines for amending the Constitution of the United States. In order to do so, the U.S. Constitution, Article V, requires a two-thirds vote of both houses of Congress and ratification by three-fourths of all State legislatures in the United States (U.S. Constitution, Article V). Even if the people of the United States voted to elect as President a candidate who did not qualify for the position under the U.S. Constitution Article II, Section 1, Clause 5, that vote would not be sufficient to overcome the Constitutional requirements for office and make that candidate eligible for the office. Once a name is placed

on a ballot, voters are only concerned with whether they prefer one candidate over another candidate, as it can be rightfully inferred by said voters that the threshold issue of eligibility has already been determined by virtue of the candidate names having been placed on the ballot. Additionally, candidates for the Office of President of the United States are not required to prove their eligibility for the office to the voters at all, and, instead, candidates are tasked with convincing the voters to vote for that particular candidate over the other candidates. Because voters can, and do, vote for candidates that are liked by the voters, even if those candidates may not be eligible for the position, the voters do not have the power, or the right, to determine the eligibility of a candidate. For the Court to hold otherwise would be to strip all candidates not winning a majority of the votes cast of all political power, as the laws would be based upon the whims of the majority of voters, rather than on the Rule of Law, and, in this case, the requirement of the U. S. Constitution for service in the Office of President of the United States.

Furthermore, the Electoral College is not empowered with the authority to determine the eligibility of any candidate for President. In twenty-six States and the District of Columbia, Presidential Electors are prohibited by statute from voting in variance with their pledges, or the votes of a majority of the voters in their State or District, or, if they do, they face civil and/or criminal penalties and fines. The act of determining eligibility is one that requires discretionary authority, so that a candidate found to be ineligible for an office may be removed or precluded from placement on the ballot. However, any discretionary authority of the majority of the States' Presidential Electors has been removed by statute, and

the Presidential Electors, instead, perform a ministerial function of casting their votes in accordance with the popular vote of the State that each Elector represents.

Any assertion that the Electoral College has the authority to make any determination of a Presidential candidate's eligibility to serve in the office is unpersuasive, because, while the historical intent of the Electoral College was to allow for such determinations, the modern majority trend of the States is to limit the duties of the Presidential Electors to the ministerial role of casting a vote for the candidate chosen by the popular vote of their respective States or District. For these reasons, the ministerial power to determine and/or exclude a candidate's eligibility is not found within the Electoral College.

Finally, political boards, committees, and panels, in general, such as the United States Congress, are not proper bodies for making determinations of eligibility in this situation, as the U.S. Senate attempted to do in the case of U.S. Senator John McCain's eligibility to serve as President of the United States in 2008 (*see* Senate Resolution 511 (2008)), because of the significant risk of "corrupt and partisan action" (*Irby v. Barrett* (AK, 1942) 163 S.W.2d 512, 514). Matters committed by the Constitution to the non-judicial branches of the Federal Government are political in nature. *Baker v. Carr* (1962) 369 U.S. 186, 211. Thus, the Office of President of the United States is designed to decide political issues. In like manner, the United States Congress is a political body with the power to legislate political matters. In addition to its political powers, Congress has internal rules concerning whether to seat or remove their own members, but these rules do not extend to eligibility of

candidates for the Office of President of the United States. Since both the Congress and the President are political bodies, any Congressional authority to determine whether a candidate meets the requirements for the Office of President would be suspect, as the determinations would depend on which political party was in the majority at the time. A related issue was considered by Court in *Irby v. Barrett*, which held:

> "If the Chairman and Secretary of the Committee have the right to say that because of the decision of this court petitioner is ineligible to be a candidate for office, they may also say, in any case, that for some other reason a candidate is ineligible. For instance, it has been held by this court in many election contests that one must pay his poll tax; that he must do so after proper assessment in the time and manner required by law, and that otherwise he is not eligible even to vote, and unless he were a voter he could not hold office. So with other qualifications, such as residence. May this question be considered or decided by the Chairman and Secretary of the Committee? It may be that such power can be conferred upon them by laws of this State or the rules of the party; but it is certain that this has not yet been done. If this can be done, and should be done, the door would be opened wide for corrupt and partisan action. It might be certified that a prospective candidate has sufficiently complied with the laws of the State and the rules of a political party to become a candidate, and, upon further consideration, that holding might be recalled; and this might be

> done before that action could be reviewed in a court of competent jurisdiction and reversed in time for the candidate to have his name placed on the ticket. It would afford small satisfaction if, after the ticket had been printed with the name of the candidate omitted, to have a holding by the court that the name should not have been omitted." (*Irby v. Barrett* (AK, 1942) 163 S.W.2d 512, 514).

Since the Office of President of the United States is the most powerful position in the country, the risk of "corrupt and partisan action" is great if the authority to determine eligibility is placed in the hands of those who are likely to gain an advantage over opposing political parties. Given this risk, the proper remedy for eligibility disputes is to bring such disputes to the Court for a determination, rather than to Congress or to the Electoral College, and this Court has the power to make determinations of fact and law regarding controversies over the eligibility of an officeholder, with little likelihood of partisan results. For all of these reasons, the issue of a candidate's eligibility is not a political question, this Court may properly make a determination on this issue, and this Court should decide this issue. The issue of the eligibility of Barack Hussein Obama, Jr., substantially impacts on the determination of whether the legislation commonly known as OBAMACARE was ever properly enacted, for, if he is not eligible to serve as President of the United States, OBAMACARE was never properly enacted, and, as a result, it never legally had any force or effect.

CONCLUSION

As discussed above, if one who is acting as President of the United States lacks the minimum requirements of eligibility for the position, then no legislation, such as OBAMACARE, signed by that ineligible President is valid or enforceable. In addition, the OBAMACARE "individual mandate" is not a Constitutional expression of Congressional power, and, since the "individual mandate" is essential to the workings of OBAMACARE, the whole Act is, therefore, invalid. For these reasons, *Amicus* respectfully request that this Court grant Petitioner's writ of certiorari.

Respectfully Submitted,

GARY G. KREEP, ESQ.
Counsel of Record
UNITED STATES JUSTICE FOUNDATION
932 "D" Street, Suite 2
Ramona, California 92065
(760) 788-6624
usjf@usjf.net

Attorney for Amicus Western Center for Journalism

Dated: October 28, 2011

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF ARKANSAS, DATED JULY 6, 1942

IRBY v. BARRETT.

No. 4-6886

SUPREME COURT OF ARKANSAS

July 6, 1942

FRANK G. SMITH, Justice.

Appellant filed in the court below a petition for a writ of mandamus requiring Joe C. Barrett and Harvey G. Combs, Chairman and Secretary of the Democratic State Committee, respectively, to certify him as a candidate for the office of State Senator from the 28th Senatorial District, of which district Clay County is a part. He alleged that he had been a resident of Clay County for many years; that he is 64 years of age and a qualified elector of that County, and had been all his life a Democrat, and that he is a member of the Democratic Party in Clay County, and that he had complied with all the laws of the State and all the rules of the Democratic Party to become a candidate for the nomination of his party as its candidate for the Senate in the district of which Clay County is a part; but notwithstanding these facts the defendants had refused to certify his name as required by the rules of the Democratic Party.

An answer was filed, which did not deny any of these allegations, and averred that defendants had refused to certify petitioner's name because petitioner is legally

ineligible to hold the office of State Senator by virtue of Art. 5, § 9, of the Constitution of 1874, which prohibits any person convicted of the embezzlement of public money or other infamous crime from serving as a member of the General Assembly or from holding any office of trust or profit in this State.

A demurrer was filed to this answer, which was overruled, and petitioner's cause of action was dismissed when he stood on his demurrer, and from that decree is this appeal.

Appellees justify their action by citing the cases of *State ex rel. Attorney General, v. Irby,* 190 Ark. 786, 81 S.W.2d 419; *Winton v. Irby,* 189 Ark. 906, 75 S.W.2d 656, and *Irby v. Day,* 182 Ark. 595, 32 S.W.2d 157.

The case first above cited was a *quo warranto* proceeding to oust petitioner from the office of County judge of Clay County to which he had been elected, and it was there held that petitioner was ineligible to hold that office because of his conviction in the Federal District Court of the crime of embezzling post office funds, notwithstanding his unconditional and full pardon for that offense by the President of the United States.

It is urged that it would be a vain and useless proceeding to permit petitioner to be a candidate for an office which he could not fill, if he were elected to it.

We cannot anticipate what action the Senate might take in the event petitioner were nominated and then elected Senator from the District in which he resides.

Section 11 of art. 5 of the Constitution provides that "Each house [of the General Assembly] shall appoint its own officers, and shall be sole judge of the qualifications, returns and elections of its own members."

The last of these Irby cases, 190 Ark. 786, 81 S.W.2d 419, 425 was decided by a divided vote of 4 to 3. It is possible, and within the power of the Senate, to adopt the view of the dissenting judges, rather than the opinion of the majority, in that case, in which event petitioner would be eligible to serve as a member of the Senate.

It was the opinion of the majority in that case that one convicted, in a Federal Court, of embezzlement of money belonging to the United States, is ineligible to hold any office of trust or profit within this State notwithstanding the Presidential pardon, since the pardon restored merely his civil rights, as distinguished from his political privileges.

It was the opinion of the majority in that case that the disqualification of petitioner to hold office was no part of the punishment for the crime for which petitioner had been convicted and that, therefore, the pardon could not remove his disqualification for holding office.

It was also the opinion of the majority that it was immaterial that petitioner had not been convicted for a violation of a law of this State, and that a conviction in any jurisdiction barred petitioner from holding office as effectively as a conviction for a violation of the laws of this State would have done.

It was the opinion of the minority that all these holdings were contrary to the great weight of authority. It was said in the minority opinion that "It has been held, upon great consideration, that a conviction and sentence for felony in one of the States and the disabilities arising from the same would not come within the inhibition of statutory and constitutional provisions of another State and the disqualifications therein denounced. Greenleaf on Evidence, [15th] ed. [§ 376]."

It was the opinion also of the minority that the pardon removed, not only the guilt of the one pardoned, but likewise the legal infamy and all other consequences arising out of the conviction, and that it was futile to say that ineligibility to hold office was not a part of the punishment for crimes denounced by § 9 of Art. 5 of the Constitution. The concession appears to have been made in the majority opinion that if ineligibility to hold office was a part of the punishment, this ineligibility was removed by the pardon.

The Senate has the power to accept either the majority or the minority view, and its action is beyond the power of review by this court, as the Senate is the sole judge of the qualification of its members.

But aside from these considerations, we are of the opinion that the Chairman and Secretary of the State Committee acted without authority in refusing to certify petitioner as a candidate. Certainly no law of this State confers that power, and we are cited to no rule of the Party conferring it. Certain it is that the Chairman and

Secretary of the State Committee are clothed with no judicial power. Their duties are purely ministerial, and in the matter under consideration are defined by § 58 of the Rules of the Party, which reads as follows: "Sec. 58. All candidates for United States Senator, Representative in Congress and all State and district offices shall file the prescribed pledge with the Secretary of the State Committee and all candidates for County and township offices shall file the prescribed pledge with the Secretary of the County Committee, not later than 12 o'clock noon on the 90th day before the preferential primary election, and all candidates for municipal offices (including candidates for County and City Committeemen) shall file their pledges with the Secretary of the County Committee and the City Committee not later than 12 o'clock noon on the 30th day before the preferential primary election.

"The name of any candidate, who shall fail to sign and file said pledge within the time fixed shall not appear on the official ballot in said primary election.

"The Chairman and Secretary of the State Committee shall certify to the various County Committees not later than 30 days before the day of the election the names of all candidates who have complied with the rules herein prescribed, and the name of no other candidate for such office shall be printed on the ballots by the County Committee."

It was held in the case of *Williamson v. Montgomery*, 185 Ark. 1129, 51 S.W.2d 987, that no one could become a candidate for a party nomination for an office without

complying with the rules of the party; but it was also held in that case that where the Committee or officer conducting a primary election acted fraudulently or in such an arbitrary manner as to prevent a person who, in good faith, sought to comply with the rules, the courts would require the party officers to comply with the party rules. There is no intimation here that the Chairman and Secretary of the Committee have acted fraudulently, but we think they have acted without authority conferred either by the laws of this State or the rules of the party.

Rule 58, above quoted, requires the Chairman and Secretary to certify the names of all candidates "who have complied with the rules herein prescribed." The fact stands undisputed that the petitioner has complied with these rules and, having done so, no duty rests upon, nor is there any power vested in, the Chairman and Secretary of the Committee except to perform the ministerial duty of certifying the names of petitioner and all others who have complied with the party rules.

If it be said—and it is said—that the Supreme Court has decided that petitioner is ineligible to hold a public office, it may be answered that this proceeding is not a contest for an office nor a proceeding to oust one from office. The only question here is whether petitioner has complied with the laws of the State and the party rules sufficiently to become a candidate for office; and the fact is undisputed that he has done so.

If the Chairman and Secretary of the Committee have the right to say that because of the decision of this

court petitioner is ineligible to be a candidate for office, they may also say, in any case, that for some other reason a candidate is ineligible. For instance, it has been held by this court in many election contests that one must pay his poll tax; that he must do so after proper assessment in the time and manner required by law, and that otherwise he is not eligible even to vote, and unless he were a voter he could not hold office. So with other qualifications, such as residence. May this question be considered or decided by the Chairman and Secretary of the Committee? It may be that such power can be conferred upon them by laws of this State or the rules of the party; but it is certain that this has not yet been done. If this can be done, and should be done, the door would be opened wide for corrupt and partisan action. It might be certified that a prospective candidate has sufficiently complied with the laws of the State and the rules of a political party to become a candidate, and, upon further consideration, that holding might be recalled; and this might be done before that action could be reviewed in a court of competent jurisdiction and reversed in time for the candidate to have his name placed on the ticket. It would afford small satisfaction if, after the ticket had been printed with the name of the candidate omitted, to have a holding by the court that the name should not have been omitted.

We are cited to only two cases in point, and in view of the fact that this opinion must be rendered within a week after the submission of the cause, if the petitioner is to have redress which will require that he be certified as a candidate, the time has not been afforded for the investigation which otherwise would have been made.

But these two cases are exactly in point and are consonant with our view that the Chairman and Secretary of the State Committee have only a ministerial duty to perform, and have no right to exclude the name of a candidate because, in their opinion, he is ineligible and could not hold the office, whether that ineligibility arose out of a conviction for a felony or any other cause which would render him ineligible.

The two cases to which we have referred are *Young v. Beckham*, 115 Ky. 246, 72 S.W. 1092, decided by the Court of Appeals of Kentucky, and the case of *Roussel v. Dornier*, 130 La. 367, 57 So. 1007, 39 L.R.A., N.S., 826.

In the first of these cases the facts are so similar and the reasoning so convincing that we quote somewhat extensively from it. The first sentence in the opinion in that case reads as follows: "Paynter, J. The purpose of this proceeding is to compel the Democratic committee to place the name of the appellee, J. C. W. Beckham, on the ballot as a candidate for the office of governor before the Democratic primary election called for May 9, 1903. The question of his eligibility has been raised, and the Committee refuses to place his name upon the ballot. The question to be determined from the pleading is whether the governing authority of the party has called a primary election, and, if so, (a) whether the statute authorizes the holding of primary elections to nominate candidates for State offices; (b) whether the Committee can refuse to place his name upon the ballot because they think he is ineligible to re-election; (c) whether, by proceeding in mandamus, the Committee may be compelled to place his

name upon the ballot used at the primary as a candidate for governor."

The opinion does not State upon what ground the Committee found Beckham to be ineligible. The facts upon which the Committee found Beckham to be ineligible were not in dispute, as the opinion does not State them. Probably the Democratic State Committee had concluded that a man had aspired to the nomination of their party for the highest office in the State who could not serve if he were nominated and elected. The ground of a candidate's ineligibility would be immaterial. It would be unimportant whether he had been convicted of a felony or was ineligible for some other reason. If he were ineligible, he was ineligible regardless of the cause of the ineligibility.

The Kentucky court did not consider the correctness of the Committee's finding that Beckham was ineligible to be a candidate. That question was pretermitted and not even referred to, the opinion being based solely upon the question of the power of the Committee to exclude the name of a candidate. In holding that the Committee did not have this power it was there said: "We are of the opinion that the Committee had no right to raise the question of the appellee's eligibility to re-election to the office of governor. The governing authority of the party has no right to determine who is eligible under the laws of the land to hold offices. It can call primary elections and make proper rules for their government, but has no right to say who is eligible to be a candidate before the primary. The persons who are entitled to vote at the primary are the ones to determine who shall be selected as their candidate

for a particular office. If the Committee can say who is and who is not eligible to be nominated as party's candidate for office, they can, on the very last day before the ballots are printed, refuse to allow a person's name to go on the ballot upon the pretext that he is ineligible, and thus prevent his name from appearing upon the official ballot. They could thus destroy one's prospect to be nominated, for the rules of procedure in courts are necessarily such that no adequate relief could be afforded the party complaining, if at all, until after the primary election had been held. If the Committee or governing authority has the authority to decide the question as to who is eligible to hold an office or be a candidate before a primary election, then they would have a discretion and judgment to exercise that could not be exercised by a mandamus. The most that could be done by such a writ would be to compel them to act upon the question."

In the second case above cited the Supreme Court of Louisiana, with equal emphasis, denied the right of a party Committee to pass upon the eligibility of a candidate for the nomination of that party as its candidate for office. A headnote in that case reads as follows: "1. A Democratic parish Committee has no power to pass upon the eligibility of candidates for public office as they are not charged with judicial functions nor clothed with judicial power." Parish Committees in Louisiana correspond with County Committees in this State.

We conclude, therefore, that the Chairman and Secretary of the State Committee exceeded their power in refusing to perform the ministerial duty of certifying petitioner as one who had complied with the laws of the State and the rules of the party, as he admittedly has done.

The decree of the court below will, therefore, be reversed and the cause will be remanded with directions to award the writ of mandamus.

GRIFFIN SMITH, C.J., dissents.

GRIFFIN SMITH, Chief Justice (dissenting).

One of two things is certain: This court either inexcusably wronged W.O. Irby in two of the three cases cited in the majority opinion, or, figuratively speaking, it is playing checkers with decisions.

"In *Irby v. Day,* 182 Ark. 595, 32 S.W.2d 157, we expressly held that Irby was disqualified to receive the democratic nomination to public office in this State because of his previous conviction for embezzlement of public funds, therefore, any question as to his conviction resting in a foreign jurisdiction is laid at rest and we shall not again consider it. The sole question here presented for consideration is, Does a pardon by the Chief Executive restore to Irby all civil rights and political privileges enjoyed by him prior to his conviction?"[1]

The author of the opinion in *Irby v. Day* (the preceding quotation having been taken from *State ex rel. Attorney General v. Irby,* 190 Ark. 786, 81 S.W.2d 419, 420) said: "Appellant's second and last contention for a reversal of the judgment is that the plea did not constitute a defense

1. Irby was sentenced February 17, 1922 on a charge of embezzling post office funds. He entered a plea of guilty. February 19, 1931, President Hoover issued a pardon, "the purpose being to restore Irby's civil rights."

to the cause of action. The plea was sufficient to show that the appellant was ineligible to hold the office of Representative from Clay County, and for that reason had no right to contest appellee's certificate of nomination. Section 9 of article 5 of the Constitution of 1874 provides that no person convicted of embezzlement of public money shall be eligible to hold an office of Representative in the General Assembly." [32 S.W.2d 158]

From what I have been able to ascertain by reading the majority opinion of today, and from discussions in conference, it is not intended that *State ex rel. Attorney General v. Irby* be overruled. On the contrary, my understanding is that if the result brings about an impairment of the opinion written by Chief Justice Johnson, a majority of the justices did not so intend. In other words, there were not four votes to overrule the former holding. We have, then, reaffirmation of the rule that one convicted of embezzling public money may not hold office, and this status is not altered by pardon.

By circuitous construction the opinion in *State ex rel. Attorney General v. Irby* is bypassed. It is now held that the State Committee could not exercise a judicial function by deciding that Irby was not eligible; that the Committee's functions were ministerial; that its members must close their vision and their minds to what this court has said on previous occasions—all this because, as it is argued, Irby might be nominated and elected, and under Art. 5, § 11, of the constitution, he could be seated.

But where, may it be asked, was the constitution when on November 3, 1930, it was held that appellant was ineligible to hold the office of Representative? Art. 5, § 11, gives the house of Representatives the same power that it accords the Senate in respect of member qualifications. It would seem that the only thing to consider is whether appellant is the same Irby whose status was determined by this court in 1930, and again on April 8, 1935. Since this is admitted, the issue has heretofore been disposed of.

Unless it should be held that the presidential pardon restored appellant's political rights, as well as his civil rights, I do not agree that if elected he can be seated by the Senate. Section 11 of Art. 5 of the constitution authorizes each house of the general assembly to appoint its own officers; and it shall be the sole judge of the qualifications, returns and election of its own members when there has been an election. But this right must be read in connection with Art. 5, § 9, and with § 8 of Art. 5 when it is applicable. Section 8 provides: "No person who now is or shall be hereafter a collector or holder of public money, nor any assistant or deputy of such holder or collector of public money, shall be eligible to a seat in either house of the General Assembly, nor to any office of trust or profit, until he shall have accounted for and paid over all sums for which he may have been liable."

Section 9 is: "No person hereafter convicted of embezzlement of public money . . . shall be eligible to the General Assembly or capable of holding any office of trust or profit in this State."

Effect of the majority opinion is to hold that the Chairman and Secretary of the State Committee are guilty of tyrannical conduct, or at least grave indiscretion, in following the law as laid down in the decision of 1930 and 1935.

It is my view that they were justified in believing the court meant what it said. They would have been insensible to a public trust had they ignored *State ex rel. Attorney General v. Irby*, and *Irby v. Day*. No discretion was exercised; no judicial function was usurped. This court had already made the law. There was more understanding in what they did than would have been the case had they simulated estrangement to the law as it had been written.

APPENDIX B — SENATE RESOLUTION 511, CONGRESSIONAL RECORD — SENATE, DATED APRIL 10, 2008

April 10, 2008 CONGRESSIONAL RECORD — SENATE S2950

that the
ittee are
iscretion,
n of 1930

eving the
nsensible
Attorney
tion was
his court
standing
had they
written.

SENATE RESOLUTION 511—RECOGNIZING THAT JOHN SIDNEY McCAIN III, IS A NATURAL BORN CITIZEN

Mrs. MCCASKILL (for herself, Mr. LEAHY, Mr. OBAMA, Mr. COBURN, Mrs. CLINTON, and Mr. WEBB) submitted the following resolution; which was referred to the Committee on the Judiciary:

S. RES. 511

Whereas the Constitution of the United States requires that, to be eligible for the Office of the President, a person must be a "natural born Citizen" of the United States;

Whereas the term "natural born Citizen", as that term appears in Article II, Section 1, is not defined in the Constitution of the United States;

Whereas there is no evidence of the intention of the Framers or any Congress to limit the constitutional rights of children born to Americans serving in the military nor to prevent those children from serving as their country's President;

Whereas such limitations would be inconsistent with the purpose and intent of the "natural born Citizen" clause of the Constitution of the United States, as evidenced by the First Congress's own statute defining the term "natural born Citizen";

Whereas the well-being of all citizens of the United States is preserved and enhanced by the men and women who are assigned to serve our country outside of our national borders;

Whereas previous presidential candidates, were born outside of the United States of America and were understood to be eligible to be President; and

Whereas John Sidney McCain, III, was born to American citizens on an American military base in the Panama Canal Zone in 1936: Now, therefore, be it

Resolved, That John Sidney McCain, III, is a "natural born Citizen" under Article II, Section 1, of the Constitution of the United States.

Mr. LEAHY. Mr. President, today I join Senator CLAIRE MCCASKILL in introducing a resolution to express the common sense of everyone here that Senator MCCAIN is a "natural born Citizen," as the term is used in the Constitution of the United States. Our Constitution contains three requirements for a person to be eligible to be President—the person must have reached the age of 35; must have resided in America for 14 years; and must be a "natural born Citizen" of the United States. Certainly there is no doubt that Senator MCCAIN is of sufficient years on this earth and in this country given that he has been serving in Washington for over 25 years. However, some pundits have raised the question of whether he is a "natural born Citizen" because he was born outside of the official borders of the United States.

JOHN SIDNEY MCCAIN, III, was born to American citizens on an American Naval base in the Panama Canal Zone in 1936. Numerous legal scholars have looked into the purpose and intent of the "natural born Citizen" requirement. As far as I am aware, no one has unearthed any reason to think that the Framers would have wanted to limit the rights of children born to military families stationed abroad or that such a limited view would serve any noble purpose enshrined in our founding document. Based on the understanding of the pertinent sources of constitutional meaning, it is widely believed that if someone is born to American citizens anywhere in the world they are natural born citizens.

It is interesting to note that another previous presidential candidate, George Romney, was also born outside of the United States. He was widely understood to be eligible to be President. Senator Barry Goldwater was born in a U.S. territory that later became the State of Arizona so some even questioned his eligibility. Certainly the millions of Americans who voted for these two Republican candidates believed that they were eligible to assume the office of the President. The same is true today.

Because he was born to American citizens, there is no doubt in my mind that Senator MCCAIN is a natural born citizen. I recently asked Secretary of Homeland Security Michael Chertoff, a former Federal judge, if he had any doubts in his mind. He did not.

I expect that this will be a unanimous resolution of the Senate and I thank the Senator from Missouri for working with me on this.

I ask unanimous consent that the relevant excerpt from the Judiciary Committee hearing where Secretary Chertoff testified be made a part of the RECORD.

EXCERPT OF SECRETARY CHERTOFF TESTIMONY FROM APRIL 2, 2008

Chairman LEAHY. We will come back to that. I would mention one other thing, if I might, Senator Specter. Let me just ask this: I believe—and we have had some question in this Committee to have a special law

Appendix B

passed declaring that Senator McCain, who was born in the Panama Canal, that he meets the constitutional requirement to be President. I fully believe he does. I have never had any question in my mind that he meets our constitutional requirement. You are a former Federal judge. You are the head of the agency that executes Federal immigration law. Do you have any doubt in your mind—I mean, I have none in mine. Do you have any doubt in your mind that he is constitutionally eligible to become President?

Secretary CHERTOFF. My assumption and my understanding is that if you are born of American parents, you are naturally a natural-born American citizen.

Chairman LEAHY. That is mine, too. Thank you.

JOINT APPENDIX

RECORD AND BRIEF

Nos. 11-393, 11-398 and 11-400

In the Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, ET AL., PETITIONERS

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL.

STATE OF FLORIDA, ET AL., PETITIONERS

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

(Minimum Coverage Provision, Anti-Injunction Act, Severability)

DONALD B. VERRILLI, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Counsel of Record for Federal Parties

PAUL CLEMENT
Bancroft PLLC
1919 M Street, N.W.
Washington D.C. 20036
pclement@bancroftpllc.com
(202) 234-0090

Counsel of Record for State Parties

(Additional Counsel Listed on Inside Cover)

PETITIONS FOR WRITS OF CERTIORARI FILED: SEPT. 27 & 28, 2011
CERTIORARI GRANTED: NOV. 14, 2011

Library of Congress
Law Library

MICHAEL CARVIN
Jones Day
51 Louisiana Ave. NW
Washington, D.C. 20001
macarvin@jonesday.com
(202) 879 3939

Counsel of Record for
Private Parties

TABLE OF CONTENTS

Page

Court of appeals docket entries, No. 11-11021 1

Court of appeals docket entries, No. 11-11067 32

District court docket entries 58

Amended complaint (May 14, 2010) 104

Plaintiffs motion for summary judgment (Nov. 4, 2010) 133

Defendants motion for summary judgment (Nov. 4, 2010) 137

Declaration of plaintiff Mary Brown in support of plaintiff's motion for summary judgment (Oct. 20, 2010) 140

Declaration of plaintiff Kaj Ahlburg in support of plaintiff's motion for summary judgment (Nov. 1, 2010) 143

Declaration of plaintiff Donald A. Danner in support of plaintiff's motion for summary judgment (Nov. 2, 2010) 146

Declaration of plaintiff Dana Grimes in support of plaintiff's motion for summary judgment (Nov. 21, 2010) 151

Declaration of plaintiff David Klemencic in support of plaintiff's motion for summary judgment (Nov. 22, 2010) 154

Declaration of plaintiff Paul McClain in support of plaintiff's motion for summary judgment (Oct. 21, 2010) 157

Declaration of plaintiff Timothy Thompson in support of plaintiffs' motion for summary judgment (Oct. 21, 2010) 160

Declaration of Elizabeth Dudek (Nov. 3, 2010) 163

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-11021

STATE OF FLORIDA, ET AL., PLAINTIFFS-APPELLANTS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	PROCEEDINGS
3/9/11	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellants Timothy F. Geithner, Kathleen Sebelius, Hilda Solis, United States Department of Health and Human Services, United States Department of Labor and United States Department of the Treasury on 03/08/2011. Appellant brief due 40 days from 03/09/2011. Fee Status: Fee Not Required.
	* * * * *
3/11/11	MB MOTION for initial hearing en banc filed by Attorney Scott Douglas Makar for Appellees State of Florida, State of Texas, State of South Carolina, State of Nebraska and State of Utah. Opposition to Motion is Unknown [6258405-1]

DATE	PROCEEDINGS
	* * * * *
3/14/11	Appellee National Federation of Independent Business added to case.
3/14/11	Appellee Kaj Ahlburg added to case.
3/14/11	Appellee Mary Brown in 11-11021 and Appellee Mary Brown in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
3/18/11	Response to Petition for Rehearing filed as to Attorney Samantha L. Chaifetz for Appellants United States Department of Labor, United States Department of Health and Human Services, Timothy F. Geithner, Hilda Solis, Kathleen Sebelius and United States Department of the Treasury in 11-11021. [11-11021, 11-11067]
	* * * * *
3/31/11	ORDER: The Court having been polled at the request of several members of the Court and a majority of the Circuit Judges who are in regular service not having voted in favor of it, (Rule 35, F.R.A.P.), Appellees' Motion for Initial Hearing En Banc is DENIED [6258405-2]. Consistent with the Court's March 11, 2011, order granting in part Appellants' motion to ex-

DATE	PROCEEDINGS
	pedite this appeal, this appeal shall also be expedited to oral argument and shall be heard at oral argument on Wednesday, June 8, 2011, at 9:30 A.M. in Atlanta, Georgia before a three judge panel randomly selected. Each side will be given one hour to present oral arguments. Further, consistent with Eleventh Cir. I.O.P. 7 (Identity of Panel), following Fed. R. App. 34, the identity of the panel which will hear oral argument will be disclosed no earlier than fourteen days in advance of oral argument. JFD. [11-11021, 11-11067]
	* * * * *
4/4/11	Appellant's brief filed by United States Department of Health and Human Services in 11-11021. Service date: 04/01/2011 [11-11021] Attorney for Appellee: Cobb - US mail; Attorney for Appellee: Katsas - US mail; Attorney for Appellant: Rivkin - US mail; Attorney for Appellee: Spohn - US mail; Attorney for Appellant: Winship - US mail; [11-11067] Attorney for Appellant: Rivkin - US mail; Attorney for Appellant: Winship - US mail; Attorney for Appellee: Katsas - US mail; Attorney for Appellee: Spohn - US mail. [11-11021, 11-11067]

DATE	PROCEEDINGS
4/4/11	Expanded Record Excerpts filed by Attorney Thomas Mark Bondy for Appellants United States Department of Labor, United States Department of Health and Human Services, Timothy F. Geithner, Hilda Solis, Kathleen Sebelius and United States Department of the Treasury in 11-11021. Service date: 04/01/2011 US mail - Attorney for Appellant(s): Rivkin, Winship; Attorney for Appellee(s): Cobb, Katsas, Spohn. [11-11021, 11-11067]
	* * * * *
4/7/11	Amicus Brief filed by Amicus Curiae American Association of People with Disabilities etc. Service date: 04/06/2011 US mail - Attorney for Amicus Curiae: Bobroff. [11-11021, 11-11067]
4/7/11	Removed Appellants Timothy F. Geithner, Kathleen Sebelius and Hilda Solis in 11-11021.
4/8/11	Appellant SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES added to case.
4/8/11	Appellant SECRETARY OF THE UNITED STATES DEPARTMENT OF TREASURY added to case.

DATE	PROCEEDINGS
4/8/11	Appellant SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR added to case.
4/8/11	Amicus Curiae The National Indian Health Board in 11-11021 and Amicus Curiae The National Indian Health Board in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/8/11	Amicus Brief filed by Amicus Curiae The National Indian Health Board. Service date: 04/07/2011 US mail - Attorney for Amicus Curiae: Strommer.
4/8/11	Amicus Curiae State Legislators in 11-11021 and Amicus Curiae State Legislators in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/8/11	Amicus Brief filed by Amicus Curiae State Legislators in 11-11021, 11-11067. Service date: 04/07/2011 US mail - Attorney for Amicus Curiae: Wydra. [11-11021, 11-11067]
	* * * * *

DATE	PROCEEDINGS
4/8/11	Amicus Brief filed by Amicus Curiae American Nurses Association in 11-11021, 11-11067. Service date: 04/07/2011 US mail - Attorney for Amicus Curiae: Millhiser. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Curiae Missouri Attorney General in 11-11021 and Amicus Curiae Missouri Attorney General in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Brief filed by Amicus Curiae Missouri Attorney General in 11-11021. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Hirth. [11-11021, 11-11067]
4/11/11	Amicus Curiae Economic Scholars in 11-11021 and Amicus Curiae Economic Scholars in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Brief filed by Amicus Curiae Economic Scholars in 11-11021, 11-11067. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Horton. [11-11021, 11-11067]

DATE	PROCEEDINGS
4/11/11	Amicus Curiae AARP in 11-11021 and Amicus Curiae AARP in 11-11067 added to case. [11-11021, 11-11067]
4/11/11	Amicus Brief filed by Amicus Curiae AARP in 11-11021, 11-11067. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Cohen. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Curiae Constitutional Law Professors added to case.
	* * * * *
4/11/11	Amicus Brief filed by Amicus Curiae Constitutional Law Professors. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Kimberly.
4/11/11	Amicus Brief filed by Amicus Curiae Services Employees International Union in 11-11021. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Weissglass. [11-11021, 11-11067]
	* * * * *

DATE	PROCEEDINGS
4/11/11	Amicus Curiae State of Oregon in 11-11021 and Amicus Curiae State of Oregon in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Brief filed by Amicus Curiae State of Oregon in 11-11021. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Dubanevich. [11-11021, 11-11067]
4/11/11	Amicus Curiae The Commonwealth of Massachusetts added to case.
4/11/11	Amicus Brief filed by Amicus Curiae The Commonwealth of Massachusetts. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Stephan.
4/11/11	Amicus Curiae Professors of Federal Jurisdiction in 11-11021 and Amicus Curiae Professors of Federal Jurisdiction in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Brief filed by Amicus Curiae Professors of Federal Jurisdiction in 11-11021, 11-11067. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Bland. [11-11021, 11-11067]

DATE	PROCEEDINGS
4/11/11	Amicus Curiae Kevin C. Walsh in 11-11021 and Amicus Curiae Kevin C. Walsh in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Brief filed by Amicus Curiae Kevin C. Walsh in 11-11021, 11-11067. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Mills. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Curiae American Hospital Association in 11-11021 and Amicus Curiae American Hospital Association in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Brief filed by Amicus Curiae American Hospital Association in 11-11021. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Stetson. [11-11021, 11-11067]

DATE	PROCEEDINGS
4/11/11	Amicus Curiae Harry Reid in 11-11021 and Amicus Curiae Harry Reid in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Brief filed by Amicus Curiae Harry Reid in 11-11021, Amicus Curiae State Legislators in 11-11067. Service date: 04/09/2011 US mail - Attorney for Amicus Curiae: Dellinger. [11-11021, 11-11067]
4/11/11	Amicus Curiae Brief of Law Professors in 11-11021 and Amicus Curiae Brief of Law Professors in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Brief filed by Amicus Curiae Brief of Law Professors in 11-11021, 11-11067. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Lamken. [11-11021, 11-11067]

DATE	PROCEEDINGS
4/11/11	Amicus Curiae Chamber of Commerce in 11-11021 and Amicus Curiae Chamber of Commerce in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Brief filed by Amicus Curiae Chamber of Commerce in 11-11021, 11-11067. Service date: 04/09/2011 US mail - Attorney for Amicus Curiae: Blalack. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Curiae American Academy of Pediatrics in 11-11021 and Amicus Curiae American Academy of Pediatrics in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Brief filed by Amicus Curiae American Academy of Pediatrics in 11-11021, 11-11067. Service date:

DATE	PROCEEDINGS
4/8/11	US mail - Attorney for Amicus Curiae: Perkins. [11-11021, 11-11067]
	* * * * *
4/12/11	Record on Appeal filed. Pleadings, 9 volumes; Transcript, 3 volumes [11-11021, 11-11067, 11-11280]
	* * * * *
4/18/11	Amicus Curiae Governor of the State of Washington in 11-11021 and Amicus Curiae Governor of the State of Washington in 11-11067 added to case. [11-11021, 11-11067]
4/18/11	Amicus Brief filed by Amicus Curiae Governor of the State of Washington in 11-11021, 11-11067. Service date: 04/11/2011 US mail - Attorney for Amicus Curium: Berger, Dellinger, Dubanevich, Hirth, Horton, Kimberly, Lamken, Millhiser, Mills, Perkins, Philo, Stephan, Stetson, Strommer, Weissglass, Wydra. [11-11021, 11-11067]

DATE	PROCEEDINGS
	* * * * *
4/19/11	Amicus Brief filed by Amicus Curiae American Cancer Society in 11-11021. Service date: 04/11/2011 US mail - Attorney for Amicus Curiae: Suda. [11-11021, 11-11067]
4/19/11	Amicus Brief filed by Amicus Curiae Young Invincibles in 11-11021. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Annino. [11-11021, 11-11067]
	* * * * *
4/19/11	Amicus Brief filed by Amicus Curiae The National Women's Law Center in 11-11021. Service date: 04/11/2011 US mail - Attorney for Amicus Curiae: Hart. [11-11021, 11-11067]
	* * * * *

DATE	PROCEEDINGS
5/4/11	Appellee's Brief filed by Appellees Kaj Ahlburg, Mary Brown and National Federation of Independent Business. Service date: 05/04/2011 US mail - Attorney for Appellant: Bondy.
5/4/11	Appellee-Cross Appellant's Brief filed by Appellees State of Florida, State of Nebraska, State of South Carolina, State of Texas and State of Utah in 11-11021, Appellants Terry E. Branstad, Commonwealth of Pennsylvania, State of Alabama, State of Alaska, State of Arizona, State of Colorado, State of Florida, State of Georgia, State of Idaho, State of Indiana, State of Kansas, State of Louisiana, State of Maine, State of Michigan, State of Mississippi, State of Nebraska, State of Nevada, State of North Dakota, State of Ohio, State of South Carolina, State of South Dakota, State of Texas, State of Utah, State of Washington, State of Wisconsin and State of Wyoming in 11-11067. Service date: 05/04/2011 US mail - Attorney for Appellant: Katyal. [11-11021, 11-11067]

DATE	PROCEEDINGS
	* * * * *
5/5/11	Amicus Brief filed by Amicus Curiae American Center for Law and Justice in 11-11021, 11-11067. Service date: 05/04/2011 US mail - Attorney for Amicus Curiae: White. [11-11021, 11-11067]
	* * * * *
5/10/11	Amicus Brief filed by Amicus Curiae South Carolina Chamber of Commerce in 11-11021, 11-11067. Service date: 05/10/2011 US mail - Attorney for Amicus Curiae: Christina. [11-11021, 11-11067]
	* * * * *
5/11/11	Amicus Brief filed by Amicus Curiae American Civil Rights Union in 11-11021, 11-11067. Service date: 05/10/2011 US mail - Attorney for Amicus Curiae: Tragos. [11-11021, 11-11067]
	* * * * *

DATE	PROCEEDINGS
5/11/11	Amicus Brief filed by Amicus Curiae Justice and Freedom Fund in 11-11021, 11-11067. Service date: 05/10/2011 US mail - Attorney for Amicus Curiae: Dewart. [11-11021, 11-11067]
	* * * * *
5/11/11	Amicus Brief filed by Amicus Curiae American Legislative Exchange Council in 11-11021, 11-11067. Service date: 05/10/2011 US mail - Attorney for Amicus Curiae: Elwood. [11-11021, 11-11067]
5/11/11	Amicus Brief filed by Amicus Curiae Landmark Legal Foundation in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Hutchison. [11-11021, 11-11067]
5/11/11	Amicus Curiae Matthew Sissel in 11-11021 and Amicus Curiae Matthew Sissel in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *

DATE	PROCEEDINGS
5/11/11	Amicus Brief filed by Amicus Curiae Matthew Sissel in 11-11021, 11-11067. Service date: 05/10/2011 US mail - Attorney for Amicus Curiae: Sandefur. [11-11021, 11-11067]
	* * * * *
5/11/11	Amicus Brief filed by Amicus Curiae Catholic Medical Association in 11-11021, 11-11067. Service date: 05/09/2011 US mail - Attorney for Amicus Curiae: Bordlee. [11-11021, 11-11067]
	* * * * *
5/11/11	Amicus Brief filed by Amicus Curiae Physician Hospitals of America in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Moldovan. [11-11021, 11-11067]
	* * * * *
5/11/11	Amicus Brief filed by Amicus Curiae Minnesota Legislators in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attor-

DATE	PROCEEDINGS
	ney for Amicus Curiae: Bader. [11-11021, 11-11067]
	* * * * *
5/11/11	Amicus Brief filed by Amicus Curiae The Heritage Foundation in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Strickland. [11-11021, 11-11067]
	* * * * *
5/11/11	Amicus Brief filed by Amicus Curiae The Independence Institute in 11-11021. Service date: 05/09/2011 US mail - Attorney for Amicus Curiae: Kopel. [11-11021, 11-11067]
	* * * * *
5/12/11	Amicus Brief filed by Amicus Curiae Doctors for Patient Care in 11-11021. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Jaffe. [11-11021, 11-11067]

DATE	PROCEEDINGS
5/12/11	Amicus Brief filed by Amicus Curiae Cato Institute in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Shapiro. [11-11021, 11-11067]
	* * * * *
5/12/11	Amicus Brief filed by Amicus Curiae Washington Legal Foundation in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Andrews. [11-11021, 11-11067]
	* * * * *
5/12/11	Amicus Brief filed by Amicus Curiae Revere America Foundation in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Cooper. [11-11021, 11-11067]
5/12/11	Amicus Brief filed by Amicus Curiae Family Research Council in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Klukowski. [11-11021, 11-11067]

DATE	PROCEEDINGS
	* * * * *
5/12/11	Amicus Brief filed by Amicus Curiae The Association of American Physicians & Surgeons, Inc. in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Tripp. [11-11021, 11-11067]
	* * * * *
5/12/11	Amicus Brief filed by Amicus Curiae Economists in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Engel. [11-11021, 11-11067]
	* * * * *
5/13/11	Amicus Brief filed by Amicus Curiae James F. Blumstein in 11-11021. Service date: 05/09/2011 US mail - Attorney for Amicus Curiae: Blumstein. [11-11021, 11-11067]

DATE	PROCEEDINGS
5/13/11	Amicus Brief filed by Amicus Curiae Mountain States Legal foundation in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Lechner. [11-11021, 11-11067]
	* * * * *
5/13/11	Amicus Brief filed by Amicus Curiae Caesar Rodney Institute in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Muir. [11-11021, 11-11067]
	* * * * *
5/13/11	Amicus Brief filed by Amicus Curiae Center for Individual Rights in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Rosman. [11-11021, 11-11067]
	* * * * *
5/13/11	Amicus Brief filed by Amicus Curiae Center for Constitutional Jurisprudence in 11-11021, 11-11067. Service date:

DATE	PROCEEDINGS
	05/11/2011 US mail - Attorney for Amicus Curiae: Caso. [11-11021, 11-11067]
	* * * * *
5/13/11	PT'D Amicus Brief filed by Amicus Curiae Members of the United States Senate in 11-11021. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Severino. [11-11021, 11-11067]
5/13/11	PT'D Amicus Brief filed by Amicus Curiae John Boehner in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Severino. [11-11021, 11-11067]
	* * * * *
5/16/11	Amicus Brief filed by Amicus Curiae Texas Public Policy Foundation in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Loyola. [11-11021, 11-11067]
	* * * * *

DATE	PROCEEDINGS
5/16/11	Amicus Brief filed by Amicus Curiae Idaho Freedom Foundation, Inc. in 11-11021. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Talmon. [11-11021, 11-11067]
	* * * * *
5/18/11	Appellant-Cross Appellee's Brief filed by Appellant United States Department of Health and Human Services in 11-11021. Service date: 05/17/2011 US mail - Attorney for Appellees: Clement, Katsas, Rivkin, Spohn, Winship. [11-11021, 11-11067]
	* * * * *
5/18/11	Amicus Brief filed by Amicus Curiae k Rohlfs in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Rohlfs. [11-11021, 11-11067]
5/19/11	ORDER: Motion to file amicus brief (John Boehner & Members of the U.S. Senate) filed by Carrie Lynn Severino is DENIED as UNNECESSARY. Be-

DATE	PROCEEDINGS
	cause the same atty has submitted more than one amicus curiae brief . . . counsel is directed to file and serve by 5/23 a single compliant amici curiae brief . . . brief is to be physically delivered to the Clerk's office by that date-5/23. [6302884-2] [11-11021, 11-11067]
	* * * * *
5/23/11	CORRECTED Amicus Brief filed by Amicus Curium John Boehner and Members of the United States Senate in 11-11021, Amicus Curiae John Boehner in 11-11067. Service date: 05/20/2011 US mail - Attorney for Amicus Curiae: Severino. [11-11021, 11-11067]
	* * * * *
5/25/11	Reply Brief filed by Appellants/Cross-Appellees Commonwealth of Pennsylvania, State of Alabama, State of Alaska, State of Arizona, State of Colorado, State of Florida, State of Georgia, State of Idaho, State of Indiana, State of Kansas, State of Louisiana, State of Maine, State

DATE	PROCEEDINGS
	of Michigan, State of Mississippi, State of Nebraska, State of Nevada, State of North Dakota, State of Ohio, State of South Carolina, State of South Dakota, State of Texas, State of Utah and State of Wisconsin in 11-11067. Service 05/24/2011 US mail - Attorney for Appellees: Carvin, Kaersvang, Katsas, Marshall, Mooppan. [11-11021, 11-11067]
	* * * * *
5/31/11	Oral argument scheduled. Argument Date: Wednesday, 06/08/2011 Argument Location: Atlanta Courtroom: Atlanta 338. [11-11021, 11-11067] 5/31/11
	* * * * *
6/8/11	Oral argument held. Oral Argument participants were Neal Kumar Katyal for Appellants United States Department of Labor, et al., Michael Anthony Carvin for Appellees National Federation of Independent Business, et al., and Paul D. Clement for Appellees State of Florida

DATE	PROCEEDINGS
	and State of Utah, et al. in 11-11021. [11-11021, 11-11067]
6/21/11	Supplemental Authority filed by Appellees Kaj Ahlburg and Mary Brown in 11-11021, Appellee Mary Brown in 11-11067. Service date: 06/17/2011 US mail - Attorney for Appellants: Bondy, Casey, Clement, Grossman, Jacquot, Kaersvang, Kennedy, Makar, Osterhaus, Rivkin, Winship. [11-11021, 11-11067]
7/7/11	Supplemental Authority filed by Appellant United States Department of Health and Human Services in 11-11021. Service date: 07/06/2011 email - Attorney for Appellees: Clement, Katsas. [11-11021, 11-11067]
7/13/11	Response to Supplemental Authority (28J) filed by Appellee Kaj Ahlburg in 11-11021, Appellee Mary Brown in 11-11067. Service date: 07/12/2011 US mail - Attorney for Appellants: Chaifetz, Clement. [11-11021, 11-11067]

DATE	PROCEEDINGS
8/9/11	Supplemental Authority filed by Appellant SECRETARY OF THE U. S. DEPARTMENT OF HEALTH & HUMAN SERVICES in 11-11021. Service date: 08/08/2011 US mail - Attorney for Appellees: Clement, Osterhaus, Rivkin. [11-11021, 11-11067]
8/12/11	Opinion issued by court as to Appellants SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, Secretary, U.S. Department of Labor, Secretary, US Department of Treasury, U.S. Department of Labor, US Department of Treasury and United States Department of Health and Human Services in 11-11021, Appellants Terry E. Branstad, Commonwealth of Pennsylvania, State of Alabama, State of Alaska, State of Arizona, State of Colorado, State of Florida, State of Georgia, State of Idaho, State of Indiana, State of Kansas, State of Louisiana, State of Maine, State of Michigan, State of Mississippi, State of Nebraska, State of Nevada, State of North Dakota, State of Ohio, State of South

DATE	PROCEEDINGS
	Carolina, State of South Dakota, State of Texas, State of Utah, State of Washington, State of Wisconsin and State of Wyoming in 11-11067. Decision: Affirmed in part and Reversed in part. Opinion type: Published. Opinion method: Signed. [11-11021, 11-11067]
8/12/11	Judgment entered as to Appellant SECRETARY OF THE U. S. DEPARTMENT OF HEALTH & HUMAN SERVICES etc., in 11-11021. [11-11021, 11-11067]
	* * * * *
9/28/11	Notice of Writ of Certiorari filed as to Appellant United States Department of Health and Human Services. SC# 11-398.
9/28/11	Notice of Writ of Certiorari filed as to Appellee National Federation of Independent Business. SC# 11-393.
10/3/11	MOTION to stay mandate filed by Appellee United States Department of Health and Human Services in 11-11067. Motion

DATE	PROCEEDINGS
	is Unopposed [6398537-1] [11-11021, 11-11067]
	* * * * *
10/5/11	ORDER: On Oct. 4, 2011, the parties filed a joint mot to stay the issuance of the mandate . . . Accordingly, on or before Noon, Eastern Standard Time on Wednesday, Oct. 12, 2011, the parties are directed to jointly submit in writing to the court the reasons why they contend there is good cause for a stay (see file for complete text). JFD [11-11021, 11-11067]
10/11/11	Response pursuant to court order of 10/05/2011 filed by Dana Kaersvang for U.S. Department of Labor, United States Department of Health and Human Services and US Department of Treasury in 11-11067,.,SKIP) [11-11021, 11-11067]
10/13/11	ORDER: Motion to stay mandate filed by Appellee United States Department of Health and Human Services is DENIED [6398537-2] JFD, FMH and SM [11-11021, 11-11067]

DATE	PROCEEDINGS
10/24/11	Mandate issued as to Appellants Secretary U.S. Department of Health and Human Services, Secretary, U.S. Department of Labor, Secretary, US Department of Treasury, U.S. Department of Labor, US Department of Treasury and United States Department of Health and Human Services in 11-11021, Appellants Terry E. Branstad, Commonwealth of Pennsylvania, State of Alabama, State of Alaska, State of Arizona, State of Colorado, State of Florida, State of Georgia, State of Idaho, State of Indiana, State of Kansas, State of Louisiana, State of Maine, State of Michigan, State of Mississippi, State of Nebraska, State of Nevada, State of North Dakota, State of Ohio, State of South Carolina, State of South Dakota, State of Texas, State of Utah, State of Washington, State of Wisconsin and State of Wyoming in 11-11067. [11-11021, 11-11067]

* * * * *

DATE	PROCEEDINGS
11/14/11	Writ of Certiorari filed as to Appellee National Federation of Independent Business is GRANTED. SC# 11-393.—[Edited 12/08/2011 by RAV]
11/14/11	Writ of Certiorari filed as to Appellant Secretary U.S. Department of Health and Human Services is GRANTED. SC# 11-398.—[Edited 12/08/2011 by RAV]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-11067

STATE OF FLORIDA, ET AL., PLAINTIFFS-APPELLANTS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	PROCEEDINGS
3/11/11	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellants Terry E. Branstad, Commonwealth of Pennsylvania, State of Alabama, State of Alaska, State of Arizona, State of Colorado, State of Florida, State of Georgia, State of Idaho, State of Indiana, State of Kansas, State of Louisiana, State of Maine, State of Michigan, State of Mississippi, State of Nebraska, State of Nevada, State of North Dakota, State of Ohio, State of South Carolina, State of South Dakota, State of Texas, State of Utah, State of Washington, State of Wisconsin and State of Wyoming on 03/10/2011. Appellant brief due 40 days from 03/11/2011. Fee Status: Fee Paid.

DATE	PROCEEDINGS
3/11/11	ORDER: Motion to expedite filed by Attorney Samantha L. Chaifetz for Appellants United States Department of Labor, United States Department of Health and Human Services, Timothy F. Geithner, Hilda Solis, Kathleen Sebelius and United States Department of the Treasury is GRANTED in part: aplt brf due 4/4, cross-aplt 5/4, cross-aple 5/18, reply brf 5/25, No ext., all brfs must be rcvd in Clerk's office . . . Aple's pet for initial hearing remains pndg . . . [6257236-2] in 11-11021 JFD [11-11021, 11-11067]
3/14/11	Appellee Mary Brown in 11-11021 and Appellee Mary Brown in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
3/18/11	Response to Petition for Rehearing filed as to Attorney Samantha L. Chaifetz for Appellants United States Department of Labor, United States Department of Health and Human Services, Timothy F. Geithner, Hilda Solis, Kathleen Sebelius and United States Department of the Treasury in 11-11021. [11-11021, 11-11067]
	* * * * *

DATE	PROCEEDINGS
3/31/11	ORDER: The Court having been polled at the request of several members of the Court and a majority of the Circuit Judges who are in regular service not having voted in favor of it, (Rule 35, F.R.A.P.), Appellees' Motion for Initial Hearing En Banc is DENIED [6258405-2]. Consistent with the Court's March 11, 2011, order granting in part Appellants' motion to expedite this appeal, this appeal shall also be expedited to oral argument and shall be heard at oral argument on Wednesday, June 8, 2011, at 9:30 A.M. in Atlanta, Georgia before a three judge panel randomly selected. Each side will be given one hour to present oral arguments. Further, consistent with Eleventh Cir. I.O.P. 7 (Identity of Panel), following Fed. R.App. 34, the identity of the panel which will hear oral argument will be disclosed no earlier than fourteen days in advance of oral argument. JFD. [11-11021, 11-11067]
	* * * * *
4/4/11	Appellant's brief filed by United States Department of Health and Human Services in 11-11021. Service date: 04/01/2011 [11-11021] Attorney for Appellee: Cobb - US mail; Attorney for Appellee: Katsas - US mail; Attorney for Appellant: Rivkin - US mail; Attorney for Appellee: Spohn -

DATE	PROCEEDINGS
	US mail; Attorney for Appellant: Winship - US mail; [11-11067] Attorney for Appellant: Rivkin - US mail; Attorney for Appellant: Winship - US mail; Attorney for Appellee: Katsas - US mail; Attorney for Appellee: Spohn - US mail. [11-11021, 11-11067]
4/04/11	Expanded Record Excerpts filed by Attorney Thomas Mark Bondy for Appellants United States Department of Labor, United States Department of Health and Human Services, Timothy F. Geithner, Hilda Solis, Kathleen Sebelius and United States Department of the Treasury in 11-11021. Service date: 04/01/2011 US mail - Attorney for Appellant(s): Rivkin, Winship; Attorney for Appellee(s): Cobb, Katsas, Spohn. [11-11021, 11-11067]
	* * * * *
4/07/11	Amicus Brief filed by Amicus Curiae American Association of People with Disabilities etc.. Service date: 04/06/2011 US mail - Attorney for Amicus Curiae: Bobroff. [11-11021, 11-11067]
4/08/11	Amicus Curiae American Association of People with Disabilities added to case.
4/08/11	Amicus Curiae The National Indian Health Board in 11-11021 and Amicus Cu-

DATE	PROCEEDINGS
	riae The National Indian Health Board in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/08/11	Amicus Curiae State Legislators in 11-11021 and Amicus Curiae State Legislators in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/08/11	Amicus Brief filed by Amicus Curiae State Legislators in 11-11021, 11-11067. Service date: 04/07/2011 US mail - Attorney for Amicus Curiae: Wydra. [11-11021, 11-11067]
	* * * * *
4/08/11	Amicus Brief filed by Amicus Curiae American Nurses Association in 11-11021, 11-11067. Service date: 04/07/2011 US mail - Attorney for Amicus Curiae: Millhiser. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Curiae Missouri Attorney General in 11-11021 and Amicus Curiae Missouri Attorney General in 11-11067 added to case. [11-11021, 11-11067]

DATE	PROCEEDINGS
	* * * * *
4/11/11	Amicus Brief filed by Amicus Curiae Missouri Attorney General in 11-11021. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Hirth. [11-11021, 11-11067]
4/11/11	Amicus Curiae Economic Scholars in 11-11021 and Amicus Curiae Economic Scholars in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Brief filed by Amicus Curiae Economic Scholars in 11-11021, 11-11067. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Horton. [11-11021, 11-11067]
4/11/11	Amicus Curiae AARP in 11-11021 and Amicus Curiae AARP in 11-11067 added to case. [11-11021, 11-11067]
4/11/11	Amicus Brief filed by Amicus Curiae AARP in 11-11021, 11-11067. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Cohen. [11-11021, 11-11067]
	* * * * *

DATE	PROCEEDINGS
4/11/11	Amicus Brief filed by Amicus Curiae Services Employees International Union in 11-11021. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Weissglass. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Curiae State of Oregon in 11-11021 and Amicus Curiae State of Oregon in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Brief filed by Amicus Curiae State of Oregon in 11-11021. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Dubanevich. [11-11021, 11-11067]
4/11/11	Amicus Curiae Professors of Federal Jurisdiction in 11-11021 and Amicus Curiae Professors of Federal Jurisdiction in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Brief filed by Amicus Curiae Professors of Federal Jurisdiction in 11-11021, 11-11067. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Bland. [11-11021, 11-11067]

DATE	PROCEEDINGS
4/11/11	Amicus Curiae Kevin C. Walsh in 11-11021 and Amicus Curiae Kevin C. Walsh in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Brief filed by Amicus Curiae Kevin C. Walsh in 11-11021, 11-11067. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Mills. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Curiae American Hospital Association in 11-11021 and Amicus Curiae American Hospital Association in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Brief filed by Amicus Curiae American Hospital Association in 11-11021. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Stetson. [11-11021, 11-11067]
4/11/11	Amicus Curiae Harry Reid in 11-11021 and Amicus Curiae Harry Reid in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *

DATE	PROCEEDINGS
4/11/11	Amicus Brief filed by Amicus Curiae Harry Reid in 11-11021, Amicus Curiae State Legislators in 11-11067. Service date: 04/09/2011 US mail - Attorney for Amicus Curiae: Dellinger. [11-11021, 11-11067]
4/11/11	Amicus Curiae Brief of Law Professors in 11-11021 and Amicus Curiae Brief of Law Professors in 11-11067 added to case. [11-11021, 11-11067]
4/11/11	Amicus Brief filed by Amicus Curiae Brief of Law Professors in 11-11021, 11-11067. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Lamken. [11-11021, 11-11067]
4/11/11	Amicus Curiae Chamber of Commerce in 11-11021 and Amicus Curiae Chamber of Commerce in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Brief filed by Amicus Curiae Chamber of Commerce in 11-11021, 11-11067. Service date: 04/09/2011 US mail - Attorney for Amicus Curiae: Blalack. [11-11021, 11-11067]
	* * * * *

DATE	PROCEEDINGS
4/11/11	Amicus Curiae Commonwealth of Massachusetts added to case.
4/11/11	Amicus Brief filed by Amicus Curiae Commonwealth of Massachusetts. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Stephan.
	* * * * *
4/11/11	Amicus Curiae American Academy of Pediatrics in 11-11021 and Amicus Curiae American Academy of Pediatrics in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
4/11/11	Amicus Brief filed by Amicus Curiae American Academy of Pediatrics in 11-11021, 11-11067. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Perkins. [11-11021, 11-11067]
	* * * * *
4/12/11	Amicus Curiae Service Employees International Union added to case.
	* * * * *
4/12/11	Record on Appeal filed. Pleadings, 9 volumes; Transcript, 3 volumes [11-11021, 11-11067, 11-11280]

DATE	PROCEEDINGS
	* * * * *
4/18/11	Amicus Curiae Governor of the State of Washington in 11-11021 and Amicus Curiae Governor of the State of Washington in 11-11067 added to case. [11-11021, 11-11067]
4/18/11	Amicus Brief filed by Amicus Curiae Governor of the State of Washington in 11-11021, 11-11067. Service date: 04/11/2011 US mail - Attorney for Amicus Curium: Berger, Dellinger, Dubanevich, Hirth, Horton, Kimberly, Lamken, Millhiser, Mills, Perkins, Philo, Stephan, Stetson, Strommer, Weissglass, Wydra. [11-11021, 11-11067]
	* * * * *
4/19/11	Amicus Brief filed by Amicus Curiae American Cancer Society in 11-11021. Service date: 04/11/2011 US mail - Attorney for Amicus Curiae: Suda. [11-11021, 11-11067]
4/19/11	Amicus Brief filed by Amicus Curiae Young Invincibles in 11-11021. Service date: 04/08/2011 US mail - Attorney for Amicus Curiae: Annino. [11-11021, 11-11067]

DATE	PROCEEDINGS
	* * * * *
4/19/11	Amicus Brief filed by Amicus Curiae The National Women's Law Center in 11-11021. Service date: 04/11/2011 US mail - Attorney for Amicus Curiae: Hart. [11-11021, 11-11067]
	* * * * *
5/4/11	Appellee-Cross Appellant's Brief filed by Appellees State of Florida, State of Nebraska, State of South Carolina, State of Texas and State of Utah in 11-11021, Appellants Terry E. Branstad, Commonwealth of Pennsylvania, State of Alabama, State of Alaska, State of Arizona, State of Colorado, State of Florida, State of Georgia, State of Idaho, State of Indiana, State of Kansas, State of Louisiana, State of Maine, State of Michigan, State of Mississippi, State of Nebraska, State of Nevada, State of North Dakota, State of Ohio, State of South Carolina, State of South Dakota, State of Texas, State of Utah, State of Washington, State of Wisconsin and State of Wyoming in 11-11067. Service date: 05/04/2011 US mail - Attorney for Appellant: Katyal. [11-11021, 11-11067]

DATE	PROCEEDINGS
	* * * * *
5/5/11	Amicus Brief filed by Amicus Curiae American Center for Law and Justice in 11-11021, 11-11067. Service date: 05/04/2011 US mail - Attorney for Amicus Curiae: White. [11-11021, 11-11067]
	* * * * *
5/10/11	Amicus Brief filed by Amicus Curiae South Carolina Chamber of Commerce in 11-11021, 11-11067. Service date: 05/10/2011 US mail - Attorney for Amicus Curiae: Christina. [11-11021, 11-11067]
	* * * * *
5/11/11	Amicus Brief filed by Amicus Curiae American Civil Rights Union in 11-11021, 11-11067. Service date: 05/10/2011 US mail - Attorney for Amicus Curiae: Tragos. [11-11021, 11-11067]
	* * * * *

DATE	PROCEEDINGS
5/11/11	Amicus Brief filed by Amicus Curiae Justice and Freedom Fund in 11-11021, 11-11067. Service date: 05/10/2011 US mail - Attorney for Amicus Curiae: Dewart. [11-11021, 11-11067]
5/11/11	Amicus Brief filed by Amicus Curiae American Legislative Exchange Council in 11-11021, 11-11067. Service date: 05/10/2011 US mail - Attorney for Amicus Curiae: Elwood. [11-11021, 11-11067]
5/11/11	Amicus Brief filed by Amicus Curiae Landmark Legal Foundation in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Hutchison. [11-11021, 11-11067]
5/11/11	Amicus Curiae Matthew Sissel in 11-11021 and Amicus Curiae Matthew Sissel in 11-11067 added to case. [11-11021, 11-11067]
	* * * * *
5/11/11	Amicus Brief filed by Amicus Curiae Matthew Sissel in 11-11021, 11-11067. Service date: 05/10/2011 US mail - Attorney for Amicus Curiae: Sandefur. [11-11021, 11-11067]
	* * * * *

DATE	PROCEEDINGS
5/11/11	Amicus Brief filed by Amicus Curiae Catholic Medical Association in 11-11021, 11-11067. Service date: 05/09/2011 US mail - Attorney for Amicus Curiae: Bordlee. [11-11021, 11-11067]
	* * * * *
5/11/11	Amicus Brief filed by Amicus Curiae Physician Hospitals of America in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Moldovan. [11-11021, 11-11067]
	* * * * *
5/11/11	Amicus Brief filed by Amicus Curiae Minnesota Legislators in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Bader. [11-11021, 11-11067]
	* * * * *
5/11/11	Amicus Brief filed by Amicus Curiae The Heritage Foundation in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Strickland. [11-11021, 11-11067]
	* * * * *

DATE	PROCEEDINGS
5/11/11	Amicus Brief filed by Amicus Curiae The Independence Institute in 11-11021. Service date: 05/09/2011 US mail - Attorney for Amicus Curiae: Kopel. [11-11021, 11-11067]
	* * * * *
5/12/11	Amicus Brief filed by Amicus Curiae Doctors for Patient Care in 11-11021. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Jaffe. [11-11021, 11-11067]
5/12/11	Amicus Brief filed by Amicus Curiae Cato Institute in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Shapiro. [11-11021, 11-11067]
	* * * * *
5/12/11	Amicus Brief filed by Amicus Curiae Washington Legal Foundation in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Andrews. [11-11021, 11-11067]
	* * * * *

DATE	PROCEEDINGS
5/12/11	Amicus Brief filed by Amicus Curiae Revere America Foundation in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Cooper. [11-11021, 11-11067]
5/12/11	Amicus Brief filed by Amicus Curiae Family Research Council in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Klukowski. [11-11021, 11-11067]
	* * * * *
5/12/11	Amicus Brief filed by Amicus Curiae The Association of American Physicians & Surgeons, Inc. in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Tripp. [11-11021, 11-11067]
	* * * * *
5/12/11	Amicus Brief filed by Amicus Curiae Economists in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Engel. [11-11021, 11-11067]
5/13/11	Amicus Brief filed by Amicus Curiae James F. Blumstein in 11-11021. Service date: 05/09/2011 US mail - Attorney for

DATE	PROCEEDINGS
	Amicus Curiae: Blumstein. [11-11021, 11-11067]
5/13/11	Amicus Brief filed by Amicus Curiae Mountain States Legal foundation in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Lechner. [11-11021, 11-11067]
	* * * * *
5/13/11	Amicus Brief filed by Amicus Curiae Caesar Rodney Institute in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Misir. [11-11021, 11-11067]
	* * * * *
5/13/11	Amicus Brief filed by Amicus Curiae Center for Individual Rights in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Rosman. [11-11021, 11-11067]
	* * * * *
5/13/11	Amicus Brief filed by Amicus Curiae Center for Constitutional Jurisprudence in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Caso. [11-11021, 11-11067]

DATE	PROCEEDINGS
	* * * * *
5/13/11	PT'D Amicus Brief filed by Amicus Curiae Members of the United States Senate in 11-11021. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Severino. [11-11021, 11-11067]
5/13/11	PT"D Amicus Brief filed by Amicus Curiae John Boehner in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Severino. [11-11021, 11-11067]
	* * * * *
5/16/11	Amicus Brief filed by Amicus Curiae Texas Public Policy Foundation in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Loyola. [11-11021, 11-11067]
	* * * * *
5/16/11	Amicus Brief filed by Amicus Curiae Idaho Freedom Foundation, Inc. in 11-11021. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Talmon. [11-11021, 11-11067]
	* * * * *

DATE	PROCEEDINGS
5/18/11	Appellant-Cross Appellee's Brief filed by Appellant United States Department of Health and Human Services in 11-11021. Service date: 05/17/2011 US mail - Attorney for Appellees: Clement, Katsas, Rivkin, Spohn, Winship. [11-11021, 11-11067]
	* * * * *
5/18/11	Amicus Brief filed by Amicus Curiae k Rohlfs in 11-11021, 11-11067. Service date: 05/11/2011 US mail - Attorney for Amicus Curiae: Rohlfs. [11-11021, 11-11067]
5/19/11	ORDER: Motion to file amicus brief (John Boehner & Members of the U.S. Senate) filed by Carrie Lynn Severino is DENIED as UNNECESSARY. Because the same atty has submitted more than one amicus curiae brief . . . counsel is directed to file and serve by 5/23 a single compliant amici curiae brief . . . brief is to be physically delivered to the Clerk's office by that date-5/23. [6302884-2] [11-11021, 11-11067]
	* * * * *

DATE	PROCEEDINGS
5/23/11	CORRECTED Amicus Brief filed by Amicus Curium John Boehner and Members of the United States Senate in 11-11021, Amicus Curiae John Boehner in 11-11067. Service date: 05/20/2011 US mail - Attorney for Amicus Curiae: Severino. [11-11021, 11-11067]
	* * * * *
5/25/11	Reply Brief filed by Appellants/Cross-Appellees Commonwealth of Pennsylvania, State of Alabama, State of Alaska, State of Arizona, State of Colorado, State of Florida, State of Georgia, State of Idaho, State of Indiana, State of Kansas, State of Louisiana, State of Maine, State of Michigan, State of Mississippi, State of Nebraska, State of Nevada, State of North Dakota, State of Ohio, State of South Carolina, State of South Dakota, State of Texas, State of Utah and State of Wisconsin in 11-11067. Service 05/24/2011 US mail - Attorney for Appellees: Carvin, Kaersvang, Katsas, Marshall, Mooppan. [11-11021, 11-11067]
	* * * * *

DATE	PROCEEDINGS
5/31/11	Oral argument scheduled. Argument Date: Wednesday, 06/08/2011 Argument Location: Atlanta Courtroom: Atlanta 338. [11-11021, 11-11067]
	* * * * *
6/08/11	Oral argument held. Oral Argument participants were Neal Kumar Katyal for Appellants United States Department of Labor, et al., Michael Anthony Carvin for Appellees National Federation of Independent Business, et al., and Paul D. Clement for Appellees State of Florida and State of Utah, et al. in 11-11021. [11-11021, 11-11067]
6/21/11	Supplemental Authority filed by Appellees Kaj Ahlburg and Mary Brown in 11-11021, Appellee Mary Brown in 11-11067. Service date: 06/17/2011 US mail - Attorney for Appellants: Bondy, Casey, Clement, Grossman, Jacquot, Kaersvang, Kennedy, Makar, Osterhaus, Rivkin, Winship. [11-11021, 11-11067]
7/07/11	Supplemental Authority filed by Appellant United States Department of Health and Human Services in 11-11021. Service date: 07/06/2011 email - Attorney for Appellees: Clement, Katsas. [11-11021, 11-11067]

DATE	PROCEEDINGS
7/13/11	Response to Supplemental Authority (28J) filed by Appellee Kaj Ahlburg in 11-11021, Appellee Mary Brown in 11-11067. Service date: 07/12/2011 US mail - Attorney for Appellants: Chaifetz, Clement. [11-11021, 11-11067]
8/09/11	Supplemental Authority filed by Appellant SECRETARY OF THE U. S. DEPARTMENT OF HEALTH & HUMAN SERVICES in 11-11021. Service date: 08/08/2011 US mail - Attorney for Appellees: Clement, Osterhaus, Rivkin. [11-11021, 11-11067]
8/12/11	Judgment entered as to Appellant SECRETARY OF THE U. S. DEPARTMENT OF HEALTH & HUMAN SERVICES etc., in 11-11021. [11-11021, 11-11067]
	* * * * *
8/12/11	Opinion issued by court as to Appellants Terry E. Branstad, Commonwealth of Pennsylvania, State of Alabama, State of Alaska, State of Arizona, State of Colorado, State of Florida, State of Georgia, State of Idaho, State of Indiana, State of Kansas, State of Louisiana, State of Maine, State of Michigan, State of Mississippi, State of Nebraska, State of Nevada, State of North Dakota, State of Ohio,

DATE	PROCEEDINGS
	State of South Carolina, State of South Dakota, State of Texas, State of Utah, State of Washington, State of Wisconsin and State of Wyoming. Decision: Affirmed in part and Reversed in part. Opinion type: Published. Opinion method: Signed.
9/29/11	Notice of Writ of Certiorari filed as to Appellant State of Florida. SC# 11-400.
10/03/11	MOTION to stay mandate filed by Appellee United States Department of Health and Human Services in 11-11067. Motion is Unopposed [6398537-1] [11-11021, 11-11067]
10/05/11	ORDER: On Oct. 4, 2011, the parties filed a joint mot to stay the issuance of the mandate . . . Accordingly, on or before Noon, Eastern Standard Time on Wednesday, Oct. 12, 2011, the parties are directed to jointly submit in writing to the court the reasons why they contend there is good cause for a stay (see file for complete text). JFD [11-11021, 11-11067]
10/11/11	Response pursuant to court order of 10/05/2011 filed by Dana Kaersvang for U.S. Department of Labor, United States Department of Health and Human Ser-

DATE	PROCEEDINGS
	vices and US Department of Treasury in 11-11067,.,SKIP) [11-11021, 11-11067]
10/13/11	ORDER: Motion to stay mandate filed by Appellee United States Department of Health and Human Services is DENIED [6398537-2] JFD, FMH and SM [11-11021, 11-11067]
10/24/11	Mandate issued as to Appellants Secretary U.S. Department of Health and Human Services, Secretary, U.S. Department of Labor, Secretary, US Department of Treasury, U.S. Department of Labor, US Department of Treasury and United States Department of Health and Human Services in 11-11021, Appellants Terry E. Branstad, Commonwealth of Pennsylvania, State of Alabama, State of Alaska, State of Arizona, State of Colorado, State of Florida, State of Georgia, State of Idaho, State of Indiana, State of Kansas, State of Louisiana, State of Maine, State of Michigan, State of Mississippi, State of Nebraska, State of Nevada, State of North Dakota, State of Ohio, State of South Carolina, State of South Dakota, State of Texas, State of Utah, State of Washington, State of Wisconsin and State of Wyoming in 11-11067. [11-11021, 11-11067]

* * * * *

DATE	PROCEEDINGS
11/14/11	Writ of Certiorari filed as to Appellant State of Florida is GRANTED. SC# 11-400.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

No. 3:10-cv-0091-RV-EMT

STATE OF FLORIDA, ET AL., PLAINTIFFS-APPELLANTS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
3/23/10	1	COMPLAINT against TIMOTHY F GEITHNER, KATHLEEN SEBELIUS, HILDA L SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY filed

DATE	DOCKET NUMBER	PROCEEDINGS
		by STATE OF FLORIDA - Filing Fee $350, Receipt Number: 1129-1533627) (WINSHIP, BLAINE) **Modified on 3/23/2010 to correct "docket text" (laj). (Entered: 03/23/2010)
		* * * * *
3/24/10	3	Summons Issued as to TIMOTHY F GEITHNER, KATHLEEN SEBELIUS, HILDA L SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, U.S. Attorney and U.S. Attorney General. (krb) (Entered: 03/24/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
5/13/10	41	SUMMONS Returned Executed by STATE OF WASHINGTON, STATE OF ALABAMA, STATE OF SOUTH CAROLINA, STATE OF FLORIDA, STATE OF SOUTH DAKOTA, STATE OF LOUISIANA, STATE OF NEBRASKA, STATE OF COLORADO, STATE OF IDAHO, STATE OF MICHIGAN, STATE OF TEXAS, COMMONWEALTH OF PENNSYLVANIA, STATE OF UTAH. TIMOTHY F GEITHNER served on 4/12/2010, answer due 5/3/2010; KATHLEEN SEBELIUS served on 3/29/2010, answer due 4/19/2010; HILDA L SOLIS served on 3/29/2010, answer due 5/3/2010; UNITED

DATE	DOCKET NUMBER	PROCEEDINGS
		STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES served on 3/29/2010, answer due 5/3/2010; UNITED STATES DEPARTMENT OF LABOR served on 4/2/2010, answer due 5/3/2010; UNITED STATES DEPARTMENT OF THE TREASURY served on 4/12/2010, answer due 5/3/2010. (Attachments: # 1 Exhibit "A" Return of Service of HHS and H. Solis, # 2 Exhibit "B" Return of Service of Treasury and T. Geithner, # 3 Exhibit "C" Return of Service of Labor and H. Solis, # 4 Exhibit "D" return of Service of Attorney General E. Holder) (WINSHIP, BLAINE) (Entered: 05/13/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
5/14/10	42	First AMENDED COMPLAINT by and through Sonny Perdue, Governor of the State of Georgia, State of Alaska, by and through Daniel S. Sullivan, Attorney General of the State of Alaska, National Federation of Independent Business, a California Nonprofit Mutual Benefit Corporation, State of Nevada, by and through Jim Gibbons, Governor of the State of Nevada, State of North Dakota, by and through Wayne Stenejhem, Attorney General of the State of North Dakota, State of Indiana, by and through Gregory F. Zoeller, Attorney General, State of Mississippi, by and through Haley Barbour, Governor of the State of Mississippi, Kaj Ahlburg, State of Arizona,

DATE	DOCKET NUMBER	PROCEEDINGS
		by and through Janice K. Brewer, Governor of the State of Arizona, Mary Brown, filed by STATE OF WASHINGTON, STATE OF ALABAMA, STATE OF SOUTH CAROLINA, STATE OF FLORIDA, STATE OF SOUTH DAKOTA, STATE OF LOUISIANA, STATE OF NEBRASKA, STATE OF COLORADO, STATE OF IDAHO, STATE OF MICHIGAN, STATE OF TEXAS, COMMONWEALTH OF PENNSYLVANIA, STATE OF UTAH (WINSHIP, BLAINE) Modified on 5/14/2010 to clean up text (djb). (Entered: 05/14/2010)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
6/16/10	55	MOTION to Dismiss by TIMOTHY F GEITHNER, KATHLEEN SEBELIUS, HILDA L SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (Internal deadline for referral to judge if response not filed earlier: 7/6/2010). (Attachments: # 1 Memorandum in Support) (BECKENHAUER, ERIC) (Entered: 06/16/2010)
6/17/10	56	NOTICE *Errata* by TIMOTHY F GEITHNER, KATHLEEN SEBELIUS, HILDA L SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HU-

DATE	DOCKET NUMBER	PROCEEDINGS
		MAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY re 55 MOTION to Dismiss (Attachments: # 1 Memorandum in Support of 55 Defendants' Motion to Dismiss) (BECKENHAUER, ERIC) (Entered: 06/17/2010)
6/23/10	57	MOTION clarification and leave *(titled as Motion for Clarification of the Court's June 14, 2010 Order and in the Alternative for Leave to Appear as Amicus Curiae and Memorandum in Support)* by States of Oregon, Iowa and Vermont. (DUBANEVICH, KEITH) (Entered: 06/23/2010)

* * * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
8/6/10	68	RESPONSE in Opposition re 55 MOTION to Dismiss filed by STATE OF FLORIDA, et al (all plaintiffs). (WINSHIP, BLAINE) **Modified on 8/6/2010 to create linkage for filers. (laj). (Entered: 08/06/2010)
		* * * * *
8/27/10	74	REPLY to Response to Motion re 55 MOTION to Dismiss filed by TIMOTHY F GEITHNER, KATHLEEN SEBELIUS, HILDA L SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY.

DATE	DOCKET NUMBER	PROCEEDINGS
		(KENNEDY, BRIAN) (Entered: 08/27/2010)
		* * * * *
9/14/10	75	Minute Entry for proceedings held before SENIOR JUDGE ROGER VINSON: Oral Argument as to Defendants' 55 MOTION to Dismiss held on 9/14/2010. (Court Reporter Donna Boland.) (Attachments: # 1 Plaintiffs' Exhibit 1) (jmd) (Entered: 09/15/2010)
9/15/10	76	AMENDED FINAL SCHEDULING ORDER - Re: 26 Order - A) I will enter my written Order on the Dfts' 55 Motion to Dismiss on or before 10/14/2010. Assuming the case survives dismissal in whole or in part, the parties have until 11/4/2010 in which to move

DATE	DOCKET NUMBER	PROCEEDINGS
		for summary judgment (and the Dfts may file their answer at the same time); the opposing party will have until 11/23/2010 to respond; and the moving party will have until 12/6/2010 to file any Reply. B) As provided in the original Final Scheduling Order, the briefing with regard to the motions discussed above will be limited to (50) pages for the initial and responsive briefs, and (25) pages for reply briefs. C) Hearing and oral argument on the motion(s) for summary judgment will held on Thursday, 12/16/2010 @ 9:00 AM (CST). Both sides will be allowed (1) hour for argument. Signed by SENIOR JUDGE ROGER VINSON on 9/15/2010. (laj) (Entered: 09/16/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
10/8/10	78	NOTICE *of Supplemental Authority* by TIMOTHY F GEITHNER, KATHLEEN SEBELIUS, HILDA L SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY (Attachments: # 1 Exhibit Thomas More Law Center v. Obama, No. 10-CV-11156 (E.D. Mich. Oct. 7, 2010)) (BECKENHAUER, ERIC) (Entered: 10/08/2010)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
10/14/10	79	ORDER AND MEMORANDUM OPINION - The Dfts' 55 Motion to Dismiss is GRANTED w/respect to Counts Two, Five, and Six, and those counts are hereby DISMISSED. The Motion is DENIED w/respect to Counts One and Four, Count Three is also DISMISSED, as Moot. The case will continue as to Counts One and Four pursuant to the Scheduling Order previously entered. Signed by SENIOR JUDGE ROGER VINSON on 10/14/2010. (laj) (Entered: 10/14/2010)
	* * * * *	
11/4/10	80	MOTION for Summary Judgment by PLAINTIFF STATES. (Internal deadline for referral to judge if re-

DATE	DOCKET NUMBER	PROCEEDINGS
		sponse not filed earlier: 11/22/2010). (Attachments: # 1 Memorandum of Law, # 2 Statement of Material Facts, # 3 Exhibits Volume I, # 4 Exhibits Volume II, # 5 Exhibits Volume III, # 6 Exhibits Volume IV) (tdg) (Additional attachment(s) added on 11/4/2010: # 7 Exhibits Volume V.1 (35, 36), # 8 Exhibits Volume V.2 (37,38), # 9 Exhibits Volume V.3 (39,40)) (tdg). (Entered: 11/04/2010)
11/4/10	81	ANSWER to Complaint *42 Amended Complaint* by TIMOTHY F GEITHNER, KATHLEEN SEBELIUS, HILDA L SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT

DATE	DOCKET NUMBER	PROCEEDINGS
		OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (BECKENHAUER, ERIC) (Entered: 11/04/2010)
11/4/10	82	MOTION for Summary Judgment by TIMOTHY F GEITHNER, KATHLEEN SEBELIUS, HILDA L SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (Internal deadline for referral to judge if response not filed earlier: 11/22/2010). (Attachments: # 1 Memorandum in Support, # 2 Statement of Facts) (BECKEN-

DATE	DOCKET NUMBER	PROCEEDINGS
		HAUER, ERIC) (Entered: 11/04/2010)
11/5/10	83	NOTICE *Errata re Exhibits in support of 82 Defendants' Motion for Summary Judgment* by TIMOTHY F GEITHNER, KATHLEEN SEBELIUS, HILDA L SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY (Attachments: # 1 Table of Exhibits, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Exhibit 9, # 11 Exhibit 10, # 12 Exhibit 11, # 13 Exhibit 12, # 14

DATE	DOCKET NUMBER	PROCEEDINGS
		Exhibit 13, # 15 Exhibit 14, # 16 Exhibit 15, # 17 Exhibit 16, # 18 Exhibit 17, # 19 Exhibit 18, # 20 Exhibit 19, # 21 Exhibit 20, # 22 Exhibit 21, # 23 Exhibit 22, # 24 Exhibit 23, # 25 Exhibit 24, # 26 Exhibit 25, # 27 Exhibit 26, # 28 Exhibit 27, # 29 Exhibit 28, # 30 Exhibit 29, # 31 Exhibit 30, # 32 Exhibit 31, # 33 Exhibit 32, # 34 Exhibit 33, # 35 Exhibit 34, # 36 Exhibit 35, # 37 Exhibit 36, # 38 Exhibit 37, # 39 Exhibit 38, # 40 Exhibit 39, # 41 Exhibit 40, # 42 Exhibit 41, # 43 Exhibit 42, # 44 Exhibit 43) (BECKENHAUER, ERIC) (Entered: 11/05/2010)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/8/10	85	NOTICE *of Filing* by KAJ AHLBURG, MARY BROWN, COMMONWEALTH OF PENNSYLVANIA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, STATE OF ALABAMA, STATE OF ALASKA, STATE OF ARIZONA, STATE OF COLORADO, STATE OF FLORIDA, STATE OF GEORGIA, STATE OF IDAHO, STATE OF INDIANA, STATE OF LOUISIANA, STATE OF MICHIGAN, STATE OF MISSISSIPPI, STATE OF NEBRASKA, STATE OF NEVADA, STATE OF NORTH DAKOTA, STATE OF SOUTH CAROLINA, STATE OF SOUTH DAKOTA, STATE OF TEXAS, STATE OF UTAH, STATE

DATE	DOCKET NUMBER	PROCEEDINGS
		OF WASHINGTON (Attachments: # 1 Plaintiffs Statement of Position on Motions for Leave to File Briefs as Amici Curiae) (WINSHIP, BLAINE) (Entered: 11/08/2010)
		* * * * *
11/16/10	119	AMICUS CURIAE BRIEF by JOHN A BOEHNER *in support of Plaintiffs' Motion for Summary Judgment.* (SEVERINO, CARRIE) (Entered: 11/16/2010)
11/17/10	120	AMICUS CURIAE BRIEF by AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES *et al.*. (BOBROFF, ROCHELLE) (Entered: 11/17/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
11/18/10	121	AMICUS CURIAE BRIEF by UNITED STATES SENATORS *in support of Plaintiffs' Motion for Summary Judgment.* (SEVERINO, CARRIE) (Entered: 11/18/2010)
11/19/10	122	AMICUS CURIAE BRIEF by AMERICAN CENTER FOR LAW AND JUSTICE, *Various Members of Congress, and the Constitutional Committee.* (WHITE, EDWARD) (Entered: 11/19/2010)
11/19/10	123	AMICUS CURIAE BRIEF by FAMILY RESEARCH COUNCIL *Supporting Plaintiffs' Motion for Summary Judgment.* (KLUKOWSKI, KENNETH) (Entered: 11/19/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
11/19/10	124	AMICUS CURIAE BRIEF by American Nurses Association *in support of defendants' motion for summary judgment.* (MILLHISER, IAN) (Entered: 11/19/2010)
11/19/10	125	MEMORANDUM in Support re 82 MOTION for Summary Judgment *Brief Amici Curiae of Economic Scholars in Support of Defendants' Motion for Summary Judgment* filed by David Cutler. (ROSEN, RICHARD) (Entered: 11/19/2010)
11/19/10	126	AMICUS CURIAE BRIEF by STATE LEGISLATORS *in Support of Defendants' Motion for Summary Judgment.* (WYDRA, ELIZABETH) (Entered: 11/19/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
11/19/10	127	AMICUS CURIAE BRIEF by AMERICAN CIVIL RIGHTS UNION (ACRU) *In Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment.* (TRAGOS, GEORGE) (Entered: 11/19/2010)
11/19/10	128	AMICUS CURIAE BRIEF by Young Invincibles. (ANNINO, PAOLO) (Entered: 11/19/2010)
11/19/10	129	MEMORANDUM in Support re 82 MOTION for Summary Judgment *Brief Amicus Curiae* filed by SMALL BUSINESS MAJORITY FOUNDATION. (SANDLER, JOSEPH) (Entered: 11/19/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
11/19/10	130	AMICUS CURIAE BRIEF by STATES OF OREGON, IOWA, AND VERMONT. (DUBANEVICH, KEITH) (Entered: 11/19/2010)
11/19/10	131	AMICUS CURIAE BRIEF by American Hospital Association et al. *in support of Defendants.* (STETSON, CATHERINE) (Entered: 11/19/2010)
11/19/10	132	AMICUS CURIAE BRIEF by Governor Tim Pawlenty re 80 MOTION for Summary Judgment. (BADER, HANS) (Entered: 11/19/2010)
11/19/10	133	AMICUS CURIAE BRIEF by GOVERNORS OF COLORADO, MICHIGAN, PENNSYLVANIA AND WASHINGTON IN SUPPORT OF DEFENDANTS'

DATE	DOCKET NUMBER	PROCEEDINGS
		MOTION FOR SUMMARY JUDGMENT. (BARAUSKAS, ALEKSAS) (Entered: 11/19/2010)
11/19/10	134	AMICUS CURIAE BRIEF by AMERICAN ACADEMY OF PEDIATRICS *In Support of Defendants' Motion for Summary Judgment.* (SOMERS, SARAH) (Entered: 11/19/2010)
11/23/10	135	PLAINTIFFS MEMORANDUM in Opposition to Defendants' Motion for Summary Judgment 82 filed by STATE OF FLORIDA. (Attachments: # 1 Supplemental Appendix) (tdg) (Entered: 11/23/2010)
11/23/10	136	PLAINTIFFS' RESPONSE to Defendants' Statement of Facts As to Which There Is No Genuine Issue 82 filed by

DATE	DOCKET NUMBER	PROCEEDINGS
		STATE OF FLORIDA. (tdg) (Entered: 11/23/2010)
11/23/10	137	MEMORANDUM in Opposition re 80 MOTION for Summary Judgment filed by TIMOTHY F GEITHNER, KATHLEEN SEBELIUS, HILDA L SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (Attachments: # 1 Response to Plaintiffs' Statement of Facts) (BECKENHAUER, ERIC) (Entered: 11/23/2010)
12/2/10	140	MOTION for Leave to File Amicus Curiae Brief by pro se litigant W. Spencer Connerat, III. (laj) (Entered: 12/07/2010)

DATE	DOCKET NUMBER	PROCEEDINGS
12/6/10	138	REPLY to Response to Motion re 80 MOTION for Summary Judgment filed by KAJ AHLBURG, MARY BROWN, COMMONWEALTH OF PENNSYLVANIA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, STATE OF ALABAMA, STATE OF ALASKA, STATE OF ARIZONA, STATE OF COLORADO, STATE OF FLORIDA, STATE OF GEORGIA, STATE OF IDAHO, STATE OF INDIANA, STATE OF LOUISIANA, STATE OF MICHIGAN, STATE OF MISSISSIPPI, STATE OF NEBRASKA, STATE OF NEVADA, STATE OF NORTH DAKOTA, STATE OF SOUTH CAROLINA, STATE OF SOUTH DA-

DATE	DOCKET NUMBER	PROCEEDINGS
		KOTA, STATE OF TEXAS, STATE OF UTAH, STATE OF WASHINGTON. (WINSHIP, BLAINE) (Entered: 12/06/2010)
12/6/10	139	REPLY to Response to Motion re 82 MOTION for Summary Judgment filed by TIMOTHY F GEITHNER, KATHLEEN SEBELIUS, HILDA L SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (BECKENHAUER, ERIC) (Entered: 12/06/2010)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
12/14/10	143	NOTICE of *Supplemental Authority* by KAJ AHLBURG, MARY BROWN, COMMONWEALTH OF PENNSYLVANIA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, STATE OF ALABAMA, STATE OF ALASKA, STATE OF ARIZONA, STATE OF COLORADO, STATE OF FLORIDA, STATE OF GEORGIA, STATE OF IDAHO, STATE OF INDIANA, STATE OF LOUISIANA, STATE OF MICHIGAN, STATE OF MISSISSIPPI, STATE OF NEBRASKA, STATE OF NEVADA, STATE OF NORTH DAKOTA, STATE OF SOUTH CAROLINA, STATE OF SOUTH DAKOTA, STATE OF TEXAS, STATE OF

DATE	DOCKET NUMBER	PROCEEDINGS
		UTAH, STATE OF WASHINGTON (Attachments: # 1 Exhibit Virginia Order Granting Summary Judgment) (WINSHIP, BLAINE) (Entered: 12/14/2010)
		* * * * *
12/16/10	145	Minute Entry for proceedings held before SENIOR JUDGE ROGER VINSON: oral arguments as to parties' motions for summary judgment held on 12/16/2010. (Court Reporter Donna Boland.) (jmd) (Entered: 12/16/2010)
		* * * * *
1/18/11	147	MOTION for Leave to File *Second Amended Complaint* by KAJ AHLBURG, MARY BROWN, COMMON

DATE	DOCKET NUMBER	PROCEEDINGS
		WEALTH OF PENNSYLVANIA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, STATE OF ALABAMA, STATE OF ALASKA, STATE OF ARIZONA, STATE OF COLORADO, STATE OF FLORIDA, STATE OF GEORGIA, STATE OF IDAHO, STATE OF INDIANA, STATE OF LOUISIANA, STATE OF MICHIGAN, STATE OF MISSISSIPPI, STATE OF NEBRASKA, STATE OF NEVADA, STATE OF NORTH DAKOTA, STATE OF SOUTH CAROLINA, STATE OF SOUTH DAKOTA, STATE OF TEXAS, STATE OF UTAH, STATE OF WASHINGTON. (WINSHIP, BLAINE) (Entered: 01/18/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
1/18/11	148	Second AMENDED COMPLAINT against TIMOTHY F GEITHNER, KATHLEEN SEBELIUS, HILDA L SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY, filed by STATE OF NORTH DAKOTA, STATE OF ALABAMA, STATE OF ALASKA, COMMONWEALTH OF PENNSYLVANIA, STATE OF WASHINGTON, STATE OF INDIANA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, STATE OF MISSISSIPPI, STATE OF GEORGIA, STATE OF IDAHO, STATE OF NE-

DATE	DOCKET NUMBER	PROCEEDINGS
		VADA, STATE OF SOUTH CAROLINA, STATE OF FLORIDA, MARY BROWN, KAJ AHLBURG, STATE OF SOUTH DAKOTA, STATE OF LOUISIANA, STATE OF NEBRASKA, STATE OF ARIZONA, STATE OF COLORADO, STATE OF MICHIGAN, STATE OF TEXAS, STATE OF UTAH. (WINSHIP, BLAINE) (Entered: 01/18/2011)
1/19/11	149	ORDER - The plaintiffs' motion for leave to file a second amended complaint (doc. 147) is hereby GRANTED, and the new complaint will be deemed filed as of this date, as will the defendants' previously-filed answer. Signed by SENIOR JUDGE ROGER VINSON on

DATE	DOCKET NUMBER	PROCEEDINGS
		1/19/2011. (djb) (Entered: 01/19/2011)
1/31/11	150	ORDER GRANTING SUMMARY JUDGMENT - For all the reasons stated and pursuant to Rule 56 of the Federal Rules of Civil Procedure, the plaintiffs motion for summary judgment (doc. 80) is hereby GRANTED as to its request for declaratory relief on Count I of the Second Amended Complaint, and DENIED as to its request for injunctive relief; and the defendants' motion for summary judgment (doc. 82) is hereby GRANTED on Count IV of the Second Amended Complaint. The respective cross-motions are each DENIED. In accordance with Rule 57 of the Federal Rules of Civil Proce-

DATE	DOCKET NUMBER	PROCEEDINGS
		dure and Title 28, United States Code, Section 2201(a), a Declaratory Judgment shall be entered separately, declaring "The Patient Protection and Affordable Care Act" unconstitutional. Signed by SENIOR JUDGE ROGER VINSON on 1/31/2011. (djb) Modified on 1/31/2011 (djb). (Entered: 01/31/2011)
1/31/11	151	FINAL SUMMARY DECLARATORY JUDGMENT. It is hereby DECLARED, ADJUDGED, and DECREED that The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124

DATE	DOCKET NUMBER	PROCEEDINGS
		Stat. 1029 (2010), is unconstitutional. Signed by SENIOR JUDGE ROGER VINSON on 1/31/2011. (djb) (Entered: 01/31/2011)
		* * * * *
2/17/11	156	MOTION To Clarify re 150 Order on Motion for Summary Judgment,,,,,,, 151 Judgment, by TIMOTHY F GEITHNER, KATHLEEN SEBELIUS, HILDA L SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (BECKENHAUER, ERIC) (Entered: 02/17/2011)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
2/18/11	157	ORDER DIRECTING EXPEDITED FILING re 156 MOTION To Clarify re 150 Order on Motion for Summary Judgment, 151 Judgment. From the date of this Order, the plaintiffs shall have 3 business days in which to file their response in opposition to the defendants' motion. If the defendants wish to file a reply to that response, they shall also have 3 business days from the date the response is filed. (Internal deadline for referral to judge if response not filed on: 2/23/2011.) Signed by SENIOR JUDGE ROGER VINSON on February 18, 2011. (tl) Modified on 2/22/2011 to clarify text. (tl) (Entered: 02/18/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
2/23/11	158	MEMORANDUM in Opposition re 156 MOTION To Clarify re 150 Order on Motion for Summary Judgment, 151 Judgment, filed by KAJ AHLBURG, TERRY E BRANSTAD, MARY BROWN, COMMONWEALTH OF PENNSYLVANIA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, STATE OF ALABAMA STATE OF ALASKA, STATE OF ARIZONA, STATE OF COLORADO, STATE OF FLORIDA, STATE OF GEORGIA, STATE OF IDAHO, STATE OF INDIANA, STATE OF KANSAS, STATE OF LOUISIANA, STATE OF MAINE, STATE OF MICHIGAN, STATE OF MISSISSIPPI, STATE OF NE-

DATE	DOCKET NUMBER	PROCEEDINGS
		BRASKA, STATE OF NEVADA, STATE OF NORTH DAKOTA, STATE OF OHIO, STATE OF SOUTH CAROLINA, STATE OF SOUTH DAKOTA, STATE OF TEXAS, STATE OF UTAH, STATE OF WASHINGTON, STATE OF WISCONSIN, STATE OF WYOMING. (WINSHIP, BLAINE) Modified on 2/24/2011 to clarify text (tl). (Entered: 02/23/2011)
		* * * * *
2/28/11	164	REPLY to 158 Response to 156 MOTION To Clarify re 150 Order on Motion for Summary Judgment, 151 Judgment, filed by TIMOTHY F GEITHNER, KATHLEEN SEBELIUS, HILDA L SOLIS, UNITED

DATE	DOCKET NUMBER	PROCEEDINGS
		STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (BECKENHAUER, ERIC) Modified on 3/1/2011 to clarify text, create link. (tl) (Entered: 02/28/2011)
		* * * * *
3/3/11	167	ORDER. The defendants' motion to clarify 156 is GRANTED. To the extent that motion is construed as a motion to stay, it is also GRANTED, and the summary declaratory judgment entered in this case is STAYED pending appeal, conditioned upon the defendants filing their notice of

DATE	DOCKET NUMBER	PROCEEDINGS
		appeal within seven (7) calendar days of this order and seeking an expedited appellate review. Signed by SENIOR JUDGE ROGER VINSON on 3/3/11. (tdg) (Entered: 03/03/2011)
		* * * * *
3/8/11	169	NOTICE OF APPEAL as to 79 Order on Motion to Dismiss, 150 Order on Motion for Summary Judgment,,,,,,, 151 Judgment, 167 Order, by TIMOTHY F GEITHNER, KATHLEEN SEBELIUS, HILDA L SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY.

DATE	DOCKET NUMBER	PROCEEDINGS
		((BECKENHAUER, ERIC) (Entered: 03/08/2011)
		* * * * *
3/10/11	173	NOTICE OF CROSS APPEAL as to 79 Order on Motion to Dismiss, 150 Order on Motion for Summary Judgment,,,,,,, 151 Judgment, by KAJ AHLBURG, TERRY E BRANSTAD, MARY BROWN, COMMONWEALTH OF PENNSYLVANIA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, STATE OF ALABAMA, STATE OF ALASKA, STATE OF ARIZONA, STATE OF COLORADO, STATE OF FLORIDA, STATE OF GEORGIA, STATE OF IDAHO, STATE OF INDIANA, STATE OF

DATE	DOCKET NUMBER	PROCEEDINGS
		KANSAS, STATE OF LOUISIANA, STATE OF MAINE, STATE OF MICHIGAN, STATE OF MISSISSIPPI, STATE OF NEBRASKA, STATE OF NEVADA, STATE OF NORTH DAKOTA, STATE OF OHIO, STATE OF SOUTH CAROLINA, STATE OF SOUTH DAKOTA, STATE OF TEXAS, STATE OF UTAH, STATE OF WASHINGTON, STATE OF WISCONSIN, STATE OF WYOMING. Filing fee $ 455, receipt number 1129-1831078. Appeal Record due by 3/8/2011. (WINSHIP, BLAINE) (Entered: 03/10/2011)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
3/11/11	177	USCA Case Number 11-11021-HH for 169 NOTICE OF APPEAL by TIMOTHY F GEITHNER, KATHLEEN SEBELIUS, HILDA L SOLIS, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF THE TREASURY. (tl) (Entered: 03/11/2011)
	* * * * *	
3/11/11	179	AMENDED NOTICE OF CROSS APPEAL as to 79 Order on Motion to Dismiss, 150 Order on Motion for Summary Judgment,,,,,,, 151 Judgment, by KAJ AHLBURG, TERRY E BRANSTAD, MARY

DATE	DOCKET NUMBER	PROCEEDINGS
		BROWN, COMMONWEALTH OF PENNSYLVANIA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, STATE OF ALABAMA, STATE OF ALASKA, STATE OF ARIZONA, STATE OF COLORADO, STATE OF FLORIDA, STATE OF GEORGIA, STATE OF IDAHO, STATE OF INDIANA, STATE OF KANSAS, STATE OF LOUISIANA, STATE OF MAINE, STATE OF MICHIGAN, STATE OF MISSISSIPPI, STATE OF NEBRASKA, STATE OF NEVADA, STATE OF NORTH DAKOTA, STATE OF OHIO, STATE OF SOUTH CAROLINA, STATE OF SOUTH DAKOTA, STATE OF TEXAS, STATE OF

DATE	DOCKET NUMBER	PROCEEDINGS
		UTAH, STATE OF WASHINGTON, STATE OF WISCONSIN, STATE OF WYOMING. Appeal Record due by 3/8/2011. (WINSHIP, BLAINE) Modified on 3/14/2011 to clarify text. (tl) (Entered: 03/11/2011)
		* * * * *
4/4/11	192	ORDER of USCA as to 169 Notice of Appeal #11-11021-HH, 173 Notice of Cross Appeal #11-11067-HH: Petition for Initial Hearing En Banc is Denied. Motion to expedite this appeal is Granted in part. Oral argument shall be heard on Wednesday, June 8, 2011, at 9:30 A.M. in Atlanta, GA. (tll) (Entered: 04/08/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
10/25/11	196	MANDATE of USCA AFFIRMING in part and REVERSING in part 169 Notice of Appeal and 173 Notice of Cross Appeal. (USCA Appeal #'s 11-11021-HH; 11-11067-HH) (kvg) (Entered: 10/25/2011)
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
Pensacola Division

Case No. 3:01-cv-91-RV/EMT

STATE OF FLORIDA, BY AND THROUGH BILL MCCOLLUM, ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., RESPONDENTS

Filed: May 14, 2010

AMENDED COMPLAINT

Pursuant to Rule 15(a), Federal Rules of Civil Procedure, and paragraph A of the Final Scheduling Order entered by the Court on April 14, 2010, Plaintiffs file this Amended Complaint against Defendants and state:

NATURE OF THE ACTION

1. This is an action seeking declaratory and injunctive relief from the "Patient Protection and Affordable Care Act," P.L. 111-148, as amended by the "Health Care and Education Reconciliation Act of 2010," P.L. 111-152 (collectively the Act). The Act's mandate that all citizens and legal residents of the United States

maintain qualifying healthcare coverage or pay a penalty (individual mandate) is an unprecedented encroachment on the sovereignty of the Plaintiff States and on the rights of their citizens, including members of Plaintiff National Federation of Independent Business (NFIB) and individual Plaintiffs Mary Brown and Kaj Ahlburg. By imposing such a mandate, the Act: exceeds the powers of the United States under Article I of the Constitution, particularly the Commerce Clause; violates the Ninth and Tenth Amendments and the Constitution's principles of federalism and dual sovereignty; and violates the Fifth Amendment's Due Process Clause. In the alternative, if the penalty required under the Act is a tax, it constitutes an unlawful capitation or direct tax in violation of Article I, sections 2 and 9 of the Constitution.

2. The Act further violates the Constitution by forcing the Plaintiff States to operate a wholly refashioned Medicaid program. The Act converts Medicaid from a federal-State partnership to provide a safety net for the needy into a federally-imposed universal healthcare regime, in which the discretion of the Plaintiff States has been removed and new requirements and expenses forced upon them in derogation of their sovereignty. In so doing, the Act violates the Ninth and Tenth Amendments and the Constitution's principles of federalism.

3. Plaintiffs seek declaratory and injunctive relief against the Act's operation in order to avoid an unprecedented and unconstitutional intrusion by the federal government into the private affairs of every American and to preserve Plaintiff States' respective sovereignty, as guaranteed by the Constitution.

JURISDICTION AND VENUE

4. The Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under the Constitution and laws of the United States and further has jurisdiction to render declaratory relief under 28 U.S.C. § 2201.

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e)(3) because no real property is involved, the district is situated in Florida, and the defendants are agencies of the United States or officers thereof acting in their official capacity.

PARTIES

6. The State of Florida, by and through Bill McCollum, Attorney General of Florida, is a sovereign State in the United States of America.

7. The State of South Carolina, by and through Henry McMaster, Attorney General of South Carolina, is a sovereign State in the United States of America.

8. The State of Nebraska, by and through Jon Bruning, Attorney General of Nebraska, is a sovereign State in the United States of America.

9. The State of Texas, by and through Greg Abbott, Attorney General of Texas, is a sovereign State in the United States of America.

10. The State of Utah, by and through Mark L. Shurtleff, Attorney General of Utah, is a sovereign State in the United States of America.

11. The State of Alabama, by and through Troy King, Attorney General of Alabama, is a sovereign State in the United States of America.

12. The State of Louisiana, by and through James D. "Buddy" Caldwell, Attorney General of Louisiana, is a sovereign State in the United States of America.

13. Michael A. Cox, Attorney General of Michigan, is bringing this action on behalf of the People of Michigan under Mich. Comp. Law § 14.28, which provides that the Michigan Attorney General may "appear for the people of [Michigan] in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of [Michigan] may be a party or interested." Under Michigan's constitution, the people are sovereign. Mich. Const. art. I, § 1 ("All political power is inherent in the people. Government is instituted for their equal benefit, security,. and protection.").

14. The State of Colorado, by and through John W. Suthers, Attorney General of Colorado, is a sovereign State in the United States of America.

15. The Commonwealth of Pennsylvania, by and through Thomas W. Corbett, Jr., Attorney General of Pennsylvania, is a sovereign State in the United States of America.

16. The State of Washington, by and through Robert A. McKenna, Attorney General of Washington, is a sovereign State in the United States of America.

17. The State of Idaho, by and through Lawrence G. Wasden, Attorney General of Idaho, is a sovereign State in the United States of America.

18. The State of South Dakota, by and through Marty J. Jackley, Attorney General of South Dakota, is a sovereign State in the United States of America.

19. The State of Indiana, by and through Gregory F. Zoeller, Attorney General of Indiana, is a sovereign State in the United States of America.

20. The State of North Dakota, by and through Wayne Stenehjem, Attorney General of North Dakota, is a sovereign State in the United States of America.

21. The State of Mississippi, by and through Haley Barbour, Governor of Mississippi, is a sovereign State in the United States of America.

22. The State of Arizona, by and through Janice K. Brewer, Governor of Arizona, is a sovereign State in the United States of America.

23. The State of Nevada, by and through Jim Gibbons, Governor of Nevada, is a sovereign State in the United States of America.

24. The State of Georgia, by and through Sonny Perdue, Governor of Georgia, is a sovereign State in the United States of America.

25. The State of Alaska, by and through Daniel S. Sullivan, Attorney General of Alaska, is a sovereign State in the United States of America.

26. The National Federation of Independent Business (NFIB), a California nonprofit mutual benefit corporation, is the nation's leading association of small businesses, including individual members, and has a presence in all 50 States and the District of Columbia. NFIB's mission is to promote and protect the rights of its members to own, operate, and earn success in their businesses, in accordance with lawfully-imposed governmental requirements. The NFIB Small Business Legal Center is a nonprofit, public interest law firm estab-

lished to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB's members include individuals who object to: forced compliance with the Act's mandate that they obtain qualifying healthcare insurance or pay a penalty; diversion of resources from their businesses that will result from complying with the mandate; and the Act's overreaching and unconstitutional encroachment on the States' sovereignty. NFIB joins in those objections on behalf of its members. NFIB's services to its members include providing information regarding legal and regulatory issues faced by small businesses, including individuals. NFIB will incur additional costs in assisting its members in understanding how the Act applies to them and affects their businesses.

27. Mary Brown is a citizen and resident of the State of Florida and a citizen of the United States. She is self-employed, operating Brown & Dockery, Inc., an automobile repair facility in Panama City, Florida, and is a member of NFIB. Ms. Brown has not had healthcare insurance for the last four years, and devotes her resources to maintaining her business and paying her employees. She does not qualify for Medicaid under the Act or Medicare and does not expect to qualify for them prior to the Act's individual mandate taking effect. Ms. Brown will be subject to the mandate and objects to being forced to comply with it, and objects to the Act's unconstitutional overreaching and its encroachment on the States' sovereignty.

28. Kaj Ahlburg is a citizen and resident of the State of Washington and a citizen of the United States. Mr. Ahlburg has not had healthcare insurance for more than

six years, does not have healthcare insurance now, and has no intention or desire to have healthcare insurance in the future. Mr. Ahlburg is and reasonably expects to remain financially able to pay for his own healthcare services if and as needed. He does not qualify for Medicaid under the Act or Medicare and does not expect to qualify for them prior to the Act's individual mandate taking effect. Mr. Ahlburg will be subject to the mandate and objects to being forced to comply with it, and objects to the Act's unconstitutional overreaching and its encroachment on the States' sovereignty. (Plaintiffs Brown and Ahlburg are referred to as the Individual Plaintiffs.)

29. The Department of Health and Human Services (HHS) is an agency of the United States, and is responsible for administration and enforcement of the Act, through its center for Medicare and Medicaid Services.

30. Kathleen Sebelius is Secretary of HHS, and is named as a party in her official capacity.

31. The Department of the Treasury (Treasury) is an agency of the United States, and is responsible for administration and enforcement of the Act.

32. Timothy F. Geithner is Secretary of the Treasury, and is named as a party in his official capacity.

33. The Department of Labor (DOL) is an agency of the United States, and is responsible for administration and enforcement of the Act.

34. Hilda L. Solis is Secretary of DOL, and is named as a party in her official capacity.

FACTUAL ALLEGATIONS

The Unprecedented and Unconstitutional Individual Mandate

35. The Act mandates that all persons who are citizens or legal residents of any State within the United States, including NFIB members and the Individual Plaintiffs, must have and maintain qualifying healthcare coverage, regardless of whether they wish to do so, to avoid having to pay a penalty. Many individuals, including NFIB members and the Individual Plaintiffs, will be forced to purchase the required coverage with their own assets, without contribution or subsidy from the federal government. If a person fails to maintain such coverage, the federal government will force that person to pay a penalty, the amount of which will be increased gradually through 2016, reaching 2.5 percent of household income or $695 per year (up to a maximum of three times that amount ($2,085)) per family, whichever is greater. After 2016, the penalty will increase annually based on a cost-of-living adjustment.

36. Exemptions to the penalty apply for individuals with certain religious objections, individuals who belong to certain faith-based healthcare cooperative organizations, American Indians, persons without coverage for less than three months, undocumented immigrants, incarcerated individuals, persons for whom the lowest cost plan option exceeds 8 percent of income, individuals with incomes below the tax filing threshold, and persons with financial hardships. Millions of individuals will be forced to choose between having qualified coverage and paying the penalty.

37. Congress never before has imposed a mandate that all citizens buy something—in this case health

insurance—or pay a penalty. According to the nonpartisan Congressional Budget Office (CBO), "the imposition of an individual mandate [to buy health insurance] . . . would be unprecedented. The government has never required people to buy any good or service as a condition of lawful residence in the United States." THE BUDGETARY TREATMENT OF AN INDIVIDUAL MANDATE TO BUY HEALTH INSURANCE, CBO MEMORANDUM (August 1994), http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf (last visited May 11, 2010). The CBO added that an individual mandate could "transform the purchase of health insurance from an essentially voluntary private transaction into a compulsory activity mandated by law." Id.

38. Congress lacks the constitutional authority to enact the individual mandate. The Constitution limits Congress's authority to the specific powers enumerated in Article I, and thus does not grant unlimited authority to Congress. None of Congress's enumerated powers includes the authority to force every American to buy a good or service on the private market or face a penalty. For the first time, Congress under the Act is attempting to regulate and penalize Americans for choosing not to engage in economic activity. If Congress can do this much, there will be virtually no sphere of private decision-making beyond the reach of federal power.

Medicaid Program Prior to the Act

39. Medicaid was established by Title XIX of the Social Security Act of 1965, 42 U.S.C. §§ 1396 et seq., as the nation's major healthcare program for low-income persons. The States and the federal government have funded each participating State's Medicaid program jointly.

40. From the beginning of Medicaid until passage of the Act, the States were given considerable discretion to implement and operate their respective Medicaid programs in accordance with State-specific designs regarding eligibility, enrollment, and administration, so long as the programs met broad federal requirements.

41. At the outset of Medicaid, the States were free to opt in and establish their own State health or welfare plans or to provide no benefits at all. None of the Plaintiff States agreed to become a Medicaid partner of the federal government with an expectation that: a) the terms of its participation would be altered significantly; b) the federal government would increase significantly its own control and reduce significantly that State's discretion over the Medicaid program; c) the federal government would alter the program's requirements to expand eligibility for enrollment beyond the State's ability to fund its participation; d) the federal government would alter the program from requiring that States pay for healthcare services to requiring that States provide such services; or e) the federal government would exercise its control over Medicaid terms and eligibility as part of a coercive scheme to force all citizens and residents of the States to have healthcare coverage.

The Act's Injurious Impact on the Federal-State Healthcare Partnership

42. The Act greatly alters the federal-State relationship, to the detriment of the Plaintiff States, with respect to Medicaid programs, their insurance regulatory role, and healthcare coverage generally.

43. The Act transforms Medicaid from federal-State partnerships into a broad federally-controlled program that deprives the States of the ability to define health-

care program eligibility and attributes, and eliminates States' historic flexibility to make cost-saving and other adjustments to their respective Medicaid programs. The Act also sets new increased Medicaid rates for primary-care practitioners' reimbursements, which States must substantially fund, and changes the manner in which drug rebates are allocated between the federal government and States in a manner that financially benefits the federal government at the States' expense.

44. The Act requires each State to expand massively its Medicaid program and to create a statewide exchange, which must be either a State governmental agency or a nonprofit entity established by the State for this purpose, through which the citizens and residents of that State can purchase healthcare insurance. If a State does not satisfy federal requirements to progress toward creation of an intrastate insurance exchange between now and the end of 2012, or chooses not to operate an exchange, the federal government (or its contractor) will establish and administer an intrastate exchange within that State. This action would displace State authority over a substantial segment of intrastate insurance regulation (e.g., licensing and regulation of intrastate insurers, plans, quality ratings, coordination with Medicaid and other State programs, and marketing) that the States have always possessed under the police powers provided in the Constitution, and subject the States to possible exchange-related penalties.

45. Participation in the Act will force the States to expand their Medicaid coverage to include all individuals under age 65 with incomes up to 133 percent of the federal poverty level. The federal government will fund much of the cost initially, but States' coverage burdens

will increase significantly after 2016, both in actual dollars and in proportion to the contributions of the federal government.

46. The Act further requires that States provide healthcare services to enrollees, a significant new obligation that goes far beyond the States' pre-Act responsibility for funding healthcare services under their respective Medicaid programs. This obligation will expose the States to significant increased litigation risks and costs.

47. The federal government will not provide full funding or resources to the States to administer the Act. Each State must oversee the newly-created intrastate insurance market by instituting regulations, consumer protections, rate reviews, solvency and reserve fund requirements, and premium taxes. Each State also must enroll all of the newly-eligible Medicaid beneficiaries (many of whom will be subject to a penalty if they fail to enroll), coordinate enrollment with the new intrastate insurance exchange, and implement other specified changes. The Act further requires each State to establish a reinsurance program by 2014, to administer a premium review process, and to cover costs associated with State-mandated insurance benefit requirements that States previously could impose without assuming a cost.

48. In addition, the Act imposes new requirements on the Plaintiff States that interfere with their ability to perform governmental functions. Effective in 2014, the Plaintiff States, as large employers, must automatically enroll employees working 30 or more hours a week into health insurance plans, without regard for current State practice, policy preferences, or financial constraints. The Act's individual mandate effectively will force many more State employees into State insurance plans than

the Plaintiff States now allow, at a significant added cost to the States. Moreover, the States will be subject to substantial penalties and taxes prescribed by the Act, at a cost of thousands of dollars per employee, for State employees who obtain subsidized insurance from an exchange instead of from a State plan, or if the State plan offers coverage that is either too little or too generous as determined by the federal government. New tax reporting requirements prescribed by the Act also will burden the Plaintiff States' ability to source goods and services as necessary to carry out governmental functions.

The Act's Injurious Impact on Plaintiffs

49. The Act will have a profound and injurious impact on all Plaintiff States. Florida's circumstances, as described below, are not identical to the circumstances in all of the Plaintiff States, but fairly represent the nature of the burdens the Act imposes on the Plaintiff States.

50. Based on United States Census Bureau statistics from 2008, Florida has 3,641,933 uninsured persons living in the State. Of those persons, 1,259,378 are below 133 percent of the federal poverty line; therefore, the Act requires that Florida add them to its Medicaid rolls.

51. Even before passage of the Act, the Medicaid program imposed a heavy cost on Florida, consuming 26 percent of its annual budget. For fiscal year 2009-2010 alone, Florida will spend more than $18 billion on Medicaid, servicing more than 2.7 million persons. Florida's Medicaid contributions and burdens, from the implementation of its Medicaid program in 1970 to the present, have gradually increased to the point where it would be infeasible for Florida to cease its participation in

Medicaid before the Act takes effect and make alternate arrangements for a traditional Medicaid-like program.

52. The federal government currently contributes 67.64 percent of every dollar Florida spends on Medicaid, a percentage that is temporarily inflated because of federal stimulus outlays. Under the current pre-Act program, after this year, the percentage of Florida's Medicaid expenses covered by the federal government would decline, and by 2011 would reach 55.45 percent, a level that is closer to the recent average. The federal government's contribution under the Act, though providing more aid for newly-eligible persons, will not fully compensate Florida for the dramatic increase to its Medicaid rolls, increased reimbursement rates for primary-care practitioners, and other substantial costs that it must bear under the Act.

53. Florida's Agency for Health Care Administration (AHCA) estimates that at least 80 percent of persons who have some form of health insurance but fall below 133 percent of the federal poverty level will drop their current plans and enroll in Medicaid, because they are newly eligible under the Act. The Act does not provide full funding for the States' cost of covering these already-covered persons. These persons represent a significant additional cost to Florida under the Act.

54. The Act also makes a large new class of persons eligible for Medicaid in Florida. Prior to passage of the Act, only certain specified low-income individuals and families qualified for Medicaid. Moreover, the qualifying income level set by Florida was generally much lower than the level of 133 percent of the federal poverty line set by the federal government under the Act. Now, Florida also must add to its Medicaid rolls every child-

less adult whose income falls below 133 percent of the federal poverty line, consistent with the Act's fundamental change in Medicaid from a federal-State partnership to provide a safety net for the needy into a federally-imposed regime for universal healthcare coverage.

55. Prior to passage of the Act, AHCA was Florida's designated State Medicaid agency tasked with developing and carrying out policies related to the Medicaid program. The Act will strip away much of the State's authority to establish and execute policies, transferring that authority to the federal government. Indeed, the Act renders AHCA and other Florida agencies mere arms of the federal government and commandeers and forces AHCA employees to administer what now is essentially a federal universal healthcare program.

56. AHCA projects a cost to Florida in the billions of dollars between now and 2019, stemming from Medicaid-related portions of the Act. The annual cost will continue to grow in succeeding years. AHCA's projections, moreover, understate the Act's adverse impact on Florida. They do not include estimated costs to be borne by Florida to administer the Act or to prepare for the Act's implementation. Such costs will include hiring and training new staff, creating new information technology infrastructures, developing an adequate provider base, creating a scheme for accountability and quality assurance, and incurring many other expenses.

57. The Act requires that Florida immediately begin to devote funds and other resources to implement sweeping changes across multiple agencies of government. Such implementation burdens include, but are not limited to: a) enforcing the Act's immediately-effective terms; b) determining gaps between current resources

in State government and the Act's requirements; c) evaluating infrastructure to consider how new programs and substantial expansion of existing programs will be implemented (e.g., new agencies, offices, etc.); d) developing a strategic plan and coordinating common issues across State agencies; e) initiating legislative and regulatory processes, while at the same time monitoring and engaging the substantial federal regulatory processes to ensure that State interests are protected; f) electing whether to participate in optional programs set forth in the Act; g) satisfying the Act's interim targets; and h) developing a communications structure and plan to disseminate new information regarding changes brought about by the Act to the many affected persons and entities.

58. The Act further requires Florida to enroll in healthcare insurance plans categories of State employees not previously covered by State-funded healthcare insurance plans. The Act subjects the State to penalties, depending upon the coverage decisions made by its employees, and limits the State's ability to determine coverage. If the State's plan for its employees is deemed inadequate by the federal government, the State will be subject to penalties. If the State's plan is deemed too generous or expansive by the federal government, the State will be subject to a distinct federal tax liability.

59. The Act also requires that Florida be responsible for providing healthcare services for all Medicaid enrollees in the expanded program, a significant change from Florida's responsibility for providing payment for such services. This added responsibility and resulting new legal liabilities further contribute to the Act's substantial and costly impact on Florida's fisc, and will

force the State to ignore other critical needs, including education, corrections, law enforcement, and more.

60. In sum, as demonstrated through the effects on Florida, the Act infringes on the Plaintiff States' constitutional status as sovereigns, entitled to cooperate with but not to be controlled by the federal government under the Medicaid program.

61. In addition, the Act will have a profound and injurious impact on the Plaintiff States' citizens and residents, a significant number of whom are or will be subject to the Act's mandate to obtain qualifying healthcare coverage or pay a penalty.

62. The Act further will have a profound and injurious impact on NFIB's individual members and its uninsured small business owners, including Ms. Brown, who are and will continue to be subject to the Act's mandate to obtain qualifying healthcare coverage or pay a penalty. Because of the mandate, these members will be forced to divert resources from their business endeavors, or otherwise to reorder their economic circumstances, in order to obtain qualifying healthcare coverage, regardless of their own conclusions on whether or not obtaining and maintaining such coverage for themselves and their dependents is a worthwhile cost of doing business. The added costs of the mandate will threaten the members' ability to maintain their own, independent businesses.

63. An important service offered by NFIB to its membership is the provision of information and assistance regarding legal and regulatory compliance issues faced by small businesses, as well as questions involving healthcare insurance and benefits. In order fully to serve the needs and interests of its membership, NFIB

now will be forced to devote its own scarce resources to assisting members in understanding how the Act, including the mandate to obtain qualifying coverage or pay a penalty, applies to them, how it will affect their businesses, and what they must do to comply.

64. The Act also will injure Mr. Ahlburg, who will be subject to the Act's mandate to obtain qualifying healthcare coverage or pay a penalty.

The Act's Requirements and Effects on the Plaintiff States Cannot Be Avoided

65. Plaintiff States cannot avoid the Act's requirements. Neither the Act nor current federal Medicaid provisions prescribe a mechanism for a State to opt out of the Act's new Medicaid requirements, to opt out of Medicaid generally, or to transition to another program that provides only traditional Medicaid services.

66. Moreover, if they were to end their longstanding participation in Medicaid, Plaintiff States would desert millions of their residents, leaving them without access to the healthcare services they have depended on for decades under Medicaid. Thus, Plaintiff States are forced to accept the harmful effects of the Act on their fiscs and their sovereignty.

67. Prior to passage of the Act, Medicaid and its corresponding law, regulations, guidance, policies, and framework had been well-established, subject to occasional limited modifications, for more than four decades. During that time, participating States developed their respective Medicaid programs in reliance on Medicaid continuing to be a partnership with the federal government.

68. Presently, the Centers for Medicare and Medicaid (CMS), the federal agency with chief responsibility for administering Medicaid for the federal government, will terminate a State's federal funding for Medicaid unless the State complies with the Act's requirements. In addition, Medicaid requirements are linked to other federal programs, and the benefits of those programs to a State and its citizens and residents would be in jeopardy if the federal government were to terminate the State's participation in Medicaid.

CAUSES OF ACTION

COUNT ONE

UNCONSTITUTIONAL MANDATE THAT ALL INDIVIDUALS HAVE HEALTHCARE INSURANCE COVERAGE OR PAY A PENALTY

(Const. art. I & amend. IX, X)

69. Plaintiffs reallege, adopt, and incorporate by reference paragraphs 1 through 68 above as though fully set forth herein.

70. The Act forces all Americans, including NFIB members and the Individual Plaintiffs, regardless of whether they want healthcare coverage, to obtain and maintain a federally-approved level of coverage or pay a penalty. The Act thus compels all Americans to perform an affirmative act or incur a penalty, simply on the basis that they exist and reside within any of the United States. In so doing, the Act purports to exercise the very type of general police power the Constitution reserves to the States and denies to the federal government.

71. The Act is directed to a lack of, or failure to engage in, activity that is driven by the choices of individual Americans. Such inactivity by its nature cannot be deemed to be in commerce or to have such an effect on commerce, whether interstate or otherwise, as to be subject to Congress's powers under the Commerce Clause, Const. art. I, § 8. Nor does the Act regulate (directly or indirectly) any properly regulable interstate or foreign market or other commerce, any instrumentality of interstate or foreign commerce, or the actual flow of goods, services, and human beings among the States. As a result, the Act cannot be upheld under the Commerce Clause.

72. The Act infringes upon Plaintiff States' sovereign interests by coercing many persons to enroll in an expanded Medicaid program at a substantial cost to Plaintiff States, or to obtain coverage from intrastate exchanges that States must establish to avoid loss of substantial regulatory authority. The Act also denies Plaintiff States their sovereign ability to confer rights upon their citizens and residents to make healthcare decisions without government interference, including the decision not to participate in any healthcare insurance program or scheme, in violation of the Ninth and Tenth Amendments to the Constitution and the constitutional principles of federalism and dual sovereignty on which this Nation was founded.

73. The Act's penalty on uninsured persons unlawfully coerces persons to obtain healthcare coverage without purposing to raise revenue and injures the Plaintiff States' fiscs, because many persons will be compelled to enroll in Medicaid at a substantial cost to Plaintiff States or to get coverage from intrastate exchanges that

Plaintiff States must establish to avoid loss of substantial regulatory authority. As a result, the Act cannot be upheld under the Taxing and Spending Clause, Const. art. I, § 8.

74. By requiring and coercing citizens and residents of the Plaintiff States to have healthcare coverage, the Act exceeds Congress's limited powers enumerated in Article I of the Constitution, and cannot be upheld under any other provision of the Constitution.

75. By requiring and coercing citizens and residents of the Plaintiff States to have healthcare coverage, the Act deprives those citizens and residents, and NFIB members and the Individual Plaintiffs, of their rights under State law to make personal healthcare decisions without governmental interference, and violates the rights of the States as sovereigns to confer and define such rights in their constitutions or by statute, in violation of the Ninth and Tenth Amendments to the Constitution and the constitutional principles of federalism and dual sovereignty on which this Nation was founded.

WHEREFORE, Plaintiffs respectfully request that the Court:

A. Declare the Patient Protection and Affordable Care Act, as amended, to be unconstitutional;

B. Declare that the individual mandate exceeds Congress's authority under Article I of the Constitution and violates the Ninth and Tenth Amendments;

C. Enjoin Defendants and any other agency or employee acting on behalf of the United States from enforcing the Act against the Plaintiff States, including their agencies, officials, and employees; the citizens and residents of the Plaintiff States; NFIB members and

small business owners; and the Individual Plaintiffs, and to take such actions as are necessary and proper to remedy their violations deriving from any such actual or attempted enforcement; and

D. Award Plaintiffs their costs and grant such other relief as the Court may deem just and proper.

COUNT TWO

UNCONSTITUTIONAL MANDATE THAT ALL INDIVIDUALS HAVE HEALTHCARE INSURANCE COVERAGE OR PAY A PENALTY

(Const. amend. V)

76. Plaintiffs reallege, adopt, and incorporate by reference paragraphs 1 through 68 above as though fully set forth herein.

77. The Act forces citizens and residents of the Plaintiff States, including NFIB members and the Individual Plaintiffs, to obtain and maintain a federally-approved level of health coverage for themselves and their dependents, regardless of whether they want or need that coverage, or pay a penalty.

78. By requiring and coercing NFIB's members and the Individual Plaintiffs to obtain and maintain such healthcare coverage, the Act deprives them of their right to be free of unwarranted and unlawful federal government compulsion in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

WHEREFORE, Plaintiffs respectfully request that the Court:

A. Declare the Patient Protection and Affordable Care Act, as amended, to be unconstitutional;

B. Declare Defendants to have violated the rights of NFIB members and small business owners and the Individual Plaintiffs under the Due Process Clause of the Fifth Amendment;

C. Enjoin Defendants and any other agency or employee acting on behalf of the United States from enforcing the Act against NFIB members and small business owners and the Individual Plaintiffs, and to take such actions as are necessary and proper to remedy their violations deriving from any such actual or attempted enforcement; and

D. Award NFIB and the Individual Plaintiffs their costs and grant such other relief as the Court may deem just and proper.

COUNT THREE

VIOLATION OF CONSTITUTIONAL PROHIBITION OF UNAPPORTIONED CAPITATION OR DIRECT TAX

(Const. art. I, §§ 2, 9 & amends. IX, X)

79. Plaintiffs reallege, adopt, and incorporate by reference paragraphs 1 through 68 above as though fully set forth herein.

80. Alternatively, the penalty on uninsured persons under the Act constitutes a capitation and a direct tax that is not apportioned among the States according to census data, thereby injuring the sovereign interests of Plaintiff States and the interests of all citizens and residents of the Plaintiff States and of the United States.

81. The tax applies without regard to property, profession, or any other circumstance, and is unrelated to any taxable event or activity. It is to be levied upon per-

sons for their failure or refusal to do anything other than to exist and reside in any of the States comprising the United States.

82. The tax violates article I, sections 2 and 9 of, and the Ninth and Tenth Amendments to, the Constitution. The Act's imposition of the tax, and the resulting coercion of many persons either to enroll in an expanded Medicaid program at a substantial cost to the Plaintiff States or to get coverage from intrastate exchanges that States must establish to avoid loss of substantial regulatory authority, injures Plaintiff States' sovereign interests and violates the States' constitutional protection against unapportioned capitation taxes or direct taxation. The tax also infringes on the right of NFIB members and the Individual Plaintiffs to be free from unconstitutional taxation. The tax is unconstitutional on its face and cannot be applied constitutionally.

WHEREFORE, Plaintiffs respectfully request that the Court:

A. Declare the Patient Protection and Affordable Care Act, as amended, to be unconstitutional;

B. Declare Defendants to have violated the Plaintiff States' constitutional protection against unapportioned capitation taxes or direct taxation, and to have violated the rights of all citizens and residents of the Plaintiff States and of the United States, including NFIB members and small business owners and the Individual Plaintiffs, to be free from unconstitutional taxation;

C. Enjoin Defendants and any other agency or employee acting on behalf of the United States from enforcing the Act against the Plaintiff States, including their agencies, officials, and employees; the citizens and

residents of the Plaintiff States; NFIB members and small business owners; and the Individual Plaintiffs, and to take such actions as are necessary and proper to remedy their violations deriving from any such actual or attempted enforcement; and

D. Award Plaintiffs their costs and grant such other relief as the Court may deem just and proper.

COUNT FOUR

COERCION AND COMMANDEERING AS TO MEDICAID

(Const. art. I & amends. IX, X)

83. Plaintiffs reallege, adopt, and incorporate by reference paragraphs 1 through 68 above as though fully set forth herein.

84. Plaintiff States cannot afford the unfunded costs of participating under the Act, but effectively have no choice other than to participate.

85. The Act exceeds Congress's powers under Article I of the Constitution, and cannot be upheld under the Commerce Clause, Const. art. I, §8; the Taxing and Spending Clause, *id.*; or any other provision of the Constitution.

86. By using Medicaid to reach universal healthcare coverage goals and forcing fundamental changes in the nature and scope of the Medicaid program upon the Plaintiff States, by denying Plaintiff States any choice with respect to new Medicaid requirements and denying them flexibility to limit the fiscal impact of those changes, by effectively co-opting Plaintiff States' control over their budgetary processes and legislative agendas through compelling them to assume costs they cannot

afford, by forcing Plaintiff States to become responsible for providing healthcare services for all Medicaid enrollees, by requiring Plaintiff States to carry out insurance mandates and establish intrastate insurance programs and regulations for federal purposes, by interfering in the Plaintiff States' relationships with their employees with respect to healthcare coverage, by commandeering the Plaintiff States and their employees as agents of the federal government's regulatory scheme at the States' own cost, and by interfering in the Plaintiff States' sovereignty, the Act violates Article IV, section 4 of the Constitution, depriving Plaintiff States of their sovereignty and their right to a republican form of government; violates the Ninth and Tenth Amendments; and violates the constitutional principles of federalism and dual sovereignty on which this Nation was founded.

WHEREFORE, Plaintiff States respectfully request that the Court:

A. Declare the Patient Protection and Affordable Care Act, as amended, to be unconstitutional;

B. Declare that the Act exceeds Congress' powers under Article I of the Constitution and interferes in the Plaintiff States' sovereignty in violation of the Ninth and Tenth Amendments and constitutional principles of federalism and dual sovereignty;

C. Enjoin Defendants and any other agency or employee acting on behalf of the United States from enforcing the Act against the Plaintiff States, their citizens and residents, and any of their agencies or officials or employees, and to take such actions as are necessary and proper to remedy their violations deriving from any such actual or attempted enforcement; and

D. Award Plaintiff States their costs and grant such other relief as the Court may deem just and proper.

COUNT FIVE

COERCION AND COMMANDEERING AS TO HEALTHCARE INSURANCE

(Const. art. I & amends. IX, X)

87. Plaintiffs reallege, adopt, and incorporate by reference paragraphs 1 through 68 above as though fully set forth herein.

88. By requiring the Plaintiff States to carry out insurance mandates and establish intrastate insurance programs for federal purposes under threat of removing or significantly curtailing their long-held regulatory authority as to intrastate insurance, and by commandeering the Plaintiff States and their employees as agents of the federal government's regulatory scheme at the States' own cost, the Act exceeds Congress's powers under Article I of the Constitution, and interferes in the Plaintiff States' sovereignty in violation of the Ninth and Tenth Amendments and the constitutional principles of federalism and dual sovereignty on which this Nation was founded.

WHEREFORE, Plaintiff States respectfully request that the Court:

A. Declare the Patient Protection and Affordable Care Act, as amended, to be unconstitutional;

B. Declare that the Act exceeds Congress' powers under Article I of the Constitution and interferes in the Plaintiff States' sovereignty in violation of the Ninth and Tenth Amendments and constitutional principles of federalism and dual sovereignty;

C. Enjoin Defendants and any other agency or employee acting on behalf of the United States from enforcing the Act against the Plaintiff States, their citizens and residents, and any of their agencies or officials or employees, and to take such actions as are necessary and proper to remedy their violations deriving from any such actual or attempted enforcement; and

D. Award Plaintiff States their costs and grant such other relief as the Court may deem just and proper.

COUNT SIX

INTERFERENCE WITH THE STATES' SOVEREIGNTY AS EMPLOYERS AND PERFORMANCE OF GOVERNMENTAL FUNCTIONS

(Const. art. I & amends. IX, X)

89. Plaintiffs reallege, adopt, and incorporate by reference paragraphs 1 through 68 above as though fully set forth herein.

90. By imposing new employer healthcare insurance mandates on the Plaintiff States, by requiring that they automatically enroll and continue enrollment of employees in healthcare plans, by subjecting States to penalties and taxes depending upon plan attributes and individual employee coverage decisions, and by burdening the States' ability to procure goods and services and to carry out governmental functions, the Act exceeds Congress's powers under Article I of the Constitution, and interferes in the Plaintiff States' sovereignty in violation of the Ninth and Tenth Amendments and the constitutional principles of federalism and dual sovereignty on which this Nation was founded.

WHEREFORE, Plaintiff States respectfully request that the Court:

A. Declare the Patient Protection and Affordable Care Act, as amended, to be unconstitutional;

B. Declare that the Act exceeds Congress's powers under Article I of the Constitution, and interferes in the Plaintiff States' sovereignty in violation of the Ninth and Tenth Amendments and constitutional principles of federalism and dual sovereignty;

C. Enjoin Defendants and any other agency or employee acting on behalf of the United States from enforcing the Act against the Plaintiff States, their citizens and residents, and any of their agencies or officials or employees, and to take such actions as are necessary and proper to remedy their violations deriving from any such actual or attempted enforcement; and

D. Award Plaintiff States their costs and grant such other relief as the Court may deem just and proper.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
Pensacola Division

Case No. 3:01-cv-91-RV/EMT

STATE OF FLORIDA, BY AND THROUGH BILL MCCOLLUM, ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF THE TREASURY; TIMOTHY F. GEITHNER, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF LABOR; AND HILDA L. SOLIS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, DEFENDANTS

Filed: Nov. 4, 2010

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56, Federal Rules of Civil Procedure, Plaintiffs hereby move for summary judgment in

their favor on Counts One and Four of the Amended Complaint. As shown in their Memorandum in Support, and as supported by their Statement of Material Facts and Appendix of Exhibits, no genuine issue of material fact exists in this action, and Plaintiffs are entitled to judgment in their favor as a matter of law.

The provisions of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("HCERA"), ("ACA") that impose the Individual Mandate on Americans, requiring that they obtain qualifying healthcare insurance coverage, are unconstitutional and cannot be severed from the balance of the ACA. In addition, the provisions of the ACA that alter the nature of the Medicaid program and the States' burdens and costs for that program are unconstitutional and cannot be severed from the balance of the ACA.

For these reasons, the ACA should be declared unconstitutional and Defendants should be enjoined from enforcing the ACA, as requested in the Amended Complaint.

Respectfully submitted,

BILL MCCOLLUM
ATTORNEY GENERAL OF FLORIDA

/s/ BLAINE H. WINSHIP
BLAINE H. WINSHIP (Fla. Bar No. 0356913)
Special Counsel
Joseph W. Jacquot (Fla. Bar No. 189715)
Deputy Attorney General

Scott D. Makar (Fla. Bar No. 709697)
Solicitor General
Louis F. Hubener (Fla. Bar No. 0140084)
Timothy D. Osterhaus (Fla. Bar No. 0133728)
Deputy Solicitors General
Office of the Attorney General of Florida
The Capitol, Suite PL-01
Tallahassee, Florida 32399-1050
Telephone: (850) 414-3300
Facsimile: (850) 488-4872
Email: blaine.winship@ myfloridalegal.com
Attorneys for Plaintiff States

David B. Rivkin (D.C. Bar No. 394446)
Lee A. Casey (D.C. Bar No. 447443)
Baker & Hostetler LLP
1050 Connecticut Avenue, N.W., Ste. 1100
Washington, DC 20036
Telephone: (202) 861-1731
Facsimile: (202) 861-1783
Attorneys for Plaintiff States, National Federation of Independent Business, Mary Brown, and Kaj Ahlburg

Katherine J. Spohn
Special Counsel to the Attorney General
Office of the Attorney General of Nebraska
2115 State Capitol Building
Lincoln, Nebraska 68508
Telephone: (402) 471-2834
Facsimile: (402) 471-1929
Email: katie.spohn@nebraska.gov

Attorneys for Plaintiff the State of Nebraska

Karen R. Harned
Executive Director
National Federation of
Independent Business
Small Business Legal
Center
1201 F. Street, N.W.,

Suite 200
Washington, DC 20004
Telephone: (202) 314-2061
Facsimile: (202) 554-5572
Of counsel for Plaintiff
NationalFederation of
Independent Business

Bill Cobb
Deputy Attorney General
for Civil Litigation
Office of the Attorney
General of Texas
P.O. Box 12548, Capitol
Station

Austin, Texas 78711-2548
Telephone: (512) 475-0131
Facsimile: (512) 936-0545
Email: bill.cobb@oag.
state.tx.us
Attorneys for Plaintiff
the State of Texas

CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of November, 2010, a copy of the foregoing Plaintiff's Motion for Summary Judgment was served on counsel of record for all Defendants through the Court's Notice of Electronic Filing system.

/s/ BLAINE H. WINSHIP
BLAINE H. WINSHIP
Special Counsel
Office of the Attorney General
of Florida

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

Case No. 3:10-cv-91-RV/EMT

STATE OF FLORIDA, BY AND THROUGH BILL MCCOLLUM, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

Filed: Nov. 4, 2010

DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT

Defendants, by undersigned counsel, hereby move the Court, pursuant to Federal Rule of Civil Procedure 56, for summary judgment on Claims One and Four of the Amended Complaint. The grounds for this motion are set forth in the accompanying memorandum of law.

Dated: Nov. 4, 2010 Respectfully submitted,

TONY WEST
Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney
General

THOMAS F. KIRWIN
United States Attorney

SHEILA LIEBER
Deputy Director

/s/ ERIC BECKENHAUER
BRIAN KENNEDY,
D.C. Bar No. 228726
Senior Trial Counsel
ERIC B. BECKENHAUER,
Cal. Bar No. 237526
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs
Branch
20 Massachusetts Ave. NW
Washington, DC 20530
Telephone: (202) 514-3338
Facsimile: (202) 616-8470
E-mail:
eric.beckenhauer@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2010, the foregoing document was filed with the Clerk of Court via the CM/ECF system, causing it to be served on Plaintiffs' counsel of record.

/s/ ERIC B. BECKENHAUER
ERIC B. BECKENHAUER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Pensacola Division

No. 3:01-cv-91-RV/EMT

STATE OF FLORIDA, BY AND THROUGH BILL MCCOLLUM, ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

DECLARATION OF PLAINTIFF MARY BROWN IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I, Mary Brown. under the provisions of 28 U.S.C. § 1746, hereby declare as follows:

1. I am 55 years old, a citizen of the United States, and a citizen and resident of the State of Florida. I am personally familiar with the facts contained herein, and I am competent to testify thereto.

2. I am a member of the National Federation of Independent Business ("NFIB") in good standing.

3. I am the Co-Owner, Secretary, and Treasurer of Brown & Dockery, Inc., an automobile repair facility located at 2707 E. 15th St., Panama City, Florida 32405. My business has two employees apart from myself.

4. I am married and have no children under the age of 26.

5. I do not have health insurance and have not had health insurance for the past four years. I devote my financial resources to maintaining my business and paying my employees.

6. I regularly use my personal funds to meet my business expenses. I have recently held off cashing my paycheck on occasion to meet my business expenses.

7. I do not qualify for Medicare or Medicaid and I do not receive health or medical benefits from either program. I do not expect to qualify for Medicare in or before 2014, or for Medicaid under the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010).

8. I am subject to the ACA's individual insurance mandate. I object to being forced to obtain and maintain qualifying health insurance coverage for myself and my dependents, or to pay a penalty for failing to have such insurance, and to the ACA's unconstitutional overreaching and its encroachment on the States' sovereignty. I do not believe that the cost of health insurance coverage is a wise or acceptable use of my financial resources.

9. Both my business and myself will be harmed if I must purchase health care insurance coverage, which I neither want nor need, to comply with the ACA, or pay the prescribed penalties for non-compliance. This is because, in either case, I will be forced to divert financial resources from my own priorities, and particularly from supporting and running my business as I consider to be best and most advantageous. I believe that the added costs of ACA compliant insurance will threaten my ability to maintain my own, independent business.

10. To comply with the individual mandate, I would be forced to reorder my personal and business affairs. Well in advance of 2014, I must now investigate whether and how to both obtain and maintain the required insurance and at the same time to support my business and to make it grow.

11. I must also now investigate the impact that complying with the individual insurance mandate will have on my priorities and especially whether, in light of the costs of complying with the individual mandate, my independent business can continue to be a viable going concern, or whether to comply I would have to layoff my employees, close my business, and seek employment that provides qualifying health insurance as a benefit.

12. In order to comply with the ACA's individual insurance mandate, I believe that I would have to plan and take appropriate action before 2014 if I am to avoid being penalized for not complying when this requirement becomes effective.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20 day of Oct., 2010 at 11:15 AM

/s/ MARY BROWN
MARY BROWN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Pensacola Division

No. 3:01-cv-91-RV/EMT

STATE OF FLORIDA, BY AND THROUGH BILL MCCOLLUM, ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

DECLARATION OF PLAINTIFF KAJ AHLBURG IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I, Kaj Ahlburg, under the provisions of 28 U.S.C. § 1746, hereby declare as follows:

1. I am 51 years old, a citizen of the United States, and a citizen and resident of the State of Washington. I am personally familiar with the facts contained herein, and I am competent to testify thereto.

2. I am retired, holding no present employment.

3. I am married and have two children under the age of 26.

4. I do not have health insurance and have not had health insurance for the past six years. I have no intention or desire to purchase health insurance in the future, as I am now and reasonably expect to remain financially

capable of fully paying for my and my family's health-care services out of my own resources as needed.

5. I do not qualify for Medicare or Medicaid and I do not receive health or medical benefits from either program. I do not expect to qualify for Medicare in or before 2014, or for Medicaid under the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010).

6. I am subject to the ACA's individual insurance mandate. I object to being forced to obtain and maintain qualifying health care insurance for myself and my dependents, or to pay a penalty for failing to have such insurance, and to the ACA's unconstitutional overreaching and its encroachment on the States' sovereignty.

7. I do not believe that the cost of health insurance in general, or in particular the cost of coverage that is compliant with the ACA, represents a sensible or acceptable use of my financial resources.

8. I will be harmed if I am required to obtain and maintain such insurance, which I neither need nor want, or to pay the prescribed penalties for non-compliance. This is because, in either case, I will be forced to divert funds from other priorities which I know to be more important for myself and my family.

9. To comply with the individual insurance mandate, and well in advance of 2014, I must now investigate whether and how to rearrange my personal financial affairs so as to ensure the availability of sufficient funds to pay the premiums associated with ACA compliant insurance coverage, and to establish what impact meeting this requirement will have on my priorities for my-

self and my family, particularly how these priorities would have to change as a result.

10. In order to comply with the individual mandate I believe I would have to plan and take appropriate action before 2014 so as to meet its requirements if I am to avoid being penalized for not complying when this requirement becomes effective.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of Nov., 2010 at Port Angeles, Washington.

/s/ KAJ AHLBURG
KAJ AHLBURG

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Pensacola Division

No. 3:01-cv-91-RV/EMT

STATE OF FLORIDA, BY AND THROUGH BILL MCCOLLUM, ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

DECLARATION OF PLAINTIFF DONALD A. DANNER IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I, Donald A. Danner, under the provisions of 28 U.S.C. § 1746, hereby declare as follows:

1. I am over the age of 18. I am personally familiar with the facts contained in this declaration, and I am competent to testify thereto.

2. I am the President and Chief Executive Officer of the National Federation of Independent Business ("NFIB"). In this capacity, I am intimately familiar with the structure, operations and finances of NFIB and have personal knowledge of the injuries done to NFIB and many of its members as a result of the passage and enactment of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No.111-148, 124 Stat. 119 (2010).

3. NFIB, a California nonprofit mutual benefit corporation, is the nation's leading association of small businesses and has a presence in all 50 States and the District of Columbia. The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

4. NFIB's mission is to promote and protect the rights of its members to own, operate, and earn success in their businesses, in accordance with lawfully-imposed government requirements. In accordance with NFIB's articles of incorporation, a public document with which I am personally familiar, its corporate purpose is, among other things, "[t]o promote the economic, financial and political welfare of its members," "to organize the independent or small business men into an association to the end that his voice may be heard effectively in local, state, and national affairs affecting small business," and "[t]o foster the promotion and advancement of civic, commercial, industrial and political welfare of its members in their respective communities."

5. NFIB's membership includes nearly 40,000 sole proprietors. Many of these individuals operate their businesses themselves or are otherwise personally involved in the day-to-day management of their enterprise.

6. NFIB's service to its members includes providing information regarding legal and regulatory issues faced by small businesses, as well as information and advice regarding compliance with federal and state reg-

ulatory requirements, including individuals who own and operate their own business.

7. Healthcare-related issues have been among NFIB's highest public policy priorities in the past twenty years. NFIB's Research Foundation has conducted at least five polls and surveys specifically to determine the burden to its small business members of offering health care benefits to employees. These polls and surveys have resulted in five publications: (1) "NFIB Small Business Poll: Health Insurance" (2003); (2) "Price Sensitivity in Health Care: Implications for Health Care Policy" (2005); (3) "A Study of Administrative Costs Accruing to Association Health Plans" (2005); (4) "NFIB Small Business Poll: Health Insurance, Purchasing" (2007); and (5) "Health Insurance Reform in an Experimental Market" (2009).

8. In addition, NFIB members guide the organization's public policy positions through periodic "Member Ballots." In this way NFIB advances the consensus of its members as a whole rather than the more narrow interests of any particular trade group.

9. Since March of 1985, NFIB has asked its members a ballot question on either healthcare or health insurance at least 63 times. Of those questions, eleven dealt with employer-mandated healthcare and on five occasions members were asked whether Congress should establish a mandatory national health insurance program or whether individuals should be required to obtain health insurance coverage for themselves. On all but one occasion (1993), NFIB members overwhelmingly rejected adoption of an individual health insurance mandate.

10. NFIB also regularly produces a "Problems and Priorities" report identifying the issues of greatest concern to its membership. This publication is based on the responses of a large sample of NFIB's small business owner membership to a questionnaire. The questionnaire presents 75 potential business problems, including those related to public policy. Respondents are asked to rate the severity of each potential problem on a scale of 1 to 7, with answers ranging from "Critical Problem" to 'Not a Problem."

11. Since 1986, the cost of health insurance has been the top priority of NFIB's small business members. NFIB sole proprietor members also rate the cost of health insurance as their top concern.

12. As demonstrated by the declarations of NFIB members submitted in this case, many NFIB members are suffering actual and immediate injuries because of the ACA's mandate that individuals obtain and maintain a statutorily established minimum level of health insurance coverage for themselves and their families. These uninsured small business owners are and will continue to be subject to the ACA's individual insurance mandate and object to being forced to obtain healthcare insurance coverage for themselves and their dependents or pay a penalty. For individuals and small business owners who do not have insurance, and especially sole proprietors, the costs of obtaining qualifying coverage will mean that they have fewer financial resources available to operate and grow their businesses. These members will be forced to divert resources from their business endeavors, or otherwise reorder their economic circumstances and priorities, to obtain the required coverage, regardless of their own conclusions regarding whether

or not having such coverage for themselves and their dependents is a worthwhile cost of doing business. In some cases, the costs associated with obtaining and maintaining ACA qualifying health insurance will threaten members' ability to maintain their own, independent small businesses as viable, going concerns.

13. In addition, the passage and enactment of the ACA has resulted in significant new costs for NFIB. Since passage, NFIB has been required to expend substantial additional resources to advise its membership on ACA-related compliance issues.

14. To this end, NFIB paid staff has to date collectively spent approximately 2,430 hours helping NFIB members understand and comply with the ACA. This is an unprecedented amount of time and resources for NFIB to spend on one issue.

15. This new cost represents 2% of NFIB's total state and federal policy budget and constitutes a significant burden on NFIB.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 2nd day of Nov., 2010 at Washington, D.C.

/s/ DONALD A. DANNER
DONALD A. DANNER

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
Pensacola Division

No. 3:01-cv-91-RV/EMT

STATE OF FLORIDA, BY AND THROUGH BILL MCCOLLUM, ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

DECLARATION OF PLAINTIFF DANA GRIMES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I, Dana Grimes, under the provisions of 28 U.S.C. § 1746, hereby declare as follows:

1. I am 48 years old, a citizen of the United States, and a citizen and resident of the State of New York. I am personally familiar with the facts contained in this declaration and I am competent to testify thereto.

2. I am a member of the National Federation of Independent Business ("NFIB") in good standing.

3. I am the sole proprietor of Premier Renovations, located at 65 County Route 52, Greenwich, NY 12834. My business provides building and home contracting services and has no employees.

4. I am divorced and have two children under the age of 26. My children live out-of-state with my ex-wife.

5. I have used my personal funds to meet my business expenses when necessary and I invest a substantial amount of my income back into my business.

6. I do not have health insurance. Until recently, I had health insurance provided through the U.S. Chamber of Commerce, but I chose to terminate my coverage because I believed it was too expensive. I am in excellent health and my medical expenses are roughly $100 per year, but my previous insurance cost me $6000 per year. I last visited the doctor after injuring myself at work with a chainsaw, and I fully paid my own medical expenses out-of-pocket.

7. I do not qualify for Medicare or Medicaid and I do not receive health or medical benefits from either program. I do not expect to qualify for Medicare in or before 2014, or for Medicaid under the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010).

8. I will be subject to the ACA's individual insurance mandate. I object to the ACA's unconstitutional overreaching and to being forced to obtain and maintain qualifying health care insurance for myself and my dependents, or to pay a penalty for failing to have such insurance. I do not wish to have such insurance and I do not believe that the costs associated with health insurance are a wise or acceptable use of my financial resources.

9. Both my business and myself will be harmed if I must purchase health care insurance coverage, which I neither want nor need, to comply with the ACA, or pay

the prescribed penalties for non-compliance. This is because, in either case, I will be forced to divert financial resources away from my own priorities, and particularly from supporting and running my business as I consider to be best and most advantageous. I believe that the added costs of ACA compliant insurance will make it difficult, if not impossible, for me to remain in business.

10. To comply with the individual mandate, I would be forced to reorder my personal and business affairs. Well in advance of 2014, I must now investigate whether and how to both obtain and maintain the required insurance and at the same time to support my business and make it grow.

11. In particular, I must investigate what impact the costs of compliance with the individual insurance mandate will have on my priorities, and especially whether, in light of those costs, my independent business can continue to be a viable going concern, or whether to comply I would have to close my business and seek employment that provides qualifying health insurance coverage as a benefit.

12. In order to comply with the ACA's individual insurance mandate, I believe that I would also have to plan and take appropriate action before 2014 if I am to avoid being penalized for not complying when this requirement becomes effective.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21st day of Nov., 2010 at 3:30 p.m.

/s/ DANA GRIMES
DANA GRIMES

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
Pensacola Division

No. 3:01-cv-91-RV/EMT

STATE OF FLORIDA, BY AND THROUGH BILL MCCOLLUM, ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

DECLARATION OF PLAINTIFF DAVID KLEMENCIC IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I, David Klemencic, under the provisions of 28 U.S.C. § 1746, hereby declare as follows:

1. I am 50 years old, a citizen of the United States, and a citizen and resident of the State of West Virginia. I am personally familiar with the facts contained in this declaration, and I am competent to testify thereto.

2. I am a member of the National Federation of Independent Business ("NFIB") in good standing.

3. I am the sole proprietor of Ellenboro Floors, located at 108 W. Washington Street, Ellenboro, West Virginia 26346. My business sells flooring. I have no employees.

4. I am married and have no children under the age of 26.

5. My business and personal funds are not kept separate, and I use my personal funds to pay my business expenses when necessary.

6. I do not have health insurance. My wife has insurance through her employer, Tim Horton's Restaurant, but I am not covered under it. I last had health insurance over 12 years ago. I have looked into purchasing health insurance within the past year but have determined that it is too expensive.

7. I do not qualify for Medicare or Medicaid and I do not receive health or medical benefits from either program. I do not expect to qualify for Medicare in or before 2014, or for Medicaid under the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010).

8. I am subject to the ACA's individual insurance mandate. I object to the ACA's unconstitutional overreaching and to being forced to obtain and maintain qualifying health care insurance for myself and my dependents, or to pay a penalty for failing to have such insurance. I do not wish to have such insurance and do not believe that the cost of health insurance is a wise or acceptable use of my financial resources.

9. Both my business and myself will be harmed if I must purchase health care insurance coverage, which I neither want nor need, to comply with the ACA, or pay the prescribed penalties for non-compliance. This is because, in either case, I will be forced to divert financial resources from my own priorities, and particularly from supporting and running my business as I consider

to be best and most advantageous. I believe that the added costs of ACA compliant insurance will threaten my ability to maintain my own, independent business.

10. To comply with the individual mandate, I would be forced to reorder my personal and business affairs. Well in advance of 2014, I must now investigate whether and how to both obtain and maintain the required insurance and at the same time to support my business and to make it grow.

11. In particular, I must investigate what impact the costs of compliance with the individual insurance mandate will have on my priorities, and especially whether, in light of those costs, my independent business can continue to be a viable going concern, or whether to comply I must close my business and seek employment that provides qualifying health insurance as a benefit.

12. In order to comply with the ACA's individual insurance mandate, I believe that I would also have to plan and take appropriate action before 2014 if I am to avoid being penalized for not complying when this requirement becomes effective.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22nd day of Nov., 2010 at 8:00 AM

/s/ DAVID KLEMENCIC
DAVID KLEMENCIC

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
Pensacola Division

No. 3:01-cv-91-RV/EMT

STATE OF FLORIDA, BY AND THROUGH BILL MCCOLLUM, ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

DECLARATION OF PLAINTIFF PAUL MCCLAIN IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I, Paul McClain, under the provisions of 28 U.S.C. § 1746, hereby declare as follows:

1. I am over the age of 18, a citizen of the United States, and a citizen and resident of the State of Indiana. I am personally familiar with the facts contained herein, and I am competent to testify thereto.

2. I am a member of the National Federation of Independent Business ("NFIB") in good standing.

3. I am the sole proprietor of AJ Towing & Recovery, located at 1415 Lafayette St., Fort Wayne, Indiana 46802. My business provides automotive towing and recovery services and has two employees.

4. I sometimes use my personal funds to meet my business expenses.

5. I do not have health insurance, nor have I had health insurance as an adult in the past. I do not offer health insurance to my employees.

6. I do not qualify for Medicare or Medicaid and I do not receive health or medical benefits from either program. I do not expect to qualify for Medicare in or before 2014, or for Medicaid under the Patient Protection and Affordable Care Act ("ACA"). Pub. L. No. 111-148. 124 Stat. 119 (20 10).

7. I am subject to the ACA's individual insurance mandate. I object to the ACA's unconstitutional overreaching, and to being forced to obtain and maintain qualifying health care insurance for myself and my dependents, or to pay a penalty for failing to have such insurance. I do not believe that the cost of health insurance is a wise or acceptable use of my financial resources.

8. Both my business and myself will be harmed if I must purchase health care insurance coverage, which I neither want nor need, to comply with the ACA, or pay the prescribed penalties for non-compliance. This is because, in either case, I will be forced to divert financial resources away from my own priorities, and particularly from supporting and running my business as I consider to be best and most advantageous. I believe that the added costs of ACA compliant insurance will make it difficult if not impossible, for me to remain in business.

9. To comply with the individual mandate. I would be forced to reorder my personal and business affairs.

Well in advance of 2014, I must now investigate whether and how to both obtain and maintain the required insurance and at the same time to support my business and to make it grow.

10. In particular, I must investigate what impact the costs of compliance with the individual insurance mandate will have on my priorities, and especially whether, in light of those costs, my independent business can continue to be a viable going concern, or whether to comply I must close my business and seek employment that provides qualifying health insurance as a benefit.

11. In order to comply with the ACA's individual insurance mandate, I believe that I would also have to plan and take appropriate action before 2014 if I am to avoid being penalized for not complying when this requirement becomes effective.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21 day of Oct., 2010 at 3:00 1415 Lafayette St. Fort Wayne, IN.

/s/ PAUL MCCLAIN
PAUL MCCLAIN

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
Pensacola Division

No. 3:01-cv-91-RV/EMT

STATE OF FLORIDA, BY AND THROUGH BILL MCCOLLUM, ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

DECLARATION OF PLAINTIFF TIMOTHY THOMPSON IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Timothy Thompson, under the provisions of 28 U.S.C. § 1746, hereby declare as follows:

1. I am 46 years old, a citizen of the United States, and a citizen and resident of the State of Ohio. I am personally familiar with the facts contained herein, and I am competent to testify thereto.

2. I am a member of the Nationa Federation of Independent Business ("NFIB") in good standing.

3. I am the sole proprietor of Thompson's Automotive, located at 893 1/2 U.S. Highway 250, North Ashland, Ohio 44805. My business provides automotive repair services and has no employees.

4. I am single and have two children under the age of 26.

5. I regularly use my personal funds to meet my business expenses.

6. I do not have health insurance. I last had health insurance many years ago when I worked at a factory.

7. I do not qualify for Medicare or Medicaid and I do not receive health or medical benefits from either program. I do not expect to qualify for Medicare in or before 2014, or for Medicaid under the Patient Protection and Affordable Care Act ("HACA"), Pub, L. No, 111-148, 124 Stat. 119 (2010).

8. I am subject to the ACA's individual insurance mandate. I object to the ACA's unconstitutional overreaching, and to being forced to obtain and maintain qualifying health care insurance for myself and my dependents, or to pay a penalty for failing to have such insurance. I do not wish to have health insurance, and I do not believe that the costs associated with that coverage are a wise or acceptable use of my financial resources.

9. Both my business and myself will be harmed if I must purchase health care insurance coverage, which I neither want nor need, to comply with the ACA, or pay the prescribed penalties for non-compliance. This is because, in either case, I will be forced to divert financial resources away from my own priorities, and particularly from supporting and running my business as I consider to be best and most advantageous. I believe that the added costs of ACA compliant health insurance will threaten my ability to maintain my own, independent business.

10. To comply with the individual mandate I would be forced to reorder my personal and business affairs. Well in advance of 2014, I must now investigate whether and how to both obtain and maintain the required insurance and at the same time to support my business and to make it grow.

11. In particular, I must investigate what impact the costs of compliance with the individual insurance mandate will have on my priorities, and especially whether, in light of those costs, my independent business can continue to be a viable going concern, or whether to comply I must close my business and seek employment that provides qualifying health insurance as a benefit.

12. In order to comply with the ACA's individual insurance mandate, I believe that I would also have to plan and take appropriate action before 2014 if I am to avoid being penalized for not complying when this requirement becomes effective.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21 day of Oct., 2010 at 8:00 AM Ashland, OH.

/s/ TIMOTHY THOMPSON
TIMOTHY THOMPSON

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
Pensacola Division

No. 3:01-cv-91-RV/EMT

STATE OF FLORIDA, BY AND THROUGH BILL MCCOLLUM, ATTORNEY GENERAL OF THE STATE OF FLORIDA, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

DECLARATION OF ELIZABETH DUDEK

Pursuant to 28 U.S.C. § 1746, I, Elizabeth Dudek, declare the following:

1. My name is Elizabeth Dudek. I am over the age of eighteen, of sound mind, and otherwise fully competent to testify to the matters described in this declaration. I am employed by the Florida Agency for Health Care Administration (AHCA) as the Interim Secretary.
2. I have served as Interim Secretary since September 2010.
3. As the Interim Secretary, I am the highest ranking official in AHCA and am responsible for all activities of the Agency including the operation of the Medicaid program.

4. Providing this declaration is within the scope of my authority and the facts and statements in this declaration are true, correct, and within my personal knowledge as of the date of this declaration. The facts and projections contained in this declaration regarding the impact of PPACA, however, were not originally prepared in anticipation of this or any other litigation. AHCA originally compiled the facts and projections contained herein as part of its responsibility to report to Florida's elected officials on developments that will impact the Medicaid program. AHCA has prepared and maintained those projections in the regular course of its state business.

A. **Florida's Medicaid Program**

5. Florida participates in the Medicaid program, and has participated continuously in the program for more than 40 years. The Federal Medicaid law requires states to designate a "single state agency" responsible for the implementation of the state's Medicaid program. 42 U.S.C. § 1396a(a)(5). [The federal law does, however, allow states under certain circumstances to bifurcate their Medicaid programs so that one agency makes eligibility determinations, while another agency serves as the "single state agency" for those found eligible. *Id.* Florida has done just that, with the Florida Department of Children and Families (DCF) conducting eligibility determinations and AHCA administering the program for those found eligi-

ble. As Florida's eligibility agency, DCF may also be impacted by PPACA.]

6. As Florida's single state agency, AHCA cannot and does not delegate, to anyone other than its own officials, the authority to issue policies, rules, and regulations on Medicaid program matters. 42 C.F.R. § 431.10(e)(1)(ii). No other state agency or entity has the authority to change or disapprove of any of AHCA's administrative decisions, and no other state agency or entity can substitute its judgment for AHCA's with respect to the application of policies, rules, and regulations that AHCA has issued. 42 C.F.R. § 431.10(e)(3). *Id.*

7. As of fiscal year 2008-09, Florida's total Medicaid program budget (including federal and state dollars) consumed 24.16% percent of the State's total annual budget. This percentage has steadily increased over the years. In fiscal year 1991-1992, for example, the total Medicaid program budget consumed 13.10% of the total state budget.

8. For the current fiscal year, AHCA estimates that it will spend $20.2 billion dollars on the Medicaid program, which will exceed 28% of the state's total budget. AHCA anticipates that the program will serve over 2.9 million eligible recipients per month during this fiscal year.

B. Impact of PPACA

Medicaid Eligibility Expansion and Increased Rates for Primary Care Practitioners

9. PPACA requires states to cover eligibility groups not previously covered.

10. Currently, Florida Medicaid has a variety of eligibility thresholds that depend on the age and condition of the recipient. Children from birth to 1, for example, are eligible if their family income does not exceed 185% of federal poverty level. Children from 1 through 5 are eligible if their family income does not exceed 133% of federal poverty level. Children 6 through 18 are eligible if their family income does not exceed 100% of federal poverty level. Children 19 and 20, as well as adults with children who are Medicaid-eligible, are eligible if their income does not exceed 22% of federal poverty level. Aged, blind, and disabled adults are eligible if their income does not exceed 74% of federal poverty level. Aged and disabled adults who need long term care (e.g. a nursing home) are eligible if their income does not exceed 222% of federal poverty level. Pregnant women are eligible if their income does not exceed 185% of federal poverty level. Women with breast and/or cervical cancer are eligible in their income does not exceed 200% of federal poverty level. Women who have lost Medicaid coverage for any reason are provided limited family planning services for up to 24 months through the Family Planning Waiver. The program does not currently serve

able-bodied, childless adults not otherwise covered in a current categorical coverage group.

11. Starting in 2014, PPACA requires that state Medicaid programs serve all individuals under 65 with incomes of up to 133% of the federal poverty level.[1] PPACA also requires a 5% income disregard for all populations (effectively raising the eligibility threshold to 138% of the federal poverty level). These newly-mandated populations ("newly eligibles") include childless adults whom the Florida Medicaid program has not previously served. It also expands eligibility in Florida for children ages 6-20 and for parents, the aged, the blind, and the disabled who do not need long term care.

12. PPACA provides for enhanced federal financial participation for the newly eligible populations. The Federal government uses the Federal Medical Assistance Percentage (or FMAP) to determine the amount of Federal matching funds for state's expenditures for assistance payments for certain social services, including Medicaid. Through the FMAP, the federal government has traditionally funded about 55% of the Florida Medicaid program, with Florida generally funding the other 45%. With respect to the newly eligible populations, the federal government will fund 100% of the cost of serving the newly eligible population from 2014 through calendar year 2016. Thereafter, states are required to start contributing to the cost of serving the expansion

---

[1] PPACA, § 2001(a).

population, with the federal government's share dropping to 95% in 2017, 94% in 2018, 93% in 2019, and 90% in 2020 and beyond.

13. Currently, Florida has broad discretion to set reimbursement rates for health care providers who participate in the Medicaid program. Starting in state fiscal year 2012-13 (January 1, 2013), PPACA will require Florida to reimburse for certain primary care procedure codes used in the Medicaid program at a federally-mandated rate (in essence, they must be reimbursed at the same rate as in the federal Medi*care* program). This requirement will continue through December 31, 2014. During this period the state will received 100% federal funding for the cost of the increased reimbursements. For estimation purposes, AHCA assumes that the federally-required rate increase would continue beyond the two-year period delineated in the law and these costs would then be partially funded with state funds.

14. AHCA has made projections regarding the fiscal and enrollment impact of PPACA, and presented its projections to the Florida legislature. The power point presentation created for this purpose is attached as Attachment 1 *(AHCA Overview of Federal Affordable Care Act, August 18, 2010)*. The power point presentation describes the various assumptions that went into AHCA's projections, and these assumptions can be found at pages 4 through 10 of the presentation. See Attachment 1. This power point presentation was not prepared in anticipation of litigation.

AHCA officials prepared it and have maintained it in the regular course of their public business.

15. The AHCA presentation projects the estimated cost to Florida of $142,460,765.00 in state general revenue in Florida's 2013-2014 fiscal year. This amount increases going forward, and by 2018-19 the projected costs to Florida are estimated to be just over a billion dollars per year, or $1,012,206,268.00, in state general revenue.

16. When fully implemented, AHCA projects that PPACA will add an additional 1.8 million people to Florida's Medicaid annual rolls, meaning that the program will, by as early as 2015, serve more than 4.5 million people annually.

17. AHCA developed projections regarding the growth in costs and enrollment as a result of PPACA which project that PPACA will result in the expansion of the Florida Medicaid caseload in four ways. First, it will extend Medicaid to persons previously ineligible (the "newly eligible"). By SFY 2018- 2019, AHCA projects that this population will cost Florida roughly $351 million per year in state revenue.

18. Second, AHCA projects that PPACA will increase program enrollment of uninsured persons who are currently eligible for Medicaid but who, for whatever reason, are not currently enrolled. By SFY 2018- 2019, AHCA projects that this population will cost Florida about $574 million per year in state revenue. The estimates developed reflect a higher commitment of state general revenue as the state will continue to receive the regular FMAP rate for this population.

19. Third, AHCA projects that PPACA will prompt some low-income individuals, who will be newly eligible for the Medicaid program under PPACA, to drop their private insurance coverage and enroll in Medicaid. By SFY 2018- 2019, AHCA projects that this population will cost Florida almost $47 million per year in state revenue.

20. Fourth, AHCA's projects reflect the transition of coverage of some CHIP enrollees to coverage under the Medicaid program. AHCA projects that children between the ages of 6-18 in families with incomes between 100-133% of FPL and currently covered by CHIP will be enrolled in Medicaid. AHCA projects that, by SFY 2018-2019, this change will cost Florida about $78 million in state revenue a year, while saving the state CHIP program about $62 million per year, for a net cost of roughly $16 million per year in state revenue.

21. Also, AHCA's projections assume that the changes PPACA makes to physician reimbursement rates will cost Florida an additional $391 million per year in state revenue by SFY 2018-2019.

22. In sum, AHCA projects that the expansion of Medicaid coverage to include all individuals under age 65 with incomes up to 133 percent of the federal poverty level will increase Florida's costs, less so in the early years but more so after 2016.

Restrictions on State Ability to Change Eligibility and Tailor Medicaid Programs

23. Traditionally, Medicaid programs have had some authority to develop eligibility standards, including reducing eligibility for groups above mandatory coverage levels. Starting on the date of its signing (March 23, 2010), PPACA takes this type of policy-making authority away. PPACA requires all states to maintain their current eligibility standards for adults through 2014, and for children through 2019. This is known as the "maintenance of effort" requirement.

24. The maintenance of effort requirement means that Florida cannot make any change to eligibility that would render a person ineligible for Medicaid or CHIP benefits when that same person would have been eligible for benefits on March 23, 2010. If Florida fails to comply with the maintenance of effort requirement, it risks losing federal matching funds for <u>all</u> Medicaid programs, including funds that support services to pregnant women, children, and the aged and disabled populations.

25. PPACA establishes separate maintenance of effort requirements for the adult and children's Medicaid populations and, as a result, alters the state's expectations for coverage of optional categorically needy populations. The maintenance of effort requirement for the adult Medicaid population will remain in place until the U.S. Department of Health and Human Services (HHS) determines that an exchange established by the state under PPACA section 1311 is fully opera-

tional.[2] The maintenance of effort requirement for CHIP and the children's Medicaid population up to age 19 will remain in effect through September 2019.[3]

26. As stated previously, consistent with federal law, Florida has opted to cover, as optional categorically needy groups: pregnant women between 150 and 185% of federal poverty level; women with breast and cervical cancer up to 200% of federal poverty level; and persons in need of long term care (e.g. nursing home services) between 74% and 222% of federal poverty level.

27. AHCA created these groups according to policy direction from state leadership. The maintenance of effort provision precludes the state from reducing or eliminating these previously optional eligibility groups as a matter of policy.

Loss of Prescription Drug Rebate Revenue

28. PPACA modifies the minimum Medicaid federal unit rebate amount for most drugs.[4] These modifications were made retroactively effective to January 1, 2010, and have the effect of reducing the supplemental rebates available to the states.

29. CMS provided initial guidance to states regarding PPACA's pharmacy rebate provisions on April 22, 2010. In this initial guidance letter, CMS indicated that it would retain the difference between the old and new rebate percent-

---

[2] PPACA, § 2001(b).

[3] *Id.*

[4] PPACA, § 2501.

ages across the board for all drugs, not just for those drugs for which there is an actual increase in the federal rebate amount due to the Act. Final guidance was distributed to State Medicaid Programs on September 28, 2010. In this letter, CMS revised the previous instructions concerning the Federal offset of Medicaid prescription drug rebates. At this time, the Agency is still waiting for additional information from CMS so that the Agency can invoice for federal 2010 rebates for the Fee-For-Service program as well as begin invoicing for federal rebates based on utilization from the Medicaid Managed Care Plans.

30. AHCA currently estimates that Florida will lose approximately $40 million in rebate revenue from SFY 2010-2011 for those drugs for which we are receiving rebates in excess of the current minimums.[5] During that same time frame, the state will receive approximately $551 million in rebate revenue.[6]

The PPACA Depends Upon State Participation in Medicaid to Achieve Its Coverage Goals

31. The PPACA provides subsidies and credits for individuals between 133% and 400% of the federal poverty level who obtain qualified coverage through a health insurance exchange, but relies solely upon state participation in Medicaid to

---

[5] These projections were developed by AHCA based on __ SFY 2010-2011 ___.

[6] *Id.*

cover individuals up to 133% of the federal poverty level.

32. In Florida, Medicaid covers and pays for health care services for almost 3 million persons, including 27% of Florida's children; pays for over 50% of Florida childbirths; pays for 63% of nursing home days; delivers services through more than 80,000 individual providers and 23 managed care plans.

33. If Florida's Medicaid and CHIP programs were ended, no current program exists that would cover the healthcare costs of individuals at 133% of the poverty level and, absent planning and implenlentation of some programmatic substitute, Florida would face a health care emergency affecting its poorest and neediest citizens. If Florida were to cease participation abruptly without a programmatic substitute, it would likely result in severe health repercussions, including possible loss of life, among the.lllost desperately ill and disabled within the current Medicaid population.

34. No known federal laws or regulations provide a non-abrupt process by which a state might make an orderly wind down or transition from Medicaid in a manner that would safeguard the health care of current Medicaid beneficiaries.

C. Attachments

35. I have attached the following document to this affidavit, which are true and correct copies of the original as maintained by AHCA:

#	Document Description
1	***Fla. AHCA, Overview of Federal Affordable Care Act, August 18, 2010***

I declare under penalty of perjury that the foregoing is true and correct. The information and projections included above are complete and accurate to the best of my knowledge as of the date of this Declaration, and are subject to revision as additional information is generated over time and as PPACA is amended or as federal agencies promulgate guidance and regulations on PPACA's application.

Executed on Nov. 3, 2010, in Tallahassee, Florida.

/s/ ELIZABETH DUDEK
ELIZABETH DUDEK
Interim Secretary
Agency for Healthcare Administration

PETITIONER'S BRIEF

No. 11-398

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONERS
(Minimum Coverage Provision)

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

BETH S. BRINKMANN
Deputy Assistant Attorney General

JOSEPH R. PALMORE
Assistant to the Solicitor General

MARK B. STERN
ALISA B. KLEIN
SAMANTHA L. CHAIFETZ
DANA KAERSVANG
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

GEORGE W. MADISON
General Counsel
Department of the Treasury
Washington, D.C. 20220

M. PATRICIA SMITH
Solicitor of Labor
Department of Labor
Washington, D.C. 20210

WILLIAM B. SCHULTZ
Acting General Counsel

KENNETH Y. CHOE
Deputy General Counsel
Department of Health and Human Services
Washington, D.C. 20201

QUESTION PRESENTED

The minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, provides that, beginning in 2014, nonexempted federal income taxpayers who fail to maintain a minimum level of health insurance for themselves or their dependents will owe a penalty, calculated in part on the basis of the taxpayer's household income and reported on the taxpayer's federal income tax return, for each month in which coverage is not maintained in the taxable year. 26 U.S.C.A. 5000A.

The question presented is whether the minimum coverage provision is a valid exercise of Congress's powers under Article I of the Constitution.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional and statutory provisions involved 2
Statement 2
A. Statutory background 2
1. Health insurance is the customary means of payment for services in the health care market 3
2. The uninsured participate in the health care market and shift substantial risks and costs to other market participants 7
3. The Affordable Care Act 9
B. Prior health care reform efforts 12
C. Proceedings below 16
Summary of argument 17
Argument:
I. The minimum coverage provision is a valid exercise of Congress's commerce power 21
A. Congress has broad power under the Commerce and Necessary and Proper Clauses to enact economic regulation 21
B. The minimum coverage provision is an integral part of a comprehensive scheme of economic regulation 24
C. The minimum coverage provision itself regulates economic conduct with a substantial effect on interstate commerce 33

Table of Contents—Continued: Page

1. The minimum coverage provision reasonably regulates the financing of participation in the health care market and is a reasonable means to prevent the shifting of costs and risks to other market participants 33
2. The court of appeals misapprehended the nature of the minimum coverage provision, the mechanics of health insurance, and this court's precedents 37
3. The minimum coverage provision is fully consistent with *Lopez* and *Morrison* and the allocation of authority between the federal and state governments 45

II. The minimum coverage provision is independently authorized by Congress's taxing power 52
A. The minimum coverage provision operates as a tax law 52
B. The validity of an assessment under the taxing power does not depend on whether it is denominated a tax 56
C. The placement of the predicate for imposition of the tax penalty in a separate subsection does not take the minimum coverage provision outside Congress's taxing power 59

Conclusion 63
Appendix – Constitutional and statutory provisions 1a

TABLE OF AUTHORITIES

Cases: Page

Bob Jones University v. *Simon*, 416 U.S. 725 (1974) 55
Carter v. *Carter Coal Co.*, 298 U.S. 238 (1936) 27
Consolidated Edison Co. v. *NLRB*, 305 U.S. 197 (1938) 42, 49
Davis v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989) 60
District of Columbia v. *Greater Wash. Bd. of Trade*, 506 U.S. 125 (1992) 27
Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988) 59
FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 60
Gonzales v. *Raich*, 545 U.S. 1 (2005) 22, 26, 42, 43, 46
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964) 25
Hodel v. *Indiana*, 452 U.S. 314 (1981) 18, 25
Katzenbach v. *McClung*, 379 U.S. 294 (1964) 25, 42
Lawrence v. *State Tax Comm'n*, 286 U.S. 276 (1932) 57
Liberty University, Inc. v. *Geithner*, No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011), petition for cert. pending, No. 11-438 (filed Oct. 7, 2011) ... 52, 57
License Tax Cases, 72 U.S. (5 Wall.) 462 (1866) 57
Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) 41
Maryland v. *Wirtz*, 392 U.S. 183 (1968) 42
McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 22, 23, 35, 52

Cases—Continued: Page

NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) 21, 43, 49

Nelson v. *Sears, Roebuck & Co.*, 312 U.S. 359 (1941) 20, 52, 57

New York v. *United States*, 505 U.S. 144 (1992) . . 57, 61, 62

Perez v. *United States*, 402 U.S. 146 (1971) 25

Preseault v. *ICC*, 494 U.S. 1 (1990) 32

Ricks v. *Budge*, 64 P.2d 208 (Utah 1937) 39

Roberts v. *Galen of Va., Inc.*, 525 U.S. 249 (1999) 40

Rostker v. *Goldberg*, 453 U.S. 57 (1981) 24

Sabri v. *United States*, 541 U.S. 600 (2004) 46

Seven-Sky v. *Holder*, 661 F.3d 1 (D.C. Cir. 2011), petition for cert. pending, No. 11-679 (filed Nov. 30, 2011) . . . . . *passim*

Sonzinsky v. *United States*, 300 U.S. 506 (1937) 54, 55

Stafford v. *Wallace*, 258 U.S. 495 (1922) 41

Steward Mach. Co. v. *Davis*, 301 U.S. 548 (1937) 52

Thomas More Law Ctr. v. *Obama*, 651 F.3d 529 (6th Cir. 2011), petition for cert. pending, No. 11-117 (filed July 26, 2011) . . . . . *passim*

United States v. *Chamberlin*, 219 U.S. 250 (1911) 54

United States v. *Comstock*, 130 S. Ct. 1949 (2010) 22, 23, 30, 38, 40

United States v. *Darby*, 312 U.S. 100 (1941) 18, 23, 25, 31, 37

United States v. *Kahriger*, 345 U.S. 22 (1953) 55

United States v. *Lopez*, 514 U.S. 549 (1995) . . . . . *passim*

United States v. *Morrison*, 529 U.S. 598 (2000) . . . 34, 45, 46

Cases—Continued: Page

United States v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939) 41

United States v. *Sanchez*, 340 U.S. 42 (1950) 21, 54, 55

United States v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) 27, 30, 41

United States v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942) 25

Walling v. *Allstate Ins. Co.*, 455 N.W.2d 736 (Mich. Ct. App. 1990) 39

Wickard v. *Filburn*, 317 U.S. 111 (1942) ... 25, 26, 41, 49, 50

Woods v. *Cloyd W. Miller Co.*, 333 U.S. 138 (1948) 59

Constitution and statutes:

U.S. Const.:

Art. I, ... 17

§ 8 ..... 1a

Cl. 1 52

Cl. 3 (Commerce Clause) 17, 21, 23, 34

Cl. 18 (Necessary and Proper Clause) 17, 21, 22, 23

Anti-Injunction Act, 26 U.S.C. 7421(a) 58

Emergency Medical Treatment and Labor Act, 42 U.S.C. 1395dd 40

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* 5

29 U.S.C. 1002(1) 28

29 U.S.C. 1144(b)(2)(A) 28

29 U.S.C. 1182 (2006 & Supp. III 2009) 5, 44a

Statutes—Continued: Page

Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 2
Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 5
Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 2
26 U.S.C. 106 4
26 U.S.C. 162 (2006 & Supp. III 2009) 5
26 U.S.C. 4974 56
26 U.S.C. 4980B(a) 56
26 U.S.C. 6402(a) 54
26 U.S.C. 6502 54
26 U.S.C. 7401 *et seq.* 54
26 U.S.C. 9707 56
42 U.S.C. 300gg-1 (2006) 5, 47a
42 U.S.C. 300gg-11(a) (2006) 5, 49a
42 U.S.C. 1395 *et seq.* 3
42 U.S.C. 1396 *et seq.* 3
42 U.S.C. 1396r-4 8
42 U.S.C. 1397aa *et seq.* 3
42 U.S.C. 2021c(a)(1)(A) 62
42 U.S.C. 2021e(d)(2)(A) 57
42 U.S.C. 2021e(e)(1) 62
42 U.S.C. 2021e(e)(2) 62
49 U.S.C. 13906 37
26 U.S.C.A. 36B 11, 31, 56
26 U.S.C.A. 45R 9, 55
26 U.S.C.A. 4980H 9, 55

Statutes—Continued: Page

26 U.S.C.A. 5000A 12, 21, 53, 56, 60, 61, 1a
26 U.S.C.A. 5000A(a) 53, 59, 60
26 U.S.C.A. 5000A(b) 21
26 U.S.C.A. 5000A(b)(2) 12, 53
26 U.S.C.A. 5000A(b)(3) 53
26 U.S.C.A. 5000A(b)(3)(B) 53
26 U.S.C.A. 5000A(c) 12, 53
26 U.S.C.A. 5000A(d) 12
26 U.S.C.A. 5000A(e) 12, 61
26 U.S.C.A. 5000A(e)(2) 53
26 U.S.C.A. 5000A(f)(1)(A) 12
26 U.S.C.A. 5000A(f)(1)(B)-(D) 12
26 U.S.C.A. 5000A(f)(1)(E) 61
26 U.S.C.A. 5000A(g) 12, 53
26 U.S.C.A. 5000A(g)(1) 61
26 U.S.C.A. 5000A(g)(2) 54
26 U.S.C.A. 6055 53
42 U.S.C.A. 300gg(a)(1) 10
42 U.S.C.A. 300gg-1 ..... 10, 17a
42 U.S.C.A. 300gg-3 ..... 10, 20a
42 U.S.C.A. 300gg-4(a) 10
42 U.S.C.A. 300gg-4(b) 10
42 U.S.C.A. 300gg-11 10
42 U.S.C.A. 300gg-12 10
42 U.S.C.A. 300gg-14 10
42 U.S.C.A. 300gg-18(b) 10
42 U.S.C.A. 1396a(a)(10)(A)(i)(VIII) 9

Statutes—Continued: Page

42 U.S.C.A. 18011 12
42 U.S.C.A. 18031-18044 ..... 10, 31
42 U.S.C.A. 18071 31
42 U.S.C.A. 18071(c)(2) 11
42 U.S.C.A. 18091(a)(2)(A) 18, 33, 41
42 U.S.C.A. 18091(a)(2)(B) 2, 27
42 U.S.C.A. 18091(a)(2)(D) 16, 30
42 U.S.C.A. 18091(a)(2)(E) 2
42 U.S.C.A. 18091(a)(2)(F) 8, 19, 34
42 U.S.C.A. 18091(a)(2)(G) 44
42 U.S.C.A. 18091(a)(2)(H) 29
42 U.S.C.A. 18091(a)(2)(I) 29
Fla. Stat. Ann. § 395.1041(3)(k)(1) (West 2011) 39
Idaho Code Ann. § 39-1391b (2011) 39
La. Rev. Stat. Ann. § 40:2113.4(A) (2008) 39
Mass. Ann. Laws ch. 111M, § 2 (LexisNexis Supp. 2011) 16
S.C. Code Ann. § 44-7-260(E) (2002) 39
Tex. Health & Safety Code Ann. (Vernon 2010):
§ 311.022(a) 39
§ 311.022(b) 39
Utah Code Ann. § 26-8a-501(1) (2007) 39
Wash. Rev. Code Ann. § 70.170.060(2) (West 2011) 39

Miscellaneous: Page

Agency for Healthcare Research & Quality, U.S. Dep't of Health & Human Servs., *NHEA-Aligned MEPS: Projected Expenditure Data Files: 2002-2016* (Aug. 2009), http://www.meps.ahrq.gov/mepsweb/data_stats/download_data_files_detail.jsp?cboPufNumber=NHEA-Aligned%20MEPS&prfricon=yes 4

Stuart Altman & David Shactman, *Power, Politics, and Universal Health Care: The Inside Story of a Century-Long Battle* (2011) 14

Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 Am. Econ. Rev. 941 (1963) 35

Anne-Emanuelle Birn et al., *Struggles for National Health Reform in the United States*, 93 Am. J. Pub. Health 86 (2003) 13

Matthew Buettgens et al., *Why the Individual Mandate Matters: Timely Analysis of Immediate Health Policy Issues* (2010), http://www.rwjf.org/files/research/71601.pdf 32

Code of Medical Ethics of the American Medical Association (2010) 39

Sara R. Collins et al., *Help on the Horizon, Findings from the Commonwealth Fund Biennial Health Insurance Survey of 2010* (2011), http://www.commonwealthfund.org/~/media/Files/Surveys/2011/1486_Collins_help_on_the_horizon_2010_biennial_survey_report_FINAL_31611.pdf 6

Miscellaneous—Continued: Page

Congressional Budget Office:

A Qualitative Analysis of the Heritage Foundation and Pauly Group Proposals to Restructure the Health Insurance System (1994), http://www.cbo.gov/ftpdocs/48xx/doc4896/doc23.pdf 15

An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act (Nov. 30, 2009), http://www.cbo.gov/ftpdocs/107xx/doc10781/11-30-premiums.pdf 11

An Analysis of the Administration's Health Proposal (1994), http://www.cbo.gov/ftpdocs/48xx/doc4882/doc07.pdf 14

CBO's Analysis of the Major Health Care Legislation Enacted in March 2010 (Mar. 30, 2011), http://www.cbo.gov/ftpdocs/121xx/doc12119/03-30-HealthCareLegislation.pdf 11

CBO's March 2011 Estimate of the Effects of the Insurance Coverage Provisions Contained in the Patient Protection and Affordable Care Act (Mar. 18, 2011), http://www.cbo.gov/budget/factsheets/2011b/HealthInsuranceProvisions.pdf 33

CBO's 2011 Long-Term Budget Outlook, http://www.cbo.gov/ftpdocs/122xx/doc12212/06-21-Long-Term_Budget_Outlook.pdf 3, 4, 9

Effects of Eliminating the Individual Mandate to Obtain Health Insurance (June 16, 2010), http://www.cbo.gov/ftpdocs/113xx/doc11379/Eliminate_Individual_Mandate_06_16.pdf 33

Miscellaneous—Continued: Page

Key Issues in Analyzing Major Health Insurance Proposals (2008), http://www.cbo.gov/ftpdocs/99xx/doc9924/12-18-KeyIssues.pdf ... 5, 6, 28

155 Cong. Rec. (daily ed.):

pp. S13,581-S15,382 (Dec. 20, 2009) 58

p. S13,751 (Dec. 22, 2009) 58

p. S13,753 (Dec. 22, 2009) 58

p. S13,830 (Dec. 23, 2009) 58

p. S13,832 (Dec. 23, 2009) 58

156 Cong. Rec. (daily ed. Mar. 21, 2010):

p. H1826 58

p. H1882 58

John L. Czajka & James Mabli, *Analysis of Transition Events in Health Insurance Coverage* (2009), http://aspe.hhs.gov/health/reports/09/CoverageTransitions/index.pdf 6, 51

Expanding Consumer Choice and Addressing "Adverse Selection" Concerns in Health Insurance: Hearing Before the Joint Economic Comm., 108th Cong., 2d Sess. (2004) 36

Families USA, *Hidden Health Tax: Americans Pay a Premium* (2009), http://familiesusa2.org/assets/pdfs/hidden-health-tax.pdf 7, 8

75 Fed. Reg. 45,629 (Aug. 3, 2010) 9

47 Million and Counting: Why the Health Care Marketplace Is Broken: Hearing Before the S. Comm. on Finance, 110th Cong., 2d Sess. (2008) 5, 39

Colin Gordon, *Dead on Arrival: The Politics of Health Care in Twentieth-Century America* (2003) .. 13

Miscellaneous—Continued: Page

John A. Graves & Sharon K. Long, Urban Inst., *Health Policy Online No. 14, Why Do People Lack Health Insurance?* (2006), http://www.urban.org/UploadedPDF/411317_lack_health_ins.pdf 6, 44

H.R. Rep. No. 241, 99th Cong., 1st Sess. (1985):

Pt. 1 40

Pt. 3 39

H.R. Rep. No. 443, 111th Cong., 2d Sess. (2010):

Pt. 1 58

Pt. 2 31

Mark A. Hall, *An Evaluation of New York's Reform Law*, 25 J. Health Pol. Pol'y & Law 71 (2000) 30

Health Equity and Access Reform Today Act of 1993, S. 1770, 103d Cong., 1st Sess. (1993) 15

John Holahan, *The 2007-09 Recession and Health Insurance Coverage*, 30 Health Affairs 145 (2011) 4

International Fed'n of Health Plans, *2010 Comparative Price Report: Medical and Hospital Fees by Country*, http://www.ifhp.com/documents/IFHPPricereportfinal.pdf 36

2 Samuel Johnson, *Dictionary of the English Language* (4th ed. 1773) 48

Letter from Douglas Elmendorf, Director, Congressional Budget Office, to Nancy Pelosi, Speaker, House of Reps. (Mar. 20, 2010), http://www.cbo.gov/ftpdocs/113xx/doc11379/amendreconProp.pdf 54

Making Health Care Work for American Families: Hearing Before the Subcomm. on Health of the House Comm. on Energy & Commerce, 111th Cong., 1st Sess. (Mar. 17, 2009) 30

Miscellaneous—Continued: Page

Wendy K. Mariner, *Health Reform: What's Insurance Got to Do With It?*, 36 Am. J.L. & Med. 436 (2010) 41

Joyce A. Martin et al., *Births: Final Data for 2009*, Nat'l Vital Statistics Reports, Nov. 2011, http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_01.pdf 36

National Ctr. for Health Statistics, U.S. Dep't of Health & Human Servs.:

DHHS Pub. No. 2011-1232, Health, United States, 2010 (2011), http://www.cdc.gov/nchs/data/hus/hus10.pdf 7

DHHS Pub. 2012-1578, Summary Health Statistics for U.S. Children: National Health Interview Survey, 2010 (2011), http://www.cdc.gov/nchs/data/series/sr_10/sr10_247.pdf 7

Ed Neuschler, Institute for Health Policy Solutions, *Policy Brief on Tax Credits for the Uninsured and Maternity Care* (2004), http://www.ihps.org/pubs/2004_Jan_Tax_Credits_Maternity.pdf 6

Office of the Assistant Sec'y for Planning & Evaluation, U.S. Dep't of Health & Human Servs.:

ASPE Issue Brief: 2.5 Million Young Adults Gain Health Insurance Due to the Affordable Care Act (2011), http://aspe.hhs.gov/health/reports/2011/YoungAdultsACA/ib.pdf . . . 10

Miscellaneous–Continued: Page

ASPE Research Brief: The Value of Health Insurance: Few of the Uninsured Have Adequate Resources to Pay Potential Hospital Bills (May 2011), http://aspe.hhs.gov/health/reports/2011/ValueofInsurance/rb.pdf 7, 8

Office of Mgmt. & Budget, *Analytical Perspectives: Budget of the U.S. Government, Fiscal Year 2011* (2010) 4

Payroll Tax Abuse: Hearing Before the Permanent Subcomm. on Investigations of the Sen. Comm. on Homeland Sec. & Gov't Affairs, 110th Cong., 2d Sess. (2008) 54

1 Steven Plitt et al., *Couch on Insurance 3d* (rev. ed. 2009) 36

President's Comm. on Econ. Sec., *The Unpublished 1935 Report on Health Insurance & Disability by the Committee on Economic Security* (Mar. 7, 1935), http://www.socialsecurity.gov/history/reports/health.html 13

J.P. Ruger, *The Moral Foundations of Health Insurance*, 100 QJM 53 (2007) 35

Manish C. Shah & Judith M. Rosenberg, *Health Care Reform in the 103d Congress—A Congressional Analysis*, 33 Harv. J. on Legis. 585 (1996) 14

Special Message to the Congress Recommending a Comprehensive Health Program, 1945 Pub. Papers 475 (Nov. 19, 1945) 13

Miscellaneous–Continued: Page

Staff of the Joint Comm. on Taxation, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," As Amended, in Combination with the "Patient Protection and Affordable Care Act"* (2010) 58

Paul Starr, *The Social Transformation of American Medicine* (1982) 13

U.S. Census Bureau:

Current Population Survey, Annual Social and Economic Supplement (Sept. 13, 2011), http://www.census.gov/hhes/www/cpstables/032011/faminc/new01_001.htm 11

Income, Poverty, and Health Insurance Coverage in the United States: 2009, (2010), http://www.census.gov/prod/2010pubs/p60-238.pdf 7

Flint J. Wainess, *The Ways and Means of National Health Care Reform, 1974 and Beyond*, 25 J. Health Pol. Pol'y & L. 305 (1999) 14

In the Supreme Court of the United States

No. 11-398

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-273a) is reported at 648 F.3d 1235. The district court's opinion on petitioners' motion to dismiss (Pet. App. 394a-475a) is reported at 716 F. Supp. 2d 1120. The district court's opinion on cross-motions for summary judgment (Pet. App. 274a-368a) is reported at 780 F. Supp. 2d 1256.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2011. The petition for a writ of certiorari was filed on September 28, 2011, and was granted on November 14, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this brief.

STATEMENT

A. Statutory Background

Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Affordable Care Act or Act),[1] to address a crisis in the national health care market. Spending in that market accounts for 17.6% of the Nation's economy. 42 U.S.C.A. 18091(a)(2)(B). Insurance is the customary means of payment for services in the health care market, but millions of people cannot obtain insurance. Many cannot afford it, and others are denied it or charged dramatically higher premiums as the result of their medical histories.

The uninsured face enormous obstacles in obtaining health care services. See 42 U.S.C. 18091(a)(2)(E) (congressional finding noting "poorer health and shorter lifespan" of the uninsured). The uninsured do, however, consume health care (frequently in hospital emergency rooms or inpatient facilities), but often they cannot pay for it. As a class, the uninsured shift tens of billions of dollars of costs for the uncompensated care they receive to other market participants annually. That cost-shifting drives up insurance premiums, which, in turn, makes insurance unaffordable to even more people. The Act breaks this cycle through a comprehensive framework of economic regulation and incentives that will im-

---

[1] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

prove the functioning of the national market for health care by regulating the terms on which insurance is offered, controlling costs, and rationalizing the timing and method of payment for health care services.

1. Health insurance is the customary means of payment for services in the health care market

The customary means by which people pay for services in the U.S. health care market is through insurance, either private or governmental. In 2009, payments by private health insurance and government programs accounted for 84% of total spending on health care consumption. Congressional Budget Office (CBO), *CBO's 2011 Long-Term Budget Outlook* 37 (*Budget Outlook*). Out-of-pocket expenditures accounted for only 13% of spending on health care consumption in 2009, including payments made to satisfy deductibles and co-payments as well as payments for uncovered services. *Ibid.* Other private spending, such as philanthropy, accounted for the remainder. *Ibid.*

The largest federal program providing affordable access to health care is Medicare, which insures virtually all Americans aged 65 years or older, as well as several million others with certain disabilities. See 42 U.S.C. 1395 *et seq.*; *Budget Outlook* 37. In 2009, the federal government spent approximately $500 billion on Medicare—22% of total spending on health care consumption in the country. *Id.* at 36-37.

The federal and state governments jointly finance access to health care for low-income persons through Medicaid, 42 U.S.C. 1396 *et seq.*, and the Children's Health Insurance Program (CHIP), 42 U.S.C. 1397aa *et seq.* In 2009, combined spending on those programs was approximately $390 billion—17% of total spending

on health care consumption in the United States. *Budget Outlook* 36-37. Medicaid and CHIP paid for the health care of 37.6 million non-elderly individuals, 14.2% of the non- elderly population. John Holahan, *The 2007-09 Recession and Health Insurance Coverage*, 30 Health Affairs 145, 148 (2011) (Holahan).

Payments by private insurers constituted about 34% of total spending on health care consumption in 2009. *Budget Outlook* 37. The vast majority of persons with private insurance obtain it through employers. For the non-elderly with private health insurance, 93% of health care expenditures in 2009 was attributable to persons with employer-sponsored or other "group coverage"; only 7% percent was attributable to persons who bought policies in the "non-group" market, in which a person can purchase individual or family coverage apart from an employer or other group. Agency for Healthcare Research & Quality, U.S. Dep't of Health & Human Services (HHS), *NHEA-Aligned MEPS: Projected Expenditure Data Files: 2002-2016*, Tbls. 4H and 5H (Aug. 2009). Employer-sponsored plans insured 156.2 million (59%) of the non-elderly in 2009, while non-group policies covered 13.8 million (5%). Holahan 148.

For decades, the federal government has made employer-sponsored insurance more affordable through favorable tax treatment. Employees generally do not include as income and pay taxes on employers' payments of their health insurance premiums, unlike most other forms of employee compensation. 26 U.S.C. 106 (2006). This tax subsidy for employment-based health insurance was $242 billion in 2009. Office of Mgmt. & Budget, *Analytical Perspectives: Budget of the U.S. Government, Fiscal Year 2011*, Tbl. 16:1 (2010). In addition, employ-

ers can deduct such premium payments as business expenses. 26 U.S.C. 162 (2006 & Supp. III 2009).

Congress also has long regulated certain terms of employer-sponsored health coverage. See CBO, *Key Issues in Analyzing Major Health Insurance Proposals* 79-80 (2008) (*Key Issues*) (citing Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, and Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936. For example, federal law generally bars group health plans from excluding individuals based on "health status-related factors" or charging different premiums for similarly situated employees within a group based on such factors. 42 U.S.C. 300gg-1 (2006); 29 U.S.C. 1182 (2006 & Supp. III 2009). Federal law further requires that insurers offering coverage to small employers (generally defined as those with fewer than 51 employees) accept all small employers that apply. 42 U.S.C. 300gg-11(a) (2006).

Before the Affordable Care Act, these federal efforts to facilitate affordable access to health care services left a significant and discrete gap. With limited exceptions, health insurance purchased in the non-group market did not receive favorable federal tax treatment, so the purchasers had to bear the full costs of premiums. *Key Issues* 9. Nor did federal law generally prevent insurers in that market from varying premiums, or denying coverage altogether, based on an individual's medical condition or history.

Without such rules, insurers deny coverage or charge higher rates for individuals with conditions as common as high blood pressure, asthma, ear infections, and even pregnancy. *47 Million and Counting: Why the Health Care Marketplace Is Broken: Hearing Before the*

S. Comm. on Finance, 110th Cong., 2d Sess. 52 (2008) (Senate Hearing) (Prof. Mark A. Hall); Ed Neuschler, *Policy Brief on Tax Credits for the Uninsured and Maternity Care* 3 (2004). A recent survey estimated that 35% of non-elderly adults who tried to purchase health insurance in the non-group market in the previous three years (about 9 million people) were denied coverage, charged a higher rate, or offered restricted coverage because of their medical condition or history. Sara R. Collins et al., *Help on the Horizon, Findings from the Commonwealth Fund Biennial Health Insurance Survey of 2010* xi (2011).

Because participants in the non-group market pay higher premiums and face other discriminatory insurance practices, participation in that market is low. *Key Issues* 46. In 2009, of those non-elderly individuals who did not work for employers offering health insurance or who were not eligible for a government insurance program, only about 20% were covered by a policy purchased in the non-group insurance market. *Ibid.* The remaining 80% were uninsured. *Ibid.* These same factors also may induce people with employer-sponsored insurance to avoid putting their insurance at risk by switching jobs or pursuing entrepreneurial opportunities. *Id.* at 8 & n.12.

Notwithstanding the large number of uninsured at any given time, most of the uninsured are not permanently without health insurance. Instead, they move in and out of coverage. See John L. Czajka & James Mabli, *Analysis of Transition Events in Health Insurance Coverage* 1, 10 (2009) (Czajka). The coverage gaps they experience result for the most part from the high cost of insurance and employment changes—not a belief that coverage is unnecessary. See John A. Graves &

Sharon K. Long, *Why Do People Lack Health Insurance?* 4 (2006) (Graves).

2. The uninsured participate in the health care market and shift substantial risks and costs to other market participants

About 50 million people lacked health insurance in 2009. U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2009*, Tbl. 8, at 23 (2010). The lack of insurance coverage seriously impairs the ability of this class to obtain adequate health care. But it does not foreclose access completely. For decades, state and federal laws—reflecting deeply rooted societal values—have required emergency rooms to stabilize patients who arrive with an emergency condition, and common-law and ethical duties restrict a physician's ability to terminate a patient-physician relationship. See pp. 39-40, *infra*. The uninsured thus participate actively in the market for health care services, even if they cannot pay in full.

As a class, the uninsured consumed $116 billion of health care services in 2008. Families USA, *Hidden Health Tax: Americans Pay a Premium* 2 (2009) (*Hidden Health Tax*). In 2009, more than 55% of Americans under age 65 who were uninsured for more than 12 months had at least one visit to a doctor or an emergency room; about 80% of those who were uninsured for less than 12 months did so. National Ctr. for Health Statistics (NCHS), *DHHS Pub. No. 2011-1232, Health, United States, 2010*, Tbl. 79, at 281 (2011); see NCHS, *DHHS Pub. No. 2012-1578, Summary Health Statistics for U.S. Children: National Health Interview Survey, 2010*, Tbl. 16, at 43 (2011). The uninsured were hospitalized more than 2.1 million times in 2008. Office of the

Assistant Sec'y for Planning & Evaluation (ASPE), HHS, *ASPE Research Brief: The Value of Health Insurance: Few of the Uninsured Have Adequate Resources to Pay Potential Hospital Bills* 5 (May 2011) (ASPE Research Br.). The average bill for a single hospital stay for an uninsured person was $22,200, and nearly 60% of those hospitalizations generated bills greater than $10,000. *Id.* at 5, 8.

Individuals without insurance can rarely cover charges of this magnitude. Even uninsured families with income above 400% of the federal poverty level—*i.e.*, starting at just under $90,000 for families of four—have sufficient assets to pay their full hospital bills for only 37% of their hospitalizations. ASPE Research Br. 6. In 2008, people without insurance did not pay for 63% of their health care costs. *Hidden Health Tax* 2, 6. Third-party sources, including government programs (like Medicaid disproportionate share hospital payments, 42 U.S.C. 1396r-4) and charities, paid for 26% of their care, totaling $30.2 billion. *Hidden Health Tax* 2, 6. Thirty-seven percent of the uninsured's health care costs, totaling $43 billion, was "uncompensated care" —*i.e.*, care received by uninsured patients but not paid for by them or by a third party on their behalf. *Ibid.*; 42 U.S.C.A. 18091(a)(2)(F). Health care providers pass on much of the cost of that care to private insurers, which pass it on to insured participants in the health care market. 42 U.S.C.A. 18091(a)(2)(F). Congress found that this cost-shifting increases the average premium for insured families by more than $1000 per year. *Ibid.*; see *Hidden Health Tax* 2, 6.

3. *The Affordable Care Act*

The Affordable Care Act establishes a framework of economic regulation and incentives that will reform health insurance markets, expand access to health care services, control costs, and reduce the market-distorting effects of cost-shifting.

First, Congress made health insurance available to millions more low-income individuals by expanding eligibility for Medicaid. Beginning in 2014, Medicaid eligibility will extend to anyone under age 65 with income up to 133% of the federal poverty level. 42 U.S.C.A. 1396a(a)(10)(A)(i)(VIII).[2] Currently, Medicaid beneficiaries are primarily children in low-income families, their parents, low-income pregnant women, and low-income elderly or disabled individuals. *Budget Outlook* 39. The newly eligible persons will consist primarily of low-income non-elderly adults without dependent children. *Id.* at 38.

Second, Congress enacted taxing measures that encourage expansion of employer-sponsored insurance. The Act establishes new tax incentives for eligible small businesses to purchase health insurance for their employees. 26 U.S.C.A. 45R. In addition, the Act's employer responsibility provision imposes a tax liability under specified circumstances on large employers that do not offer adequate coverage to full-time employees. 26 U.S.C.A. 4980H.

Third, Congress provided for creation of health insurance exchanges to enable individuals and small businesses to leverage their collective buying power to ob-

---

[2] Except in Alaska and Hawaii, the federal poverty level in 2010 was $10,830 for one person and $22,050 for a family of four. 75 Fed. Reg. 45,629 (Aug. 3, 2010).

tain health insurance at rates competitive with those charged for typical large employer plans. 42 U.S.C.A. 18031-18044.

Fourth, Congress enacted market reforms that will make affordable insurance available to millions who cannot now obtain it. Certain reforms have already taken effect, including provisions that bar insurers from canceling insurance absent fraud or intentional misrepresentation, 42 U.S.C.A. 300gg-12, and from placing lifetime caps on benefits, 42 U.S.C.A. 300gg-11. In addition, the Act establishes medical loss ratios for insurers, *i.e.*, minimum percentages of premium revenues that insurers must spend on clinical services and activities that improve health care quality, as opposed to administrative costs or profits. See 42 U.S.C.A. 300gg-18(b). The Act also requires insurers providing family coverage to continue covering adult children until age 26, 42 U.S.C.A. 300gg-14, which has led to an additional 2.5 million young adults gaining coverage, see ASPE, HHS, *ASPE Issue Brief: 2.5 Million Young Adults Gain Health Insurance Due to the Affordable Care Act* (2011).

Beginning in 2014, the Act will bar insurers from denying coverage to any person because of medical condition or history, 42 U.S.C.A. 300gg-1, 300gg-3, 300gg-4(a) (guaranteed-issue provision), and from charging higher premiums because of a person's medical condition or history, 42 U.S.C.A. 300gg(a)(1), 300gg-4(b) (community-rating provision).

Fifth, Congress enacted new tax credits, cost-sharing reduction payments, and tax penalties as incentives for individuals to maintain a minimum level of health insurance. The Act establishes federal premium tax credits to assist eligible individuals with household income up to 400% of the federal poverty level purchase insurance

through the new exchanges. 26 U.S.C.A. 36B. These premium tax credits, which are advanceable and fully refundable such that individuals with little or no income tax liability can still benefit, are designed to make health insurance affordable by reducing a taxpayer's net cost of insurance. The credits will be available even to families with incomes at (and above) the median level, which, in 2010, was $75,148 for a family of four and $42,863 for an individual.[3] For eligible individuals with income up to 250% of the federal poverty level, the Act also authorizes federal payments to insurers to help cover those individuals' cost-sharing expenses (such as co-payments or deductibles) for insurance obtained through an exchange. 42 U.S.C.A. 18071(c)(2). CBO projected that 83% of people who buy non-group insurance policies through exchanges will receive premium tax credits, *CBO's Analysis of the Major Health Care Legislation Enacted in March 2010*, Tbl. 3, at 18-19 (Mar. 30, 2011) (20 million of 24 million), and that those credits, on average, will cover nearly two-thirds of the premium, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act* 6 (Nov. 30, 2009).

In addition to those incentives through tax and other subsidies to purchase health insurance, Congress assigned adverse tax consequences to the alternative of attempted self-insuring. Congress provided that, beginning in 2014, non-exempted federal income taxpayers who fail to maintain a minimum level of health insurance coverage for themselves or their dependents will owe a tax penalty for each month in the tax year during which

---

[3] See U.S. Census Bureau, *Current Population Survey, Annual Social and Economic Supplement*, Tbl. FINC-01 (Sept. 13, 2011) (Selected Characteristics of Families by Total Money Income).

minimum coverage is not maintained. 26 U.S.C.A. 5000A. The amount of the penalty will be calculated as a percentage of household income for federal income tax purposes, subject to a floor and capped at the price of forgone insurance coverage. 26 U.S.C.A. 5000A(c). It will be reported on the taxpayer's federal income tax return and assessed and collected by the Internal Revenue Service (IRS) under the Internal Revenue Code in the same manner as other assessable penalties. 26 U.S.C.A. 5000A(b)(2) and (g).

Individuals who are not required to file federal income tax returns for a given year are exempt from the penalty. Congress also exempted individuals whose premium payments would exceed eight percent of their household income, individuals who establish that obtaining coverage would be a hardship under standards to be set by the Secretary of HHS, and members of recognized Indian tribes. 26 U.S.C.A. 5000A(e). Individuals who qualify for religious exemptions, are incarcerated, or are undocumented aliens are not subject to the minimum coverage provision. 26 U.S.C.A. 5000A(d).

Various types of insurance coverage are deemed minimum coverage, including government-sponsored programs such as Medicare, Medicaid, CHIP, and programs offered by the Departments of Defense and Veterans Affairs. 26 U.S.C.A. 5000A(f)(1)(A). Minimum coverage also includes eligible employer-sponsored plans and plans offered in the non-group market. 26 U.S.C.A. 5000A(f)(1)(B)-(D); 42 U.S.C.A 18011.

B. Prior Health Care Reform Efforts

The Act in general, and the insurance reforms in particular, culminated a nearly century-long national effort to expand access to health care by making affordable

health insurance more widely available. As early as 1912, Theodore Roosevelt called for a system of social insurance to protect against illness and other hazards. Anne-Emanuelle Birn et al., *Struggles for National Health Reform in the United States*, 93 Am. J. Pub. Health 86, 86 (2003).

President Franklin Roosevelt's task force for social security legislation initially proposed a joint federal-state health insurance program financed at the state level by mandatory employer and employee contributions and supplemented with federal subsidies. See *The Unpublished 1935 Report on Health Insurance & Disability by the Committee on Economic Security* (Mar. 7, 1935). President Roosevelt, however, ultimately decided to focus first on social insurance for retirement and unemployment, leaving health insurance for further study. See Colin Gordon, *Dead on Arrival: The Politics of Health Care in Twentieth-Century America* 17-18 (2003) (Gordon).

In 1945, President Truman called for a compulsory national health insurance program. See *Special Message to the Congress Recommending a Comprehensive Health Program*, 1945 Pub. Papers 475 (Nov. 19, 1945). Although President Truman continued to promote that program after his election in 1948, the legislation was not enacted. See Paul Starr, *The Social Transformation of American Medicine* 281-286 (1982).

In 1965, Congress enacted Medicare and Medicaid, which extended health insurance to elderly and low-income individuals, for whom private insurance was generally inaccessible. See Gordon 28. Yet the inaccessibility of health insurance continued to command sustained national attention in the ensuing decades.

In 1971, President Nixon developed a national health care strategy that included a comprehensive national insurance program. The program would have required employers to provide employees and their dependents with health insurance and pay most of the premiums, while subsidizing coverage for families of the unemployed. See Stuart Altman & David Shactman, *Power, Politics, and Universal Health Care: The Inside Story of a Century-Long Battle* 42-43 (2011). A bill partly based on an expanded proposal by President Nixon was introduced in Congress but substituted a new payroll tax for a direct employer mandate and also made employee participation compulsory. See Flint J. Wainess, *The Ways and Means of National Health Care Reform, 1974 and Beyond*, 24 J. Health Pol. Pol'y & L. 305, 318-319 (1999). Ultimately, however, no reform legislation was enacted during the Nixon administration.

In 1993, President Clinton proposed a "Health Security Plan" that would have required all employers to pay premiums on behalf of their employees and also would have required all employees, except those with very low income, to contribute to their premiums. See CBO, *An Analysis of the Administration's Health Proposal*, at xi (1994).

Alternatives to President Clinton's plan emerged, ranging from federal single-payer plans (extending government-provided health insurance to those not eligible for Medicare or Medicaid) to proposals to expand coverage by requiring individuals to obtain insurance, coupled with tax credits to make insurance affordable. See Manish C. Shah & Judith M. Rosenberg, *Health Care Reform in the 103d Congress—A Congressional Analysis*, 33 Harv. J. on Legis. 585, 595-608 (1996). Plans in the latter category were based on recommenda-

tions by the Heritage Foundation and a group of health care economists and lawyers associated with the American Enterprise Institute, both of which supported the mandatory purchase of private insurance so that the sale of insurance and delivery of health care would take advantage of private-sector market efficiencies. See generally CBO, *A Qualitative Analysis of the Heritage Foundation and Pauly Group Proposals to Restructure the Health Insurance System* (1994). A leading congressional alternative to President Clinton's plan, the Health Equity and Access Reform Today Act of 1993, was modeled on those proposals. It would have mandated that "each individual who is a citizen or lawful permanent resident of the United States shall be covered under * * * a qualified health plan, or * * * an equivalent health care program" such as Medicare or Medicaid. S. 1770, 103d Cong., 1st Sess. § 1501 (1993). Neither President Clinton's proposal nor the alternative bill was enacted.

In the absence of federal reform, a number of States attempted their own efforts to broaden access to health care services by ending discriminatory insurance practices. "Kentucky, Maine, New Hampshire, New Jersey, New York, Vermont, and Washington enacted legislation that required insurers to guarantee issue to all consumers in the individual market, but did not have a minimum coverage provision." Pet. App. 230a-231a (Marcus J.) (quoting Am. Ass'n of People with Disabilities C.A. Amicus Br. 5-6).[4] Because those reforms effectively permitted individuals to purchase insurance after illness or injury struck, "[a]ll seven states suffered from sky-rock-

[4] In the decision below, Judge Marcus concurred in part and dissented in part. Pet. App. 189a. This brief will identify his opinion with the parenthetical (Marcus, J.).

eting insurance premium costs, reductions in individuals with coverage, and reductions in insurance products and providers." *Id.* at 231a (same).

By contrast, Massachusetts in 2006 successfully paired insurance market reforms with a provision requiring individuals to pay a tax penalty if they do not "obtain and maintain creditable coverage." Mass. Ann. Laws ch. 111M, § 2 (LexisNexis Supp. 2011). Congress cited the Massachusetts law as a template for key provisions of the Affordable Care Act, including the minimum coverage provision. See 42 U.S.C.A. 18091(a)(2)(D).

C. Proceedings Below

Respondents are two individuals (Mary Brown and Kaj Ahlburg), the National Federation of Independent Business (NFIB), and 26 States. They filed suit in the District Court for the Northern District of Florida, challenging the constitutionality of several provisions of the Act. As relevant here, the district court held that the minimum coverage provision is not a valid exercise of Congress's commerce or taxing powers. Pet. App. 278a n.4, 296a-350a, 401a-424a.

A divided court of appeals affirmed that ruling. Pet. App. 1a-273a. The court held that the minimum coverage provision is not a valid exercise of Congress's commerce power, *id.* at 63a-156a, or taxing power, *id.* at 157a-172a. Judge Marcus dissented, concluding that the minimum coverage provision falls well within Congress's commerce power. *Id.* at 189a-273a.[5]

---

[5] The federal government has contested the standing of the State respondents to challenge the minimum coverage provision, see Cert.-Stage Reply Br. 9-11, as well as NFIB's associational standing, see Mem. in Support of D.Ct. Mot'n to Dismiss 27-28. In the court of appeals, the federal government conceded Brown's standing, Fed. Gov't

SUMMARY OF ARGUMENT

The minimum coverage provision is within Congress's powers under Article I of the Constitution.

1. Congress had authority under the Commerce and Necessary and Proper Clauses to enact the minimum coverage provision. The Affordable Care Act expands access to health care services and controls health care costs by reforming the terms on which health insurance is offered and rationalizing the timing and means of payment for health care services. It does so by ending discriminatory insurance practices that have excluded millions of individuals from coverage based on medical history; creating State-based exchanges to further competition and lower prices in the individual and small-group market; using tax credits and penalties to expand the availability of employer-provided coverage and make individual coverage more affordable; and expanding eligibility for Medicaid.

The minimum coverage provision plays a critical role in that comprehensive regulatory scheme by regulating how health care consumption is financed. It creates an incentive for individuals to finance their participation in the health care market by means of insurance, the customary way of paying for health care in this country,

---

C.A. Br. 6 n.1, but she has closed the business discussed in the declaration filed in the district court to support her standing. See Letter from Gregory G. Katsas, Jones Day, to Denise J. McNerney, Merits Cases Clerk, Sup. Ct. of the U.S. (Dec. 7, 2011) (Katsas letter) and attached Voluntary Petition, *In re Brown*, No. 5:11-bk-50521 (Bankr. N.D. Fla. filed Sept. 30, 2011); J.A. 140-142. The federal government has supported a motion in this Court to add as parties two NFIB members whose standing allegations are materially identical to those made by Brown before the filing of her bankruptcy petition. See Unopposed Motion for Leave to Add Parties Dana Grimes and David Klemencic (Jan. 4, 2012).

and it works in tandem with the Act's other provisions to expand the availability and affordability of health insurance coverage. In particular, the minimum coverage provision is key to the viability of the Act's guaranteed-issue and community-rating provisions. Those market reforms will end discriminatory practices under which millions of Americans are denied coverage, or charged unaffordable rates, based on medical condition or history. Federal law previously applied similar protections in the employer-sponsored group-insurance market; the guaranteed-issue and community-rating provisions thus serve to fill a gap by requiring insurers who sell policies directly to individuals to operate under similar norms of non-discrimination. As demonstrated by the experience of States that attempted such reforms without a minimum coverage provision, guaranteed-issue and community-rating enacted in isolation create a spiral of higher costs and reduced coverage because individuals can wait to enroll until they are sick. As Congress found, the minimum coverage provision is thus necessary to achieve Congress's concededly valid objective of reforming the interstate market in health insurance.

The minimum coverage provision is within Congress's power to enact not only because it is a necessary component of a broader scheme of interstate economic regulation, see *e.g.*, *Hodel* v. *Indiana*, 452 U.S. 314, 329 n.17 (1981); *United States* v. *Darby*, 312 U.S. 100, 119-120 (1941), but also because, within that scheme, the provision itself regulates economic conduct with a substantial effect on interstate commerce, namely the way in which individuals finance their participation in the health care market, 42 U.S.C.A. 18091(a)(2)(A). Individuals without insurance actively participate in the health care market, but they pay only a fraction of the cost of

the services they consume. As Congress found, the uninsured consumed approximately $116 billion in health care services in 2008, and providers were not compensated for $43 billion of that total. 42 U.S.C.A. 18091(a)(2)(F). Those costs are shifted to other market participants, raising the average family's annual health insurance premiums by more than $1000. *Ibid.* In sum, the uninsured as a class presently externalize the risks and costs of much of their health care; the minimum coverage provision will require that they internalize them (or pay a tax penalty). This is classic economic regulation of economic conduct.

Respondents do not contest Congress's authority to regulate the financing of health care consumption. Instead, they contend that the particular means Congress employed—a minimum insurance coverage provision that applies in advance of health care consumption—was beyond its power. But Congress has wide latitude when deciding how best to achieve its constitutional objectives, and its decision to adopt a minimum coverage provision was eminently reasonable. Insurance is by far the predominant means of paying for health care in this country, and that prevalence reflects the realities of the market. Unlike costs in other markets, many health care costs cannot reasonably be anticipated and budgeted for. The frequency, timing, and magnitude of an individual's overall demand for health care services are largely unknowable. Thus, the uninsured, as a class, pay only 37% of their health care costs out of pocket. Pet. App. 193a (Marcus, J.). Because health insurance is the principal mechanism for meeting these unpredictable and often expensive liabilities, it was reasonable for Congress to invoke that same mechanism to address the problem of uncompensated care.

The court of appeals was of the view that Congress's only choice in enacting a minimum coverage provision was to "require those who consume health care to pay for it with insurance when doing so." Pet. App. 119a. No constitutional principle supports such a limitation on Congress's choice of means for achieving its constitutionally authorized ends. Congress's decision to require insurance in advance, rather than attempting to apply a minimum coverage provision at the point of consumption, was particularly reasonable in light of the economic realities of insurance (which must be obtained before the need to use it arises) and the well-established legal duty of health care providers to provide emergency care regardless of ability to pay (which makes restrictions at the "point of sale" infeasible as well as inhumane). Indeed, the court of appeals' reasoning parallels the now-discarded approach to the commerce power under which the Court attempted to impose semantic and formalistic limitations on its exercise.

2. Congress's taxing power provides an independent ground to uphold the minimum coverage provision. In "passing on the constitutionality of a tax law," a court is "concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941) (citation omitted). The practical operation of the minimum coverage provision is as a tax law. The only consequences of a failure to maintain minimum coverage are tax consequences: non-exempted federal income taxpayers will have increased tax liability for those months in which they fail to maintain minimum coverage for themselves or their dependents. That additional tax liability will be calculated on the basis of the taxpayer's household income (subject to a floor and a

cap), reported on the taxpayer's federal income tax return, and collected by the IRS.

The fact that the minimum coverage provision—like longstanding tax provisions such as the exclusion of employer-paid health insurance premiums from employees' taxable income—is intended to encourage health insurance coverage has no bearing on the taxing power inquiry. It is well settled that a tax "does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed." *United States* v. *Sanchez*, 340 U.S. 42, 44 (1950).

Likewise, that Congress used the word "penalty" in the minimum coverage provision, 26 U.S.C.A. 5000A(b), rather than "tax," is immaterial to whether it was a proper exercise of Congress's power over taxation. So too is the fact that Section 5000A includes the predicate for the penalty in a different subsection than those governing the penalty's calculation, assessment, and collection.

ARGUMENT

I. THE MINIMUM COVERAGE PROVISION IS A VALID EXERCISE OF CONGRESS'S COMMERCE POWER

A. Congress Has Broad Power Under The Commerce And Necessary And Proper Clauses To Enact Economic Regulation

1. The Constitution grants Congress the power "[t]o regulate Commerce * * * among the several States." Art. I, § 8, Cl. 3. "[T]he power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement'; to adopt measures 'to promote its growth and insure its safety'; 'to foster, protect, control and restrain.'" *NLRB* v. *Jones & Laughlin*

Steel Corp., 301 U.S. 1, 36-37 (1937) (internal citations omitted).

In addition to regulating the "channels of interstate commerce" and "the instrumentalities of interstate commerce, and persons or things in interstate commerce," Congress may "regulate activities that substantially affect interstate commerce." *Gonzales* v. *Raich*, 545 U.S. 1, 16-17 (2005). When Congress acts in this third category, it has the power to "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 17. And "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Ibid.* (citation omitted). In reviewing such a determination, the Court's "task * * * is a modest one." *Id.* at 22. The Court "need not determine whether [the regulated] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Ibid.* (citation omitted).

The Necessary and Proper Clause, which authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution" its other enumerated powers, Art. I, § 8, Cl. 18, also "grants Congress broad authority to enact federal legislation." *United States* v. *Comstock*, 130 S. Ct. 1949, 1956 (2010); see *Raich*, 545 U.S. at 39 (Scalia, J., concurring in the judgment). While the federal government is one of enumerated powers, "'a government, entrusted with such' powers 'must also be entrusted with ample means for their execution.'" *Comstock*, 130 S. Ct. at 1956 (quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819)). "Accordingly, the Necessary and Proper Clause makes clear that the Constitution's grants of specific

federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive, to the authority's 'beneficial exercise.'" *Ibid.* (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 413, 418).

2. Respondents do not contend that the Affordable Care Act's comprehensive market reforms and the ends those reforms advance are beyond Congress's powers under the Commerce Clause and the Necessary and Proper Clause. Respondents do not even dispute that Congress may accomplish those ends through the means of requiring individuals to maintain health insurance in order to receive health care services. Instead, they challenge only one particular feature of the means Congress chose: application of the minimum coverage provision before, rather than at, the "point of consumption" of health care. Yet, as the Court has recognized since the time of Chief Justice Marshall, if "the end be legitimate," *McCulloch*, 17 U.S. (4 Wheat.) at 421, Congress's authority is at its apogee when it determines what means to deploy to achieve that end. See *Comstock*, 130 S. Ct. at 1956; *United States* v. *Darby*, 312 U.S. 100, 121 (1941); *McCulloch*, 17 U.S. (4 Wheat.) at 409-410.

The Act's minimum coverage provision is a particularly well-adapted means of accomplishing Congress's concededly legitimate ends. It is necessary to effectuate Congress's comprehensive reforms of the insurance market, and is itself an economic regulation of the timing and method of financing the purchase of health care services. In both of these respects, the minimum coverage provision regulates economic activity that substantially affects interstate commerce. Its links to interstate commerce are tangible, direct, and strong. See *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring). It is therefore well within the established scope of Congress's

power. See *United States* v. *Lopez*, 514 U.S. 549, 560 (1995).

"Whenever called upon to judge the constitutionality of an Act of Congress—'the gravest and most delicate duty that this Court is called upon to perform'—the Court accords 'great weight to the decisions of Congress.'" *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citations omitted). Congress enacted the Affordable Care Act, and chose to include the minimum coverage provision, after years of careful consideration and after a vigorous national debate. That was a policy choice the Constitution entrusts the democratically accountable Branches to make, and the Court should respect it.

B. The Minimum Coverage Provision Is An Integral Part Of A Comprehensive Scheme Of Economic Regulation

The minimum coverage provision is integral to the Affordable Care Act's insurance reforms. Those reforms are part of the Act's broad framework of economic regulation and incentives designed to address the terms on which health insurance is offered, rationalize the timing and method of payment for health care services, expand access to health care, and reduce shifting of risks and costs. That framework builds upon decades of federal involvement in this enormous and highly regulated segment of the national economy. The Act and the preexisting federal statutory structure on which it builds comprehensively address economic conduct having a substantial effect on interstate commerce and are therefore unquestionably within the scope of Congress's commerce power. The minimum coverage provision is necessary to make effective the Act's core reforms of the insurance market, *i.e.*, the guaranteed-issue and community-rating provisions. And the minimum cover-

age provision itself regulates economic conduct with substantial effects on interstate commerce—the manner in which individuals finance and pay for services in the health care market. Even considered in isolation, therefore, the provision is well within the commerce power. See pp. 33-52, *infra*. Because the provision is necessary to make the Act's reforms effective, and is an independently valid economic regulation, it is plainly constitutional.

1. In determining whether a challenged statutory provision is a permissible exercise of the commerce power, the Court considers its role as part of a broader economic regulatory scheme. To sustain provisions that are part of a "complex regulatory program such as established by the [Affordable Care] Act * * * [i]t is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole" is within the commerce power. *Hodel* v. *Indiana*, 452 U.S. 314, 329 n.17 (1981) (citing *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 262 (1964), *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964), *Perez* v. *United States*, 402 U.S. 146, 154-156 (1971), *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942), and *Darby*, 312 U.S. at 123). The Court has therefore "many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce *or the exercise of the Congressional power over it*." *Darby*, 312 U.S. at 119-120 (emphasis added); see *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 118-120 (1942) (Where Congress has the authority to regulate interstate commerce, "it possesses every power needed to make that regulation effective.").

For example, in *Wickard* the Court upheld the federal regulation of wheat that was neither "sold [n]or intended to be sold" but instead was intended for use only on a single farm. 317 U.S. at 119, 129. The Court held that Congress had power under the Commerce Clause to regulate the interstate market in wheat, and it upheld regulation of the non-commercial home-grown wheat because exercise of that authority was integral to the larger regulatory scheme. *Id.* at 128-129. In *Wickard*, the "potential disruption of Congress's interstate regulation, and not only the effect that personal consumption of wheat had on interstate commerce, justified Congress's regulation of that conduct." *Raich*, 545 U.S. at 37 n.2 (Scalia, J., concurring in the judgment).

Indeed, Congress "may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Raich*, 545 U.S. at 37 (Scalia, J., concurring in the judgment) (citing *Lopez*, 514 U.S. at 561)). That "is not a power that threatens to obliterate the line between 'what is truly national and what is truly local,'" *id.* at 38 (quoting *Lopez*, 514 U.S. at 567-568), because Congress can exercise it only when enacting comprehensive regulation that is within its commerce power. See *Seven-Sky* v. *Holder*, 661 F.3d 1, 21 (D.C. Cir. 2011) (Edwards, J., concurring), petition for cert. pending, No. 11-679 (filed Nov. 30, 2011). And where (as here) Congress regulates economic conduct to effectuate a comprehensive scheme, see pp. 33-52, *infra*, it acts well within the full scope of its authority. In the modern era of Commerce Clause jurisprudence beginning with *Jones & Laughlin Steel*, the Court has not once invalidated a provision enacted by Congress as part of a comprehensive scheme of na-

tional economic regulation. Compare *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 297-310 (1936).

2. The minimum coverage provision is an integral part of the Act's comprehensive regulation of the market in health care and health care financing. In particular, it is essential to the Act's reform of discriminatory practices in the individual insurance market. The health care sector occupies a dominant position in the American economy. As Congress found, "[n]ational health spending is projected to increase from $2,500,000,000,000, or 17.6 percent of the economy, in 2009 to $4,700,000,000,000 in 2019." 42 U.S.C.A. 18091(a)(2)(B). "Private health insurance spending [was] projected to be $854,000,000,000 in 2009, and pays for medical supplies, drugs, and equipment that are shipped in interstate commerce." *Ibid.* As Congress further found, "[s]ince most health insurance is sold by national or regional health insurance companies, health insurance is sold in interstate commerce and claims payments flow through interstate commerce." *Ibid.*; see *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 539-553 (1944).

The Act supplements the already-pervasive involvement by the federal government in the health care sector, both as a direct payer and as a regulator and subsidizer of private insurance. See pp. 3-5, *supra* (discussing Medicare, Medicaid, CHIP, and tax subsidies for employer-provided insurance). ERISA, for example, "sets out a comprehensive system for the federal regulation of private employee benefit plans, including * * * any 'plan, fund, or program' maintained for the purpose of providing medical or other health benefits for employees or their beneficiaries 'through the purchase of insurance or otherwise.'" *District of Columbia* v. *Greater*

Wash. Bd. of Trade, 506 U.S. 125, 127 (1992) (quoting 29 U.S.C. 1002(1)). "ERISA's pre-emption provision assures that federal regulation of covered plans will be exclusive," *ibid.*, subject to specified exceptions such as that for state regulation of insurance, see 29 U.S.C. 1144(b)(2)(A). In addition, through ERISA and HIPAA, a group health plan may not exclude individuals based on "health status-related factors" or charge different premiums for similarly situated employees based on such factors. See p. 5, *supra*.

Most people have health insurance through coverage that is federally financed, subsidized, or regulated, including Medicare, Medicaid, and employer plans. In 2009, the only health insurance option available to the 45 million people who were not eligible for government programs or employer plans was the "non-group" market. *Key Issues* 46. Of this group, nine million purchased insurance and the remaining 36 million were uninsured. *Ibid.*

Insurers in the non-group market have generally been free to deny coverage or vary premiums based on an applicant's medical condition or history. As a result, "approximately thirty-six percent of applicants in the market for individual health insurance are denied coverage, charged a substantially higher premium, or offered only limited coverage that excludes pre-existing conditions." *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 546 (6th Cir. 2011) (Martin, J.), petition for cert. pending, No. 11-117 (filed July 26, 2011). Along with restrictive underwriting practices, high administrative costs in this market have drastically limited access to coverage.

The guaranteed-issue and community-rating provisions of the Affordable Care Act remove those obstacles to coverage and extend to the non-group market norms

of non-discrimination parallel to those applicable to group health plans. But achieving those results in the individual insurance market required different regulatory tools than those for employer-based plans. In particular, Congress found that without a minimum coverage provision, "many individuals would wait to purchase health insurance until they needed care," taking advantage of the Act's guaranteed-issue and community-rating provisions, 42 U.S.C.A. 18091(a)(2)(I), thereby driving up costs in the non-group market (and, indeed, threatening the viability of that market). Congress therefore determined that the minimum coverage provision "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." *Ibid.* Noting that "[u]nder [ERISA], the Public Health Service Act, and this Act, the Federal Government has a significant role in regulating health insurance," Congress further found that the minimum coverage provision is "an essential part of this larger regulation of economic activity," and that "the absence of the requirement would undercut Federal regulation of the health insurance market." 42 U.S.C.A. 18091(a)(2)(H) (internal citations omitted).[6]

Ample evidence before Congress supported its conclusion that the minimum coverage provision is indispensable to the viability of the Act's guaranteed-issue and community-rating reforms, which were unquestion-

---

[6] Congress also found that, "[b]y significantly increasing health insurance coverage," the minimum coverage provision, "together with the other provisions of this Act, will minimize * * * adverse selection[,] broaden the health insurance risk pool to include healthy individuals" who could otherwise exploit the system, and, in turn, "lower health insurance premiums." 42 U.S.C.A. 18091(a)(2)(I).

ably within Congress's commerce power to enact. See *South-Eastern Underwriters Ass'n*, 322 U.S. at 539-553; see also *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring in the judgment) (discussing "a demonstrated link in fact, based on empirical demonstration"). For example, citing New Jersey's experience, Princeton University Professor Uwe Reinhardt explained that "[i]t is well known that community-rating and guaranteed issue coupled with voluntary insurance tends to lead to a death spiral of individual insurance." *Making Health Care Work for American Families: Hearing Before the Subcomm. on Health of the House Comm. on Energy & Commerce*, 111th Cong., 1st Sess. 10 (Mar. 17, 2009). In the wake of such legislation in New York without a minimum coverage provision, "[t]here was a dramatic exodus of indemnity insurers from New York's individual market." Mark A. Hall, *An Evaluation of New York's Reform Law*, 25 J. Health Pol. Pol'y & L. 71, 91-92 (2000); see Pet. App. 230a-231a (Marcus, J.) (discussing similar failures in Kentucky, Maine, New Hampshire, Vermont, and Washington).

In contrast, Congress found that Massachusetts avoided these perils by enacting a minimum coverage provision as part of broader insurance reforms. That Massachusetts law "has strengthened private employer-based coverage: despite the economic downturn, the number of workers offered employer-based coverage has actually increased." 42 U.S.C.A. 18091(a)(2)(D). There is therefore substantial support for Congress's conclusion that the minimum coverage provision "is 'necessary' to the end of regulating insurers' underwriting practices without running insurers out of business." Pet. App. 231a (Marcus, J.).

3. More broadly, the minimum coverage provision and the insurance reforms for the non-group market will contribute to the success of other measures in the Affordable Care Act that further the Act's goals in other ways. For example, the Act provides for the creation of exchanges, either by a State (or a group of States) or the federal government, to enable individuals and small businesses to leverage their collective buying power to obtain insurance at rates competitive with those of typical large employer plans. 42 U.S.C.A. 18031-18044. These exchanges will function "as an organized and transparent marketplace for the purchase of health insurance where individuals and employers * * * can shop and compare health insurance options." H.R. Rep. No. 443, 111th Cong., 2d Sess. Pt. 2, at 976 (2010) (2010 House Report) (quotation marks and footnote omitted). Insurers offering policies in the exchanges must comply with the Act's insurance market reforms; Congress thus contemplated that all insurers in the exchanges would "compete [not] based on risk selection" but instead "based on quality and efficiency." *Id.* at 975-976; cf. *Darby*, 312 U.S. at 115 (Congress can use its commerce power to restrict competition on grounds "injurious to * * * commerce"). The exchanges would be less effective in promoting competition and lowering costs without those reforms.

To take another example, the Act will provide substantial tax credits for insurance purchased by eligible taxpayers in the insurance exchanges, 26 U.S.C.A. 36B, and federal cost-sharing reduction payments to defray eligible individuals' co-payments and deductibles in plans purchased through an exchange, 42 U.S.C.A. 18071. Those tax credits and payments will subsidize many individuals who maintain insurance coverage,

while the minimum coverage provision operates in parallel by requiring payments to the government by those non-exempted individuals who do not maintain coverage. The minimum coverage provision similarly complements provisions of the Act (as well as pre-existing measures) that encourage employers to offer health insurance to their employees. See pp. 4-5, 9, *supra*. It provides an extra incentive for employees to seek and accept, and employers to offer, coverage through the workplace. See Matthew Buettgens et al., *Why the Individual Mandate Matters: Timely Analysis of Immediate Health Policy Issues* 5 (2010) (Act without minimum coverage provision would result in nearly seven million fewer individuals covered by employer-sponsored insurance than Act with it).

In sum, the Act closes a gap that has undermined Congress's longstanding system of regulation and financial incentives in the health care market and that has impeded the ability of millions of Americans to obtain services in that market. The minimum coverage provision is key to the insurance reforms that were designed to fill that gap. The provision is therefore within Congress's commerce power.[7]

---

[7] Instead of deferring to Congress's judgments, the court of appeals made its own *de novo* assessment and concluded that, in its view, the minimum coverage provision will not adequately accomplish Congress's objectives because of its exemptions and enforcement mechanisms. Pet. App. 151a-152a. That analysis was "startlingly like strict scrutiny review" and has no place in review of an Act of Congress under the commerce power. *Id.* at 218a (Marcus, J.). It is for Congress, not the courts, to decide how to balance its legislative goals with other concerns. See *Preseault* v. *ICC*, 494 U.S. 1, 19 (1990). In the CBO's expert judgment, by 2019, the Act will reduce the number of non-elderly individuals without insurance by approximately 33 million, resulting in 95% of Americans having coverage (up from 83% today); the CBO has

C. The Minimum Coverage Provision Itself Regulates Economic Conduct With A Substantial Effect On Interstate Commerce

The minimum coverage provision is within Congress's power to enact not only because it is a necessary component of a broader scheme of interstate economic regulation, but also because, within that scheme, it regulates economic conduct with a substantial effect on interstate commerce: the way in which individuals finance their participation in the health care market.

1. The minimum coverage provision reasonably regulates the financing of participation in the health care market and is a reasonable means to prevent the shifting of costs and risks to other market participants

a. As Congress expressly found, the minimum coverage provision "regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased." 42 U.S.C.A. 18091(a)(2)(A). "In the absence of the requirement, some individuals would make an economic and financial decision to forego health insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers." *Ibid.* Congress had far more than a rational basis for concluding that the

---

attributed about half of that projected decrease in the number of non-elderly uninsured—16 million people—to the direct and indirect effects of the minimum coverage provision. *CBO's March 2011 Estimate of the Effects of the Insurance Coverage Provisions Contained in the Patient Protection and Affordable Care Act* 1 (Mar. 18, 2011); CBO, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* 2 (June 16, 2010).

practices of "forego[ing] health insurance" and "attempt[ing] to self-insure" has a substantial and deleterious effect on interstate commerce. Congress therefore had power under the Commerce Clause to regulate those practices.

As a class, the uninsured actively participate in the health care market, but they pay only a fraction of the cost of the services they consume. See Pet. App. 193a-194a, 211a-213a (Marcus, J.); pp. 7-8, *supra*. Congress found that the cost of tens of billions of dollars in uncompensated care provided to the uninsured is passed on to insured consumers, raising average annual family premiums by more than $1000. 42 U.S.C.A. 18091(a)(2)(F).

The minimum coverage provision addresses those defects in the health care market. It creates a financial incentive (by means of a tax penalty) for uninsured participants in the health care market to internalize their own risks and costs, rather than externalizing them to others. This constitutes classic economic regulation under the commerce power. As Judge Sutton recognized, "[n]o one must pile 'inference upon inference,' *Lopez*, 514 U.S. at 567, to recognize that the national regulation of a $2.5 trillion industry, much of which is financed through 'health insurance . . . sold by national or regional insurance companies,' 42 U.S.C.A. § 18091(a)(2)(B), is economic in nature." *Thomas More*, 651 F.3d at 558 (Sutton, J.).[8] "Where," as is clearly the case here, such "economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *United States* v. *Morrison*, 529 U.S.

---

[8] Judge Sutton's opinion was partly for the court and was partly a concurrence in the judgment. See *Thomas More*, 651 F.3d at 533. When citing to the portion of his opinion that was a concurrence in the judgment, this brief will use the parenthetical (Sutton, J.).

598, 610 (2000) (quoting *Lopez*, 514 U.S. at 560); *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring) ("Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.").

b. A requirement that individuals maintain a minimum level of insurance to finance their own health care needs and those of their dependents (or else pay a tax penalty) is manifestly an "appropriate means" (*McCulloch*, (4 Wheat.) 17 U.S. at 410), of addressing the substantial economic problems created by uncompensated care.

Insurance is by far the predominant method of paying for health care in this country. See p. 3, *supra*. That predominance reflects the realities of the health care market. That market, unlike others with essentially universal participation (like the markets for food and housing), involves needs that cannot reasonably be anticipated and budgeted for. For example, when a heart attack or appendicitis strikes, a person cannot postpone a hospital visit in order to save enough money for it, as can be done for purchasing a home or car. Nor can a family be assured that a budgeted amount for anticipated doctor visits will be adequate, as it can for food purchases.

The frequency, timing, and magnitude of an individual's demand for health care services are largely unknowable. J.P. Ruger, *The Moral Foundations of Health Insurance*, 100 QJM 53, 54-55 (2007); see also Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 Am. Econ. Rev. 941, 948-949 (1963). Indeed, "[m]ost medical expenses for people under 65" result "from the 'bolt-from-the-blue' event of an accident, a stroke, or a complication of pregnancy

that we know will happen on average but whose victim we cannot (and they cannot) predict well in advance." *Expanding Consumer Choice and Addressing "Adverse Selection" Concerns in Health Insurance: Hearing Before the Joint Economic Comm.*, 108th Cong., 2d Sess. 32 (2004) (Prof. Mark V. Pauly). As Judge Sutton observed, an "individual can count on incurring some healthcare costs each year (*e.g.*, an annual check-up, insulin for a diabetic) but cannot predict others (*e.g.*, a cancer diagnosis, a serious accident)." *Thomas More*, 651 F.3d at 557.

In addition, costs can mount rapidly for even common medical procedures. For example, approximately one in three babies in the U.S. is born by cesarean delivery, costing, on average, more than $13,000. See Joyce A. Martin et al., *Births: Final Data for 2009*, Nat'l Vital Statistics Reports, Nov. 2011, at 3; International Fed'n of Health Plans, *2010 Comparative Price Report: Medical and Hospital Fees by Country* 12. The average cost of an appendectomy is also $13,000; of an angioplasty, $29,000; of bypass surgery, nearly $60,000. *Id.* at 14, 16, 17.

For these reasons, "most Americans manage the risk of not having the assets to pay for health care by purchasing medical insurance." *Thomas More*, 651 F.3d at 557 (Sutton, J.); see Pet. App. 246a (Marcus, J.). These same considerations amply demonstrate that it was reasonable for Congress to address the problem of uncompensated care by imposing a tax penalty on individuals who do not maintain a minimum level of insurance to meet such health care needs. States have mandated insurance when (as here) an individual's lack of insurance shifts risks to others. See 1 Steven Plitt et al., *Couch on Insurance 3d* § 1:50 (rev. ed. 2009) (discussing

mandatory automobile insurance laws). Congress therefore acted well within its constitutional authority by adopting a means of regulation parallel to insurance measures enacted by the States to address comparable risk-shifting, for "[t]he authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce," *Darby*, 312 U.S. at 116 (citation omitted). See also 49 U.S.C. 13906 (mandatory liability insurance for interstate motor carriers).

2. The court of appeals misapprehended the nature of the minimum coverage provision, the mechanics of health insurance, and this Court's precedents

a. The court of appeals did not take issue with the premises that underlie the minimum coverage provision, or with the legitimacy of the ends Congress sought to achieve, or even with the accomplishment of those ends through the means of a minimum coverage provision. To the contrary, the panel majority acknowledged that requiring individuals to maintain health insurance is a proper means of regulating payment in the market for health care services and that Congress could constitutionally "require those who consume health care to pay for it with insurance when doing so." Pet. App. 118a-119a. Respondents have likewise acknowledged that "Congress may constitutionally require the uninsured to obtain health care insurance on the hospital doorstep, or that Congress may otherwise impose a penalty on those who attempt to consume health care services without insurance." *Id.* at 207a (Marcus, J.); see States C.A. Br. 31-32.

The panel majority objected, however, to the particular policy choice Congress made in deciding how best to

accomplish the Act's concededly legitimate objectives. The minimum coverage provision in the Affordable Care Act exceeds the commerce power, the majority declared, because it "does *not* regulate behavior at the point of consumption" of health care. Pet. App. 118a. The majority concluded that Congress may not require those who fail to maintain minimum coverage to pay a tax penalty, and that, instead, Congress's only permissible option is to impose an insurance requirement at the point at which health care services are provided. See *id.* at 118a-119a.

No constitutional principle authorized the court of appeals to set aside Congress's considered judgment regarding the appropriate means for carrying out the Act's objectives, including the precise framing of a minimum coverage provision. The Constitution "'address-e[s]' the 'choice of means' 'primarily . . . to the judgment of Congress.'" *Comstock*, 130 S. Ct. at 1957 (brackets in original) (citation omitted). As Judge Sutton correctly recognized, "[r]equiring insurance today and requiring it at a future point of sale amount to policy differences in degree, not kind, and not the sort of policy differences removed from the political branches by the word 'proper' or for that matter 'necessary' or 'regulate' or 'commerce.'" *Thomas More*, 651 F.3d at 563; see *Seven-Sky*, 661 F.3d at 18; Pet. App. 216a (Marcus, J.). Indeed, the objective of a "point of consumption" regulation presumably would not be to deny health care to those without insurance; rather, it would be to create an incentive, albeit a draconian one, for the uninsured to obtain insurance before they need health care—precisely what the minimum coverage provision seeks to accomplish, but in a more reasonable and humane manner.

The panel majority's focus on the point of health care "consumption" conflicts with the economic rationale for insurance, which necessarily must be obtained before the need to use the coverage arises. A "health insurance market could never survive or even form if people could buy their insurance on the way to the hospital." Senate Hearing 52 (Prof. Mark A. Hall). It therefore was surely reasonable for Congress to conclude that its ends were most appropriately served by applying the minimum coverage provision *before* the point of consumption of health care services.

The panel majority's reasoning also disregards realities of the health care services market, and deeply ingrained societal norms, that would render infeasible an insurance requirement imposed at "the point of consumption." State court rulings have long imposed "a common law duty on doctors and hospitals to provide necessary emergency care," notwithstanding a patient's inability to pay. H.R. Rep. No. 241, 99th Cong., 1st Sess. Pt. 3, at 5 (1985) (1985 House Report); see, *e.g.*, *Ricks* v. *Budge*, 64 P.2d 208, 210-213 (Utah 1937) (doctors); *Walling* v. *Allstate Ins. Co.*, 455 N.W.2d 736, 738 (Mich. Ct. App. 1990) (hospitals). Many States, including a number of the respondent States, have statutory requirements to the same effect. See 1985 House Report Pt. 3, at 5;[9] see also *Code of Medical Ethics of the American Medical Association* (2010) (Opinion 9.065: Caring for the Poor) ("Each physician has an obligation to share in providing care to the indigent.").

---

[9] See also, *e.g.*, Fla. Stat. Ann. § 395.1041(3)(k)(1) (West 2011); Idaho Code Ann. § 39-1391b (2011); La. Rev. Stat. Ann. § 40:2113.4(A) (2008); S.C. Code Ann. § 44-7-260(E) (2002); Tex. Health & Safety Code Ann. § 311.022(a) and (b) (Vernon 2010); Utah Code Ann. § 26-8a-501(1) (2007); Wash. Rev. Code Ann. § 70.170.060(2) (West 2011).

Finding these measures inadequate to prevent "hospital emergency rooms [from] refusing to accept or treat patients with emergency conditions if the patient does not have medical insurance," 1985 House Report Pt. 1, at 27, Congress in 1986 augmented the patchwork of state laws through enactment of the Emergency Medical Treatment and Labor Act, 42 U.S.C. 1395dd. That statute requires all hospitals participating in Medicare and offering emergency services to stabilize any patient who arrives with an emergency condition, without regard to evidence of ability to pay. See *Roberts* v. *Galen of Va., Inc.*, 525 U.S. 249 (1999).

It was clearly proper for Congress to take into account these legal norms, and the societal judgments they reflect, in determining that denying health care to persons without insurance, or otherwise attempting to penalize them at a time of medical need, was an inappropriate means of addressing uncompensated care. Cf. *Comstock*, 130 S. Ct. at 1961 (noting the "common law" duty not to release dangerous persons in one's custody, in finding it "necessary and proper" for Congress to confine a federal prisoner whose mental illness threatens others).

b. Respondents contend that Congress was without authority to enact the minimum coverage provision to address the distorting effects of risk-shifting and cost-shifting in the market for health care services because the provision is a regulation of health *insurance*, which, they insist, is a different market. See, *e.g.*, NFIB Cert.-Stage Br. 5-8. The uninsured, respondents assert, are "strangers to commerce in health insurance," and the minimum coverage provision is unconstitutional because it "is not tied to those who do not pay for a portion of

their health care." *Id.* at 5, 7 (internal citation omitted). These contentions rest on several fundamental errors.

First, this Court has repeatedly rejected efforts, like respondents', to put particular conduct beyond Congress's commerce power by artificially isolating it from the overall commerce of which it is a part. See *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 227-229 (1948); *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 568 (1939) (rejecting argument that Congress could not regulate terms of "a local transaction" that was alleged to be "fully completed before any interstate commerce begins"); *Stafford* v. *Wallace*, 258 U.S. 495, 516 (1922) ("Such transactions can not be separated from the movement to which they contribute and necessarily take on its character."). Instead, the Court defers to Congress's judgment about how to define the market it is regulating. See *Wickard*, 317 U.S. at 118-119 (noting that Congress had adopted "a definition of [the wheat] 'market'" that went beyond "its conventional meaning").

Congress properly viewed the minimum coverage provision as a regulation of the financing of health care, *i.e.*, of "activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased." 42 U.S.C.A. 18091(a)(2)(A). No one purchases health insurance for its own sake; it exists only as a means of financing participation in the health care market. See Wendy K. Mariner, *Health Reform: What's Insurance Got to Do With It?*, 36 Am. J.L. & Med. 436, 450 (2010). Congress understood the economic reality that health insurance and health care financing are inherently integrated, and it was permitted to regulate on that basis. Cf. *South-Eastern Underwrit-*

ers Ass'n, 322 U.S. at 540 n.14. & 547 (contract for purchase of insurance is "essentially different from ordinary commercial transactions"; it is necessary to "examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce") (citation omitted).

Second, Congress was not required to stay its hand until the point uncompensated care is consumed, or somehow attempt to identify and regulate only "those [uninsured persons] who do not pay for a portion of their health care." NFIB Cert.-Stage Br. 7. Congress may instead regulate the uninsured as a class. See *Seven-Sky*, 661 F.3d at 20. In *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197 (1938), an employer that had not itself experienced labor strife argued that it could not be subjected to the jurisdiction of the National Labor Relations Board on the theory that labor strife generally affects interstate commerce. *Id.* at 204. The Court rejected that contention, explaining:

> If industrial strife due to unfair labor practices actually brought about [a disruption to interstate commerce], we suppose that no one would question the authority of the Federal Government to intervene * * * . But it cannot be maintained that the exertion of federal power must await the disruption of that commerce. Congress was entitled to provide reasonable preventive measures and that was the object of the National Labor Relations Act.

Id. at 221-222; see *Maryland* v. *Wirtz*, 392 U.S. 183, 192 (1968); *McClung*, 379 U.S. at 301 ("With this situation spreading as the record shows, Congress was not required to await the total dislocation of commerce.").

The Court applied that preventive principle in *Raich*. Like respondents here, Raich claimed that Congress could not regulate her cultivation of marijuana for personal medical use because she was "entirely separated from the market." 545 U.S. at 30 (citation omitted). The Court rejected that artificial limit on Congress's commerce power, see *id.* at 25-33, because "marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market," *id.* at 40 (Scalia, J., concurring in the judgment). See *Thomas More*, 651 F.3d at 562 (Sutton, J.) ("Angel Raich * * * never entered *any* markets, whether interstate or intrastate, yet Congress regulated [her] nonetheless.").

The same principle applies here. Because of human susceptibility to disease and accident, we are all potentially never more than an instant from the "point of consumption" of health care (Pet. App. 118a), yet it is impossible to predict which of us will need it during any period of time. See *id.* at 210a (Marcus, J.); see also *Jones & Laughlin Steel Corp.*, 301 U.S. at 43 ("Congress [is] entitled to foresee and to exercise its protective power to forestall.").

Third, there is no practical way to limit an insurance requirement to those "who do not pay for a portion of their health care" (NFIB Cert.-Stage Br. 7). Health insurance, by definition, must be purchased before filing a claim. Individuals who think they can go without it will often turn out to be wrong. At the point health care is consumed, it is too late to avoid the market disruption caused by the shifting of risks and costs to others.

Respondents nonetheless attempt to subdivide the uninsured into cost-shifters (who they say can be regulated) and non-cost-shifters (who they say cannot be),

contending that "many healthy individuals make a rational choice to self-insure and are fully capable of paying for the care they receive," States C.A. Br. 30, and that uninsured individuals are able to properly consider their "actuarial risk in self-financing [their] healthcare," NFIB C.A. Br. 23. In reality, the number of those who go without insurance based on what they think is a "rational" choice is minuscule. See Graves 4 (less than three percent of uninsured non-elderly individuals say they have "no need for insurance"; most want coverage but report they cannot obtain it because of high cost or their job situation).

The circumstances of this case well illustrate the flaws in respondents' premises. At the outset of this litigation, respondent Mary Brown thought she had made a rational choice to forgo insurance: she said she did "not believe that the cost of health insurance coverage [was] a wise or acceptable use of [her] financial resources," J.A. 141, apparently believing that she could pay her medical bills out of pocket. That belief proved incorrect. Ms. Brown and her husband recently filed a petition for bankruptcy, and they list among their liabilities thousands of dollars in unpaid medical bills, including bills from out-of-state providers. See Katsas letter, n.5, *supra*, and attached Voluntary Petition, Sch. F. Those liabilities are uncompensated care that will ultimately be paid for by other market participants. As Congress found, Brown's experience is hardly atypical. 42 U.S.C.A. 18091(a)(2)(G) ("62 percent of all personal bankruptcies are caused in part by medical expenses.").

3. *The minimum coverage provision is fully consistent with* Lopez *and* Morrison *and the allocation of authority between the federal and state governments*

a. This Court's decisions in *Lopez* and *Morrison* confirm that respondents' challenges to the minimum coverage provision lack merit. In *Lopez*, the Court considered a stand-alone federal criminal statute, "not an essential part of a larger regulation of economic activity," that simply prohibited possession of a firearm near a school. 514 U.S. at 551, 561. The Court explained that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567. The government instead sought to justify the *Lopez* statute's connection to commerce primarily by "the threat that firearm possession in and near schools poses to the educational process and the potential economic consequences flowing from that threat." *Id.* at 565. That chain of causation was too attenuated. "To uphold the Government's contentions," the Court would have had "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567.

Likewise, in *Morrison*, the Court concluded that a statute "provid[ing] a federal civil remedy for the victims of gender-motivated violence" was beyond Congress's commerce power. 529 U.S. at 601-602, 613-619. Like the statute at issue in *Lopez*, the civil-remedy provision was not part of a larger scheme of economic regulation, and the Court emphasized that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* at 613. Accordingly,

defense of the statute rested on the same "method of reasoning" based on attenuated inferences that the Court in *Lopez* had "rejected as unworkable." *Id.* at 615.

The court of appeals' conclusion that the minimum coverage provision runs afoul of the limitations articulated in *Lopez* and *Morrison* (*e.g.*, Pet. App. 133a) thus is incorrect for at least two reasons. First, in both *Lopez* and *Morrison*, "[t]he Court emphasized the noneconomic nature of the regulated conduct" in finding it outside Congress's commerce power. *Sabri* v. *United States*, 541 U.S. 600, 607 (2004); see *Morrison*, 529 U.S. at 610 ("[T]he noneconomic, criminal nature of the conduct at issue [in *Lopez*] was central to our decision in that case."); *Raich*, 545 U.S. at 23, 25.

By contrast, "[h]ealth care and the means of paying for it are 'quintessentially economic' in a way that possessing guns near schools and domestic violence are not." *Thomas More*, 651 F.3d at 557-558 (Sutton, J.) (internal citations omitted); accord *Seven-Sky*, 661 F.3d at 16-17. As in *Raich*, "[b]ecause the [minimum coverage provision] is a statute that directly regulates economic, commercial activity, [the] opinion in *Morrison* casts no doubt on its constitutionality." 545 U.S. at 26.

Second, "[n]either [*Lopez* nor *Morrison*] involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation." *Raich*, 545 U.S. at 39 (Scalia, J., concurring in the judgment). "The statutory scheme that the Government is defending in this litigation is at the opposite end of the regulatory spectrum." *Id.* at 24; see pp. 27-32, *supra*.

Unlike the statutory provisions in *Lopez* and *Morrison*, the minimum coverage provision is justified on the

basis of a constitutional analysis that poses no risk of "convert[ing] congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. Respondents "have not argued that health care and health insurance are uniquely state concerns, and decades of established federal legislation in these areas suggest the contrary." *Seven-Sky*, 661 F.3d at 19. Indeed, respondents do not contest that Congress has the authority to enact the Act's comprehensive regulatory scheme; nor do they question the undeniably pervasive federal role in providing and regulating the methods of health care financing. See pp. 3-5, *supra*. They have also conceded that Congress could constitutionally achieve the end that the minimum coverage provision seeks to achieve through the (more coercive) means of prohibiting individuals without insurance from obtaining health care. Given those concessions, respondents cannot plausibly contend that the minimum coverage provision "upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power," *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring), or that it trenches upon areas such as family law, general criminal law, or education, "where States historically have been sovereign," *id.* at 564; see *Seven-Sky*, 661 F.3d at 18-19; *Thomas More*, 651 F.3d at 557 (Sutton, J.) (minimum coverage provision "steers clear of the central defect in the laws at issue in *Lopez* and *Morrison*").

b. Respondents, along with other parties challenging the minimum coverage provision, have contended that it regulates "inactivity" and for that reason is categorically beyond Congress's commerce authority. *E.g.*, States C.A. Br. 20-22. That effort to fashion an unprece-

dented limitation on the commerce power should be rejected.

i. There is no textual support in the Commerce Clause for respondents' "inactivity" limitation. See *Thomas More*, 651 F.3d at 560 (Sutton, J.); *Seven-Sky*, 661 F.3d at 16.

> At the time the Constitution was fashioned, to "regulate" meant, as it does now, "[t]o adjust by rule or method," as well as "[t]o *direct*." To "direct," in turn, included "[t]o prescribe certain measure[s]; to mark out a certain course," and "[t]o order; to command." In other words, to "regulate" can mean to require action.

Seven-Sky, 661 F.3d at 16 (quoting 2 Samuel Johnson, *Dictionary of the English Language* 514, 1619 (4th ed. 1773) (footnotes omitted)); see *Thomas More*, 651 F.3d at 561 (Sutton, J.) ("The power to regulate includes the power to prescribe and proscribe. Legislative prescriptions set forth rules of conduct, some of which require action.") (citations omitted). "Nor was the term 'commerce'" at the time of the founding "limited to only *existing* commerce." *Seven-Sky*, 661 F.3d at 16.

Apart from its lack of a textual foundation, respondents' effort to carve out an abstract category of "inactivity" from Congress's commerce power rests on a mode of analysis this Court long ago rejected. See *Seven-Sky*, 661 F.3d at 17-18. The Court once employed such categories by, for example, attempting to classify conduct as "'production,' 'manufacturing,' [or] 'mining'" and on that basis place that conduct beyond Congress's regulatory power. *Lopez*, 514 U.S. at 554; see also *id.* at 555 (discussing the Court's similar attempt to draw a

"distinction between 'direct' and 'indirect' effects on interstate commerce").

In the "new era of federal regulation under the commerce power," *Lopez*, 514 U.S. at 554, however, the Court has recognized that it is not appropriate to "draw content-based or subject-matter distinctions, thus defining by semantic or formalistic categories those activities that [are] commerce and those that [are] not." *Id.* at 569 (Kennedy, J., concurring). Instead of attempting to apply "mathematical or rigid formulas," the Court "recogni[zes] * * * the importance of a practical conception of the commerce power." *Id.* at 572-573 (Kennedy, J., concurring); see *Wickard*, 317 U.S. at 120 ("[Q]uestions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature.").

Under the Court's practical approach, it "ha[s] applied the well-settled principle that it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion." *Consolidated Edison Co.*, 305 U.S. at 222; see also, *e.g.*, *Jones & Laughlin Steel Corp.*, 301 U.S. at 32 (same). Here, for the reasons explained above, the practice of going without health insurance and seeking to pay for health care in other ways has a massive effect on interstate commerce. The attempt to immunize that conduct from regulation on the theory that it precedes entry into commerce would be analogous to earlier failed attempts to seal off conduct such as "manufacturing" from Congress's commerce power. See *Lopez*, 514 U.S. at 570 (Kennedy, J., concurring). The effort to impose a new "semantic or formalistic" limitation on Congress's commerce power (*id.* at 569) would fail in practice in any event, as did the last such attempts in the 1930s, because the analysis would

turn entirely on the easily malleable level of generality at which a regulation is characterized. See *Thomas More*, 651 F.3d at 560-561 (Sutton, J.) (providing examples); *Seven-Sky*, 661 F.3d at 17 (same).

ii. In any event, respondents are simply incorrect in describing the minimum coverage provision as a regulation of inactivity.

First, the uninsured as a class are active in the market for health care, which they regularly seek and obtain. The minimum coverage provision merely regulates how individuals finance and pay for that active participation—requiring that they do so through insurance, rather than through attempted self-insurance with the back-stop of shifting costs to others. See *Thomas More*, 651 F.3d at 557, 561 (Sutton, J.) ("No one is inactive when deciding how to pay for health care, as self-insurance and private insurance are two forms of action for addressing the same risk.").

In *Wickard*, this Court noted that the statute under review "restrict[ed] the amount which may be produced for market and the extent as well to which one may *forestall resort to the market* by producing to meet his own needs." 317 U.S. at 127 (emphasis added). Congress could regulate home-grown wheat because "it supplie[d] a need of the man who grew it which would otherwise be reflected by purchases in the open market." *Id.* at 128. Here, the constitutional foundation for Congress's action is considerably stronger. The minimum coverage provision regulates the way in which the uninsured finance what they will consume in the market for health care services (in which they participate), requiring that they "resort to the market" for insurance rather than attempt to "meet [their] own needs" through attempted self-insurance. *Id.* at 127.

Second, respondents' argument reflects a fundamental misunderstanding of the economics of insurance. Whether or not an individual receives health care services in any specific time period, he or she is always at risk of needing such services. Those who go without insurance to cover that risk—*i.e.*, who self-insure, but only for those medical expenses they will be able to afford—do not just shift *future costs* incurred when they later consume health care for which they cannot pay. They also shift *present risk* to other market participants, which is monetized in the form of higher insurance premiums now, not later, for those with insurance. The point of obtaining insurance is to internalize risk, which occurs when the insurance is obtained and the premium paid. Conversely, the failure to obtain insurance externalizes risk, and that externalization occurs at the time the insurance is not obtained. Moreover, the costs not paid by the uninsured and instead absorbed by others contribute to maintaining the ongoing viability of hospitals and other components of the Nation's health-care delivery system, which nonetheless will be available to the uninsured when they need them.

Third, even if the market for health insurance were regarded as distinct from the market for health-care services, the uninsured as a class are active in the health insurance market too. The majority of the uninsured are not permanently out of the insurance market, and the population typically moves in and out of coverage. See *Czajka*, 1, 10, 77 (more than half of uninsured spells by non-elderly adults during study period ended within six months).

iii. Finally, respondents' "inactivity" limitation "seems more redolent of Due Process Clause arguments" than any principled enumerated powers analysis.

Seven-Sky, 661 F.3d. at 19. "[I]t has no foundation in the Commerce Clause," where what "matters is whether the national problem Congress has identified is one that substantially affects interstate commerce." *Ibid.* For all of the reasons discussed above, the minimum coverage provision is an "appropriate" and "plainly adapted" means of achieving Congress's concededly legitimate ends. *McCulloch*, 17 U.S. (4 Wheat.) at 421. The Constitution entrusts the choice of that means to Congress, and there is no basis for invalidating the minimum coverage provision as beyond the commerce power, on the basis of respondents' "inactivity" argument or any other ground.

II. THE MINIMUM COVERAGE PROVISION IS INDEPENDENTLY AUTHORIZED BY CONGRESS'S TAXING POWER

A. The Minimum Coverage Provision Operates As A Tax Law

Congress's power "[t]o lay and collect Taxes, Duties, Imposts and Excises," Art. I, § 8, Cl. 1, provides an independent basis to uphold the constitutionality of the minimum coverage provision. The taxing power is "comprehensive." *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 581-582 (1937). In "passing on the constitutionality of a tax law," a court is "concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941) (citation omitted). The practical operation of the minimum coverage provision is as a tax law. It is fully integrated into the tax system, will raise substantial revenue, and triggers only tax consequences for non-compliance. See *Liberty University, Inc.* v. *Geithner*, No. 10-2347, 2011

WL 3962915, at *16-*22 (4th Cir. Sept. 8, 2011) (Wynn, J., concurring), petition for cert. pending, No. 11-438 (filed Oct. 7, 2011). The Court has never held that a revenue-raising provision bearing so many indicia of taxation was beyond Congress's taxing power, and it should not do so here.

1. The minimum coverage provision amends the Internal Revenue Code to provide that a non-exempted individual who must file a federal income tax return will owe a monetary penalty, in addition to the income tax itself, for any months in which the taxpayer or dependents lack minimum coverage. 26 U.S.C.A. 5000A. The amount of the penalty will be calculated as a percentage of household income for income tax purposes, subject to a floor and a cap. 26 U.S.C.A. 5000A(c). Individuals who are not required to file income tax returns for the taxable year are not subject to the penalty. 26 U.S.C.A. 5000A(e)(2). A taxpayer's responsibility for family members depends on their status as dependents under the Internal Revenue Code, 26 U.S.C.A. 5000A(a) and (b)(3), and taxpayers filing a joint tax return are jointly liable for the penalty, 26 U.S.C.A. 5000A(b)(3)(B).

The IRS will assess and collect the penalty in the same manner as assessable penalties under the Internal Revenue Code. 26 U.S.C.A. 5000A(b)(2) and (g). Under the federal income tax system, taxpayers self-declare their income and deductions on their returns and then calculate the income tax due on their taxable income. The penalty imposed under the minimum coverage provision will be self-declared on the taxpayer's income tax return in the same way. 26 U.S.C.A. 5000A(b)(2). In addition, the Act imposes reporting requirements on health insurance providers that will assist the IRS in identifying non-compliant taxpayers. 26 U.S.C.A. 6055.

Although the Act provides that the IRS may not use criminal prosecutions, notices of federal tax liens, or levies on property to collect an unpaid penalty, 26 U.S.C.A. 5000A(g)(2), the IRS may employ offsets against federal tax refunds, 26 U.S.C. 6402(a). The IRS also may seek payment through correspondence or phone calls from IRS employees. Offsets, correspondence, and phone calls are consistently some of the most productive tools in the federal tax collection process as measured by total dollars collected. See *Payroll Tax Abuse: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. & Gov't Affairs*, 110th Cong., 2d Sess. 137 (2008) (testimony of Linda Stiff, Deputy Comm'r, IRS). In addition, the Attorney General has general authority to file civil suits for unpaid tax liabilities. See 26 U.S.C. 6502, 7401 *et seq.*; *United States* v. *Chamberlin*, 219 U.S. 250, 261-262 (1911).

The court of appeals questioned the efficacy of those collection tools, see Pet. App. 151a-152a, but it did not take issue with the CBO's projection that the minimum coverage provision will raise billions of dollars in revenues for the general treasury each year. *Id.* at 167a; see Letter from Douglas Elmendorf, Director, CBO, to Nancy Pelosi, Speaker, House of Representatives, Tbl. 4 (Mar. 20, 2010) (provision will raise at least $4 billion each year once the penalty is fully implemented). In short, the minimum coverage provision will plainly be "productive of some revenue" and thus satisfies a key attribute of taxation. *Sonzinsky* v. *United States*, 300 U.S. 506, 514 (1937).

2. The court of appeals perceived the goal of the minimum coverage provision as reducing the number of uninsured people, not raising revenue. Pet. App. 164a.

A tax, however, "does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed." *United States* v. *Sanchez*, 340 U.S. 42, 44 (1950); *Seven-Sky*, 661 F.3d at 48 n.37 (Kavanaugh, J., dissenting).

"Every tax is in some measure regulatory" in that "it interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky*, 300 U.S. at 513; see *United States* v. *Kahriger*, 345 U.S. 22, 24 (1953). So long as the statute is "productive of some revenue," Congress may exercise its taxing powers irrespective of any "collateral inquiry as to the measure of the regulatory effect of a tax." *Sonzinsky*, 300 U.S. at 514. Accordingly, "[f]rom the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment." *Sanchez*, 340 U.S. at 45 (citation omitted). The Court has long "abandoned the view that bright-line distinctions exist between regulatory and revenue-raising taxes." *Bob Jones University* v. *Simon*, 416 U.S. 725, 743 n.17 (1974).

Congress, in fact, has long used taxing measures to expand health insurance coverage. See pp. 4-5, *supra*. The Affordable Care Act builds on those efforts and employs familiar tools of tax incentives and tax penalties to expand the availability of insurance as a means of payment for health care services. The Act provides tax credits to eligible small businesses that provide insurance to their employees, 26 U.S.C.A. 45R, and imposes a tax liability under certain circumstances on large employers that do not offer adequate coverage to full-time employees, 26 U.S.C.A. 4980H. In parallel fashion, it

provides tax credits for many individuals who purchase health insurance through an exchange, see 26 U.S.C.A. 36B, and, as a mirror image of those credits, it imposes tax penalties on non-exempted individuals who fail to maintain minimum coverage, 26 U.S.C.A. 5000A.

Each of these measures is a proper exercise of Congress's taxing power, and each reflects Congress's broad discretion to determine how much tax is owed. In particular, just as deductions, exemptions, and credits operate to reduce an individual taxpayer's federal income tax liability based on the personal circumstances of the taxpayer, the minimum coverage penalty operates to increase the taxpayer's total tax liability based on his individual circumstances. In that sense, the minimum coverage provision is valid not only as a tax in its own right,[10] but also as an adjunct to the income tax, as it merely provides an additional input in calculating the total amount owed on the taxpayer's income tax return.

B. The Validity Of An Assessment Under The Taxing Power Does Not Depend On Whether It Is Denominated A Tax

The court of appeals concluded that the minimum coverage provision cannot be upheld under Congress's taxing power because it refers to the increased tax liability as a "penalty" rather than as a "tax." Pet. App. 157a-172a; see *Thomas More*, 651 F.3d at 551. It is well established, however, that "an exaction's label" is

---

[10] See, *e.g.*, 26 U.S.C. 4974 (excise tax on failure to take "minimum required distribution" from qualified retirement plan);26 U.S.C. 4980B(a) (tax imposed if, under specified circumstances, a group health plan does not "meet the requirement[]" that it offer each qualified beneficiary an opportunity to continue receiving coverage under the plan when coverage would otherwise end); 26 U.S.C. 9707 (tax penalty on mine operators for "failure" to pay required health benefit premiums for coal industry workers).

not "germane to the constitutional inquiry." *Liberty University*, 2011 WL 3962915, at *17 (Wynn, J., concurring); accord *Seven-Sky*, 661 F.3d at 48 n.37 (Kavanaugh, J., dissenting). In "passing on the constitutionality of a tax law" under the taxing power, a court is "concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Nelson*, 312 U.S. at 363 (quoting *Lawrence* v. *State Tax Comm'n*, 286 U.S. 276, 280 (1932)).

Thus, in the *License Tax Cases*, 72 U.S. (5 Wall.) 462 (1867), this Court upheld under Congress's taxing power a statute that required persons pursuing intrastate gambling and liquor operations to pay for a "license" from federal tax authorities. That Congress had used the term "license" was irrelevant; the Court declared that the "granting of a license * * * must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it." *Id.* at 471. Similarly, in *New York* v. *United States*, 505 U.S. 144 (1992), the Court upheld as a "federal tax on interstate commerce" an assessment that was described in the statute as a percentage of "surcharge fees" on low-level radioactive waste. *Id.* at 171 (discussing 42 U.S.C. 2021e(d)(2)(A)).

The court of appeals nonetheless concluded that Congress had disavowed any reliance on its taxing power through its "deliberate choice of the term 'penalty.'" Pet. App. 169a. The suggestion that Congress disavowed its taxing power is insupportable. Congress placed the minimum coverage provision in the Internal Revenue Code (in Subtitle D, covering "Miscellaneous Excise Taxes"), gave the IRS enforcement power over it, and used the federal income tax return as the report-

ing mechanism. In addition, Congress's taxing power was expressly invoked to defeat constitutional points of order against the minimum coverage provision in the Senate. See 155 Cong. Rec. S13,830, S13,832 (daily ed. Dec. 23, 2009); see also 2010 House Report Pt. 1, at 265 (describing minimum coverage provision as a "tax on individuals who opt not to purchase health insurance"). And during the debates, congressional leaders defended the provision as an exercise of the taxing power. *E.g.*, 156 Cong. Rec. H1882 (daily ed. Mar. 21, 2010) (Rep. Miller); *id.* at H1826 (daily ed. Mar. 21, 2010) (Rep. Slaughter); 155 Cong. Rec. S13,751, S13,753 (daily ed. Dec. 22, 2009) (Sen. Leahy); *id.* at S13,581-13,582 (daily ed. Dec. 20, 2009) (statement of Sen. Baucus); see also Staff of Joint Comm. on Taxation, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," As Amended, in Combination with the "Patient Protection and Affordable Care Act,"* 31 (Mar. 21, 2010).

The court of appeals contrasted Congress's use of the term "penalty" in the minimum coverage provision with its use of the term "tax" in certain other provisions of the Act, *id.* at 160a-163a, and inferred that the term "penalty" was "carefully selected to denote a specific meaning," *id.* at 161a. That reasoning confused questions of statutory interpretation with the issue of congressional power. Congress's use of the term "penalty" has significance for purposes of statutory interpretation—most notably for the inapplicability of the Anti-Injunction Act, 26 U.S.C. 7421(a). But that does not justify reliance on labels to disregard the taxing power as a source of Congress's authority to enact the minimum coverage provision. To the contrary, "the constitutionality of action taken by Congress does not depend on

recitals of the power which it undertakes to exercise." *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). Rather than strain to characterize the provision as something other than a tax law, it was the court of appeals' duty to construe the provision to uphold its constitutionality, "unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality."). Accordingly, if the minimum coverage provision can reasonably be interpreted as a tax law—as it surely can be for the reasons given above—then it must be upheld as constitutional.

C. The Placement Of The Predicate For Imposition Of The Tax Penalty In A Separate Subsection Does Not Take The Minimum Coverage Provision Outside Congress's Taxing Power

It is beyond dispute that the taxing power would permit Congress to create incentives for the purchase of health insurance by "impos[ing] a lower tax rate on people with health insurance than those without it." *Thomas More*, 651 F.3d at 550. Similarly, the taxing power "readily" permits Congress to impose a "[t]ax on individuals without acceptable health care coverage." *Seven-Sky*, 661 F.3d at 49-50 (citation omitted) (Kavanaugh, J., dissenting). In Judge Kavanaugh's view, "[t]he only reason the current statute *may not* suffice under the Taxing Clause"—a question he did not ultimately decide—"is that Section 5000A arguably does not just incentivize certain kinds of lawful behavior but also mandates such behavior." *Id.* at 48 (citing 26 U.S.C.A. 5000A(a)) (footnote omitted). To the extent that the pro-

vision means that "a citizen who does not maintain health insurance might be acting *illegally*," Judge Kavanaugh reasoned, it might be outside Congress's tax power. *Id.* at 48-49.

Even in Judge Kavanaugh's view, however, a "minor tweak to the current statutory language would definitively establish the law's constitutionality under the Taxing Clause." *Seven-Sky*, 661 F.3d at 48. He suggested, for example, that

> Congress might retain the exactions and payment amounts as they are but eliminate the legal mandate language in Section 5000A, instead providing something to the effect of: "An applicable individual without minimum essential coverage must make a payment to the IRS on his or her tax return in the amounts listed in Section 5000A(c)."

Id. at 49.

In fact, no "minor tweak to the current statutory language" (*Seven-Sky*, 661 F.3d at 48 (Kavanaugh, dissenting)) is required because Section 5000A as currently drafted is materially indistinguishable from Judge Kavanaugh's proposed revision. Statutory provisions "must be read in * * * context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989)). When understood as an exercise of Congress's power over taxation and read in the context of Section 5000A as a whole, subsection (a) serves only as the predicate for tax consequences imposed by the rest of the section. It serves no other purpose in the statutory scheme. Section 5000A imposes no consequence other than a tax penalty for a taxpayer's

failure to maintain minimum coverage, and it thus establishes no independently enforceable legal obligation. Indeed, Congress's understanding that subsection (a) is not separate from the tax penalties associated with it is reflected in the reference later in Section 5000A to a "penalty * * * imposed under subsection (a)." 26 U.S.C.A. 5000A(e).

Even assuming there were ambiguity on the question whether subsection (a) establishes a free-standing obligation with independent consequences, any such ambiguity must be resolved in a manner that supports the constitutionality of the legislation, for two independent reasons. First, neither the Treasury Department nor the Department of Health and Human Services interprets Section 5000A as imposing a legal obligation on applicable individuals independent of its tax-penalty consequences; each instead views it as only a predicate provision for the imposition of tax consequences. Those are the two agencies to which Congress assigned authority to administer the minimum coverage provision, see, *e.g.*, 26 U.S.C.A. 5000A(f)(1)(E) and (g)(1), and their views are thus entitled to substantial deference.

Second, to the extent the constitutionality of Section 5000A under Congress's taxing power turns on whether subsection (a) creates an independent legal obligation, the statute must be read not to do so. The decision in *New York*, *supra*, is closely on point. There, the federal statute provided that "[e]ach State *shall* be responsible for providing * * * for the disposal of . . . low-level radioactive waste," 505 U.S. at 151 (quoting 42 U.S.C. 2021c(a)(1)(A)) (emphasis added), and set forth three sets of consequences for States that failed to meet statutory deadlines, *id.* at 152-154. Notwithstanding the statute's use of the term "shall," and its imposition of

"[p]enalties for failure to comply" with specified "[r]equirements," 42 U.S.C. 2021e(e)(1) and (2), this Court "decline[d] petitioners' invitation to construe § 2021c(a)(1)(A), alone and in isolation, as a command to the States independent of the remainder of the Act." *New York*, 505 U.S. at 170. The Court observed that the statute "could plausibly be understood either as a mandate to regulate or as a series of incentives," and that, under the petitioners' view of the statute as a mandate, Section 2021c(a)(1)(A) "would clearly commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Ibid.* (quotation marks and citation omitted). The Court rejected that interpretation and chose to interpret the statute as an integrated set of incentives, despite the fact that the challenged provision was, on its face, a stand-alone requirement in a separate statutory subsection. *Ibid.* The Court should follow the same course here in the event it concludes that the constitutionality of the minimum coverage provision under the tax power turns on whether subsection (a) creates a free-standing obligation.

CONCLUSION

The judgment of the court of appeals invalidating the minimum coverage provision should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

TONY WEST
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

BETH S. BRINKMANN
Deputy Assistant Attorney General

JOSEPH R. PALMORE
Assistant to the Solicitor General

MARK B. STERN
ALISA B. KLEIN
SAMANTHA L. CHAIFETZ
DANA KAERSVANG
Attorneys

GEORGE W. MADISON
General Counsel
Department of the Treasury

M. PATRICIA SMITH
Solicitor of Labor
Department of Labor

WILLIAM B. SCHULTZ
Acting General Counsel

KENNETH Y. CHOE
Deputy General Counsel
Department of Health and Human Services

JANUARY 2012

APPENDIX

1. Article I, Section 8 of the United States Constitution provides in relevant part:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

* * *

To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.

* * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

2. 26 U.S.C.A. 5000A provides:

Requirement to maintain minimum essential coverage

(a) Requirement to maintain minimum essential coverage.—An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

(b) **Shared responsibility payment.**—

(1) **In general.**—If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).

(2) **Inclusion with return.**—Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

(3) **Payment of penalty.**—If an individual with respect to whom a penalty is imposed by this section for any month—

(A) is a dependent (as defined in section 152) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

(B) files a joint return for the taxable year including such month, such individual and the spouse of such individual shall be jointly liable for such penalty.

(c) **Amount of penalty.**—

(1) In general.—The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to the lesser of—

(A) the sum of the monthly penalty amounts determined under paragraph (2) for months in the taxable year during which 1 or more such failures occurred, or

(B) an amount equal to the national average premium for qualified health plans which have a bronze level of coverage, provide coverage for the applicable family size involved, and are offered through Exchanges for plan years beginning in the calendar year with or within which the taxable year ends.

(2) **Monthly penalty amounts.**—For purposes of paragraph (1)(A), the monthly penalty amount with respect to any taxpayer for any month during which any failure described in subsection (b)(1) occurred is an amount equal to 1/12 of the greater of the following amounts:

(A) **Flat dollar amount.**—An amount equal to the lesser of—

(i) the sum of the applicable dollar amounts for all individuals with respect to whom such failure occurred during such month, or

(ii) 300 percent of the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

(B) **Percentage of income.**—An amount equal to the following percentage of the excess of the taxpayer's household income for the tax-

able year over the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer for the taxable year:

(i) 1.0 percent for taxable years beginning in 2014.

(ii) 2.0 percent for taxable years beginning in 2015.

(iii) 2.5 percent for taxable years beginning after 2015.

(3) **Applicable dollar amount.**—For purposes of paragraph (1)—

(A) **In general.**—Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $695.

(B) **Phase in.**—The applicable dollar amount is $95 for 2014 and $325 for 2015.

(C) **Special rule for individuals under age 18.**—If an applicable individual has not attained the age of 18 as of the beginning of a month, the applicable dollar amount with respect to such individual for the month shall be equal to one-half of the applicable dollar amount for the calendar year in which the month occurs.

(D) **Indexing of amount.**—In the case of any calendar year beginning after 2016, the applicable dollar amount shall be equal to $695, increased by an amount equal to—

(i) $695, multiplied by

(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year, determined by substituting "calendar year 2015" for "calendar year 1992" in subparagraph (B) thereof.

If the amount of any increase under clause (i) is not a multiple of $50, such increase shall be rounded to the next lowest multiple of $50.

(4) **Terms relating to income and families.**—For purposes of this section—

(A) **Family size.**—The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year.

(B) **Household income.**—The term "household income" means, with respect to any taxpayer for any taxable year, an amount equal to the sum of—

(i) the modified adjusted gross income of the taxpayer, plus

(ii) the aggregate modified adjusted gross incomes of all other individuals who—

(I) were taken into account in determining the taxpayer's family size under paragraph (1), and

(II) were required to file a return of tax imposed by section 1 for the taxable year.

(C) Modified adjusted gross income.—The term "modified adjusted gross income" means adjusted gross income increased by—

(i) any amount excluded from gross income under section 911, and

(ii) any amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax.

[(D) **Repealed.** Pub. L. 111-152, Title I, § 1002(b)(1), Mar. 30, 2010, 124 Stat. 1032]

(d) **Applicable individual.**—For purposes of this section—

(1) **In general.**—The term "applicable individual" means, with respect to any month, an individual other than an individual described in paragraph (2), (3), or (4).

(2) **Religious exemptions.**—

(A) **Religious conscience exemption.**—Such term shall not include any individual for any month if such individual has in effect an exemption under section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act which certifies that such individual is—

(i) a member of a recognized religious sect or division thereof which is described in section 1402(g)(1), and

(ii) an adherent of established tenets or teachings of such sect or division as described in such section.

(B) **Health care sharing ministry.**—

(i) **In general.**—Such term shall not include any individual for any month if such individual is a member of a health care sharing ministry for the month.

(ii) **Health care sharing ministry.**—The term "health care sharing ministry" means an organization—

(I) which is described in section 501(c)(3) and is exempt from taxation under section 501(a),

(II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,

(III) members of which retain membership even after they develop a medical condition,

(IV) which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and

without interruption since at least December 31, 1999, and

(V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.

(3) **Individuals not lawfully present.**—Such term shall not include an individual for any month if for the month the individual is not a citizen or national of the United States or an alien lawfully present in the United States.

(4) **Incarcerated individuals.**—Such term shall not include an individual for any month if for the month the individual is incarcerated, other than incarceration pending the disposition of charges.

(e) **Exemptions.**—No penalty shall be imposed under subsection (a) with respect to—

(1) **Individuals who cannot afford coverage.**—

(A) **In general.**—Any applicable individual for any month if the applicable individual's required contribution (determined on an annual basis) for coverage for the month exceeds 8 percent of such individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act. For purposes of applying this subparagraph, the taxpayer's household income shall be increased by any exclusion from gross income for any por-

tion of the required contribution made through a salary reduction arrangement.

(B) **Required contribution.**—For purposes of this paragraph, the term "required contribution" means—

(i) in the case of an individual eligible to purchase minimum essential coverage consisting of coverage through an eligible-employer-sponsored plan, the portion of the annual premium which would be paid by the individual (without regard to whether paid through salary reduction or otherwise) for self-only coverage, or

(ii) in the case of an individual eligible only to purchase minimum essential coverage described in subsection (f)(1)(C), the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides (without regard to whether the individual purchased a qualified health plan through the Exchange), reduced by the amount of the credit allowable under section 36B for the taxable year (determined as if the individual was covered by a qualified health plan offered through the Exchange for the entire taxable year).

(C) **Special rules for individuals related to employees.**—For purposes of subparagraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by

reason of a relationship to an employee, the determination under subparagraph (A) shall be made by reference to required contribution of the employee.

(D) **Indexing.**—In the case of plan years beginning in any calendar year after 2014, subparagraph (A) shall be applied by substituting for '8 percent' the percentage the Secretary of Health and Human Services determines reflects the excess of the rate of premium growth between the preceding calendar year and 2013 over the rate of income growth for such period.

(2) **Taxpayers with income below filing threshold.**—Any applicable individual for any month during a calendar year if the individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act is less than the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer.

(3) **Members of Indian tribes.**—Any applicable individual for any month during which the individual is a member of an Indian tribe (as defined in section 45A(c)(6)).

(4) **Months during short coverage gaps.**—

(A) **In general.**—Any month the last day of which occurred during a period in which the applicable individual was not covered by minimum essential coverage for a continuous period of less than 3 months.

(B) **Special rules.**—For purposes of applying this paragraph—

(i) the length of a continuous period shall be determined without regard to the calendar years in which months in such period occur,

(ii) if a continuous period is greater than the period allowed under subparagraph (A), no exception shall be provided under this paragraph for any month in the period, and

(iii) if there is more than 1 continuous period described in subparagraph (A) covering months in a calendar year, the exception provided by this paragraph shall only apply to months in the first of such periods.

The Secretary shall prescribe rules for the collection of the penalty imposed by this section in cases where continuous periods include months in more than 1 taxable year.

(5) **Hardships.**—Any applicable individual who for any month is determined by the Secretary of Health and Human Services under section 1311(d)(4)(H) to have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.

(f) **Minimum essential coverage.**—For purposes of this section—

(1) **In general.**—The term "minimum essential coverage" means any of the following:

(A) **Government sponsored programs.**—Coverage under—

(i) the Medicare program under part A of title XVIII of the Social Security Act,

(ii) the Medicaid program under title XIX of the Social Security Act,

(iii) the CHIP program under title XXI of the Social Security Act,

(iv) medical coverage under chapter 55 of title 10, United States Code, including coverage under the TRICARE program;

(v) a health care program under chapter 17 or 18 of title 38, United States Code, as determined by the Secretary of Veterans Affairs, in coordination with the Secretary of Health and Human Services and the Secretary,

(vi) a health plan under section 2504(e) of title 22, United States Code (relating to Peace Corps volunteers); or

(vii) the Nonappropriated Fund Health Benefits Program of the Department of Defense, established under section 349 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337; 10 U.S.C. 1587 note).

(B) **Employer-sponsored plan.**—Coverage under an eligible employer-sponsored plan.

(C) **Plans in the individual market.**—Coverage under a health plan offered in the individual market within a State.

(D) **Grandfathered health plan.**—Coverage under a grandfathered health plan.

(E) **Other coverage.**—Such other health benefits coverage, such as a State health benefits risk pool, as the Secretary of Health and Human Services, in coordination with the Secretary, recognizes for purposes of this subsection.

(2) **Eligible employer-sponsored plan.**—The term "eligible employer-sponsored plan" means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to the employee which is—

(A) a governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act), or

(B) any other plan or coverage offered in the small or large group market within a State.

Such term shall include a grandfathered health plan described in paragraph (1)(D) offered in a group market.

(3) **Excepted benefits not treated as minimum essential coverage.**—The term "minimum essential coverage" shall not include health insurance coverage which consists of coverage of excepted benefits—

(A) described in paragraph (1) of subsection (c) of section 2791 of the Public Health Service Act; or

(B) described in paragraph (2), (3), or (4) of such subsection if the benefits are provided un-

der a separate policy, certificate, or contract of insurance.

(4) Individuals residing outside United States or residents of territories.—Any applicable individual shall be treated as having minimum essential coverage for any month—

(A) if such month occurs during any period described in subparagraph (A) or (B) of section 911(d)(1) which is applicable to the individual, or

(B) if such individual is a bona fide resident of any possession of the United States (as determined under section 937(a)) for such month.

(5) Insurance-related terms.—Any term used in this section which is also used in title I of the Patient Protection and Affordable Care Act shall have the same meaning as when used in such title.

(g) Administration and procedure.—

(1) In general.—The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Special rules.—Notwithstanding any other provision of law—

(A) Waiver of criminal penalties.—In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.

(B) Limitations on liens and levies.—The Secretary shall not—

(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

(ii) levy on any such property with respect to such failure.

3. 42 U.S.C.A. 300gg provides:

Fair health insurance premiums

(a)[1] Prohibiting discriminatory premium rates

(1) In general

With respect to the premium rate charged by a health insurance issuer for health insurance coverage offered in the individual or small group market—

(A) such rate shall vary with respect to the particular plan or coverage involved only by—

(i) whether such plan or coverage covers an individual or family;

(ii) rating area, as established in accordance with paragraph (2);

(iii) age, except that such rate shall not vary by more than 3 to 1 for adults (consistent with section 300gg-6(c) of this title); and

---

[1] So in original. No subsec. (b) enacted.

(iv) tobacco use, except that such rate shall not vary by more than 1.5 to 1; and

(B) such rate shall not vary with respect to the particular plan or coverage involved by any other factor not described in subparagraph (A).

(2) **Rating area**

(A) **In general**

Each State shall establish 1 or more rating areas within that State for purposes of applying the requirements of this title.

(B) **Secretarial review**

The Secretary shall review the rating areas established by each State under subparagraph (A) to ensure the adequacy of such areas for purposes of carrying out the requirements of this title. If the Secretary determines a State's rating areas are not adequate, or that a State does not establish such areas, the Secretary may establish rating areas for that State.

(3) **Permissible age bands**

The Secretary, in consultation with the National Association of Insurance Commissioners, shall define the permissible age bands for rating purposes under paragraph (1)(A)(iii).

(4) **Application of variations based on age or tobacco use**

With respect to family coverage under a group health plan or health insurance coverage, the rating variations permitted under clauses (iii) and (iv) of

paragraph (1)(A) shall be applied based on the portion of the premium that is attributable to each family member covered under the plan or coverage.

(5) Special rule for large group market

If a State permits health insurance issuers that offer coverage in the large group market in the State to offer such coverage through the State Exchange (as provided for under section 18033(f)(2)(B) of this title), the provisions of this subsection shall apply to all coverage offered in such market (other than self-insured group health plans offered in such market) in the State.

4. 42 U.S.C.A. 300gg-1 will provide:*

Guaranteed availability of coverage

(a) Guaranteed issuance of coverage in the individual and group market

Subject to subsections (b) through (e), each health insurance issuer that offers health insurance coverage in the individual or group market in a State must accept every employer and individual in the State that applies for such coverage.

(b) Enrollment

(1) Restriction

A health insurance issuer described in subsection (a) may restrict enrollment in coverage de-

---

* See 42 U.S.C.A. 300gg-1 note.

scribed in such subsection to open or special enrollment periods.

(2) Establishment

A health insurance issuer described in subsection (a) shall, in accordance with the regulations promulgated under paragraph (3), establish special enrollment periods for qualifying events (under section 1163 of Title 29).

(3) Regulations

The Secretary shall promulgate regulations with respect to enrollment periods under paragraphs (1) and (2).

(c) Special rules for network plans

(1) In general

In the case of a health insurance issuer that offers health insurance coverage in the group and individual market through a network plan, the issuer may—

(A) limit the employers that may apply for such coverage to those with eligible individuals who live, work, or reside in the service area for such network plan; and

(B) within the service area of such plan, deny such coverage to such employers and individuals if the issuer has demonstrated, if required, to the applicable State authority that—

(i) it will not have the capacity to deliver services adequately to enrollees of any additional groups or any additional individuals be-

cause of its obligations to existing group contract holders and enrollees, and

(ii) it is applying this paragraph uniformly to all employers and individuals without regard to the claims experience of those individuals, employers and their employees (and their dependents) or any health status-related factor relating to such individuals employees and dependents.

(2) 180-day suspension upon denial of coverage

An issuer, upon denying health insurance coverage in any service area in accordance with paragraph (1)(B), may not offer coverage in the group or individual market within such service area for a period of 180 days after the date such coverage is denied.

(d) Application of financial capacity limits

(1) In general

A health insurance issuer may deny health insurance coverage in the group or individual market if the issuer has demonstrated, if required, to the applicable State authority that—

(A) it does not have the financial reserves necessary to underwrite additional coverage; and

(B) it is applying this paragraph uniformly to all employers and individuals in the group or individual market in the State consistent with applicable State law and without regard to the claims experience of those individuals, employers and their employees (and their dependents)

or any health status-related factor relating to such individuals, employees and dependents.

(2) 180-day suspension upon denial of coverage

A health insurance issuer upon denying health insurance coverage in connection with group health plans in accordance with paragraph (1) in a State may not offer coverage in connection with group health plans in the group or individual market in the State for a period of 180 days after the date such coverage is denied or until the issuer has demonstrated to the applicable State authority, if required under applicable State law, that the issuer has sufficient financial reserves to underwrite additional coverage, whichever is later. An applicable State authority may provide for the application of this subsection on a service-area-specific basis.

5. 42 U.S.C.A. 300gg-3 provides:

Prohibition of preexisting condition exclusions or other discrimination based on health status

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage may not impose any preexisting condition exclusion with respect to such plan or coverage.

(b) Definitions

For purposes of this part—

(1) Preexisting condition exclusion

(A) In general

The term "preexisting condition exclusion" means, with respect to coverage, a limitation or exclusion of benefits relating to a condition based on the fact that the condition was present before the date of enrollment for such coverage, whether or not any medical advice, diagnosis, care, or treatment was recommended or received before such date.

(B) Treatment of genetic information

Genetic information shall not be treated as a condition described in subsection (a)(1) of this section in the absence of a diagnosis of the condition related to such information.

(2) Enrollment date

The term "enrollment date" means, with respect to an individual covered under a group health plan or health insurance coverage, the date of enrollment of the individual in the plan or coverage or, if earlier, the first day of the waiting period for such enrollment.

(3) Late enrollee

The term "late enrollee" means, with respect to coverage under a group health plan, a participant or beneficiary who enrolls under the plan other than during—

(A) the first period in which the individual is eligible to enroll under the plan, or

(B) a special enrollment period under subsection (f) of this section.

(4) Waiting period

The term "waiting period" means, with respect to a group health plan and an individual who is a potential participant or beneficiary in the plan, the period that must pass with respect to the individual before the individual is eligible to be covered for benefits under the terms of the plan.

(c) Rules relating to crediting previous coverage

(1) "Creditable coverage" defined

For purposes of this subchapter, the term "creditable coverage" means, with respect to an individual, coverage of the individual under any of the following:

(A) A group health plan.

(B) Health insurance coverage.

(C) Part A or part B of title XVIII of the Social Security Act [42 U.S.C.A. § 1395c et seq. or § 1395j et seq.].

(D) Title XIX of the Social Security Act [42 U.S.C.A. § 1396 et seq.], other than coverage consisting solely of benefits under section 1928 [42 U.S.C.A. § 1396s].

(E) Chapter 55 of Title 10.

(F) A medical care program of the Indian Health Service or of a tribal organization.

(G) A State health benefits risk pool.

(H) A health plan offered under chapter 89 of Title 5.

(I) A public health plan (as defined in regulations).

(J) A health benefit plan under section 2504(e) of Title 22.

Such term does not include coverage consisting solely of coverage of excepted benefits (as defined in section 300gg-91(c) of this title).

(2) Not counting periods before significant breaks in coverage

(A) In general

A period of creditable coverage shall not be counted, with respect to enrollment of an individual under a group or individual health plan, if, after such period and before the enrollment date, there was a 63-day period during all of which the individual was not covered under any creditable coverage.

(B) Waiting period not treated as a break in coverage

For purposes of subparagraph (A) and subsection (d)(4) of this section, any period that an individual is in a waiting period for any coverage under a group or individual health plan (or for group health insurance coverage) or is in an affiliation period (as defined in subsection (g)(2) of this section) shall not be taken into account in determining the continuous period under subparagraph (A).

(C) TAA-eligible individuals

In the case of plan years beginning before February 13, 2011—

(i) TAA pre-certification period rule

In the case of a TAA-eligible individual, the period beginning on the date the individual has a TAA-related loss of coverage and ending on the date that is 7 days after the date of the issuance by the Secretary (or by any person or entity designated by the Secretary) of a qualified health insurance costs credit eligibility certificate for such individual for purposes of section 7527 of Title 26 shall not be taken into account in determining the continuous period under subparagraph (A).

(ii) Definitions

The terms "TAA-eligible individual" and "TAA-related loss of coverage" have the meanings given such terms in section 300bb-5(b)(4) of this title.

(3) Method of crediting coverage

(A) Standard method

Except as otherwise provided under subparagraph (B), for purposes of applying subsection (a)(3) of this section, a group health plan, and a health insurance issuer offering group or individual health insurance coverage, shall count a period of creditable coverage without regard to the specific benefits covered during the period.

(B) Election of alternative method

A group health plan, or a health insurance issuer offering group or individual health insurance, may elect to apply subsection (a)(3) of this section based on coverage of benefits within each of several classes or categories of benefits specified in regulations rather than as provided under subparagraph (A). Such election shall be made on a uniform basis for all participants and beneficiaries. Under such election a group health plan or issuer shall count a period of creditable coverage with respect to any class or category of benefits if any level of benefits is covered within such class or category.

(C) Plan notice

In the case of an election with respect to a group health plan under subparagraph (B) (whether or not health insurance coverage is provided in connection with such plan), the plan shall—

(i) prominently state in any disclosure statements concerning the plan, and state to each enrollee at the time of enrollment under the plan, that the plan has made such election, and

(ii) include in such statements a description of the effect of this election.

(D) Issuer notice

In the case of an election under subparagraph (B) with respect to health insurance coverage of-

fered by an issuer in the individual or group group[1] market, the issuer—

(i) shall prominently state in any disclosure statements concerning the coverage, and to each employer at the time of the offer or sale of the coverage, that the issuer has made such election, and

(ii) shall include in such statements a description of the effect of such election.

(4) Establishment of period

Periods of creditable coverage with respect to an individual shall be established through presentation of certifications described in subsection (e) of this section or in such other manner as may be specified in regulations.

(d) Exceptions

(1) Exclusion not applicable to certain newborns

Subject to paragraph (4), a group health plan, and a health insurance issuer offering group or individual health insurance coverage, may not impose any preexisting condition exclusion in the case of an individual who, as of the last day of the 30-day period beginning with the date of birth, is covered under creditable coverage.

(2) Exclusion not applicable to certain adopted children

Subject to paragraph (4), a group health plan, and a health insurance issuer offering group or individual

---

[1] So in original.

health insurance coverage, may not impose any preexisting condition exclusion in the case of a child who is adopted or placed for adoption before attaining 18 years of age and who, as of the last day of the 30-day period beginning on the date of the adoption or placement for adoption, is covered under creditable coverage. The previous sentence shall not apply to coverage before the date of such adoption or placement for adoption.

(3) Exclusion not applicable to pregnancy

A group health plan, and health insurance issuer offering group or individual health insurance coverage, may not impose any preexisting condition exclusion relating to pregnancy as a preexisting condition.

(4) Loss if break in coverage

Paragraphs (1) and (2) shall no longer apply to an individual after the end of the first 63-day period during all of which the individual was not covered under any creditable coverage.

(e) Certifications and disclosure of coverage

(1) Requirement for certification of period of creditable coverage

(A) In general

A group health plan, and a health insurance issuer offering group or individual health insurance coverage, shall provide the certification described in subparagraph (B)—

(i) at the time an individual ceases to be covered under the plan or otherwise becomes covered under a COBRA continuation provision,

(ii) in the case of an individual becoming covered under such a provision, at the time the individual ceases to be covered under such provision, and

(iii) on the request on behalf of an individual made not later than 24 months after the date of cessation of the coverage described in clause (i) or (ii), whichever is later.

The certification under clause (i) may be provided, to the extent practicable, at a time consistent with notices required under any applicable COBRA continuation provision.

(B) Certification

The certification described in this subparagraph is a written certification of—

(i) the period of creditable coverage of the individual under such plan and the coverage (if any) under such COBRA continuation provision, and

(ii) the waiting period (if any) (and affiliation period, if applicable) imposed with respect to the individual for any coverage under such plan.

(C) Issuer compliance

To the extent that medical care under a group health plan consists of group health insurance coverage, the plan is deemed to have satisfied the cer-

tification requirement under this paragraph if the health insurance issuer offering the coverage provides for such certification in accordance with this paragraph.

(2) Disclosure of information on previous benefits

In the case of an election described in subsection (c)(3)(B) of this section by a group health plan or health insurance issuer, if the plan or issuer enrolls an individual for coverage under the plan and the individual provides a certification of coverage of the individual under paragraph (1)—

(A) upon request of such plan or issuer, the entity which issued the certification provided by the individual shall promptly disclose to such requesting plan or issuer information on coverage of classes and categories of health benefits available under such entity's plan or coverage, and

(B) such entity may charge the requesting plan or issuer for the reasonable cost of disclosing such information.

(3) Regulations

The Secretary shall establish rules to prevent an entity's failure to provide information under paragraph (1) or (2) with respect to previous coverage of an individual from adversely affecting any subsequent coverage of the individual under another group health plan or health insurance coverage.

(f) Special enrollment periods

(1) Individuals losing other coverage

A group health plan, and a health insurance issuer offering group health insurance coverage in connection with a group health plan, shall permit an employee who is eligible, but not enrolled, for coverage under the terms of the plan (or a dependent of such an employee if the dependent is eligible, but not enrolled, for coverage under such terms) to enroll for coverage under the terms of the plan if each of the following conditions is met:

(A) The employee or dependent was covered under a group health plan or had health insurance coverage at the time coverage was previously offered to the employee or dependent.

(B) The employee stated in writing at such time that coverage under a group health plan or health insurance coverage was the reason for declining enrollment, but only if the plan sponsor or issuer (if applicable) required such a statement at such time and provided the employee with notice of such requirement (and the consequences of such requirement) at such time.

(C) The employee's or dependent's coverage described in subparagraph (A)—

(i) was under a COBRA continuation provision and the coverage under such provision was exhausted; or

(ii) was not under such a provision and either the coverage was terminated as a result of loss

of eligibility for the coverage (including as a result of legal separation, divorce, death, termination of employment, or reduction in the number of hours of employment) or employer contributions toward such coverage were terminated.

(D) Under the terms of the plan, the employee requests such enrollment not later than 30 days after the date of exhaustion of coverage described in subparagraph (C)(i) or termination of coverage or employer contribution described in subparagraph (C)(ii).

(2) **For dependent beneficiaries**

(A) **In general**

If—

(i) a group health plan makes coverage available with respect to a dependent of an individual,

(ii) the individual is a participant under the plan (or has met any waiting period applicable to becoming a participant under the plan and is eligible to be enrolled under the plan but for a failure to enroll during a previous enrollment period), and

(iii) a person becomes such a dependent of the individual through marriage, birth, or adoption or placement for adoption,

the group health plan shall provide for a dependent special enrollment period described in subparagraph (B) during which the person (or, if not other-

wise enrolled, the individual) may be enrolled under the plan as a dependent of the individual, and in the case of the birth or adoption of a child, the spouse of the individual may be enrolled as a dependent of the individual if such spouse is otherwise eligible for coverage.

(B) Dependent special enrollment period

A dependent special enrollment period under this subparagraph shall be a period of not less than 30 days and shall begin on the later of—

(i) the date dependent coverage is made available, or

(ii) the date of the marriage, birth, or adoption or placement for adoption (as the case may be) described in subparagraph (A)(iii).

(C) No waiting period

If an individual seeks to enroll a dependent during the first 30 days of such a dependent special enrollment period, the coverage of the dependent shall become effective—

(i) in the case of marriage, not later than the first day of the first month beginning after the date the completed request for enrollment is received;

(ii) in the case of a dependent's birth, as of the date of such birth; or

(iii) in the case of a dependent's adoption or placement for adoption, the date of such adoption or placement for adoption.

(3) Special rules for application in case of Medicaid and CHIP

(A) In general

A group health plan, and a health insurance issuer offering group health insurance coverage in connection with a group health plan, shall permit an employee who is eligible, but not enrolled, for coverage under the terms of the plan (or a dependent of such an employee if the dependent is eligible, but not enrolled, for coverage under such terms) to enroll for coverage under the terms of the plan if either of the following conditions is met:

(i) Termination of Medicaid or CHIP coverage

The employee or dependent is covered under a Medicaid plan under title XIX of the Social Security Act [42 U.S.C.A. 1396 et seq.] or under a State child health plan under title XXI of such Act [42 U.S.C.A. 1397aa et seq.] and coverage of the employee or dependent under such a plan is terminated as a result of loss of eligibility for such coverage and the employee requests coverage under the group health plan (or health insurance coverage) not later than 60 days after the date of termination of such coverage.

(ii) Eligibility for employment assistance under Medicaid or CHIP

The employee or dependent becomes eligible for assistance, with respect to coverage under the group health plan or health insurance coverage, under such Medicaid plan or State child health plan (including under any waiver or dem-

onstration project conducted under or in relation to such a plan), if the employee requests coverage under the group health plan or health insurance coverage not later than 60 days after the date the employee or dependent is determined to be eligible for such assistance.

(B) Coordination with Medicaid and CHIP

(i) Outreach to employees regarding availability of Medicaid and CHIP coverage

(I) In general

Each employer that maintains a group health plan in a State that provides medical assistance under a State Medicaid plan under title XIX of the Social Security Act [42 U.S.C.A 1396 et seq.], or child health assistance under a State child health plan under title XXI of such Act [42 U.S.C.A 1397aa et seq.], in the form of premium assistance for the purchase of coverage under a group health plan, shall provide to each employee a written notice informing the employee of potential opportunities then currently available in the State in which the employee resides for premium assistance under such plans for health coverage of the employee or the employee's dependents. For purposes of compliance with this subclause, the employer may use any State-specific model notice developed in accordance with section 1181(f)(3)(B)(i)(II) of Title 29.

(II) Option to provide concurrent with provision of plan materials to employee

An employer may provide the model notice applicable to the State in which an employee resides concurrent with the furnishing of materials notifying the employee of health plan eligibility, concurrent with materials provided to the employee in connection with an open season or election process conducted under the plan, or concurrent with the furnishing of the summary plan description as provided in section 1024(b) of Title 29.

(ii) Disclosure about group health plan benefits to States for Medicaid and CHIP eligible individuals

In the case of an enrollee in a group health plan who is covered under a Medicaid plan of a State under title XIX of the Social Security Act [42 U.S.C.A 1396 et seq.] or under a State child health plan under title XXI of such Act [42 U.S.C.A 1397aa et seq.], the plan administrator of the group health plan shall disclose to the State, upon request, information about the benefits available under the group health plan in sufficient specificity, as determined under regulations of the Secretary of Health and Human Services in consultation with the Secretary that require use of the model coverage coordination disclosure form developed under section 311(b)(1)(C) of the Children's Health Insurance Reauthorization Act of 2009, so as to permit the State to make a determination (under paragraph (2)(B), (3), or (10) of section 2105(c) of the Social Security Act [42 U.S.C.A 1397ee(c)(2)(B),

(3), (10)] or otherwise) concerning the cost-effectiveness of the State providing medical or child health assistance through premium assistance for the purchase of coverage under such group health plan and in order for the State to provide supplemental benefits required under paragraph (10)(E) of such section or other authority.

(g) Use of affiliation period by HMOs as alternative to preexisting condition exclusion

(1) In general

A health maintenance organization which offers health insurance coverage in connection with a group health plan and which does not impose any preexisting condition exclusion allowed under subsection (a) of this section with respect to any particular coverage option may impose an affiliation period for such coverage option, but only if—

(A) such period is applied uniformly without regard to any health status-related factors; and

(B) such period does not exceed 2 months (or 3 months in the case of a late enrollee).

(2) Affiliation period

(A) "Affiliation period" defined

For purposes of this subchapter, the term "affiliation period" means a period which, under the terms of the health insurance coverage offered by the health maintenance organization, must expire before the health insurance coverage becomes effective. The organization is not required to provide health care services or benefits during such period

and no premium shall be charged to the participant or beneficiary for any coverage during the period.

(B) Beginning

Such period shall begin on the enrollment date.

(C) Runs concurrently with waiting periods

An affiliation period under a plan shall run concurrently with any waiting period under the plan.

(3) Alternative methods

A health maintenance organization described in paragraph (1) may use alternative methods, from those described in such paragraph, to address adverse selection as approved by the State insurance commissioner or official or officials designated by the State to enforce the requirements of this part for the State involved with respect to such issuer.

6. 42 U.S.C.A. 300gg-4 provides in pertinent part:

Prohibiting discrimination against individual participants and beneficiaries based on health status

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage may not establish rules for eligibility (including continued eligibility) of any individual to enroll under the terms of the plan or coverage based on any of the following health status-related factors in relation to the individual or a dependent of the individual:

(1) Health status.

(2) Medical condition (including both physical and mental illnesses).

(3) Claims experience.

(4) Receipt of health care.

(5) Medical history.

(6) Genetic information.

(7) Evidence of insurability (including conditions arising out of acts of domestic violence).

(8) Disability.

(9) Any other health status-related factor determined appropriate by the Secretary.

(b) In premium contributions

(1) In general

A group health plan, and a health insurance issuer offering group or individual health insurance coverage, may not require any individual (as a condition of enrollment or continued enrollment under the plan) to pay a premium or contribution which is greater than such premium or contribution for a similarly situated individual enrolled in the plan on the basis of any health status-related factor in relation to the individual or to an individual enrolled under the plan as a dependent of the individual.

(2) Construction

Nothing in paragraph (1) shall be construed—

(A) to restrict the amount that an employer or individual may be charged for coverage under a group health plan except as provided in paragraph (3) or individual health coverage, as the case may be; or

(B) to prevent a group health plan, and a health insurance issuer offering group health insurance coverage, from establishing premium discounts or rebates or modifying otherwise applicable copayments or deductibles in return for adherence to programs of health promotion and disease prevention.

(3) No group-based discrimination on basis of genetic information

(A) In general

For purposes of this section, a group health plan, and health insurance issuer offering group health insurance coverage in connection with a group health plan, may not adjust premium or contribution amounts for the group covered under such plan on the basis of genetic information.

(B) Rule of construction

Nothing in subparagraph (A) or in paragraphs (1) and (2) of subsection (d) shall be construed to limit the ability of a health insurance issuer offering group or individual health insurance coverage to increase the premium for an employer based on the manifestation of a disease or disorder of an individual who is enrolled in the plan. In such case, the manifestation of a disease or disorder in one individual cannot also be used as genetic informa-

tion about other group members and to further increase the premium for the employer.

* * * * *

7. 42 U.S.C.A. 18091 provides:

Requirement to maintain minimum essential coverage

(a) Findings

Congress makes the following findings:

(1) In general

The individual responsibility requirement provided for in this section (in this subsection referred to as the "requirement") is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2).

(2) Effects on the national economy and interstate commerce

The effects described in this paragraph are the following:

(A) The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased. In the absence of the requirement, some individuals would make an economic and financial decision to forego health insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers.

(B) Health insurance and health care services are a significant part of the national economy. National health spending is projected to increase from $2,500,000,000,000, or 17.6 percent of the economy, in 2009 to $4,700,000,000,000 in 2019. Private health insurance spending is projected to be $854,000,000,000 in 2009, and pays for medical supplies, drugs, and equipment that are shipped in interstate commerce. Since most health insurance is sold by national or regional health insurance companies, health insurance is sold in interstate commerce and claims payments flow through interstate commerce.

(C) The requirement, together with the other provisions of this Act, will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services, and will increase the number and share of Americans who are insured.

(D) The requirement achieves near-universal coverage by building upon and strengthening the private employer-based health insurance system, which covers 176,000,000 Americans nationwide. In Massachusetts, a similar requirement has strengthened private employer-based coverage: despite the economic downturn, the number of workers offered employer-based coverage has actually increased.

(E) The economy loses up to $207,000,000,000 a year because of the poorer health and shorter lifespan of the uninsured. By significantly reducing the number of the uninsured, the re-

quirement, together with the other provisions of this Act, will significantly reduce this economic cost.

(F) The cost of providing uncompensated care to the uninsured was $43,000,000,000 in 2008. To pay for this cost, health care providers pass on the cost to private insurers, which pass on the cost to families. This cost-shifting increases family premiums by on average over $1,000 a year. By significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will lower health insurance premiums.

(G) 62 percent of all personal bankruptcies are caused in part by medical expenses. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will improve financial security for families.

(H) Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 *et seq.*), the Public Health Service Act (42 U.S.C. 201 *et seq.*), and this Act, the Federal Government has a significant role in regulating health insurance. The requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market.

(I) Under sections 2704 and 2705 of the Public Health Service Act (as added by section 1201 of this Act), if there were no requirement, many

individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.

(J) Administrative costs for private health insurance, which were $90,000,000,000 in 2006, are 26 to 30 percent of premiums in the current individual and small group markets. By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the requirement, together with the other provisions of this Act, will significantly reduce administrative costs and lower health insurance premiums. The requirement is essential to creating effective health insurance markets that do not require underwriting and eliminate its associated administrative costs.

(3) Supreme Court ruling

In *United States v. South-Eastern Underwriters Association* (322 U.S. 533 (1944)), the Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation.

8. 29 U.S.C. 1182 (2006 & Supp. III 2009) provides in pertinent part:

Prohibiting discrimination against individual participants and beneficiaries based on health status

(a) In eligibility to enroll

(1) In general

Subject to paragraph (2), a group health plan, and a health insurance issuer offering group health insurance coverage in connection with a group health plan, may not establish rules for eligibility (including continued eligibility) of any individual to enroll under the terms of the plan based on any of the following health status-related factors in relation to the individual or a dependent of the individual:

(A) Health status.

(B) Medical condition (including both physical and mental illnesses).

(C) Claims experience.

(D) Receipt of health care.

(E) Medical history.

(F) Genetic information.

(G) Evidence of insurability (including conditions arising out of acts of domestic violence).

(H) Disability.

(2) No application to benefits or exclusions

To the extent consistent with section 1181 of this title, paragraph (1) shall not be construed—

(A) to require a group health plan, or group health insurance coverage, to provide particular benefits other than those provided under the terms of such plan or coverage, or

(B) to prevent such a plan or coverage from establishing limitations or restrictions on the amount, level, extent, or nature of the benefits or coverage for similarly situated individuals enrolled in the plan or coverage.

(3) Construction

For purposes of paragraph (1), rules for eligibility to enroll under a plan include rules defining any applicable waiting periods for such enrollment.

(b) In premium contributions

(1) In general

A group health plan, and a health insurance issuer offering health insurance coverage in connection with a group health plan, may not require any individual (as a condition of enrollment or continued enrollment under the plan) to pay a premium or contribution which is greater than such premium or contribution for a similarly situated individual enrolled in the plan on the basis of any health status-related factor in relation to the individual or to an individual enrolled under the plan as a dependent of the individual.

(2) Construction

Nothing in paragraph (1) shall be construed—

(A) to restrict the amount that an employer may be charged for coverage under a group health plan except as provided in paragraph (3); or

(B) to prevent a group health plan, and a health insurance issuer offering group health insurance coverage, from establishing premium discounts or rebates or modifying otherwise applicable copayments or deductibles in return for adherence to programs of health promotion and disease prevention.

(3) No group-based discrimination on basis of genetic information

(A) In general

For purposes of this section, a group health plan, and a health insurance issuer offering group health insurance coverage in connection with a group health plan, may not adjust premium or contribution amounts for the group covered under such plan on the basis of genetic information.

(B) Rule of construction

Nothing in subparagraph (A) or in paragraphs (1) and (2) of subsection (d) shall be construed to limit the ability of a health insurance issuer offering health insurance coverage in connection with a group health plan to increase the premium for an employer based on the manifestation of a disease or disorder of an individual who is enrolled in the plan. In such case, the manifestation of a disease or disorder in one individual cannot also be used as genetic information about other group members and to further increase the premium for the employer.

* * * * *

9. 42 U.S.C. 300gg-1 (2006) provides:

Prohibiting discrimination against individual participants and beneficiaries based on health status (a)

(a) In eligibility to enroll

(1) In general

Subject to paragraph (2), a group health plan, and a health insurance issuer offering group health insurance coverage in connection with a group health plan, may not establish rules for eligibility (including continued eligibility) of any individual to enroll under the terms of the plan based on any of the following health status-related factors in relation to the individual or a dependent of the individual:

(A) Health status.

(B) Medical condition (including both physical and mental illnesses).

(C) Claims experience.

(D) Receipt of health care.

(E) Medical history.

(F) Genetic information.

(G) Evidence of insurability (including conditions arising out of acts of domestic violence).

(H) Disability.

(2) No application to benefits or exclusions

To the extent consistent with section 300gg of this title, paragraph (1) shall not be construed—

(A) to require a group health plan, or group health insurance coverage, to provide particular benefits other than those provided under the terms of such plan or coverage, or

(B) to prevent such a plan or coverage from establishing limitations or restrictions on the amount, level, extent, or nature of the benefits or coverage for similarly situated individuals enrolled in the plan or coverage.

(3) Construction

For purposes of paragraph (1), rules for eligibility to enroll under a plan include rules defining any applicable waiting periods for such enrollment.

(b) In premium contributions

(1) In general

A group health plan, and a health insurance issuer offering health insurance coverage in connection with a group health plan, may not require any individual (as a condition of enrollment or continued enrollment under the plan) to pay a premium or contribution which is greater than such premium or contribution for a similarly situated individual enrolled in the plan on the basis of any health status-related factor in relation to the individual or to an individual enrolled under the plan as a dependent of the individual.

(2) Construction

Nothing in paragraph (1) shall be construed—

(A) to restrict the amount that an employer may be charged for coverage under a group health plan; or

(B) to prevent a group health plan, and a health insurance issuer offering group health insurance coverage, from establishing premium discounts or rebates or modifying otherwise applicable copayments or deductibles in return for adherence to programs of health promotion and disease prevention.

10. 42 U.S.C. 300gg-11(a) (2006) provides:

Guaranteed availability of coverage for employers in group market

(a) Issuance of coverage in small group market

(1) In general

Subject to subsections (c) through (f) of this section, each health insurance issuer that offers health insurance coverage in the small group market in a State—

(A) must accept every small employer (as defined in section 300gg-91(e)(4) of this title) in the State that applies for such coverage; and

(B) must accept for enrollment under such coverage every eligible individual (as defined in paragraph (2)) who applies for enrollment during the period in which the individual first becomes eligible to enroll under the terms of the group health plan and may not place any restriction which is inconsis-

tent with section 300gg-1 of this title on an eligible individual being a participant or beneficiary.

(2) "Eligible individual" defined

For purposes of this section, the term "eligible individual" means, with respect to a health insurance issuer that offers health insurance coverage to a small employer in connection with a group health plan in the small group market, such an individual in relation to the employer as shall be determined—

(A) in accordance with the terms of such plan,

(B) as provided by the issuer under rules of the issuer which are uniformly applicable in a State to small employers in the small group market, and

(C) in accordance with all applicable State laws governing such issuer and such market.

PETITIONER'S BRIEF

No. 11-398

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONERS
(Anti-Injunction Act)

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JOHN A. DICICCO
Principal Deputy Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

LEONDRA R. KRUGER
Assistant to the Solicitor General

MARK B. STERN
ALISA B. KLEIN
JOEL MCELVAIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

GEORGE W. MADISON
General Counsel
Department of the Treasury
Washington, D.C. 20220

M. PATRICIA SMITH
Solicitor of Labor
Department of Labor
Washington, D.C. 20210

WILLIAM B. SCHULTZ
Acting General Counsel

KENNETH Y. CHOE
Deputy General Counsel
Department of Health and Human Services
Washington, D.C. 20201

QUESTION PRESENTED

The minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, provides that, beginning in 2014, non-exempted federal income taxpayers who fail to maintain a minimum level of health insurance for themselves or their dependents will owe a penalty, calculated in part on the basis of the taxpayer's household income and reported on the taxpayer's federal income tax return, for each month in which coverage is not maintained in the taxable year. 26 U.S.C. 5000A (Supp. IV 2010).

The question presented is whether the suit brought by respondents to challenge the minimum coverage provision is barred by the Anti-Injunction Act, 26 U.S.C. 7421(a).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 2
A. Statutory background 2
B. Proceedings below 3
Summary of argument 5
Argument:
Respondents' challenge to the minimum coverage provision of the Affordable Care Act is not barred by the Anti-Injunction Act 8
A. Where it applies, the Anti-Injunction Act imposes a jurisdictional limitation on the courts' adjudicatory authority 8
B. The Anti-Injunction Act does not bar respondents' challenge to the constitutionality of the minimum coverage provision 20
1. The AIA does not bar challenges to every exercise of Congress's taxing power, but bars only those impositions designated as or deemed to be "taxes" for purposes of the Internal Revenue Code 20
2. The statutory directive that the minimum coverage penalty shall be assessed and collected in the same manner as assessable penalties is a procedural instruction to the Secretary rather than a jurisdictional instruction to the courts 31

3. The conclusion that the AIA does not bar respondents' pre-enforcement challenge to Section 5000A does not undermine the protections of the AIA and other bars to relief .. 35

C. If the AIA otherwise applies, respondents cannot avoid its application by recharacterizing their challenge as focused solely on the "requirement" to maintain minimum essential coverage, without regard to the penalty 38

D. States are subject to the limitations of the Anti-Injunction Act on the same terms as other persons 42

1. Because state respondents lack standing to challenge the minimum coverage provision, the Court need not consider their arguments for special treatment under the AIA 42

2. States are "persons" subject to the AIA 45

3. State respondents are not entitled to challenge the minimum coverage provision under *South Carolina* v. *Regan* 49

Conclusion 52

Appendix – Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Alexander v. *"Americans United" Inc.*, 416 U.S. 752 (1974) 11, 39, 48

Allen v. *Regents of the Univ. Sys.*, 304 U.S. 439 (1938) 46

Allen v. *Wright*, 468 U.S. 737 (1984) 43

Arbaugh v. *Y&H Corp.*, 546 U.S. 500 (2006) 16

Cases—Continued: Page

Arizona Christian Sch. Tuition Org. v. *Winn*, 131 S. Ct. 1436 (2011) 43
Arkansas v. *Farm Credit Servs.*, 520 U.S. 821 (1997) ... 13
Bailey v. *George*, 259 U.S. 16 (1922) 29
Block v. *North Dakota*, 461 U.S. 273 (1983) 49
Bob Jones Univ. v. *Simon*, 416 U.S. 725 (1974) 8, 9, 11, 19, 39, 40, 48
Botta v. *Scanlon*, 314 F.2d 392 (2d Cir. 1963) 23
Bowles v. *Russell*, 551 U.S. 205 (2007) 15
Brushaber v. *Union Pac. R.R.*, 240 U.S. 1 (1916) 18
California v. *Grace Brethren Church*, 457 U.S. 393 (1982) 14
Cheatham v. *United States*, 92 U.S. 85 (1876) 10
Commissioner v. *Lundy*, 516 U.S. 235 (1996) 13
Dodge v. *Osborn*, 240 U.S. 118 (1916) 11
Dolan v. *United States*, 130 S. Ct. 2533 (2010) 9
Duncan v. *Walker*, 533 U.S. 167 (2001) 28
Enochs v. *Williams Packing & Navigation Co.*, 370 U.S. 1 (1962) 8, 11, 15, 16, 19
Free Enter. Fund v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) 36
Georgia v. *Evans*, 316 U.S. 159 (1942) 46
Gonzalez v. *Thaler*, No. 10-895 (Jan. 10, 2012) 9, 10
Hansen v. *Department of Treasury*, 528 F.3d 597 (9th Cir. 2007) 12
Helvering v. *Davis*, 301 U.S. 619 (1937) 17, 19
Helvering v. *Stockholms Enskilda Bank*, 293 U.S. 84 (1934) 46

Cases—Continued: Page

Helwig v. *United States*, 188 U.S. 605 (1903) 28
Henderson v. *Shinseki*, 131 S. Ct. 1197 (2011) 9, 10, 14, 20
Hibbs v. *Winn*, 542 U.S. 88 (2004) 13, 50
Jefferson County v. *Acker*, 527 U.S. 423 (1999) 11, 13
Jefferson County Pharm. Ass'n v. *Abbott Labs.*, 460 U.S. 150 (1983) 46
John R. Sand & Gravel Co. v. *United States*, 552 U.S. 130 (2008) 14
Judicial Watch, Inc. v. *Rossotti*, 317 F.3d 401 (4th Cir.), cert. denied, 540 U.S. 825 (2003) 50
Kontrick v. *Ryan*, 540 U.S. 443 (2004) 9, 10
Kowalski v. *Tesmer*, 543 U.S. 125 (2004) 44
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 9
LaSalle Rolling Mills, Inc., In re, 832 F.2d 390 (7th Cir. 1987) 12
Liberty Univ., Inc. v. *Geithner*, No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011), petition for cert. pending, No. 11-438 (filed Oct. 7, 2011) 12
License Tax Cases, 72 U.S. 462 (1867) 6
Louisiana v. *McAdoo*, 234 U.S. 627 (1914) 43
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 43
Martin v. *United States*, 833 F.2d 655 (7th Cir. 1987) ... 13
Massachusetts v. *EPA*, 549 U.S. 497 (2007) 45
Massachusetts v. *Mellon*, 262 U.S. 447 (1923) 45
Mathes v. *United States*, 901 F.2d 1031 (11th Cir. 1990) 12
McCarthy v. *Marshall*, 723 F.2d 1034 (1st Cir. 1983) 12

Cases—Continued: Page

McKart v. *United States*, 395 U.S. 185 (1969) 36
Miller v. *Standard Nut Margarine Co.*, 284 U.S. 498 (1932) 16, 18, 46
Mobile Republican Assembly v. *United States*, 353 F.3d 1357 (11th Cir. 2003) 27
New York v. *United States*, 505 U.S. 144 (1992) 41
Ohio v. *Helvering*, 292 U.S. 360 (1934) 46, 47
O'Shea v. *Littleton*, 414 U.S. 488 (1974) 37
Pagonis v. *United States*, 575 F.3d 809 (8th Cir. 2009) 12
Phillips v. *Commissioner*, 283 U.S. 589 (1931) 29
Pollock v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895) 18
Puckett v. *United States*, 556 U.S. 129 (2009) 19
Raines v. *Byrd*, 521 U.S. 811 (1997) 42
Randell v. *United States*, 64 F.3d 101 (2d Cir. 1995), cert. denied, 519 U.S. 815 (1996) 12
Reed Elsevier, Inc. v. *Muchnick*, 130 S. Ct. 1237 (2010) 9, 14
Rosewell v. *LaSalle Nat'l Bank*, 450 U.S. 503 (1981) 14
Sage v. *United States*, 908 F.2d 18 (5th Cir. 1990) 32
Seven-Sky v. *Holder*, 661 F.3d 1 (D.C. Cir. 2011), petition for cert. pending, No. 11-679 (filed Nov. 30, 2011) ..... *passim*
Sherman v. *Nash*, 488 F.2d 1081 (3d Cir. 1973) 12
Simon v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) 43
Sims v. *United States*, 359 U.S. 108 (1959) 47
Snyder v. *Marks*, 109 U.S. 189 (1883) 10

Cases—Continued: Page

Sonzinsky v. *United States*, 300 U.S. 506 (1937) 40
South Carolina v. *Regan*, 465 U.S. 367 (1984) 7, 16, 17, 42. 48, 49, 50
Souther v. *Mihlbachler*, 701 F.2d 131 (10th Cir. 1983) ... 23
State R.R. Tax Cases, 92 U.S. 575 (1876) 10
Sterling Consulting Corp. v. *United States*, 245 F.3d 1161 (10th Cir. 2001), cert. denied, 534 U.S. 1114 (2002) 12
Sunshine Anthracite Coal Co. v. *Adkins*, 310 U.S. 381 (1940) 17
Thomas More Law Ctr. v. *Obama*, 651 F.3d 529 (6th Cir. 2011), petition for cert. pending, No. 11-117 (filed July 26, 2011) 12, 25, 32
Thunder Basin Coal Co. v. *Reich*, 510 U.S. 200 (1994) ... 36
Tomlinson v. *Smith*, 128 F.2d 808 (7th Cir. 1942) 48
TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 28
United States v. *Brockamp*, 519 U.S. 347 (1997) 13
United States v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008) 8, 22
United States v. *Cooper Corp.*, 312 U.S. 600 (1941) 45
United States v. *Dalm*, 494 U.S. 596 (1990) 13
United States v. *Galletti*, 541 U.S. 114 (2004) 32
United States v. *Sanchez*, 340 U.S. 42 (1950) 29, 40
Vermont Agency of Natural Res. v. *United States*, 529 U.S. 765 (2000) 46, 49
Virginia v. *Sebelius*, 656 F.3d 253 (4th Cir. 2011), petition for cert. pending, No. 11-420 (filed Sept. 30, 2011) 45
Warth v. *Seldin*, 422 U.S. 490 (1975) 43, 44

Cases—Continued: Page

Will v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989) 46
Zernial v. *United States*, 714 F.2d 431 (5th Cir. 1983) . . . 12

Constitution and statutes:

U.S. Const.:
Art. I 6, 27
§ 8, Cl. 3 (Commerce Clause) 5
Art. III 43
Art. VI:
Cl. 2 (Supremacy Clause) 49
Amend. X 16, 49, 50
Act of July 13, 1866, § 19, 14 Stat. 152 10
Act of Mar. 2, 1867, § 10, 14 Stat. 475 . . . . . 10, 46
Administrative Procedure Act, 5 U.S.C. 701 *et seq.*:
5 U.S.C. 702(1) 37
5 U.S.C. 703 36
5 U.S.C. 704 36
Anti-Injunction Act, 26 U.S.C. 7421(a) . . . . . *passim*
Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554, App. G, 114 Stat. 2763A-587:
§ 313(b)(2)(B), 114 Stat. 2763A-642 14
§ 319(24), 114 Stat. 2763A-647 14
Declaratory Judgment Act, 28 U.S.C. 2201 8
False Claims Act, 31 U.S.C. 3729(a) 46

Statutes—Continued: Page

Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125:
§ 110(a), 80 Stat. 1142 48
§ 110(c), 80 Stat. 1142 48
Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 2
§ 1406(a)(5), 124 Stat. 1066 26
Internal Revenue Code, 26 U.S.C. 1 *et seq.*:
Subtit. A, 26 U.S.C. 1 *et seq.*:
Ch. 1, 26 U.S.C. 1 *et seq.*:
26 U.S.C. 103(j)(1) (1982) 49, 50
26 U.S.C. 275(a)(6) 27
26 U.S.C. 527 27
26 U.S.C. 527(j)(1) 27
26 U.S.C. 860(h)(1) 34
Ch. 2, 26 U.S.C. 1401 *et seq.*:
26 U.S.C. 1401(b)(2) (Supp. IV 2010) 37
Subtit. D, 26 U.S.C. 4001 *et seq.*:
Ch. 34, 26 U.S.C. 4371 *et seq.* 25
Subch. B, 26 U.S.C. 4375 *et seq.* 25, 18a
26 U.S.C. 4377(c) (Supp. IV 2010) 25
Ch. 43, 26 U.S.C. 4971 *et seq.*:
26 U.S.C. 4980H (Supp. IV 2010) 26, 37
26 U.S.C. 4980H(b)(2) (Supp. IV 2010) 26
26 U.S.C. 4980H(c)(7) (Supp. IV 2010) 26
26 U.S.C. 4980H(d)(1) (Supp. IV 2010) 26
26 U.S.C. 4980I (Supp. IV 2010) 37

Statutes—Continued: Page

Ch. 48, 26 U.S.C. 5000A (Supp. IV 2010) .... *passim*
26 U.S.C. 5000A(a) (Supp. IV 2010) 2, 38, 39, 40, 41
26 U.S.C. 5000A(b) (Supp. IV 2010) 2, 20, 40
26 U.S.C. 5000A(b)(2) (Supp. IV 2010) 3
26 U.S.C. 5000A(c) (Supp. IV 2010) 2, 37
26 U.S.C. 5000A(d) (Supp. IV 2010) 3
26 U.S.C. 5000A(e) (Supp. IV 2010) 3, 41
26 U.S.C. 5000A(g) (Supp. IV 2010) ... 3, 24, 25, 26
26 U.S.C. 5000A(g)(1) (Supp. IV 2010) 7, 22, 24, 31, 36
26 U.S.C. 5000A(g)(2) (Supp. IV 2010) 22
Ch. 49, 26 U.S.C. 5000B (Supp. IV 2010) 37
Subtit. E, 26 U.S.C. 5001 *et seq.*:
Ch. 51, 26 U.S.C. 5001 *et seq.*:
26 U.S.C. 5114(c)(3) 36
26 U.S.C. 5684(b) 36
Ch. 52, 26 U.S.C. 5701 *et seq.*:
26 U.S.C. 5761(e) 36
Subtit. F, 26 U.S.C. 6001 *et seq.* 25, 26
Ch. 61, 26 U.S.C. 6001 *et seq.*:
26 U.S.C. 6015(e)(1) 15
26 U.S.C. 6155(a) 34
Ch. 63, 26 U.S.C. 6201 *et seq.* 32
26 U.S.C. 6201(a) (2006 & Supp. IV 2010) 33, 34, 35, 15a
26 U.S.C. 6202 34
26 U.S.C. 6213(a) 11, 15

Statutes—Continued: Page

26 U.S.C. 6225(b) 15
26 U.S.C. 6246(b) 15
Ch. 64, 26 U.S.C. 6301 *et seq.* 32
26 U.S.C. 6305(a) 33
26 U.S.C. 6305(b) 33
26 U.S.C. 6321 34
26 U.S.C. 6324A 34
26 U.S.C. 6330(e)(1) 15
26 U.S.C. 6332(b) (Supp. V 1957) 47
26 U.S.C. 6332(c) (Supp. V 1957) 47
26 U.S.C. 6332(d)(1) 47
26 U.S.C. 6332(f) 47
Ch. 66, 26 U.S.C. 6501 *et seq.*:
26 U.S.C. 6511(a) 13
Ch. 67, 26 U.S.C. 6601 *et seq.*:
26 U.S.C. 6601(e) 24
26 U.S.C. 6601(e)(1) 34
26 U.S.C. 6601(e)(2) 34
26 U.S.C. 6602 35
Ch. 68, 26 U.S.C. 6651 *et seq.* ..... *passim*
Subch. A, 26 U.S.C. 6651 *et seq.*:
26 U.S.C. 6665(a) 23, 36
26 U.S.C. 6665(a)(1) 24, 36
26 U.S.C. 6665(a)(2) 24, 36
Subch. B, 26 U.S.C. 6671 *et seq.* ..... *passim*
26 U.S.C. 6671 ..... 3, 36
26 U.S.C. 6671(a) ..... *passim*

Statutes—Continued: Page

26 U.S.C. 6700 (1988) 32
Ch. 69, 26 U.S.C. 6901 *et seq.*:
26 U.S.C. 6901(a) 33
Ch. 74, 26 U.S.C. 7121 *et seq.*:
26 U.S.C. 7122(b) 35
Ch. 76, 26 U.S.C. 7401 *et seq.*:
26 U.S.C. 7421(a) ..... *passim*
26 U.S.C. 7421(b)(1) 33
26 U.S.C. 7422 8
26 U.S.C. 7422(a) 11, 13, 21, 22, 24, 17a
26 U.S.C. 7426 48
26 U.S.C. 7426(b) 15
26 U.S.C. 7426(b)(1) 15, 48
26 U.S.C. 7429(b)(2)(A) 15
Ch. 79, 26 U.S.C. 7701 *et seq.*:
26 U.S.C. 7701(a)(1) 47
Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 2
§ 6301(e)(2), 124 Stat. 743 25
§ 9008, 124 Stat. 859 ..... 25, 27
§ 9008(f), 124 Stat. 861 27
§ 9008(f)(1), 124 Stat. 861 25
§ 9010, 124 Stat. 865 ..... 25, 27, 20a
§ 9010(f), 124 Stat. 861 27
§ 9010(f)(1), 124 Stat. 867 25
§ 9010(g)(2), 124 Stat. 867 26
§ 9010(g)(2)(B)(i)-(iii), 124 Stat. 867 26

Statutes—Continued: Page

§ 9010(g)(3), 124 Stat. 1066 26
§ 9010(g)(3)(C), 124 Stat. 1066 26
Quiet Title Act, 28 U.S.C. 2409a (1982) 49
Robinson-Patman Act, 15 U.S.C. 13 *et seq.*:
15 U.S.C. 13(a) 46
15 U.S.C. 13(f) 46
Sherman Act, 15 U.S.C. 7 46
Tax Injunction Act, 28 U.S.C. 1341 . . . . . 13, 17a
26 U.S.C. 11 (1925) 47
26 U.S.C. 205 (1925) 47
28 U.S.C. 1331 16
28 U.S.C. 1346(a)(1) 12
28 U.S.C. 2253(c) 10
42 U.S.C. 652 33
42 U.S.C. 1396a(a)(8) 44
42 U.S.C. 1983 46
42 U.S.C. 2021c(a)(1)(A) 41
42 U.S.C.A. 18091(a)(2)(B) (Supp. 2011) 2

Miscellaneous:

155 Cong. Rec. S13,823 (daily ed. Dec. 23, 2009) 30
156 Cong. Rec. E475 (daily ed. Mar. 24, 2010) 30
Florida Agency for Health Care Admin., *Florida KidCare Program: Amendment to Florida's Title XXI Child Health Insurance Plan Submitted to the Centers for Medicare and Medicaid Services* (July 1, 2010), http://ahca.myflorida.com/medicaid/medikids/PDF/KidCare_Program_Amendment_19_to_Titlle_XXI_2010-07-01.pdf 44

Miscellaneous—Continued: Page

Letter from Douglas Elmendorf, Director, Congressional Budget Office, to Nancy Pelosi, Speaker, U.S. House of Representatives (Mar. 20, 2010), http://www.cbo.gov/ftpdocs/113xx/doc11379/amendreconProp.pdf 40

Priority of Federal Tax Liens and Levies: Hearings on H.R. 11256 and H.R. 11290 Before the House Comm. on Ways & Means, 89th Cong., 2d Sess. (1966) 47, 48

Noah Webster, *An American Dictionary of the English Language* (1860) 27

In the Supreme Court of the United States

No. 11-398

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-273a) is reported at 648 F.3d 1235. The district court's opinion on the federal government's motion to dismiss (Pet. App. 394a-475a) is reported at 716 F. Supp. 2d 1120. The district court's opinion on the parties' cross-motions for summary judgment (Pet. App. 274a-368a) is reported at 780 F. Supp. 2d 1256.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to this brief. App., *infra*, 1a-22a.

STATEMENT

A. Statutory Background

Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Affordable Care Act or Act),[1] to address a crisis in the national health care market, a market that accounts for 17.6% of the Nation's economy. 42 U.S.C.A. 18091(a)(2)(B) (Supp. 2011). The Act establishes a comprehensive framework of economic regulation and incentives that are designed, *inter alia*, to improve the functioning of the national market for health care by regulating the terms on which health insurance is offered, controlling costs, and rationalizing the timing and method of payment for health care services. See generally Gov't Minimum Coverage Br. 2-12.

As relevant here, the Act provides that, beginning in 2014, non-exempted federal income taxpayers who fail to maintain a minimum level of health insurance coverage for themselves or their dependents will owe a penalty for each month in the tax year during which minimum coverage is not maintained. 26 U.S.C. 5000A(a) and (b).[2] The amount of the penalty will be calculated as a percentage of household income for federal income tax purposes, subject to a floor and capped at the price of forgone insurance coverage. 26 U.S.C. 5000A(c). The penalty will be reported on the taxpayer's federal income tax return for the taxable year, and assessed and collected by the Internal Revenue Service (IRS) in the same manner as "assessable penalties" un-

---

[1] Amended by the Health Care and Education Reconciliation Act of 2010 (HCERA), Pub. L. No. 111-152, 124 Stat. 1029.

[2] Unless otherwise indicated, all citations to the United States Code refer to the 2006 edition and Supplement IV (2010).

der Subchapter B of Chapter 68 of the Internal Revenue Code. 26 U.S.C. 5000A(b)(2) and (g); see 26 U.S.C. 6671(a) ("assessable penalties" under Subchapter B of Chapter 68 "shall be assessed and collected in the same manner as taxes").

Individuals who are not required to file federal income tax returns for a given year are not subject to the penalty. Congress also exempted taxpayers whose premium payments would exceed 8% of their household income, taxpayers who establish that obtaining coverage would be a hardship under standards to be set by the Secretary of Health and Human Services, and members of recognized Indian tribes. 26 U.S.C. 5000A(e). Individuals who meet specified criteria for religious exemptions, individuals who are incarcerated, and undocumented aliens also are not subject to the minimum coverage provision, irrespective of their income levels or ability to afford insurance. 26 U.S.C. 5000A(d).

B. Proceedings Below

Respondents Mary Brown and Kaj Ahlburg, the National Federation of Independent Business (NFIB), and 26 States filed suit in the Northern District of Florida, challenging the constitutionality of several provisions of the Affordable Care Act.[3]

1. The district court held that Brown had standing to challenge the minimum coverage provision because she did not currently have health insurance and had to "make financial arrangements now to ensure compliance" with that provision in 2014. Pet. App. 292a. The court also concluded that respondent NFIB had stand-

---

[3] On January 17, 2012, this Court granted the private respondents' motion for leave to add Dana Grimes and David Klemencic as additional respondents.

ing because one of its members (Brown) had standing, *id.* at 293a, and that Ahlburg's declaration was sufficient to establish his standing as well, *id.* at 291a. The court further held that two States, Idaho and Utah, have standing to challenge the minimum coverage provision because their legislatures had enacted statutes purporting to exempt their residents from it. *Id.* at 293a-295a.

In district court, the government argued that respondents' suit was barred by the Anti-Injunction Act (AIA), which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. 7421(a). The court rejected that argument, concluding that the penalty for failure to maintain minimum essential coverage is not a "tax" to which the AIA applies. Pet. App. 401a-425a.

On the merits, the district court held that the minimum coverage provision is not a valid exercise of Congress's commerce or taxing powers. Pet. App. 278a n.4, 296a-350a, 401a-424a. The court then declared the entire Act invalid because it concluded that the minimum coverage provision could not be severed from any other provision in the Act. *Id.* at 350a-364a. The court stayed its judgment pending appellate review. *Id.* at 387a-392a.

2. A divided court of appeals affirmed in part and reversed in part. As a threshold matter, the court held that respondents Brown, NFIB, and Ahlburg had standing to challenge the minimum coverage provision. Pet. App. 8a-10a. In view of that determination, the court declined to decide whether any state respondents also have standing. *Ibid.* The government did not renew in the court of appeals its argument that the AIA bars this

suit, and the parties did not address that question. Nor did the court of appeals.[4]

On the merits, the court held that the minimum coverage provision is not a valid exercise of Congress's commerce or tax powers. Pet. App. 63a-172a. Judge Marcus dissented on Commerce Clause grounds, concluding that the minimum coverage provision regulates "quintessentially economic conduct"—the means by which individuals pay for health care. *Id.* at 189a, 194a-195a.

SUMMARY OF ARGUMENT

The suit brought by respondents to challenge the minimum coverage provision is not barred by the Anti-Injunction Act, 26 U.S.C. 7421(a).

1. Although the parties are in agreement on the question presented, this Court must independently review the issue to ensure that it does not exceed the scope of its jurisdiction.

The AIA is a substantive limitation on the subject-matter jurisdiction of the courts. The text of the AIA—"no suit * * * shall be maintained in any court by any person"—speaks unambiguously to the courts' adjudicatory authority, not merely the rights and obligations of the parties. 26 U.S.C. 7421(a). That jurisdictional limitation is consistent with the primary purpose animating the AIA: enabling the prompt and efficient assessment and collection of taxes on which the government's opera-

---

[4] Following the district court's decision in this case and decisions rendered in other Affordable Care Act litigation, the government reexamined its position on the AIA and concluded that it does not foreclose the exercise of jurisdiction to consider the constitutionality of the minimum coverage provision. See Gov't Supp. Br. at 2, *Liberty Univ.* v. *Geithner*, No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011).

tions depend. The AIA therefore bars the courts from exercising jurisdiction over pre-enforcement tax disputes.

This Court has repeatedly described the AIA as jurisdictional in nature, and it has held that other, related provisions also rank as jurisdictional. Congress has endorsed that understanding in its subsequent amendments to the statute, which have left its operative language untouched.

2. The AIA does not, however, bar the Court's exercise of jurisdiction in this case. The AIA applies to suits to restrain the assessment or collection of "any tax." The payment under the Affordable Care Act's minimum coverage provision is, however, termed a "penalty" rather than a "tax," and it is not within the category of tax penalties that trigger the AIA's jurisdictional bar.

For purposes of determining whether Congress has properly exercised its Article I taxing power, use of the term "penalty" is irrelevant; it is the practical operation of the provision, not its label, that controls, see *License Tax Cases*, 72 U.S. 462, 471 (1867), and a provision should be upheld as a valid exercise of the taxing power so long as it can reasonably be construed as an exercise of that power, see Gov't Minimum Coverage Br. 56-59. But the precise labels Congress chooses are highly relevant for the very different purpose of statutory construction under the Internal Revenue Code. The term "tax" carries with it a number of procedural and substantive implications under various statutory provisions, and a "penalty" is not the same thing as a "tax" for statutory purposes under the Internal Revenue Code. The Affordable Care Act does not specify that the minimum coverage penalty is to be treated as a "tax" for all statutory purposes, including the AIA. On the contrary, Con-

gress specified only that the penalty was to be "assessed and collected in the same manner as an assessable penalty" under a separate provision of the Internal Revenue Code. 26 U.S.C. 5000A(g)(1). That limited directive indicates that Congress determined not to apply the full panoply of statutory rules governing "taxes," including the AIA, to the minimum coverage penalty.

3. Should the Court nevertheless conclude that the minimum coverage penalty qualifies as a "tax" subject to the AIA, respondents cannot evade the jurisdictional bar by recharacterizing their claim as a challenge solely to the provision governing minimum essential coverage and not the accompanying provision prescribing a penalty for failure to maintain such coverage. The two provisions are inextricably intertwined; the only consequence of failing to maintain minimum coverage is payment of a penalty. Respondents' complaint thus necessarily challenged the penalty as well as the predicate for its imposition. And because a decision in respondents' favor would have the effect of restraining the assessment and collection of the penalty, respondents' challenge would be barred by the AIA if the penalty were in fact a "tax" within the statute's compass.

4. Finally, because state respondents lack standing to challenge the minimum coverage provision, this Court need not address their arguments for a special exemption from the terms of the AIA. Those arguments lack merit in any event. States, like individuals, are "persons" subject to the prohibitions of the AIA. And should the Court conclude that the individual respondents' challenge is barred by the AIA, the rule of *South Carolina* v. *Regan*, 465 U.S. 367 (1984), provides no basis for allowing the state respondents to go forward. Unlike the petitioner in *Regan*, state respondents are not parties

"aggrieved" by the minimum coverage provision, and this is not the rare case in which a constitutional question will go unanswered if state respondents are not permitted to proceed.

ARGUMENT

RESPONDENTS' CHALLENGE TO THE MINIMUM COVERAGE PROVISION OF THE AFFORDABLE CARE ACT IS NOT BARRED BY THE ANTI-INJUNCTION ACT

A. Where It Applies, The Anti-Injunction Act Imposes A Jurisdictional Limitation On The Courts' Adjudicatory Authority

The Anti-Injunction Act provides that, with certain enumerated exceptions inapplicable here, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. 7421(a). The AIA's primary purpose is "the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference, 'and to require that the legal right to the disputed sums be determined in a suit for refund.'" *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 736 (1974) (quoting *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962)); see 26 U.S.C. 7422 (governing civil refund actions); see also *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 10 (2008). Where the AIA applies, it imposes a jurisdictional limitation on the courts' power to hear pre-enforcement suits challenging federal tax liability.[5]

---

[5] The Declaratory Judgment Act also excepts from its coverage suits for declaratory relief "with respect to Federal taxes." 28 U.S.C. 2201.

1. The term "'[j]urisdiction' refers to 'a court's adjudicatory authority.'" *Reed Elsevier, Inc.* v. *Muchnick*, 130 S. Ct. 1237, 1243 (2010) (quoting *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004)). A jurisdictional statute is accordingly one that "speak[s] to the power of the court rather than to the rights or obligations of the parties." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994) (internal quotation marks and citation omitted). Because "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction," courts "must raise and decide jurisdictional questions" on their own, even where, as here, the parties agree that there is no jurisdictional impediment to adjudicating the case. *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011).

To differentiate between "truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim processing rules,' which do not," *Gonzalez* v. *Thaler*, No. 10-895 (Jan. 10, 2012), slip op. 5 (quoting *Kontrick*, 540 U.S. at 455), "this Court has looked to statutory language, to the relevant context, and to what they reveal about the purposes that [the rule] is designed to serve." *Dolan* v. *United States*, 130 S. Ct. 2533, 2538 (2010); accord, *e.g.*, *Gonzalez*, *supra*, slip op. at 6 & n.3. The language, purpose, and context of the AIA all demonstrate that the statutory bar to preenforcement tax challenges is jurisdictional.

a. The plain text of the AIA—"no suit * * * shall be maintained in any court by any person," 26 U.S.C. 7421(a)—speaks in language that is "'clear[ly]' jurisdic-

---

That exception "is at least as broad as the Anti-Injunction Act." *Bob Jones Univ.*, 416 U.S. at 733 n.7. The federal tax exception to the Declaratory Judgment Act does not reach the minimum coverage provision for the same reasons that the Anti-Injunction Act does not.

tional." *Gonzalez*, *supra*, slip op. at 7; see *ibid.* (identifying as an example of "'clear' jurisdictional language" the directive in 28 U.S.C. 2253(c) that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals"). The AIA's language does not merely describe procedures to "promote the orderly process of litigation." *Henderson*, 131 S. Ct. at 1203. Rather, in barring the very "maint[enance]" of pre-enforcement tax challenges, 26 U.S.C. 7421(a), the AIA is a substantive "prescription[] delineating the classes of cases (subject-matter jurisdiction) * * * falling within a court's adjudicatory authority," *Kontrick*, 540 U.S. at 455.

b. Interpreting the statutory bar as jurisdictional is consistent with its purpose. The AIA was first enacted in 1867 as an amendment to the statute then in force imposing restrictions on tax refund suits. Act of Mar. 2, 1867 (1867 Act), § 10, 14 Stat. 475;[6] see *Snyder* v. *Marks*, 109 U.S. 189, 192 (1883). Congress enacted the AIA with a "sense * * * of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence." *State R.R. Tax Cases*, 92 U.S. 575, 613 (1876); see also *Cheatham* v. *United States*, 92 U.S. 85, 89 (1876). The AIA accordingly governs the very "maint[enance]" of litigation rather than

---

[6] The tax refund provision was enacted in Section 19 of the Act of July 13, 1866, 14 Stat. 152, which provided, in pertinent part, that "no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected," until an appeal has been filed with and resolved by the Commissioner of Internal Revenue. The 1867 Act added to the end of that Section a sentence stating: "And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." § 10, 14 Stat. 475.

the way litigation will proceed. As this Court has noted, "to permit even the maintenance of a suit in which an injunction could issue only after the taxpayer's non-liability had been conclusively established might 'in every practical sense operate to suspend collection of the . . . taxes until the litigation is ended.'" *Williams Packing*, 370 U.S. at 8 (citation omitted). The law thus requires that taxpayers who seek to challenge their federal tax liability file a refund suit after payment, see 26 U.S.C. 7422(a), or file a petition with the Tax Court after receiving a notice of deficiency, see 26 U.S.C. 6213(a).

c. Against this backdrop, it is unsurprising that this Court has long regarded the AIA, as well as related provisions, as "jurisdictional." See *Jefferson County* v. *Acker*, 527 U.S. 423, 434 (1999) (describing AIA as "depriv[ing] courts of jurisdiction over suits brought 'for the purpose of restraining the assessment or collection' of any federal tax.") (quoting 26 U.S.C. 7421(a)); see also, *e.g.*, *Bob Jones Univ.*, 416 U.S. at 749 (affirming judgment "that [AIA] deprived the District Court of jurisdiction to issue the injunctive relief [the plaintiff] sought"); *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 758 (1974) (suit that fell within AIA's strictures "must be dismissed"); *Williams Packing*, 370 U.S. at 5 ("The object of § 7421 (a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes."); *Dodge* v. *Osborn*, 240 U.S. 118, 119, 121, 122 (1916) (affirming trial court's dismissal of complaint seeking to enjoin assessment and collection of taxes "for want of jurisdiction because the complainants had an adequate remedy at law" and because of AIA). The

courts of appeals have likewise unanimously concluded that the AIA imposes a jurisdictional bar.[7]

This Court has also squarely held that provisions closely related to the AIA are jurisdictional. Under 28 U.S.C. 1346(a)(1), district courts and the Court of Federal Claims are granted "jurisdiction" over tax refund actions. The statute restricting tax refund suits, to which the AIA was added in 1867 to form an integrated set of restrictions (see p. 10, *supra*), in turn provides:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary.

26 U.S.C. 7422(a). This Court has held that Section 7422(a), along with the prescribed time limits for filing

---

[7] See *Seven-Sky* v. *Holder*, 661 F.3d 1, 5 (D.C. Cir. 2011), petition for cert. pending, No. 11-679 (filed Nov. 30, 2011); *Liberty Univ., Inc.* v. *Geithner*, No. 10-2347, 2011 WL 3962915, at *4 (4th Cir. Sept. 8, 2011), petition for cert. pending, No. 11-438 (filed Oct. 7, 2011); *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 539 (6th Cir. 2011), petition for cert. pending, No. 11-117 (filed July 26, 2011); *Pagonis* v. *United States*, 575 F.3d 809, 813-815 (8th Cir. 2009); *Hansen* v. *Department of Treasury*, 528 F.3d 597, 600-602 (9th Cir. 2007); *Sterling Consulting Corp.* v. *United States*, 245 F.3d 1161, 1167 (10th Cir. 2001), cert. denied, 534 U.S. 1114 (2002); *Randell* v. *United States*, 64 F.3d 101, 106 (2d Cir. 1995), cert. denied, 519 U.S. 815 (1996); *Mathes* v. *United States*, 901 F.2d 1031, 1033 (11th Cir. 1990); *In re LaSalle Rolling Mills, Inc.*, 832 F.2d 390, 392 n.6 (7th Cir. 1987); *McCarthy* v. *Marshall*, 723 F.2d 1034, 1037 (1st Cir. 1983); *Zernial* v. *United States*, 714 F.2d 431, 433-434 (5th Cir. 1983) (per curiam); *Sherman* v. *Nash*, 488 F.2d 1081, 1083 (3d Cir. 1973).

an administrative refund claim, 26 U.S.C. 6511(a), is a limitation on the courts' "jurisdiction." *United States* v. *Dalm*, 494 U.S. 596, 608-610 (1990); see *id.* at 611 ("controlling jurisdictional statutes" barred suit); see also *United States* v. *Brockamp*, 519 U.S. 347, 352-353 (1997) (rejecting equitable tolling of time limitations for filing administrative refund claim under Section 6511(a)); *Commissioner* v. *Lundy*, 516 U.S. 235, 240 (1996) (noting that "provisions governing refund suits * * * make timely filing of a refund claim a jurisdictional prerequisite to bringing suit.") (citing 26 U.S.C. 7422(a) and *Martin* v. *United States*, 833 F.2d 655, 658-659 (7th Cir. 1987)). The Court's conclusion that the preconditions to suit under Section 7422(a) are jurisdictional strongly reinforces the conclusion that the AIA is as well, because the AIA works in tandem with Section 7422(a) and uses materially identical language (as it has since 1867): "No suit * * * shall be maintained in any court * * * ."

This Court has reached a similar conclusion with respect to the Tax Injunction Act, 28 U.S.C. 1341, a limitation on federal-court interference with state tax collections that was modeled on the AIA. *Hibbs* v. *Winn*, 542 U.S. 88, 102-103 (2004); *Jefferson County*, 527 U.S. at 434; see 28 U.S.C. 1341 ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."). The Court has squarely held that the Tax Injunction Act is a subject-matter jurisdiction limitation. See *Arkansas* v. *Farm Credit Servs.*, 520 U.S. 821, 824, 825-826 (1997) (noting that Tax Injunction Act is a "broad jurisdictional barrier," and directing dismissal of suit for lack of subject-matter jurisdiction even though

court of appeals had not addressed Tax Injunction Act and parties had not raised it in this Court) (citation omitted); *California* v. *Grace Brethren Church*, 457 U.S. 393, 396, 408, 417-418 n.38 (1982) (holding that Tax Injunction Act "deprive[d] the District Court of jurisdiction," notwithstanding defendant's contention that it was inapplicable); *Rosewell* v. *LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981) (Tax Injunction Act "was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes").

This Court has recognized that "context, including this Court's interpretation of similar provisions in many years past, is relevant" in determining whether a statute is jurisdictional. *Reed Elsevier*, 130 S. Ct. at 1248. "When 'a long line of this Court's decisions left undisturbed by Congress,' has treated a similar requirement as 'jurisdictional,'" this Court "will presume that Congress intended to follow that course." *Henderson*, 131 S. Ct. at 1203 (citation omitted); see also *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 134-135, 139 (2008). Since its original enactment in 1867, Congress has amended the AIA many times, most recently in 2000. See Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554, App. G, § 313(b)(2)(B), 114 Stat. 2763A-642; *id.* § 319(24), 114 Stat. 2763A-647. Congress has not, however, altered the operative text of the statute. Moreover, when Congress has amended the AIA to carve out exceptions to the bar against pre-enforcement suits, it typically has phrased those exceptions in juris-

dictional terms.[8] That history confirms that the AIA is properly regarded as jurisdictional.

2. Private respondents have contended that the AIA cannot be jurisdictional because the Court has recognized a "'judicially created exception[].'" NFIB Cert.-Stage Br. 17 (citation omitted; brackets in original). That contention lacks merit.

The "exception" to which private respondents refer is the situation described in *Williams Packing*. There, the Court stated that an injunction against tax assessment or collection may issue "[o]nly if it is * * * apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim." 370 U.S. at 7. Contrary to private respondents' characterization, the *Williams Packing* rule is not an "equitable exception[]" that undermines this Court's longstanding recognition of the AIA as jurisdictional. NFIB Cert.-Stage Br. 17 (quoting *Bowles* v. *Russell*, 551 U.S. 205, 214 (2007)). To the contrary, *Williams Packing* de-

---

[8] See, *e.g.*, 26 U.S.C. 6015(e)(1) (an individual who seeks relief from joint-and-several liability on a joint return "may petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the appropriate relief available to the individual"), 6213(a) ("Notwithstanding the provisions of section 7421(a)," certain assessments, levies, and collection proceedings "may be enjoined by a proceeding in the proper court, including the Tax Court," but Tax Court "shall have no jurisdiction" unless certain conditions are met), 6225(b) ("Notwithstanding section 7421(a)," action that violates certain restrictions on assessments, levies, and collection proceedings related to deficiencies attributable to partnership items "may be enjoined in the proper court, including the Tax Court," with similar "no jurisdiction" language), 6246(b) (similar for restrictions on partnership adjustments), 6330(e)(1) (similar for collection actions), 7426(b) (district court "jurisdiction" to enjoin levy), 7429(b)(2)(A) (exclusive district court "jurisdiction" to review jeopardy levy or assessment).

scribed the AIA in jurisdictional terms. See 370 U.S. at 7 (unless it is clear that there are no circumstances under which the government could prevail, "the District Court is without jurisdiction, and the complaint must be dismissed"). The principle announced in *Williams Packing* was a product of statutory interpretation, rooted in the AIA's text and purpose. The Court explained that "if it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and * * * the exaction is merely 'in the guise of a tax,'" rather than being an actual "tax" the assessment and collection of which the AIA would shield. *Ibid.* (quoting *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932)).[9]

This Court's decision in *South Carolina* v. *Regan*, 465 U.S. 367 (1984), likewise does not support private respondents' position. There, the Court held that the AIA did not bar a suit in which the State was an "aggrieved party" because the tax allegedly interfered with its sovereign prerogative under the Tenth Amendment, but the State lacked "an alternative legal avenue by which to contest the legality of a particular tax." *Id.* at 373. The Court did not arrive at that conclusion as a matter of equity, but rather rested its decision on consideration of Congress's intent, as evidenced by the

---

[9] *Williams Packing*'s "under no circumstances" test is analogous to the rule that a "claim invoking federal-question jurisdiction under 28 U.S.C. § 1331 * * * may be dismissed for want of subject-matter jurisdiction if it is not colorable, *i.e.*, if it is * * * 'wholly insubstantial and frivolous.'" *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006) (citation omitted). A district court's ability to examine the merits of a claim to that limited extent does not make Section 1331 any less jurisdictional.

"Act's purpose and the circumstances of its enactment." *Id.* at 378.

Thus, far from demonstrating that the AIA is nonjurisdictional, *Williams Packing* and *Regan* stand for the unremarkable proposition that "the status of a statute as jurisdictional does not disable the courts from interpreting the statute and Congress's intent by means of the usual tools of statutory construction." *Seven-Sky* v. *Holder*, 661 F.3d 1, 29 n.8 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), petition for cert. pending, No. 11-679 (filed Nov. 30, 2011).

3. Private respondents also argue (Cert.-Stage Br. 17) that this Court's willingness to accept the government's waiver of an AIA defense in *Helvering* v. *Davis*, 301 U.S. 619, 639-640 (1937), demonstrates that the AIA is nonjurisdictional. On this point, too, private respondents are incorrect.

In its brief in *Davis*, the government took the view that, because the AIA "was enacted to promote, not to discourage, the orderly administration and collection of Government revenues," if "the appropriate officers of the Government" conclude that "the litigation of an injunction suit is more important for the protection of the revenues than insistence upon adherence to the ordinary procedure of payment followed by a suit for refund, the officers should be permitted to waive" the AIA's protections. Gov't Br. at 31, *Davis*, *supra* (No. 910). By a closely divided vote, the Court in *Davis* chose to proceed to the merits. 301 U.S. at 639-640. The government similarly waived the AIA in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940) (see Gov't Br. at 9, *Sunshine Anthracite*, *supra* (No. 804)), and the

Court proceeded to decide the case without mention of the AIA.[10]

It is unclear whether the results in those cases represent "an anomaly predating more stringent jurisdictional limitations" or reflected the Court's acceptance of a reading of the AIA that would render it inapplicable upon an affirmative waiver by certain government officials. *Seven-Sky*, 661 F.3d at 13. In either event, these decisions do not detract from the overwhelming indications that Congress has ranked the bar to pre-enforcement tax liability challenges as jurisdictional.

Davis and *Sunshine Anthracite* date from an era when the Court viewed the AIA as simply "declaratory of the principle" in equity that the tax collector could be enjoined if there were "special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence." *Standard Nut*, 284 U.S. at 509. That reading "effectively repealed the Act, since the Act was viewed as requiring nothing more than equity doctrine had demanded before the

---

[10] In *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), the Court decided it was appropriate "[u]nder the[] circumstances" to consider the merits of stockholders' constitutional challenge to imposition of the income tax on their corporation. *Id.* at 554. The Court noted that "so far as it was within the power of the government to do so, the question of jurisdiction * * * was explicitly waived at argument." The Court also pointed out, however, that the relief sought was against voluntary action "by the defendant company, and not in respect of the assessment and collection themselves." *Ibid.* In *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1 (1916), another stockholder action, the Court concluded that the AIA did not bar the suit, relying on *Pollock*, but with no mention of government waiver. *Id.* at 10. In our view, a suit to bar a corporation from voluntarily paying a tax should be regarded as one seeking to "restrain" the "collection" of the tax within the meaning of the AIA.

Act's passage." *Bob Jones Univ.*, 416 U.S. at 744. And, in fact, the Court in *Davis* discussed the government's waiver of a defense under the AIA together with its waiver of equitable defenses. 301 U.S. at 639-640. The Court has more recently clarified, however, that the "explicit language" of the AIA bars such a reading of the statute. *Bob Jones Univ.*, 416 U.S. at 745; see *Williams Packing*, 370 U.S. at 7. The Court has further emphasized that where the AIA applies, "the District Court is *without jurisdiction*, and the complaint must be dismissed." *Ibid.* (emphasis added). This Court's repudiation of any view of the AIA as nothing more than a codification of equitable principles, and its recognition that the AIA's bar deprives the courts of jurisdiction, calls into serious doubt any continuing force of the Court's cryptic ruling in *Davis*.

It would be theoretically possible to read the AIA as both depriving the courts of jurisdiction *and* subject to affirmative and explicit waiver by the government where, as in *Davis*, the government concludes that resolution of the dispute would further tax collection by eliminating constitutional doubts. Nothing would bar Congress from enacting such a statute. The AIA is designed to preserve the government's sovereign immunity and protect its revenues and the general Treasury. As in *Davis*, there could be circumstances in which allowing the government to affirmatively waive the bar that would otherwise be imposed by the AIA would be consistent with those purposes.[11] And the Court has

---

[11] Under such an interpretation, however, there would be no forfeiture of the protections of the AIA's bar as a result of the mere failure by the government to raise it as a defense. Cf. *Puckett* v. *United States*, 556 U.S. 129, 138 (2009) (distinguishing waiver from forfeiture).

never expressly disavowed the result in *Davis* that enabled it to reach the merits.

Yet neither has the Court ever reaffirmed, relied upon, or even cited that brief passage in *Davis*. Because the rationale of *Davis* on this point is itself unclear, and in light of this Court's decisions in *Williams Packing* and other more modern cases repeatedly reaffirming that the AIA constitutes a jurisdictional bar, we do not believe that the AIA is properly construed to allow the government to waive the AIA's bar if it otherwise applies.

B. The Anti-Injunction Act Does Not Bar Respondents' Challenge To The Constitutionality Of The Minimum Coverage Provision

Because the AIA is a jurisdictional statute, this Court has an independent obligation to determine whether it applies here. See *Henderson*, 131 S. Ct. at 1202. It does not. The wording of the minimum coverage provision does not trigger the AIA's bar to respondents' challenge to Section 5000A.

1. The AIA does not bar challenges to every exercise of Congress's taxing power, but bars only those impositions designated as or deemed to be "taxes" for purposes of the Internal Revenue Code

The AIA bars suits "for the purpose of restraining the assessment or collection *of any tax*." 26 U.S.C. 7421(a) (emphasis added). In enacting the minimum coverage provision, Congress designated the shared-responsibility payment as a "penalty," rather than a "tax." 26 U.S.C. 5000A(b). By its terms, then, the AIA does not embrace the "penalty" imposed by Section 5000A. Nor, as we explain below, is the AIA rendered

applicable to the Section 5000A penalty by any other provision of the Internal Revenue Code.

a. For purposes of determining whether the minimum coverage provision is a valid exercise of Congress's Article I taxing power, the label Congress attached to the monetary payment is irrelevant; what matters is the practical operation of the provision. See Gov't Minimum Coverage Br. 56-59. Because the minimum coverage penalty operates as a tax provision, it can reasonably be construed as an exercise of Congress's tax power, and must therefore be upheld on that basis. See *id.* at 52-62.

The precise terms Congress chose to use in the Affordable Care Act are highly relevant, however, for purposes of statutory construction under the Internal Revenue Code, of which the AIA is a part. Under the Code, the term "tax" carries with it a wide array of substantive and procedural statutory consequences, and a "penalty" is not the same thing as a "tax" for statutory purposes under the Code.

That much is evident from a comparison of the AIA and the immediately adjacent refund statute, 26 U.S.C. 7422(a). The AIA provides that, with specified exceptions, "no suit for the purpose of restraining the assessment or collection of any *tax* shall be maintained." 26 U.S.C. 7421(a) (emphasis added). Section 7422(a), by contrast, provides that, until a refund claim has been filed with and disposed of by the Secretary of the Treasury (Secretary), "[n]o suit or proceeding shall be maintained," not only "for the recovery of any internal revenue *tax* alleged to have been erroneously or illegally assessed or collected," but also for the recovery of "any *penalty* claimed to have been collected without authority," or of "any *sum* alleged to have been excessive or in any manner wrongfully collected." 26 U.S.C. 7422(a)

(emphases added). Section 7422(a), by its inclusion of any "penalty" or "sum" in addition to any "tax," is plainly broader than Section 7421(a). See *Clintwood Elkhorn*, 553 U.S. at 13. It demonstrates that a "tax" under Section 7421(a) is distinct from a "penalty," including the penalty imposed by Section 5000A.

b. The distinction between a "penalty" and a "tax" for statutory purposes is also evident from the text and operation of other parts of the Internal Revenue Code to which Section 5000A is tied. Subsection (g)(1) of Section 5000A provides that the minimum coverage penalty "shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." 26 U.S.C. 5000A(g)(1).[12]

The text of Section 5000A(g)(1) makes it necessary to turn to Subchapter B of Chapter 68 to determine the "manner" in which assessable penalties are assessed and collected, in order to determine the applicable procedures for the penalty under Section 5000A. In that Subchapter, the relevant section is 26 U.S.C. 6671(a). The first sentence of Section 6671(a) provides that "[t]he penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected *in the same manner as taxes*." 26 U.S.C. 6671(a) (emphasis added). The directive in Section 6671(a) that "assessable penalties"—and therefore the "penalty" imposed by Section 5000A—

---

[12] Subsection (g)(2), to which the quoted passage refers, specifies certain "[s]pecial rules" limiting the government's tools for enforcement: A taxpayer may not be subject to criminal prosecution or penalty for failure to make timely payment, nor may the Secretary file a notice of lien or levy on the taxpayer's property. 26 U.S.C. 5000A(g)(2).

"shall be assessed and collected in the same manner *as* taxes" refutes the proposition that such penalties *are* taxes for statutory purposes under the Code, including the AIA.

That conclusion is confirmed by the second sentence of Section 6671(a), which states that, except as otherwise provided, "any reference in this title [*i.e.*, Title 26 of the United States Code] to 'tax' imposed by this title shall be deemed *also* to refer to the *penalties* and liabilities provided by this subchapter." 26 U.S.C. 6671(a) (emphases added). Assessable penalties imposed by Subchapter B of Chapter 68 therefore are treated as "taxes" for all purposes under the Internal Revenue Code, including the AIA, not because of the first sentence of Section 6671(a), which governs only assessment and collection, but because they are "deemed" to be taxes for all purposes by the second sentence of Section 6671(a). See, *e.g.*, *Souther* v. *Mihlbachler*, 701 F.2d 131, 131-132 (10th Cir. 1983) (per curiam) ("[T]he penalties imposed pursuant to § 6682 are 'taxes' under § 7421(a). Such penalties are taxes by definition and are to be treated as taxes.") (citing 26 U.S.C. 6671(a)); *Botta* v. *Scanlon*, 314 F.2d 392, 393 (2d Cir. 1963) (rejecting argument that "assessments under § 6672 are in the nature of a penalty and that they do not come within the prohibition of § 7421(a) against suits to restrain the collection of a 'tax,'" because "it is expressly provided in § 6671(a) of the Code that 'except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter [including § 6672].'") (brackets in original).[13]

---

[13] In parallel fashion to Section 6671(a), 26 U.S.C. 6665(a), which applies to all of Chapter 68, provides both that "the additions to the tax,

The penalty imposed by Section 5000A is not in Chapter 68 of the Code, but rather is in a new Chapter 48 added by the Affordable Care Act. Because the second sentence of Section 6671(a) refers only to "penalties" provided by Subchapter B of Chapter 68, the Section 5000A penalty is *not* deemed a "tax" for all purposes under the Code, including the AIA, by the second sentence of Section 6671(a).[14]

c. The conclusion that follows from the text of Section 6671(a) is reinforced by comparing it to the text of Section 5000A(g) itself, as well as other provisions of the Affordable Care Act. As noted above, Section 5000A(g) directs that the minimum coverage penalty shall generally be "assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68" of the Code. 26 U.S.C. 5000A(g)(1). This language parallels the *first* sentence of Section 6671(a), which refers to assessment and collection of assessable penalties under that same subchapter. But Section 5000A(g) contains no further directive, parallel to that in the *second* sentence of Section 6671(a), that any reference to any "tax" under Title 26 shall be deemed also to refer to the penalty in Section 5000A. That distinct and more limited text indi-

---

additional amounts, and penalties provided by this chapter * * * shall be assessed, collected, and paid in the same manner as taxes," *and* that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this chapter." 26 U.S.C. 6665(a)(1) and (2). Also using parallel language, Congress has provided that "interest" is generally deemed to be a "tax" for purposes of the Internal Revenue Code. See 26 U.S.C. 6601(e).

[14] The Section 5000A penalty is, however, covered by the restrictions in the refund statute, which applies to suits to recover "any penalty," as well as any "tax." 26 U.S.C. 7422(a).

cates that Congress considered the treatment of the minimum coverage provision under the Internal Revenue Code and decided that the full panoply of rules relating to "taxes," including the AIA, should not apply. See *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 540 (6th Cir. 2011) ("Distinct words have distinct meanings. Congress said one thing in sections 6665(a)(2) and 6671(a), and something else in section 5000A, and we should respect the difference."), petition for cert. pending, No. 11-117 (filed July 26, 2011).

This conclusion is reinforced by the presence of other provisions in the Affordable Care Act that, unlike Section 5000A(g), do make the AIA applicable. Section 6301(e)(2) of the Act, 124 Stat. 743, added a new Subchapter B to Chapter 34 of the Internal Revenue Code, 26 U.S.C. 4375 *et seq.*, to impose "fees" on certain health plans. The new Section 4377(c) expressly provides that, "[f]or purposes of subtitle F," which includes the AIA, "the fees imposed by this subchapter shall be treated as if they were *taxes*." 26 U.S.C. 4377(c) (emphasis added).

Similarly, Sections 9008 and 9010 of the Affordable Care Act provide for the imposition of "fees" on pharmaceutical manufacturers and health insurance providers, respectively. 124 Stat. 859, 865. Sections 9008 and 9010 both provide that the fees imposed, "for purposes of subtitle F of the Internal Revenue Code of 1986, shall be treated as excise *taxes* with respect to which only actions for refund under procedures of such subtitle shall apply." §§ 9008(f)(1), 9010(f)(1), 124 Stat. 861, 867 (emphasis added). These two provisions of the Act, like Section 6301, thus expressly and specifically direct that the monetary exactions they impose shall be treated as "taxes," and all of these provisions cross-reference all of Subtitle F of the Code, 26 U.S.C. 6001 *et seq.*, which con-

tains the AIA, rather than (like Section 5000A(g)) only Subchapter B of Chapter 68 in Subtitle F, which does not.

Significantly, moreover, Section 9010(g)(3) imposes a "penalty" on an insurer that understates its premiums in its report to the Secretary. Section 9010(g)(3) then expressly provides that the penalty imposed "shall be subject to the provisions of subtitle F of the Internal Revenue Code of 1986 that apply to assessable penalties under chapter 68 of such Code." HCERA § 1406(a)(5), 124 Stat. 1066 (ACA § 9010(g)(3)(C)). This provision thus triggers the AIA specifically with respect to penalties.[15] Congress has thereby demonstrated in the Affordable Care Act itself that it knows how to trigger application of the AIA to the monetary exactions it imposes, including penalties, but it did not do so in Section 5000A(g).[16]

---

[15] Section 9010(g)(2) imposes a penalty for the late filing of a report to the Secretary. That penalty "shall be treated as a penalty for purposes of subtitle F of the Internal Revenue Code of 1986," shall be paid on notice and demand "and in the same manner as a tax under such Code," and "with respect to which only civil actions for refund under procedures of subtitle F shall apply." § 9010(g)(2)(b)(i)-(iii). It is unclear whether the first clause triggers the AIA, since 26 U.S.C. 6671(a) deems "penalties" under Subchapter B of Chapter 68 (which is part of Subtitle F) to be "taxes." The third clause, by limiting the available remedy to a refund action, may preclude a pre-enforcement challenge to that penalty.

[16] The employer responsibility provision of the Affordable Care Act, much like the minimum coverage provision, provides that an "assessable payment" under that provision "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." 26 U.S.C. 4980H(d)(1). But unlike Section 5000A, that provision expressly refers to the assessable payment as a "tax." 26 U.S.C. 4980H(b)(2) and (c)(7). That description triggers application of the AIA. Indeed, Section 4980H, in its Subsection (c)(7), specifically

d. The Court-appointed amicus curiae argues that, because the AIA does not define the term "tax," it should be read "to refer broadly to any 'sum of money assessed on the person or property of a citizen by government, for the use of the nation or state.'" Court-Appointed Amicus Br. 37 (quoting Noah Webster, *An American Dictionary of the English Language* 1132 (1860) (Webster)). That definition, the amicus notes, is broad enough to include "almost every species of imposition on persons or property for supplying the public treasury, as tolls, tribute, subsidy, excise, impost, or customs." *Ibid.* (quoting Webster 1132).

Once again, this broad view of a "tax" reinforces the conclusion that the minimum coverage provision is a valid exercise of Congress's Article I taxing power as a *constitutional* matter because it underscores that the provision can, and therefore must, be construed as an exercise of that power. It is, however, out of place in the context of construing the specific statutory terms in a

---

cross-references 26 U.S.C. 275(a)(6) as establishing the rule "[f]or denial of deduction for the tax imposed by this section." Section 275(a)(6), which bars a deduction for "[c]ertain taxes," is also expressly cross-referenced by Sections 9008 and 9010 for the fees that are treated as "excise taxes." See §§ 9008(f), 9010(f), 124 Stat. 861, 867.

Section 527 of Title 26, which prescribes certain penalties for a political organization's failure to make required disclosures of expenditures and contributions, provides that the penalty "shall be assessed and collected in the same manner as penalties imposed by section 6652(c)." 26 U.S.C. 527(j)(1). It does not specify that the penalty shall be deemed a "tax" for any purpose. The Eleventh Circuit has held that, because the "disclosure requirements constitute conditions attached to the receipt of a tax subsidy," the "penalties imposed for violating the conditions of that tax status should be considered as part of the tax for purposes of analysis under the Anti-Injunction Act." *Mobile Republican Assembly* v. *United States*, 353 F.3d 1357, 1362 (2003).

highly reticulated scheme like the Internal Revenue Code, in which distinctions between different kinds of "sum[s] of money assessed" carry important substantive and procedural statutory consequences. To ascribe to the Code's use of the word "tax" a meaning broad enough to cover "almost every species of imposition" would render numerous Code provisions entirely superfluous. If every such imposition—including the penalty imposed by Section 5000A—fell within the scope of the term "tax," there would be no need for Congress to have specified that interest, or Chapter 68 penalties, or other payments shall be treated as "taxes" for some or all purposes under the Code. See pp. 23-24 & note 13, *supra*. The Code should not be interpreted in a manner that would render so many provisions "superfluous, void, or insignificant." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001)).[17]

Nor do this Court's cases ascribe a broader meaning to the word "tax" as it appears in the AIA than elsewhere in the Code. Amicus points (Br. 37) to this Court's statement that the AIA "postpones redress for [an] alleged invasion of property rights if the exaction is

---

[17] The Court-appointed amicus cites *Helwig* v. *United States*, 188 U.S. 605 (1903), for the proposition that "in the tax context, labels do not 'change the nature and character of the enactment.'" Br. 37 (quoting *Helwig*, 188 U.S. at 613). But in *Helwig*, which concerned whether a particular imposition qualified as a "penalty" subject to challenge in district court, the Court also made clear that, "[i]f it clearly appear that it is the will of Congress that the provision shall not be regarded as in the nature of a penalty, the court must be governed by that will." *Helwig*, 188 U.S. at 613. Here, the text of Section 5000A makes clear that Congress did not intend to apply all of the statutory rules in the Internal Revenue Code governing "taxes," including the AIA, to the minimum coverage penalty.

made under the color of their offices by revenue officers charged with the general authority to assess and collect the revenue." *Phillips* v. *Commissioner*, 283 U.S. 589, 595-596 (1931). But the issue before the Court in *Phillips* concerned procedures used for the collection of certain income and profits *taxes*, and in the quoted passage the Court simply described the purpose of the AIA to protect collection of taxes generally. *Id.* at 591-592. The Court had no occasion to consider whether other types of payments not designated as "taxes" fall within the scope of the AIA. Similarly, cases concerning the scope of Congress's taxing authority, *e.g.*, *United States* v. *Sanchez*, 340 U.S. 42, 44-45 (1950), or concluding that the AIA applies to taxes challenged as beyond Congress's taxing authority, *e.g.*, *Bailey* v. *George*, 259 U.S. 16, 19-20 (1922), do not support amicus's proposed interpretation of the AIA as barring judicial challenges to payments that Congress has not chosen to treat as "taxes" for statutory purposes. On the contrary, the Court's decision in *Bailey* v. *George* demonstrates that the AIA and the scope of the tax power are not coterminous. See *ibid.* Here, Congress has demonstrated an intent not to apply the AIA to the minimum coverage provision, even though it is a valid exercise of the taxing power.[18]

e. The conclusion that Congress did not subject the penalty under Section 5000A to the AIA's jurisdictional bar is reinforced by the role of the minimum coverage

---

[18] Private respondents have asserted that the minimum coverage penalty is not a "tax" within the meaning of the AIA because it imposes a "punishment" for an unlawful act. 11-393 Pet. 17. For the reasons explained below, see pp. 39-41, *infra*, and in prior filings, see Gov't Minimum Coverage Br. 59-62, that is a mischaracterization of the minimum coverage provision.

provision in the Affordable Care Act's insurance reforms and the timing of those reforms. The minimum coverage provision is integral to the Act's guaranteed-issue and community-rating provisions, and all these provisions go into effect in 2014. See Gov't Minimum Coverage Br. 27-30; Gov't Severability Br. 44-54. That delayed effective date enables the responsible federal agencies, the insurance industry, and millions of individuals to prepare for implementation of the insurance reforms. Application of the AIA to Section 5000A would have required that any constitutional challenge to the minimum coverage provision be postponed until after those interconnected provisions of the Act were fully implemented and relied upon by millions of individuals, as well as by the insurance industry.

By the same token, Congress's decision to delay the effective date meant that any constitutional challenges to the minimum coverage provision brought soon after enactment of the Affordable Care Act would not cause immediate disruption to the ongoing administration of the Internal Revenue Code, or the receipt of revenues by the Treasury. Congress was aware of the prospect of such constitutional challenges.[19]

Of course, where the AIA applies, there is no basis for a court to disregard its jurisdictional bar because Congress has delayed the effective date of the relevant statutory provision, or because of the court's own assessment of whether the purposes of the AIA would be

---

[19] See 155 Cong. Rec. S13,823 (daily ed. Dec. 23, 2009) (statement of Sen. Hatch); see also 156 Cong. Rec. E475 (daily ed. Mar. 24, 2010) (statement of Rep. Bonner) (noting "there are already attempts to challenge [the provision] in court"); see also Gov't Minimum Coverage Br. 58 (discussing constitutional point of order in Senate).

served. Here, however, the text and structure of Section 5000A and related statutory provisions establish that the AIA does *not* apply. The practical considerations associated with the minimum coverage provision's delayed effective date underscore that Congress could reasonably conclude that not subjecting Section 5000A to the AIA would facilitate the orderly implementation of the insurance market reforms and at the same time not unduly undermine the policies of the AIA in this particular context.

2. ***The statutory directive that the minimum coverage penalty shall be assessed and collected in the same manner as assessable penalties is a procedural instruction to the Secretary rather than a jurisdictional instruction to the courts***

a. The Court-appointed amicus argues (Br. 24-36) that the statutory directive that the minimum coverage penalty generally be "assessed and collected in the same manner" as assessable penalties under Subchapter B of Chapter 68 (see 26 U.S.C. 5000A(g)(1)) supports, rather than undermines, application of the AIA to bar respondents' challenge. As amicus notes (Br. 24), and as explained above, Section 6671(a) provides that "[t]he penalties and liabilities provided by this subchapter * * * shall be assessed, collected, and paid in the same manner as taxes." 26 U.S.C. 6671(a). Amicus reasons that unless the AIA bars pre-enforcement judicial challenges to the minimum coverage penalty, the penalty cannot be "assessed and collected in the same manner" as taxes because assessment and collection could be delayed or prohibited by a judicial ruling. Br. 26. Amicus is incorrect.

The statutory directive that the minimum coverage penalty be "assessed and collected in the same manner" as assessable penalties under Chapter 68 is a procedural instruction to the *Secretary* governing administration of the Code. It is not an instruction to *courts* governing adjudication of suits. Cf., *e.g.*, *Sage* v. *United States*, 908 F.2d 18, 24-25 (5th Cir. 1990) (rejecting taxpayer's argument that the statutory directive that assessable penalties be "assessed and collected in the same manner as taxes" means that the general three-year limitations period for assessing "any tax" applies to the Chapter 68 penalty for promoting abusive tax shelters, 26 U.S.C. 6700 (1988)).

The Secretary's assessment authority is found in Chapter 63 of the Internal Revenue Code, which generally grants him the power to record tax liabilities as reported by the taxpayer or as determined by the Secretary. 26 U.S.C. 6201 *et seq.*; see *United States* v. *Galletti*, 541 U.S. 114, 122-124 (2004). The Secretary's collection authority is found in Chapter 64 of the Code, which generally grants him the authority to collect assessed taxes upon notice and demand. 26 U.S.C. 6301 *et seq.* Neither Chapter 63 nor Chapter 64 includes the AIA.

Given this structure, "the most natural reading of the [minimum coverage] provision is that the 'manner' of assessment and collection mentioned in sections 5000A(g)(1) and 6671(a) refers to the mechanisms the Internal Revenue Service employs to enforce penalties, not to the bar against pre-enforcement challenges to taxes." *Thomas More Law Ctr.*, 651 F.3d at 540; see also *Seven-Sky*, 661 F.3d at 11 ("The phrase 'in the same manner,' which modifies 'assessment and collection,'

* * * is used throughout the Code to refer to methodology and procedures.") (citing examples).[20]

b. Alternatively, amicus argues (Br. 39-41) that respondents' challenge is barred because all "assessable penalties" are "tax[es]" within the meaning of the AIA. Amicus notes that the Code's assessment provision authorizes the Secretary to assess "all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title." 26 U.S.C. 6201(a). Because the AIA is concerned with suits to restrain the assessment and collection of taxes, amicus argues, Section 6201(a)'s statement that taxes subject to assessment "includ[e]" assessable penalties means that assessable penalties must also be "tax[es]" within the meaning of Section 7421(a). Br. 40.

Amicus's argument is a variant of the "assessed and collected" argument discussed above, and it is incorrect for similar reasons. Section 6201(a) is a directive to the Secretary in his administration of the Internal Revenue

---

[20] In other provisions of the Code, Congress has provided *both* that a particular payment shall be "assessed and collected" as a tax *and* that no suit shall be maintained to restrain the assessment or collection of the payment. See 26 U.S.C. 7421(b)(1) (prohibiting suit to restrain assessment or collection of "the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax"), 6901(a) (providing that this transferee liability shall be "assessed, paid, and collected in the same manner * * * [as] taxes"); 26 U.S.C. 6305(a) and (b) (providing that certain child support obligations, see 42 U.S.C. 652, shall be assessed and collected in the same manner as taxes, and explicitly barring pre-enforcement review of that assessment or collection). These provisions furnish further evidence that Congress has not regarded a directive to the Secretary to "assess and collect" a payment in the same manner as a tax as also a directive to the courts not to entertain suits to restrain assessment or collection.

Code; the AIA, which appears in a separate chapter of the Code, is a directive to the courts. And unlike Section 6201(a), the AIA contains no language providing that the term "tax" includes assessable penalties.

In any event, amicus reads far too much into Section 6201(a)'s provision for the Secretary to assess "all taxes (including * * * assessable penalties)." See also 26 U.S.C. 6202 (same language governing "mode or time of assessment"). The wording of Section 6201(a) is simply a way of describing that the Secretary's assessment authority with respect to "taxes" also extends to "interest, additional amounts, additions to tax, and assessable penalties" imposed by the Internal Revenue Code. 26 U.S.C. 6201(a). To say that those items are "includ[ed]" as "taxes" for purposes of assessment does not mean that they are included as "taxes" for purposes of all sections of the Code, such as the AIA, that do not contain such "including" language.

Significantly, moreover, other provisions of the Code, such as those cited in Judge Kavanaugh's dissenting opinion in *Seven-Sky*, 661 F.3d at 40, that also refer to "assessable penalties" for the most part do not say that taxes "includ[e]" such penalties.[21] There thus is no

---

[21] Section 6155(a), in language parallel to Section 6201(a), does require payment on demand at the specified place and time of "any tax (including any interest, additional amounts, additions to taxes, and assessable penalties)." 26 U.S.C. 6155(a). But a number of other provisions cited by Judge Kavanaugh are worded in a way that does not suggest that the term "tax" actually subsumes "penalty." See 26 U.S.C. 860(h)(1) (running of statute of limitations on deficiency "*and* all interest * * * and assessable penalties") (emphasis added), 6321 (if person refuses to pay "any tax," "the *amount* (including any interest * * * or assessable penalty)" "shall be a lien") (emphasis added), 6324A(a) ("deferred amount (*plus* any interest * * * [and] assessable penalty)" shall be a lien) (emphasis added), 6601(e)(1) and (2) (interest

pattern across the Code to suggest that "penalties" necessarily are subsumed within the term "taxes." And the language of Section 6201(a), on which amicus relies, simply makes clear that assessable penalties are encompassed within the same general grant of assessment authority as taxes.

3. The conclusion that the AIA does not bar respondents' pre-enforcement challenge to Section 5000A does not undermine the protections of the AIA and other bars to relief

To decide this case, the Court need not broadly hold that the AIA has no application to any payments designated as a "penalty" unless a statutory provision like Section 6671(a) provides that the penalty should be deemed a "tax." See Caplin & Cohen Amicus Br. 18. The Internal Revenue Code is complex, with many differently worded provisions. It suffices here to conclude that Congress does not intend every exercise of its taxing power to be deemed a "tax" for any and all purposes under the Internal Revenue Code, including the AIA. Here, the unique wording of Section 5000A—its limited cross-reference to Subchapter B of Chapter 68, its failure either to incorporate *or* cross-reference the language in Section 6671(a) deeming an assessable penalty to be a "tax," and its failure to include the expansive cross-reference language that is found in other provi-

---

shall be "assessed, collected, and paid in the same manner" as taxes, and any reference to "taxes" shall be deemed to refer to interest; separate reference to interest on "assessable penalties"), 6602 (interest to be paid on erroneous refunds of "any internal revenue tax (*or* any interest [or] assessable penalty * * *)") (emphasis added), 7122(b) (in case of compromises, General Counsel shall record "(1) [t]he amount of tax assessed," "(2) [t]he amount of interest * * * or assessable penalty," *and* "(3) [t]he amount actually paid").

sions of the Affordable Care Act—establishes that the minimum coverage penalty is not to be treated as a "tax" for purposes of the AIA.[22]

Nor is it the case that permitting this challenge to proceed means "forever * * * enabl[ing] taxpayers to evade the Code's carefully constructed procedures for the exhaustion of administrative remedies and the time limits for filing suit" concerning the application of Section 5000A to individual taxpayers. Caplin & Cohen Amicus Br. 7-8; see *id.* at 36. Such suits would be barred on any of a host of grounds: (1) the absence of "final agency action" under the Administrative Procedure Act, 5 U.S.C. 704; (2) preclusion of review because there is a special statutory administrative and judicial review procedure for raising such issues, see 5 U.S.C. 703; compare *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994), with *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3150-3151 (2010); (3) primary jurisdiction and failure to exhaust administrative remedies, see *McKart* v. *United States*,

---

[22] There thus is no occasion to decide, for example, whether the AIA applies to challenges to other provisions of the Code, cited by the Court-appointed amicus (Br. 35-36), providing that the penalties imposed under the Code's alcohol and tobacco tax chapters "shall be assessed, collected and paid in the same manner as taxes, as provided in [26 U.S.C. 6665(a)]." 26 U.S.C. 5114(c)(3), 5684(b), and 5761(e). Those provisions expressly refer to "taxes," and refer to the entirety of Section 6665(a) (a provision parallel to Section 6671(a)), which includes both a provision for assessable penalties to be assessed in the same manner as taxes *and* a provision deeming all references to taxes as referring also to such items. See 26 U.S.C. 6665(a)(1) and (2). Section 5000A(g)(1), by contrast, expressly refers to an "assessable penalty," not a "tax," and contains no cross-reference to Section 6671 or 6665(a) and thus no express cross-reference to the provisions deeming assessable penalties to be "taxes."

395 U.S. 185, 193 (1969); and (4) standard equitable principles such as those barring a suit where there is another adequate remedy, see 5 U.S.C. 702(1) (preserving equitable grounds for dismissal); *O'Shea* v. *Littleton*, 414 U.S. 488, 499 (1974). Moreover, unlike respondents' general challenge to the constitutionality of the minimum coverage provision, a challenge to the calculation or imposition of a particular penalty under Section 5000A would often implicate other federal tax liabilities, because the Section 5000A penalty turns on calculations of gross income, deductions, and other matters that also go to the existence and amount of federal income tax liability. See 26 U.S.C. 5000A(c). A suit raising such issues thus would seek to restrain the assessment or collection of a "tax" as well as that of the minimum coverage penalty, and for that reason would be barred by the AIA.[23]

Finally, the AIA will continue to bar other pre-enforcement challenges to the many other provisions of the Affordable Care Act that concern "taxes" within the meaning of the AIA, including the employer responsibility provision, 26 U.S.C. 4980H. See note 16, *supra*.[24] That is so whether the pre-enforcement suit takes the form of a direct constitutional challenge or an indirect challenge in the form of an argument that, if the minimum coverage provision is held unconstitutional, the tax

---

[23] Indeed, questions concerning the calculation of the minimum coverage penalty for a particular taxpayer would affect the *total* amount of liability on the taxpayer's federal income tax return.

[24] See also, *e.g.*, 26 U.S.C. 1401(b)(2) (additional Medicare tax on high-income taxpayers); 26 U.S.C. 4980I (excise tax on high cost employer-sponsored health coverage); 26 U.S.C. 5000B (tax on indoor tanning services).

provisions are inseverable and therefore invalid. See Gov't Severability Br. 14 n.8.

C. If The AIA Otherwise Applies, Respondents Cannot Avoid Its Application By Recharacterizing Their Challenge As Focused Solely On The "Requirement" To Maintain Minimum Essential Coverage, Without Regard To The Penalty

Private respondents have contended in this case that the AIA does not apply because their "'purpose' is to 'restrain' the mandate's free-standing legal requirement that *they must buy costly insurance*," and "obviously has nothing to do with 'restraining' the sanction for noncompliance with the mandate." 11-393 Pet. 18; see also *Seven-Sky*, 661 F.3d at 8-9 (suggesting similar theory). Private respondents err in suggesting that they can avoid the AIA, if otherwise applicable, by characterizing their suit as a challenge to the statutory predicate for imposition of the minimum coverage penalty rather than the penalty itself.

1. As an initial matter, the premise of private respondents' argument is belied by respondents' complaint, which repeatedly characterizes their challenge as directed to "the Act's mandate that all citizens and legal residents of the United States maintain qualifying healthcare coverage *or pay a penalty*." J.A. 104-105 (emphasis added); see also J.A. 109, 112, 122, 125, 126. Moreover, as relief for the alleged constitutional violation, the complaint asks the court to enjoin enforcement of the Affordable Care Act. J.A. 124-126. Because the only consequence for failure to comply with the "[r]equirement to maintain minimum essential coverage," 26 U.S.C. 5000A(a), is the assessment and collec-

tion of a penalty, respondents necessarily are seeking to enjoin that penalty.

2. Even if respondents had drafted their complaint differently, however, if the relief they seek "would necessarily preclude the collection" of "taxes" within the meaning of the AIA, "a suit seeking such relief falls squarely within the literal scope of the Act." *Bob Jones Univ.*, 416 U.S. at 732; see *id.* at 738-739. And even if the individual private respondents now plan to obtain minimum essential coverage rather than incur the penalty, see 11-393 Pet. 18, this Court has emphasized that "Section 7421(a) does not bar merely a taxpayer's attempt to enjoin the collection of his own taxes": "[A] suit to enjoin the assessment or collection of anyone's taxes triggers the literal terms of [Section] 7421(a)," *Americans United*, 416 U.S. at 760. The relief respondents seek in this Court—the invalidation of 26 U.S.C. 5000A—necessarily would restrain the assessment and collection of the minimum coverage penalty against any applicable individuals who fail to maintain minimum essential coverage. Thus if the penalty imposed when an individual fails to maintain minimum coverage were a "tax" to which the AIA applied, respondents could not escape the AIA's application by characterizing their challenge as focused on the statutory predicate for imposition of the penalty rather than the penalty itself.

3. This Court's holdings in *Bob Jones University* and *Americans United* cannot be distinguished on the ground that the challenges at issue in those cases were "*inextricably linked* to the assessment and collection of taxes" in a way that a challenge to Section 5000A(a) is not. *Seven-Sky*, 661 F.3d at 10. The minimum coverage provision cannot meaningfully be divided into a "discrete regulatory requirement" and a companion penalty. *Ibid.*

Under the Affordable Care Act, the only consequence of noncompliance with Section 5000A(a) is the penalty prescribed by Section 5000A(b); Section 5000A(a) establishes no independently enforceable legal obligation. See Gov't Minimum Coverage Provision Br. 60-61. It therefore *is* "inextricably linked" with the penalty provision.

The minimum coverage provision is projected to raise at least $4 billion a year for the general Treasury from taxpayers who do not maintain qualifying coverage. Letter from Douglas Elmendorf, Director, Congressional Budget Office, to Nancy Pelosi, Speaker, U.S. House of Representatives Tbl. 4 (Mar. 20, 2010). To be sure, Congress had regulatory purposes in addition to a revenue-raising purpose in enacting 26 U.S.C. 5000A—namely, to rationalize payments for health care services and solve the cost-shifting problem in the national health care market, and to ensure the effectiveness of the Affordable Care Act's guaranteed-issue and community-rating provisions. See *Seven-Sky*, 661 F.3d at 10. But this Court has long since "abandoned" any distinctions that prior cases drew between "regulatory and revenue-raising taxes" for purposes of the AIA. *Bob Jones Univ.*, 416 U.S. at 741 n.12; see *Sanchez*, 340 U.S. at 44-45; *Sonzinsky* v. *United States*, 300 U.S. 506, 513 (1937); *Seven-Sky*, 661 F.3d at 41-45 (Kavanaugh, J., dissenting).

Nor does either the mandatory phrasing of the reference to maintaining minimum coverage in Subsection (a) of Section 5000A ("An applicable individual shall" maintain minimum essential coverage)—or its codification in a subsection of Section 5000A that is separate from Subsection (b)'s specification of the penalty imposed—mean that Subsection (a) prescribes a freestanding legal obli-

gation subject to challenge separate and apart from the penalty. To the contrary, Congress's understanding that Subsection (a) does not operate separately from the tax penalty associated with it is reflected later in Section 5000A, in the subsection specifying exemptions from the penalty, which refers to the "penalty imposed under *subsection (a)*." 26 U.S.C. 5000A(e) (emphasis added). And there is in any event no basis for concluding that the Congress that exempted individuals from the penalty because of their low income nonetheless intended the exempted individuals to be regarded as violators of a freestanding statutory requirement that they lack the resources to satisfy. Compare *New York* v. *United States*, 505 U.S. 144, 151, 170-171 (1992) (holding, in light of constitutional concerns, that statute providing that "[e]ach State shall be responsible for providing * * * for the disposal of * * * low-level radioactive waste," 42 U.S.C. 2021c(a)(1)(A), is not a "command to the States independent of the remainder of the Act," but instead must be read as part of an Act "compris[ing] sets of 'incentives,'" including through a federal tax).

The relevant question, then, is not whether a taxing statute uses mandatory terms, but instead what consequences flow from the operation of the provision as a whole. "Construed as a whole," *New York*, 505 U.S. at 170, Section 5000A describes tax consequences—and only tax consequences—for a taxpayer's failure to maintain insurance coverage for himself, or for applicable individuals for whom he is responsible. Respondents' attempt to describe their suit as challenging only a "requirement," and not the consequences that follow, therefore fails.

D. States Are Subject To The Limitations Of The Anti-Injunction Act On The Same Terms As Other Persons

State respondents, for their part, have argued that, if the AIA did apply to the minimum coverage provision, it still would not bar their suit, for two reasons: (1) because they are not "person[s]" subject to the Act, and (2) because they are "aggrieved parties for whom [Congress] has not provided an alternative remedy," *Regan*, 465 U.S. at 378. States Cert.-Stage Br. 14-18. Both assertions fail. Should the Court conclude that state respondents have standing and that the minimum coverage provision qualifies as a "tax" subject to the AIA, the Court should reject the States' argument for special treatment: States that wish to challenge federal tax law are subject to the AIA on the same terms as anyone else.

1. Because state respondents lack standing to challenge the minimum coverage provision, the Court need not consider their arguments for special treatment under the AIA

As an initial matter, the Court need not address state respondents' AIA arguments because their challenge fails for another fundamental reason: They lack standing to challenge the minimum coverage provision in the first place.

a. As the government has previously explained, see Gov't Severability Br. 16, a plaintiff seeking to invalidate a federal statute must demonstrate that it has suffered an injury in fact caused by the challenged statute and fairly redressable by a decision in its favor. See, *e.g.*, *Raines* v. *Byrd*, 521 U.S. 811, 818-820 (1997). The plaintiff must also satisfy established prudential standing rules, such as the rule barring reliance on the rights of

third parties. *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). These standing rules operate as an important check on using litigation as a forum for airing mere policy or political disagreements. See, *e.g.*, *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1441-1442, 1449 (2011).

State respondents fail to satisfy these basic requirements for invoking the courts' authority. The minimum coverage provision applies to individuals, not States. See 26 U.S.C. 5000A. As this Court has recognized, it is "'substantially more difficult'" for a plaintiff challenging "the government's allegedly unlawful regulation (or lack of regulation) of *someone else*" to establish Article III standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quoting *Allen* v. *Wright*, 468 U.S. 737, 758 (1984)). That is particularly true in cases involving the liability of third-party taxpayers. See, *e.g.*, *Allen*, 468 U.S. at 756-758; *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40-42 (1976); *Louisiana* v. *McAdoo*, 234 U.S. 627, 632 (1914). State respondents cannot meet that demanding standard here.

State respondents contend that, even though they are not subject to the minimum coverage provision, they are injured by the provision because it will lead "individuals who were previously eligible for Medicaid but declined to enroll" to do so. States Cert.-Stage Br. 16. That claimed injury does not establish standing. A State has suffered no legally cognizable injury if an eligible person applies for a benefit that a State has elected to provide (such as those available through a State's Medicaid program). See *Lujan*, 504 U.S. at 560 ("injury in fact" requires "an invasion of a *legally protected* interest") (emphasis added). State respondents do not claim that they have policies of discouraging eligible individu-

als from enrolling in Medicaid; to the contrary, States that elect to participate in Medicaid must ensure that "all individuals wishing to make application for medical assistance under the [State's Medicaid] plan shall have opportunity to do so." 42 U.S.C. 1396a(a)(8). And lead respondent Florida last year represented to the federal government that it "has a strong historical commitment to Medicaid outreach" and that it has taken a number of steps to encourage eligible individuals to enroll in the program. Florida Agency for Health Care Admin., *Florida KidCare Program: Amendment to Florida's Title XXI Child Health Insurance Plan Submitted to the Centers for Medicare and Medicaid Services* 17 (July 1, 2010).

b. State respondents have not in any event met the standards for prudential standing under the Internal Revenue Code, since they challenge the application of the penalty to others. The orderly administration and enforcement of the Code would be greatly undermined if a third party were permitted to challenge a tax or tax penalty or benefit applicable *to someone else* based on asserted indirect effects on the third party. And States have no standing to assert the "legal rights" of individuals to whom the minimum coverage provision does apply. *Warth*, 422 U.S. at 499. As a rule, a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski* v. *Tesmer*, 543 U.S. 125, 129 (2004) (internal quotation marks and citation omitted). Although the Court has made an exception where the plaintiff can show "a 'close' relationship with the person who possesses the right" and "a 'hindrance' to the possessor's ability to protect his own interests," *id.* at 130 (citations omitted), neither criterion applies here.

States do not possess a "close relationship" with individuals to whom the minimum coverage provision applies. And as the presence of the individual respondents in this very case demonstrates, there is no hindrance to individuals' ability to challenge the minimum coverage provision.

c. Nor do the States have authority as *parens patriae* to challenge the minimum coverage provision on behalf of individuals to whom the provision applies. A State has no authority "to protect her citizens from the operation of federal statutes." *Massachusetts* v. *EPA*, 549 U.S. 497, 520 n.17 (2007) (internal quotation marks and citation omitted); see *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923) ("[I]t is no part of [the state's] duty or power to enforce [citizens'] rights in respect of their relations with the federal government. In that field it is the United States, and not the state, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status."); accord *Virginia* v. *Sebelius*, 656 F.3d 253, 268-269 (4th Cir. 2011) (State lacked standing as *parens patriae* to challenge minimum coverage provision), petition for cert. pending, No. 11-420 (filed Sept. 30, 2011).

2. States are "persons" subject to the AIA

Should the Court reach the issue, the Court should reject state respondents' claim that they are beyond the reach of the AIA because they are not "person[s]" to whom the statute applies.

There is "no hard and fast rule" governing whether a State qualifies as a "person" for purposes of federal laws. *United States* v. *Cooper Corp.*, 312 U.S. 600, 604-

605 (1941); see *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989). In fact, "[i]t many times has been held that * * * a state is a 'person' within the meaning of statutory provisions applying only to persons." *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 91-92 (1934).[25] Whether "person" incorporates such a meaning in any given statute depends on context.

For almost a century after its enactment in 1867, the AIA contained no reference to "person[s]." See 1867 Act § 10, 14 Stat. 475 ("And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court."). This Court's cases contained no suggestion that States were not subject to the AIA on the same terms as other persons. Indeed, in *Allen* v. *Regents of the University System*, 304 U.S. 439 (1938), the Court declined to apply the AIA to a State, not because the State was excused from its restrictions, but on the different ground that the State's situation fell within the Court's then-existing precedents permitting suit in certain "exceptional cases." *Id.* at 449 (citing *Standard Nut Margarine*, 284 U.S. at 509).

The Court's cases did, however, make clear that States are "persons" to whom various other internal revenue laws apply. In *Ohio* v. *Helvering*, 292 U.S. 360 (1934), the Court held that a tax on "person[s]" selling

---

[25] See, *e.g.*, *Jefferson County Pharm. Ass'n* v. *Abbott Labs.*, 460 U.S. 150, 155-157 (1983) (State is "person" that can be sued under Robinson-Patman Act, 15 U.S.C. 13(a) and (f)); *Georgia* v. *Evans*, 316 U.S. 159, 162 (1942) (State is "person" entitled to sue for treble damages under Sherman Act, 15 U.S.C. 7). Compare *Vermont Agency of Natural Res.* v. *United States*, 529 U.S. 765, 787 (2000) (State is not "person" subject to *qui tam* liability under False Claims Act, 31 U.S.C. 3729(a)); *Will*, 491 U.S. at 66 (State is not "person" that may be sued for damages under 42 U.S.C. 1983).

liquor in 26 U.S.C. 205 (1925)—"person" being defined to "include a partnership, association, company, or corporation, as well as a natural person," in 26 U.S.C. 11 (1925)[26]—applied to the State of Ohio as such a seller. The Court found "no merit in the * * * contention that a state is not embraced within the meaning of the word 'person,' as used in" Section 205. 292 U.S. at 370.

Similarly, in *Sims* v. *United States*, 359 U.S. 108, 112 (1959), the Court held that a State, like any other person who fails to honor a levy despite being in possession of a taxpayer's property upon which a levy has been made, is a "person" that may be held liable to the United States for the value of the property not so surrendered under 26 U.S.C. 6332(b) (Supp. V. 1957) (now codified as amended at 26 U.S.C. 6332(d)(1)). The Court reached that conclusion even though the definition of "person" in 26 U.S.C. 6332(c) (Supp. V. 1957) (now codified at 26 U.S.C. 6332(f)) did not refer to a State. Observing that "[i]t is clear that § 6332 is stated in all-inclusive terms of general application," the Court held that it is "plain that Congress intended to and did include States within the term 'person' as used in § 6332." *Ibid.*

The AIA's reference to "any person" was added in 1966, after the decisions of this Court discussed above, in apparent response to questions that had arisen in suits brought by nontaxpayers whose property had been wrongfully levied upon. *Priority of Federal Tax Liens and Levies: Hearings on H.R. 11256 and H.R. 11290 Before the House Comm. on Ways & Means*, 89th Cong., 2d Sess. 58 (1966) (*House Hearing*) (statement of Stanley S. Surrey, Assistant Sec'y of the Treasury); see, *e.g.*,

---

[26] A similar definition of "person" appears in the current version of the Code. 26 U.S.C. 7701(a)(1).

Tomlinson v. *Smith*, 128 F.2d 808, 811 (7th Cir. 1942). To provide a remedy to third parties in that situation, Congress created a suit for wrongful levy by "persons other than taxpayers." *House Hearing* 58; Federal Tax Lien Act of 1966 (FTLA), Pub. L. No. 89-719, § 110(a), 80 Stat. 1142; see 26 U.S.C. 7426. At the same time, Congress amended the AIA, not only to make an express exception to the Act's proscription where a wrongful levy would irreparably injure the nontaxpayer's superior rights in property, but to emphasize that the AIA's bar applies to suits "by any person, whether or not such person is the person against whom such tax was assessed." FTLA § 110(c), 80 Stat. 1144; see 26 U.S.C. 7426(b)(1). See generally *Regan*, 465 U.S. at 388-390 (O'Connor, J., concurring in the judgment). As this Court has explained, the 1966 amendment to the AIA was intended to "reaffirm[] the plain meaning of the original language of the Act." *Americans United*, 416 U.S. at 760 & n.11; see also *Bob Jones Univ.*, 416 U.S. at 732 n.6 (the change was "declaratory, not innovative"). The history of the 1966 amendment makes clear that Congress added the phrase beginning with "by any person" to make clear that it *extends* to third parties—such as state respondents in this case—and not to narrow the AIA to *exclude* States.

State respondents contend that none of these precedents should have force here, because a plain statement should be required to include States in a provision that would alter the ordinary constitutional balance. States Cert.-Stage Br. 14-15. But this Court has already concluded in *Ohio* and *Sims* that the internal revenue laws apply to States as "persons." And in any event, applying the AIA to the States does not upset the federal-state balance. This is not a case in which the Court is asked

to determine whether a State is subject to suit by private persons under a federal statute—a context in which the Court has required a clear statement. See, *e.g.*, *Vermont Agency of Natural Res.* v. *United States*, 529 U.S. 765, 787 (2000). This case instead involves a suit by States *against the United States*. Under the Supremacy Clause and rules governing federal sovereign immunity, no principle of federalism is implicated by applying to States a generally applicable bar on pre-enforcement tax challenges. Cf. *Block* v. *North Dakota*, 461 U.S. 273, 289 (1983) (generally applicable statute of limitations on suits against United States under Quiet Title Act, 28 U.S.C. 2409(a) (1982), applies equally to state plaintiffs).

3. *State respondents are not entitled to challenge the minimum coverage provision under* South Carolina *v.* Regan

Finally, should this Court conclude that the AIA bars private respondents' challenge to the minimum coverage provision, this Court's decision in *South Carolina* v. *Regan*, provides no basis for allowing state respondents' challenge to go forward.

In that case, South Carolina sought leave to file an original action in this Court to enjoin enforcement of 26 U.S.C. 103(j)(1) (1982) (repealed 1986), which provided that interest on certain obligations issued in bearer, rather than registered, form was taxable. The State contended that Section 103(j)(1) interfered with its sovereign power to raise money by issuing tax-exempt bonds, in violation of the Tenth Amendment and asserted intergovernmental immunity. The State could not file a refund action itself, however, because the tax on unregistered bonds fell on the bondholder, not the State. *Regan*, 465 U.S. at 379-380.

The Court rejected the federal government's argument that the State should obtain judicial review by issuing bearer bonds and urging a friendly purchaser of the bonds to contest the validity of Section 103(j)(1). *Regan*, 465 U.S. at 380-381. In the Court's view, that was not a satisfactory alternative mechanism, because it was "by no means certain that the State would be able to convince a taxpayer to raise its claims," and, moreover, "instances in which a third party may raise the constitutional rights of another are the exception rather than the rule." *Id.* at 380. Instead, the Court held that the AIA did not preclude the suit, reasoning that "the Act's purposes and the circumstances of its enactment[] demonstrate that * * * the Act was intended to apply only when Congress has provided an alternative avenue for an aggrieved party to litigate its claims on its own behalf." *Id.* at 381.

Regan was, as this Court has noted, a "unique suit," *Winn*, 542 U.S. at 104 n.6, and rarely since have courts found occasion to apply the rule announced in that case, see, *e.g.*, *Judicial Watch, Inc.* v. *Rossotti*, 317 F.3d 401, 408 n.3 (4th Cir.) ("Because of the strong policy animating the Anti-Injunction Act, and the sympathetic, almost unique, facts in *Regan*, courts have construed the *Regan* exception very narrowly."), cert. denied, 540 U.S. 825 (2003). Because third parties generally lack standing to litigate the tax liabilities of others, it would be exceedingly rare for a person to be "aggrieved" in the sense used in *Regan*, or in any cognizable sense, by any tax to be paid by someone else.

Unlike South Carolina in *Regan*, state respondents in this case are not "aggrieved part[ies]." South Carolina challenged a statute that allegedly infringed its power to borrow funds in violation of its Tenth Amend-

ment rights. As explained above, see pp. 42-44, *supra*, state respondents here can claim no similar injury to their own rights as a result of the minimum coverage provision, because that provision applies only to individuals. The States thus are necessarily seeking to invoke the rights of third parties, which they cannot do here. See pp. 44-45, *supra*.

Should this Court determine that the AIA otherwise bars private respondents' challenge, there is no reason to permit the States' challenge alone to go forward. State respondents have no legitimate interest in circumventing the AIA when the actual taxpayers, whose asserted rights and interests are at stake, could not.

CONCLUSION

The Court should hold that the suit brought by respondents to challenge the minimum coverage provision is not barred by the Anti-Injunction Act.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

TONY WEST
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JOHN A. DICICCO
Principal Deputy Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

LEONDRA R. KRUGER
Assistant to the Solicitor General

MARK B. STERN
ALISA B. KLEIN
JOEL MCELVAIN
Attorneys

GEORGE W. MADISON
General Counsel
Department of the Treasury

M. PATRICIA SMITH
Solicitor of Labor
Department of Labor

WILLIAM B. SCHULTZ
Acting General Counsel

KENNETH Y. CHOE
Deputy General Counsel
Department of Health and Human Services

FEBRUARY 2012

APPENDIX

1. 26 U.S.C. 5000A (Supp. IV 2010) provides:

Requirement to maintain minimum essential coverage

(a) Requirement to maintain minimum essential coverage

An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

(b) Shared responsibility payment

(1) In general

If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).

(2) Inclusion with return

Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

(3) Payment of penalty

If an individual with respect to whom a penalty is imposed by this section for any month—

(A) is a dependent (as defined in section 152) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

(B) files a joint return for the taxable year including such month, such individual and the spouse of such individual shall be jointly liable for such penalty.

(c) Amount of penalty

(1) In general

The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to the lesser of—

(A) the sum of the monthly penalty amounts determined under paragraph (2) for months in the taxable year during which 1 or more such failures occurred, or

(B) an amount equal to the national average premium for qualified health plans which have a bronze level of coverage, provide coverage for the applicable family size involved, and are offered through Exchanges for plan years beginning in the calendar year with or within which the taxable year ends.

(2) Monthly penalty amounts

For purposes of paragraph (1)(A), the monthly penalty amount with respect to any taxpayer for any month during which any failure described in subsection (b)(1) occurred is an amount equal to 1/12 of the greater of the following amounts:

(A) Flat dollar amount

An amount equal to the lesser of—

(i) the sum of the applicable dollar amounts for all individuals with respect to whom such failure occurred during such month, or

(ii) 300 percent of the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

(B) Percentage of income

An amount equal to the following percentage of the excess of the taxpayer's household income for the taxable year over the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer for the taxable year:

(i) 1.0 percent for taxable years beginning in 2014.

(ii) 2.0 percent for taxable years beginning in 2015.

(iii) 2.5 percent for taxable years beginning after 2015.

(3) Applicable dollar amount

For purposes of paragraph (1)—

(A) In general

Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $695.

(B) Phase in

The applicable dollar amount is $95 for 2014 and $325 for 2015.

(C) Special rule for individuals under age 18

If an applicable individual has not attained the age of 18 as of the beginning of a month, the applicable dollar amount with respect to such individual for the month shall be equal to one-half of the applicable dollar amount for the calendar year in which the month occurs.

(D) Indexing of amount

In the case of any calendar year beginning after 2016, the applicable dollar amount shall be equal to $695, increased by an amount equal to—

(i) $695, multiplied by

(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year, determined by substituting "calendar year 2015" for "calendar year 1992" in subparagraph (B) thereof.

If the amount of any increase under clause (i) is not a multiple of $50, such increase shall be rounded to the next lowest multiple of $50.

(4) Terms relating to income and families.

For purposes of this section—

(A) Family size

The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year.

(B) Household income

The term "household income" means, with respect to any taxpayer for any taxable year, an amount equal to the sum of—

(i) the modified adjusted gross income of the taxpayer, plus

(ii) the aggregate modified adjusted gross incomes of all other individuals who—

(I) were taken into account in determining the taxpayer's family size under paragraph (1), and

(II) were required to file a return of tax imposed by section 1 for the taxable year.

(C) Modified adjusted gross income

The term "modified adjusted gross income" means adjusted gross income increased by—

(i) any amount excluded from gross income under section 911, and

(ii) any amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax.

(d) Applicable individual

For purposes of this section—

(1) In general

The term "applicable individual" means, with respect to any month, an individual other than an individual described in paragraph (2), (3), or (4).

(2) Religious exemptions

(A) Religious conscience exemption

Such term shall not include any individual for any month if such individual has in effect an exemption under section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act which certifies that such individual is—

(i) a member of a recognized religious sect or division thereof which is described in section 1402(g)(1), and

(ii) an adherent of established tenets or teachings of such sect or division as described in such section.

(B) Health care sharing ministry

(i) In general

Such term shall not include any individual for any month if such individual is a member of a health care sharing ministry for the month.

(ii) Health care sharing ministry

The term "health care sharing ministry" means an organization—

(I) which is described in section 501(c)(3) and is exempt from taxation under section 501(a),

(II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,

(III) members of which retain membership even after they develop a medical condition,

(IV) which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999, and

(V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.

(3) Individuals not lawfully present

Such term shall not include an individual for any month if for the month the individual is not a citizen or national of the United States or an alien lawfully present in the United States.

(4) Incarcerated individuals

Such term shall not include an individual for any month if for the month the individual is incarcerated, other than incarceration pending the disposition of charges.

(e) Exemptions

No penalty shall be imposed under subsection (a) with respect to—

(1) Individuals who cannot afford coverage

(A) In general

Any applicable individual for any month if the applicable individual's required contribution (determined on an annual basis) for coverage for the month exceeds 8 percent of such individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act. For purposes of applying this subparagraph, the taxpayer's household income shall be increased by any exclusion from gross income for any portion of the required contribution made through a salary reduction arrangement.

(B) Required contribution

For purposes of this paragraph, the term "required contribution" means—

(i) in the case of an individual eligible to purchase minimum essential coverage consisting of coverage through an eligible-employer-sponsored plan, the portion of the annual premium which would be paid by the individual (without regard to whether paid through salary reduction or otherwise) for self-only coverage, or

(ii) in the case of an individual eligible only to purchase minimum essential coverage described in subsection (f)(1)(C), the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides (without regard to whether the individual purchased a qualified health plan through the Exchange), reduced by the amount of the credit allowable under section 36B for the taxable year (determined as if the individual was covered by a qualified health plan offered through the Exchange for the entire taxable year).

(C) Special rules for individuals related to employees

For purposes of subparagraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by reason of a relationship to an employee, the determination under subparagraph (A) shall be made by reference to[1] required contribution of the employee.

(D) Indexing

In the case of plan years beginning in any calendar year after 2014, subparagraph (A) shall be ap-

---

[1] So in original. Probably should be followed by "the".

plied by substituting for "8 percent" the percentage the Secretary of Health and Human Services determines reflects the excess of the rate of premium growth between the preceding calendar year and 2013 over the rate of income growth for such period.

(2) Taxpayers with income below filing threshold

Any applicable individual for any month during a calendar year if the individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act is less than the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer.

(3) Members of Indian tribes

Any applicable individual for any month during which the individual is a member of an Indian tribe (as defined in section 45A(c)(6)).

(4) Months during short coverage gaps.

(A) In general

Any month the last day of which occurred during a period in which the applicable individual was not covered by minimum essential coverage for a continuous period of less than 3 months.

(B) Special rules

For purposes of applying this paragraph—

(i) the length of a continuous period shall be determined without regard to the calendar years in which months in such period occur,

(ii) if a continuous period is greater than the period allowed under subparagraph (A), no exception shall be provided under this paragraph for any month in the period, and

(iii) if there is more than 1 continuous period described in subparagraph (A) covering months in a calendar year, the exception provided by this paragraph shall only apply to months in the first of such periods.

The Secretary shall prescribe rules for the collection of the penalty imposed by this section in cases where continuous periods include months in more than 1 taxable year.

(5) Hardships.

Any applicable individual who for any month is determined by the Secretary of Health and Human Services under section 1311(d)(4)(H) to have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.

(f) Minimum essential coverage

For purposes of this section—

(1) In general

The term "minimum essential coverage" means any of the following:

(A) Government sponsored programs

Coverage under—

(i) the Medicare program under part A of title XVIII of the Social Security Act,

(ii) the Medicaid program under title XIX of the Social Security Act,

(iii) the CHIP program under title XXI of the Social Security Act,

(iv) medical coverage under chapter 55 of title 10, United States Code, including coverage under the TRICARE program;[2]

(v) a health care program under chapter 17 or 18 of title 38, United States Code, as determined by the Secretary of Veterans Affairs, in coordination with the Secretary of Health and Human Services and the Secretary,

(vi) a health plan under section 2504(e) of title 22, United States Code (relating to Peace Corps volunteers); or

(vii) the Nonappropriated Fund Health Benefits Program of the Department of Defense, established under section 349 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337; 10 U.S.C. 1587 note).

(B) Employer-sponsored plan

Coverage under an eligible employer-sponsored plan.

(C) Plans in the individual market

Coverage under a health plan offered in the individual market within a State.

---

[2] So in original. The semicolon probably should be a comma.

(D) Grandfathered health plan

Coverage under a grandfathered health plan.

(E) Other coverage

Such other health benefits coverage, such as a State health benefits risk pool, as the Secretary of Health and Human Services, in coordination with the Secretary, recognizes for purposes of this subsection.

(2) Eligible employer-sponsored plan.

The term "eligible employer-sponsored plan" means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to the employee which is—

(A) a governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act), or

(B) any other plan or coverage offered in the small or large group market within a State.

Such term shall include a grandfathered health plan described in paragraph (1)(D) offered in a group market.

(3) Excepted benefits not treated as minimum essential coverage.

The term "minimum essential coverage" shall not include health insurance coverage which consists of coverage of excepted benefits—

(A) described in paragraph (1) of subsection (c) of section 2791 of the Public Health Service Act; or

(B) described in paragraph (2), (3), or (4) of such subsection if the benefits are provided under a separate policy, certificate, or contract of insurance.

(4) Individuals residing outside United States or residents of territories

Any applicable individual shall be treated as having minimum essential coverage for any month—

(A) if such month occurs during any period described in subparagraph (A) or (B) of section 911(d)(1) which is applicable to the individual, or

(B) if such individual is a bona fide resident of any possession of the United States (as determined under section 937(a)) for such month.

(5) Insurance-related terms

Any term used in this section which is also used in title I of the Patient Protection and Affordable Care Act shall have the same meaning as when used in such title.

(g) Administration and procedure.—

(1) In general

The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Special rules

Notwithstanding any other provision of law—

(A) Waiver of criminal penalties

In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.

(B) Limitations on liens and levies

The Secretary shall not—

(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

(ii) levy on any such property with respect to such failure.

2. 26 U.S.C. 6201(a) provides in pertinent part:

Assessment authority

(a) Authority of Secretary

The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. * * *

* * * * *

3. 26 U.S.C. 6671(a) provides:

Rules for application of assessable penalties

(a) Penalty assessed as tax

The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

4. 26 U.S.C. 7421 provides:

Prohibition of suits to restrain assessment or collection

(a) Tax

Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

(b) Liability of transferee or fiduciary

No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of—

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3713(b) of title 31, United States Code[3] in respect of any such tax.

5. 26 U.S.C. 7422(a) provides:

Civil actions for refund

(a) No suit prior to filing claim for refund

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

6. 28 U.S.C. 1341 provides:

Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

---

[3] So in original. Probably should be followed by a comma.

7. Subchapter B of Chapter 34 of the Internal Revenue Code, 26 U.S.C. 4375-4377 (Supp. IV 2010), provides in pertinent part:

Insured and Self-Insured Health Plans

* * * * *

§ 4375. Health insurance

(a) Imposition of fee

There is hereby imposed on each specified health insurance policy for each policy year ending after September 30, 2012, a fee equal to the product of $2 ($1 in the case of policy years ending during fiscal year 2013) multiplied by the average number of lives covered under the policy.

* * * * *

§ 4376. Self-insured health plans

(a) Imposition of fee

In the case of any applicable self-insured health plan for each plan year ending after September 30, 2012, there is hereby imposed a fee equal to $2 ($1 in the case of plan years ending during fiscal year 2013) multiplied by the average number of lives covered under the plan.

* * * * *

§ 4377. Definitions and special rules

* * * * *

(c) Treatment as tax

For purposes of subtitle F, the fees imposed by this subchapter shall be treated as if they were taxes.

* * * * *

8. Section 9008 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 859, provides in pertinent part:

IMPOSITION OF ANNUAL FEE ON BRANDED PRESCRIPTION PHARMACEUTICAL MANUFACTURERS AND IMPORTERS.

(a) IMPOSITION OF FEE.—

(1) IN GENERAL.—Each covered entity engaged in the business of manufacturing or importing branded prescription drugs shall pay to the Secretary of the Treasury not later than the annual payment date of each calendar year beginning after 2009 a fee in an amount determined under subsection (b).

* * * * *

(f) TAX TREATMENT OF FEES.—The fees imposed by this section—

(1) for purposes of subtitle F of the Internal Revenue Code of 1986, shall be treated as excise taxes with respect to which only civil actions for refund under procedures of such subtitle shall apply, and

(2) for purposes of section 275 of such Code, shall be considered to be a tax described in section 275(a)(6).

* * * * *

9. Section 9010 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 865, provides in pertinent part:

IMPOSITION OF ANNUAL FEE ON HEALTH INSURANCE PROVIDERS.

(a) IMPOSITION OF FEE.—

(1) IN GENERAL.—Each covered entity engaged in the business of providing health insurance shall pay to the Secretary not later than the annual payment date of each calendar year beginning after 2009 a fee in an amount determined under subsection (b).

* * * * *

(f) TAX TREATMENT OF FEES.—The fees imposed by this section—

(1) for purposes of subtitle F of the Internal Revenue Code of 1986, shall be treated as excise taxes with respect to which only civil actions for refund under procedures of such subtitle shall apply, and

(2) for purposes of section 275 of such Code shall be considered to be a tax described in section 275(a)(6).

(g) REPORTING REQUIREMENT.—

(1) IN GENERAL.—Not later than the date determined by the Secretary following the end of any calendar year, each covered entity shall report to the Secretary, in such manner as the Secretary prescribes, the covered entity's net premiums written with respect to health insurance for any United States health risk and third party administration agreement fees for such calendar year.

(2) PENALTY FOR FAILURE TO REPORT.—

(A) IN GENERAL.—In the case of any failure to make a report containing the information required by paragraph (1) on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause, there shall be paid by the covered entity failing to file such report, an amount equal to—

(i) $10,000, plus

(ii) the lesser of—

(I) an amount equal to $1,000, multiplied by the number of days during which such failure continues, or

(II) the amount of the fee imposed by this section for which such report was required.

(B) TREATMENT OF PENALTY.—The penalty imposed under subparagraph (A)—

(i) shall be treated as a penalty for purposes of subtitle F of the Internal Revenue Code of 1986,

(ii) shall be paid on notice and demand by the Secretary and in the same manner as tax under such Code, and

(iii) with respect to which only civil actions for refund under procedures of such subtitle F shall apply.

* * * * *

RESPONDENT'S BRIEF

No. 11-398

In the
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR STATE RESPONDENTS ON THE ANTI-INJUNCTION ACT

PAMELA JO BONDI
Attorney General of Florida
SCOTT D. MAKAR
Solicitor General
LOUIS F. HUBENER
TIMOTHY D. OSTERHAUS
BLAINE H. WINSHIP
Office of the Attorney General of Florida
The Capitol, Suite PL-01
Tallahassee, FL 32399
(850) 414-3300

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
CONOR B. DUGAN
ERIN M. HAWLEY
Bancroft PLLC
1919 M Street, NW
Suite 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

February 6, 2012 *(Additional Counsel Listed on Inside Cover)*

GREG ABBOTT
Attorney General
of Texas
BILL COBB
Deputy Attorney General
for Civil Litigation
Office of the Attorney
General of Texas
P.O. Box 12548
Capitol Station
Austin, TX 78711
(512) 475-0131

JON BRUNING
Attorney General
of Nebraska
KATHERINE J. SPOHN
Special Counsel to the
Attorney General
Office of the Attorney
General of Nebraska
2115 State Capitol Building
Lincoln, NE 68508
(402) 471-2834

ALAN WILSON
Attorney General
of South Carolina
P.O. Box 11549
Columbia, SC 29211

MARK L. SHURTLEFF
Attorney General of Utah
Capitol Suite #230
P.O. Box 142320
Salt Lake City, UT 84114

LUTHER STRANGE
Attorney General
of Alabama
501 Washington Avenue
Montgomery, AL 36130

JAMES D. "BUDDY" CALDWELL
Attorney General
of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804

BILL SCHUETTE
Attorney General
of Michigan
P.O. Box 30212
Lansing, MI 48909

JOHN W. SUTHERS
Attorney General
of Colorado
1525 Sherman Street
Denver, CO 80203

ROBERT M. MCKENNA
Attorney General
of Washington
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504

LAWRENCE G. WASDEN
Attorney General of Idaho
P.O. Box 83720
Boise, ID 83720

THOMAS W. CORBETT, JR.
Governor
LINDA L. KELLY
Attorney General
Commonwealth of
Pennsylvania
16th Floor
Strawberry Square
Harrisburg, PA 17120

JOSEPH SCIARROTTA, JR.
General Counsel
Office of Arizona Governor
JANICE K. BREWER
TOM HORNE
Attorney General
of Arizona
1700 West Washington Street
9th Floor
Phoenix, AZ 85007

MARTY J. JACKLEY
Attorney General
of South Dakota
1302 East Highway 14
Pierre, SD 57501

WAYNE STENEJHEM
Attorney General
of North Dakota
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

GREGORY F. ZOELLER
Attorney General
of Indiana
302 West Washington Street
Indianapolis, IN 46204

BRIAN SANDOVAL
Governor of Nevada
State Capitol Building
101 North Carson Street
Carson City, NV 89701

SAMUEL S. OLENS
Attorney General
of Georgia
40 Capitol Square, SW
Atlanta, GA 30334

MICHAEL C. GERAGHTY
Attorney General
of Alaska
P.O. Box 110300
Juneau, AK 99811

MICHAEL DEWINE
Attorney General of Ohio
DAVID B. RIVKIN
LEE A. CASEY
Baker & Hostetler LLP
Special Counsel
30 East Broad Street
17th Floor
Columbus, OH 43215

MATTHEW MEAD
Governor of Wyoming
State Capitol
200 West 24th Street
Cheyenne, WY 82002

J.B. VAN HOLLEN
Attorney General of Wisconsin
114 East State Capitol
Madison, WI 53702

TERRY BRANSTAD
Governor of Iowa
107 East Grand Avenue
Des Moines, IA 50319

MICHAEL B. WALLACE
Counsel for the State of Mississippi by and through Governor
PHIL BRYANT
Wise Carter Child & Caraway, P.A.
P.O. Box 651
Jackson, MS 39205

DEREK SCHMIDT
Attorney General of Kansas
Memorial Hall
120 SW 10th Street
Topeka, KS 66612

WILLIAM J. SCHNEIDER
Attorney General of Maine
Six State House Station
Augusta, ME 04333

QUESTION PRESENTED

The question presented is whether the suit brought by Respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a).

PARTIES TO THE PROCEEDING

Petitioners, who were the appellants/cross-appellees below, are the U.S. Department of Health & Human Services; Kathleen Sebelius, Secretary, U.S. Department of Health & Human Services; the U.S. Department of Treasury; Timothy F. Geithner, Secretary, U.S. Department of Treasury; the U.S. Department of Labor; and Hilda L. Solis, Secretary, U.S. Department of Labor.

The State Respondents, who were the appellees/cross-appellants below, are 26 States: Florida, by and through Attorney General Pam Bondi; South Carolina, by and through Attorney General Alan Wilson; Nebraska, by and through Attorney General Jon Bruning; Texas, by and through Attorney General Greg Abbott; Utah, by and through Attorney General Mark L. Shurtleff; Louisiana, by and through Attorney General James D. "Buddy" Caldwell; Alabama, by and through Attorney General Luther Strange; Attorney General Bill Schuette, on behalf of the People of Michigan; Colorado, by and through Attorney General John W. Suthers; Pennsylvania, by and through Governor Thomas W. Corbett, Jr., and Attorney General Linda L. Kelly; Washington, by and through Attorney General Robert M. McKenna; Idaho, by and through Attorney General Lawrence G. Wasden; South Dakota, by and through Attorney General Marty J. Jackley; Indiana, by and through Attorney General Gregory F. Zoeller; North Dakota, by and through Attorney General Wayne Stenehjem; Mississippi, by and through Governor Phil Bryant; Arizona, by and through Governor Janice K. Brewer and Attorney General Thomas C. Horne; Nevada, by and through

Governor Brian Sandoval; Georgia, by and through Attorney General Samuel S. Olens; Alaska, by and through Attorney General Michael C. Geraghty; Ohio, by and through Attorney General Michael DeWine; Kansas, by and through Attorney General Derek Schmidt; Wyoming, by and through Governor Matthew H. Mead; Wisconsin, by and through Attorney General J.B. Van Hollen; Maine, by and through Attorney General William J. Schneider; and Governor Terry E. Branstad, on behalf of the People of Iowa. The National Federation of Independent Business, Kaj Ahlburg, and Mary Brown are also Respondents, and were also appellees below. Individuals Dana Grimes and David Klemencic were also made Respondents by this Court's order of January 17, 2012.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

INTRODUCTION 1

STATEMENT OF THE CASE 2

A. The Affordable Care Act 2

B. The Anti-Injunction Act 7

C. Proceedings Below 8

SUMMARY OF ARGUMENT 10

ARGUMENT 13

I. The Court Need Not Consider Whether The AIA Applies Because It Is Not Jurisdictional 13

A. Congress Did Not Clearly Indicate that the AIA Is Jurisdictional 14

B. This Court's Precedents Confirm that the AIA Is Not Jurisdictional 17

1. Recent cases warn against relying on "less than meticulous" past use of the term "jurisdictional" 17

2. Labels aside, the Court has consistently treated the AIA as non-jurisdictional 18

II. Even Assuming The AIA Is Jurisdictional, It Is Not An Obstacle To The States 25

A. The States Have Standing to Challenge the Individual Mandate 25

B. The States Fall Squarely Within *Regan*'s Exception to the AIA 34

C. States Are Not Persons Within the Meaning of the AIA 36

III. In All Events, The AIA Does Not Apply To Challenges To The Individual Mandate 43

A. The States Are Challenging the Mandate, Not the Penalty 43

B. The Individual Mandate Is Enforced by a Penalty, Not a Tax 48

CONCLUSION 58

TABLE OF AUTHORITIES

Cases

Alaska Airlines, Inc. v. Brock,
480 U.S. 678 (1987) 30

Alaska Airlines, Inc. v. Donovan,
766 F.3d 1550 (D.C. Cir. 1985) 30

Alexander v. "Americans United" Inc.,
416 U.S. 752 (1974) 47, 48, 49

Allen v. Regents of the Univ. Sys. of Ga.,
304 U.S. 439 (1938) 23

Arbaugh v. Y & H Corp.,
546 U.S. 500 (2006) ..... *passim*

ASARCO Inc. v. Kadish,
490 U.S. 605 (1989) 26

Bailey v. Drexel Furniture Co.,
259 U.S. 20 (1922) 54, 55

Bailey v. George,
259 U.S. 16 (1922) 23, 54, 55

Bell v. Hood,
327 U.S. 678 (1946) 19

Bob Jones Univ. v. Simon,
416 U.S. 725 (1974) 8, 20, 23, 36, 47

Bond v. United States,
131 S. Ct. 2355 (2011) ..... *passim*

Bowles v. Russell,
551 U.S. 205 (2007) 20, 22

Brewster v. Gage,
280 U.S. 327 (1930) 50

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 30

Dean v. United States,
129 S. Ct. 1849 (2009) 51

Dodge v. Brady,
240 U.S. 122 (1916) 23, 24

Dodge v. Osborn,
240 U.S. 118 (1916) 23

Dolan v. United States,
130 S. Ct. 2533 (2010) 20, 22

Enochs v. Williams Packing & Nav. Co.,
370 U.S. 1 (1962) ..... *passim*

Federal Maritime Comm'n v. S.C. Ports Auth.,
535 U.S. 743 (2002) 42

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,
130 S. Ct. 3138 (2010) 56

Garcia v. San Antonio Metro. Transit Auth.,
469 U.S. 528 (1985) 40

Gonzalez v. Thaler,
___ S. Ct. ___, 2012 WL 43513 (2012) 14, 17, 18

Graham v. Du Pont,
262 U.S. 234 (1923) 23

Gregory v. Ashcroft,
501 U.S. 452 (1991) 43

Helvering v. Davis,
301 U.S. 619 (1937) 22, 24, 40

Henderson ex rel. Henderson v. Shinseki,
131 S. Ct. 1197 (2011) 13, 16, 18, 24

Hill v. Wallace,
259 U.S. 44 (1922) 23

I.N.S. v. Cardoza-Fonseca,
480 U.S. 421 (1987) 50

Indian Motorcycle Co. v. United States,
283 U.S. 570 (1931) 40

Int'l Primate Prot. League v. Adm'r of Tulane Educ. Fund,
500 U.S. 72 (1991) 37

Kontrick v. Ryan,
540 U.S. 443 (2004) 18, 20, 22

Landgraf v. USI Film Products,
511 U.S. 244 (1994) 15

Lipke v. Lederer,
259 U.S. 557 (1922) 23

Massachusetts v. EPA,
549 U.S. 497 (2007) 32, 42

Massachusetts v. Mellon,
262 U.S. 477 (1923) 28, 29, 31, 32

Miller v. Standard Nut Margarine Co.,
284 U.S. 498 (1932) 23, 24

New York v. United States,
505 U.S. 144 (1992) 31

Nixon v. Mo. Mun. League,
541 U.S. 125 (2004) 37, 43

Ohio v. Helvering,
292 U.S. 360 (1934) 38, 39, 40, 41

Owasso Indep. Sch. Dist. No. I-011 v. Falvo,
534 U.S. 426 (2002) 43

Pennsylvania v. New Jersey,
426 U.S. 660 (1976) 27, 28, 29

Raygor v. Regents of Univ. of Minn.,
534 U.S. 533 (2002) 37, 43

Reed Elsevier, Inc. v. Muchnick,
130 S. Ct. 1237 (2010) ..... *passim*

Regal Drug Corp. v. Wardell,
260 U.S. 386 (1922) 23

Russello v. United States,
464 U.S. 16 (1983) 50, 51

Seven-Sky v. Holder,
661 F.3d 1 (2011) ..... *passim*

Sims v. United States,
359 U.S. 108 (1959) 38, 40, 41

Snyder v. Marks,
109 U.S. 189 (1883) 24

Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs,
531 U.S. 159 (2001) 43

South Carolina v. Baker,
485 U.S. 505 (1988) 33

South Carolina v. Regan,
465 U.S. 367 (1984) ..... *passim*

Steel Co. v. Citizens for Better Env't,
523 U.S. 83 (1998) ..... *passim*

Texas v. White,
74 U.S. 700 (1868) 31

Thomas More Law Ctr. v. Obama,
651 F.3d 529 (6th Cir. 2011) 52

United States v. Am. Friends Serv. Comm.,
419 U.S. 7 (1974) 49

United States v. Reorganized CF&I Fabricators of Utah, Inc.,
518 U.S. 213 (1996) 44

United States v. United Mine Workers of Am.,
330 U.S. 258 (1947) 37

Vt. Agency of Natural Res. v. United States ex. rel. Stevens,
529 U.S. 765 (2000) ..... *passim*

Constitutional Provisions

U.S. Const. art. III 32

U.S. Const. art. III § 2, cl. 2 42

Statutes

26 U.S.C. § 6332(a) 40

26 U.S.C. § 6332(c) 40

26 U.S.C. § 6671(a) 4, 52, 53

26 U.S.C. § 7422 42

26 U.S.C. § 7701(a)(1) 38

26 U.S.C. § 7701(c) 38

28 U.S.C. § 1341 16

26 U.S.C.A. § 3101(b) 7

26 U.S.C.A. § 4191(a) 7

26 U.S.C.A. § 4959 7

26 U.S.C.A. § 4980I(a) 6

26 U.S.C.A. § 5000A 6, 9, 50, 51

26 U.S.C.A. § 5000A(a) 3, 26, 44

26 U.S.C.A. § 5000A(b) ..... *passim*

26 U.S.C.A. § 5000A(b)(1) 44

26 U.S.C.A. § 5000A(c) 50

26 U.S.C.A. § 5000A(d) 3, 44

26 U.S.C.A. § 5000A(e) 3, 44, 50

26 U.S.C.A. § 5000A(e)(2) 4, 34

26 U.S.C.A. § 5000A(f)(1)(A)(ii) 4, 26, 45

26 U.S.C.A. § 5000A(g) 50

26 U.S.C.A. § 5000A(g)(1) 3, 52, 53

26 U.S.C.A. § 5000A(g)(2) 4

26 U.S.C.A. § 5000A(g)(2)(A) 53

26 U.S.C.A. § 5000A(g)(2)(B) 53

26 U.S.C.A. § 5000B 6

Anti-Injunction Act, 26 U.S.C. § 7421(a) ..... *passim*

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education and Reconciliation Act of 2010, Pub. L. No. 111-152 (ACA) ..... *passim*

ACA § 1501(a)(2)(D) 2

ACA § 1501(b) 3, 6

ACA § 2001 5

ACA § 2001(a)(3) 5, 27

ACA § 9001 6

ACA § 9007(b)(1) 6-7

ACA § 9009 7

ACA § 9015 7

ACA § 10907(b) 6

Rules

Fed. R. Civ. P. 12(h)(3) 20

Other Authorities

Cong. Budget Office, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* (June 16, 2010) 5, 45

The Federalist No. 39, (C. Rossiter ed. 1961) 31

The Federalist No. 72, (J. Cooke ed. 1961) 56

H.R. 3200, 111th Cong. § 401 (2009) 5

H.R. 3962, 111th Cong. § 501 (2009) 5

Obama: Requiring health insurance is not a tax increase, CNN (Sept. 20, 2009)) 7

Richard S. Foster, *Estimated Financial Effects of the "Patient Protection and Affordable Care Act,"* Ctrs. for Medicare & Medicaid Servs. (Apr. 22, 2010) 4

S. 1796, 111th Cong. § 1301 (2009) 6

Staff of the Joint Comm. on Taxation, Estimated Revenue Effects of the Amendment in the Nature of a Substitute to H.R. 4872, the "Reconciliation Act of 2010," as amended, in Combination with the Revenue Effects of H.R.

3590, the "Patient Protection and Affordable Care Act ('PPACA')," as Passed by the Senate, and Scheduled for Consideration by the House Committee on Rules on March 20, 2010 (JCX-17-10) (2010) 7

INTRODUCTION

The Anti-Injunction Act ("AIA") poses no bar to this Court reaching the merits of the critically important questions concerning the constitutionality of the individual mandate. That is particularly true of the States' challenge. Initially, the AIA imposes no obstacle because the provision is not jurisdictional and is not pressed by any party to this case. If the Court agrees that the AIA is not jurisdictional, it need go no further.

But even if the AIA were jurisdictional, it would not bar the States' challenge to the mandate. While the States have standing to challenge the mandate—it inflicts injury on them by, *inter alia*, imposing massive costs by forcing currently eligible but unenrolled low-income individuals to obtain health insurance funded by the State—they are not injured as penalty payers and could never seek a refund. Thus, as this Court has already held, *see South Carolina v. Regan*, 465 U.S. 367 (1984), the AIA does not apply and leave States wholly without a remedy. Indeed, the AIA and its generic reference to persons do not even extend to States in the first place.

In all events, the AIA is not applicable for the most basic reason of all: The challenge here is to the mandate, and not the penalty that enforces it. The two are distinct provisions with distinct exemptions. Numerous individuals subject to the mandate are exempt from the penalty—indeed, the States' injury stems in large measure from the mandate's coverage of just such individuals. What is more, because the insurance premiums paid to satisfy the mandate cannot be paid under protest and recouped in a

refund action in which the constitutional claims can be vindicated, the AIA is a non-sequitur.

At bottom, this case involves assertion of a federal power of unprecedented scope. That power is constitutionally problematic for numerous reasons, not the least of which is the mandate's tendency to avoid the political accountability associated with straightforward efforts to increase taxes. The federal government simply cannot be allowed to assert this unprecedented power, avoid the accountability required of taxes, and then avoid judicial review for years based on a provision limited to taxes. The time for review of the individual mandate is now.

STATEMENT OF THE CASE

A. The Affordable Care Act

1. The Affordable Care Act is a 2,700-page collection of "sweeping and comprehensive" provisions, Pet. App. 20a, intended to impose "near-universal" health insurance coverage on the Nation. ACA § 1501(a)(2)(D).[1] The Act imposes new and substantial obligations on every corner of society, from individuals to insurers to employers to States.

The centerpiece of the ACA is an unprecedented mandate that nearly every individual must maintain health insurance coverage at all times. In a provision entitled "Requirement to maintain minimum essential coverage," Congress mandated

---

[1] All citations of provisions of the "ACA" are of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education and Reconciliation Act of 2010, Pub. L. No. 111-152.

that every "applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month." ACA § 1501(b); 26 U.S.C.A. § 5000A(a). This mandate to maintain a federally approved level of insurance applies to all individuals except foreign nationals residing here unlawfully, incarcerated individuals, and individuals falling within two very narrow religious exemptions. *Id.* § 5000A(d).

The individual mandate is enforced by a separate statutory provision labeled a "Shared Responsibility Payment." *Id.* § 5000A(b). Under that provision, "[i]f a taxpayer who is an applicable individual ... fails to meet the requirement" that the mandate imposes, "then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty." *Id.* This "penalty" has its own set of five "exemptions." *Id.* § 5000A(e). Importantly, though, individuals exempted from the *penalty* are *not* thereby exempted from the *mandate*. Thus, individuals fully subject to the mandate may be exempt from the penalty, but exemption from the penalty does not obviate their obligation to comply with the mandate to maintain health insurance at all times. Nor does payment of the penalty satisfy the individual mandate for those who are subject to both.

The penalty, subject to certain exceptions, is to be "assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68" of the federal tax code. *Id.* § 5000A(g)(1). Penalties in that chapter, in turn, are to be "assessed and collected in the same manner as taxes." 26

U.S.C. § 6671(a). Neither the mandate nor the penalty is housed in chapter 68 of the code; they are instead found in chapter 48. *See* 26 U.S.C.A. § 5000A(b). While Congress made the ACA's penalty payable to the Secretary of the Treasury, the exceptions to assessment and collection "in the same manner as" assessable penalties actually preclude the Secretary from using most of the traditional means of enforcing and collecting a tax. Specifically, those who fail to pay the penalty "shall not be subject to any criminal prosecution or penalty" for that failure, and the Secretary may not uses liens or levies to recover the penalty. *Id.* § 5000A(g)(2).

Among the individuals exempted from the penalty but not the mandate are individuals with income below the federal poverty level. *See id.* § 5000A(e)(2). As a result, many individuals who are eligible for Medicaid are not subject to the penalty, but are still subject to the mandate's requirement to maintain a minimum level of insurance. The ACA expressly renders enrollment in Medicaid a means of satisfying that obligation. *See id.* § 5000A(f)(1)(A)(ii). Indeed, there is no other mechanism in the Act besides Medicaid for those below the poverty level to comply with the mandate, *see* Br. for State Petrs. on Medicaid 11–13, and the federal government estimates that some 18 million additional individuals will satisfy the mandate in just that way. *See* Richard S. Foster, *Estimated Financial Effects of the "Patient Protection and Affordable Care Act," Centers for Medicare & Medicaid Servs.*, (Apr. 22, 2010) at 6 ("[o]f the additional 34 million people who are estimated to be insured by 2019 as a result of the [ACA], a little more than one-half (18 million) would

receive Medicaid coverage"). Although some of that additional enrollment is in part attributable to a dramatic expansion of Medicaid that the ACA will impose upon the States, *see* ACA § 2001, the Congressional Budget Office concluded that, even with the expansion, 6 to 7 million fewer individuals would enroll in Medicaid if there were no individual mandate. CBO, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* (June 16, 2010).[2]

Although the ACA provides that the federal government will initially fund 100% of the costs of covering individuals newly eligible for Medicaid under the ACA's expanded eligibility criteria, the ACA does not provide any increase in funding for enrollment of individuals who are currently eligible for Medicaid but have chosen not to enroll. ACA § 2001(a)(3). Thus, States will continue to pay up to 50% of the costs generated by enrollment of the currently eligible but unenrolled. Florida, for example, has projected that solely as a result of enrolling the currently eligible, its share of Medicaid spending will increase by more than $500 million annually by the end of the decade. JA (Medicaid) 76 ¶¶ 17–18.

2. Before enacting the ACA, Congress considered and rejected a number of other pieces of legislation that differed markedly from the ACA. For example, two bills introduced in the House of Representatives would have imposed a "tax upon individuals without acceptable health care coverage." H.R. 3200, 111th Cong. § 401 (2009); *see also* H.R. 3962, 111th Cong.

---

[2] *Available at* http://www.cbo.gov/ftpdocs/113xx/doc11379/Eliminate_Individual_Mandate_06_16.pdf.

§ 501 (2009) (same). Unlike the ACA, neither of those bills imposed a stand-alone mandate that individuals maintain insurance, and the exaction that each imposed on "individuals without acceptable" insurance was expressly and repeatedly labeled a "tax," not a penalty.

By contrast, the ACA explicitly imposes a stand-alone requirement to obtain insurance, and then explicitly describes the punishment for failure to comply with that requirement as a "penalty," both in the operative provision and more than a dozen times throughout the statute. *See* ACA § 1501(b); 26 U.S.C. § 5000A(b). That terminology also stands in stark contrast to another bill considered by the Senate that also would have imposed a "requirement to maintain essential health benefits coverage," but would have "imposed a *tax*" on individuals who "fail[] to meet th[at] requirement." S. 1796, 111th Cong. § 1301 (2009) (emphasis added).

The terminology used in section 5000A also differs materially from other provisions throughout the ACA, many of which expressly impose new "taxes." For instance, section 9001 imposes a "tax" on so-called "Cadillac health plans." ACA § 9001, 26 U.S.C.A § 4980I(a) ("[i]f—(1) an employee is covered under any applicable employer-sponsored coverage of an employer at any time during a taxable period, and (2) there is any excess benefit with respect to the coverage, there is hereby imposed a *tax* equal to 40 percent of the excess benefit" (emphasis added)). Similarly, Congress imposed on "any indoor tanning service a *tax* equal to 10 percent of the amount paid for such service." ACA § 10907(b), 26 U.S.C.A. § 5000B (emphasis added); *see also* ACA § 9007(b)(1),

26 U.S.C.A. § 4959 (imposing "a tax equal to $50,000" on hospitals that fail to meet certain requirements); ACA § 9009, 26 U.S.C.A. § 4191(a) (imposing a "tax" "on the sale of any taxable medical device"); ACA § 9015, 26 U.S.C.A. § 3101(b) (imposing hospital "tax" on high income taxpayers).

Notably, the President insisted that the penalty for failure to obtain insurance was not a tax. *See, e.g.*, *Obama: Requiring health insurance is not a tax increase*, CNN (Sept. 20, 2009) ("For us to say you have to take responsibility to get health insurance is absolutely not a tax increase.").[3] The Congressional Joint Committee on Taxation also did not include the effects of the penalty in its assessment of the effects of the ACA's tax provisions.[4]

B. The Anti-Injunction Act

The AIA provides that, with exceptions not relevant here, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). The statute's

---

[3] *Available at* http://articles.cnn.com/2009-09-20/politics/obama.health.care_1_health-insurance-coverage-mandate-medicare-advantage?_s=PM:POLITICS.

[4] *See* Staff of the Joint Committee on Taxation, Estimated Revenue Effects of the Amendment in the Nature of a Substitute to H.R. 4872, the "Reconciliation Act of 2010," as amended, in Combination with the Revenue Effects of H.R. 3590, the "Patient Protection and Affordable Care Act ('PPACA')," as Passed by the Senate, and Scheduled for Consideration by the House Committee on Rules on March 20, 2010 (JCX-17-10) (2010), *available at* http://www.jct.gov/publications.html?func=startdown&id=3672.

basic function is to prohibit taxpayers from bringing pre-enforcement suits to enjoin taxes, and to instead require them to "pay income taxes, ... exhaust ... internal refund procedures, and then bring suit for a refund." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 746 (1974). Because the AIA is premised on the relatively unusual ability of a disgruntled taxpayer to pay taxes under protest and still have "a full, albeit delayed, opportunity to litigate the legality of" a tax even if the challenger pays the tax as required, *id.*, courts will apply "the Act to bar a suit only in situations in which Congress had provided the aggrieved party with an alternative legal avenue by which to contest the legality of a particular tax." *Regan*, 465 U.S. at 374.

C. Proceedings Below

Shortly after the ACA was enacted, Florida and 12 other States brought this action seeking a declaration that the individual mandate is facially unconstitutional and the Act as a whole is invalid. They have since been joined by 13 additional States, the National Federation of Independent Business, and multiple individuals.

Initially, the federal government argued that Respondents' challenge to the individual mandate was barred by the AIA. *See* Govt.'s Mem. Supp. Mot. Dismiss 33–34 [Eleventh Circuit Record Excerpts ("R.E.") 128–29]. According to the federal government, any challenge to the mandate was a suit for the purpose of restraining the separate penalty provision, which the federal government argued was a tax. *See id.* at 34 [R.E. 129]. The States replied that the ACA's "enforcement penalty

... is not a tax" because Congress explicitly chose to enact a penalty, not a tax. Plfs.' Mem. Opp. Mot. Dismiss 18–19 [R.E. 193–94].

The District Court rejected the federal government's AIA argument. The court first found it telling that Congress considered and rejected numerous proposals to impose a "tax" rather than a "penalty." Pet. App. 410a. The court also found "Congress's failure to call the penalty a 'tax' ... especially significant in light of the fact that the Act itself imposes a number of taxes in other sections." Pet. App. 411a. The court concluded that this demonstrated "beyond question that Congress knew how to impose a tax when it meant to do so" and thus that "the strong inference and presumption must be that Congress did not intend for the 'penalty' to be a tax." Pet. App. 411a. The court also concluded that the ACA "contain[ed] *no* indication that Congress was exercising its taxing authority" in section 5000A. Pet. App. 415a. And it found noteworthy that the ACA both "eliminated traditional IRS enforcement methods for the failure to pay the" penalty and "failed to identify ... any revenue that would be raised from it, notwithstanding that at least seventeen other revenue-generating provisions were specifically so identified." Pet. App. 421a. Accordingly, the court concluded that the AIA does not bar the States' challenge to the individual mandate and proceeded to hold the mandate unconstitutional. Pet. App. 350a.

On appeal to the Eleventh Circuit, the federal government declined to pursue its argument that the AIA bars Respondents' challenge to the mandate. *See* Fed. Govt.'s Pet. for Cert. 32. And in two parallel suits challenging the AIA, the federal

government disavowed its earlier position and expressly argued that the AIA does *not* bar pre-enforcement challenges to the individual mandate because the penalty provision is not a tax for purposes of the AIA. *Id.* at 32–33; *see also* Fed. Govt.'s Supp. Br. 2, *Liberty Univ., Inc. v. Geithner* (4th Cir.) (No. 10-2347).

The Eleventh Circuit affirmed the District Court's holding that the individual mandate is unconstitutional. Pet. App. 187a–88a. Although the court did conclude that the penalty to enforce the mandate is not a "tax" for purposes of constitutional analysis under Congress' tax power, Pet. App. 157a–72a, it did not address the AIA issue.

SUMMARY OF ARGUMENT

The AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). There is no need to consider whether that proscription encompasses the States' challenge to the individual mandate because the AIA is not a jurisdictional statute. The AIA lacks the clear indication this Court requires to find a statute jurisdictional because it is addressed to the rights and obligations of litigants, not to the power of courts. Moreover, it is located in a section of the U.S. Code that governs procedure and administration, not the jurisdiction of the courts. And it admits of exceptions, both statutorily defined and judicially created. While the Court's cases have sometimes used loose language to describe the AIA as "jurisdictional," the AIA is

hardly the only statutory context where that has occurred, and the Court has more recently insisted on turning square corners and reserving the jurisdictional label and its consequences for truly jurisdictional statues. The AIA is clearly a claims-processing rule, not a jurisdictional bar. No party to this case invokes the AIA. Accordingly, the Court can consider the critical constitutional questions the individual mandate raises without considering the applicability of the AIA.

Even if the AIA were jurisdictional, it would pose no bar to the States' challenge to the mandate. The States are injured by the mandate for multiple reasons, most obviously because it will force millions of individuals to enroll in Medicaid, thereby substantially increasing States' financial obligations under the program. The States are injured just as obviously as if Congress had amended Medicaid directly to require the States to enroll a higher percentage of eligible individuals. But because neither the mandate nor its penalty provision applies directly to the States, to hold the AIA applicable to the States' challenge would deprive the States of *any* remedy for that injury. This Court has already rejected the argument that the AIA applies in such circumstances, and *Amicus* does not argue otherwise. Beyond that, the AIA does not even apply to States in the first place, as it uses the generic term "person" and contains no clear indicia to overcome the "longstanding interpretive presumption that 'person' does not include the sovereign." *Vt. Agency of Natural Res. v. United States ex. rel. Stevens*, 529 U.S. 765, 780 (2000).

The AIA is also inapplicable because the States are challenging the individual mandate, not the penalty provision through which the mandate is enforced. That renders the AIA inapplicable by its plain terms regardless of whether that penalty is a tax, as the States' challenge is not a "suit for the purpose of restraining" the penalty. 26 U.S.C. § 7421(a). That the two are distinct is most evident from the fact that many individuals are subject to the mandate but not the penalty. Indeed, the States' injury is largely a product of the mandate's effect on just such individuals, as many of the Medicaid-eligible individuals who must enroll on account of the mandate are exempt from the penalty.

Moreover, unlike taxpayers to whom the AIA applies, those who oppose the mandate have no option of paying insurance premiums under protest and seeking to recoup them as unconstitutional in a refund action. If the AIA applies nonetheless it would leave individuals such as Private Respondents—who fully intend to comply with the mandate so long as it stands—without any ability to challenge the mandate. They would have to violate the mandate to challenge it. That is not how the AIA is supposed to work. It forces taxpayers to pursue a refund action; it does not force citizens to break the law in order to challenge it.

Moreover, to the extent that a challenge to the mandate might be construed as a challenge to the penalty, the AIA would still pose no bar because that penalty is not a tax. Congress considered and rejected proposals to impose a tax on the insured, and instead imposed a stand-alone regulatory command to obtain insurance, with a "penalty" provision to

enforce it. Congress did so for an obvious reason: It lacked the political support to impose a tax. That Congress could not and would not have passed the penalty were it a tax is reason enough not to construe it as one, as accountability to the people is the single most important restraint on Congress' vast power to impose taxes.

In short, *Amicus*' argument fails on every level: The AIA is not jurisdictional, does not apply to the States, and does not apply to challenges to the individual mandate or even its penalty provision. There is no reason that the AIA should prevent the Court from reaching the critical constitutional questions that this case presents.

ARGUMENT

I. The Court Need Not Consider Whether The AIA Applies Because It Is Not Jurisdictional.

Because the federal government has affirmatively disavowed reliance on the AIA, there is no need for the Court to consider the AIA's applicability unless the statute is jurisdictional. *See Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011). It is not. The AIA has none of the clear indications that this Court requires before concluding that a statute is truly jurisdictional. And while this Court's opinions in the AIA context, as in other contexts, contain some loose references to the statute as jurisdictional, this Court has cautioned against relying on such mislabeling. What matters is not the label attached, but the substance of this Court's decisions, and the Court has consistently treated the AIA as non-jurisdictional by recognizing

exceptions to its application, which could not be squared with a truly jurisdictional statute. Accordingly, this Court need only reaffirm that the AIA is not jurisdictional and move on to decide the merits.

A. Congress Did Not Clearly Indicate That the AIA Is Jurisdictional.

Given the "drastic" consequences that attend a withdrawal of jurisdiction, this Court will not find a statute jurisdictional absent a clear indication from Congress. *Gonzalez v. Thaler*, ___ S. Ct. ___, 2012 WL 43513, at *5 (2012); *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1245 (2010) (question is whether statute "clearly states' that its ... requirement is 'jurisdictional'" (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006))). A limit is jurisdictional "[i]f the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional." *Thaler*, 2012 WL at *5 (quoting *Arbaugh*, 546 U.S. at 515–16; emphasis added). Conversely, "[w]here Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional." *Arbaugh*, 546 U.S. at 516.

The AIA plainly lacks the clear statement that this Court requires before finding a statute jurisdictional. To begin, the term "jurisdiction" is wholly absent from the AIA. Even beyond that obvious deficiency, the AIA lacks the most salient characteristic of jurisdictional statutes: It is not addressed to courts, but is instead addressed to litigants. Because "[s]ubject matter jurisdiction" refers to "the courts' statutory or constitutional

power to adjudicate the case," *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998), the term properly applies only to prescriptions that "speak to the power of the court rather than to the rights or obligations of the parties." *Reed Elsevier*, 130 S. Ct. at 1243 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994)). Statutes that speak to the rights or obligations of litigants, by contrast, establish "claim-processing rules" rather than "jurisdictional prescriptions." *Id.* at 1243–44.

Instead of limiting "the courts' statutory or constitutional power to adjudicate the case," *Steel Co.*, 523 U.S. at 89, the AIA focuses on the litigant's cause of action: "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). It would have been easy enough for Congress to direct the Act to the ability of the court to hear the suit (or in the passive voice the ability of the matter to be maintained or heard "*by* any court"), but Congress focused instead on the ability of a person to maintain a suit "*in* any court *by* any person." As such, the AIA "says nothing about whether a federal court has subject-matter jurisdiction." *Reed Elsevier*, 130 S. Ct. at 1245. It instead functions as a claims-processing statute, establishing the method and timing of judicial review by directing certain litigants to statutorily provided refund actions. As this Court put it, the AIA "was merely intended to require taxpayers to litigate their claims in a designated proceeding." *Regan*, 465 U.S. at 374.

The location of the AIA also provides no "clear indication" that Congress intended the AIA to be

jurisdictional. *Henderson*, 131 S. Ct. at 1205. The AIA does not reside in the section of the U.S. Code dedicated to district court jurisdiction. It resides instead in a miscellaneous tax code section that governs procedure and administration. That the AIA "is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction over [the] respective claims" is further confirmation that it is not jurisdictional. *Reed Elsevier*, 130 S. Ct. at 1245–46; *see also Arbaugh*, 546 U.S. at 514–15.

Although the enactment of the Tax Injunction Act ("TIA") "throws light on the proper construction" of the AIA, *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 6 (1962); *see Amicus* Br. 17, it is the contrast between the two that shines through. Unlike the AIA, the TIA *is* directed to the power of courts and *is* located in the section of the U.S. Code that establishes the jurisdiction of district courts. *See* 28 U.S.C. § 1341 ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."). Congress' choice to use such obviously jurisdictional language in an analogous context only underscores that the requisite "clear indication" is lacking for the AIA. As the Court explained in *Williams Packing*, the inclusion of express language addressing a particular issue in the TIA "indicates" that, if Congress had desired the AIA to have the same effect, "it would have said so explicitly." 370 U.S. at 6.

Congress could have spoken in jurisdictional terms in the AIA, *e.g.*, "no court shall hear" (or better yet, "have jurisdiction over") "any suit for the

purpose of restraining the assessment or collection of any tax," but it did not. Its "failure to do so" demonstrates Congress' intent that the AIA is not jurisdictional, even if the TIA is. *Williams Packing*, 370 U.S. at 6; *see also Thaler*, 2012 WL at *6 ("unambiguous jurisdictional terms" in a related statute are evidence that Congress "would have spoken in clearer terms if it intended [the statute] to have similar jurisdictional force"). In short, there is nothing to indicate that Congress intended the AIA to "speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Reed Elsevier*, 130 S. Ct. at 1246.

B. This Court's Precedents Confirm that the AIA Is Not Jurisdictional.

1. Recent cases warn against relying on "less than meticulous" past use of the term "jurisdictional."

Amicus argues that this Court can overlook the absence of any clear jurisdictional statement in the AIA because prior cases have referred to the statute as "jurisdictional." *Amicus* Br. 17. But the smattering of cases that *Amicus* musters for this point cannot survive the Court's more recent admonishments that such loose uses of the term "jurisdictional" are of little or no value.

"Jurisdiction," the Court has cautioned, "is a word of many, too many, meanings." *Steel Co.*, 523 U.S. at 90. As a result, "[c]ourts—including this Court—have sometimes mischaracterized claim-processing rules ... as jurisdictional limitations." *Reed Elsevier*, 130 S. Ct. at 1243–44; *see also Arbaugh*, 546 U.S. at 511–12 (citing examples); *Steel*

Co., 523 U.S. at 91 (same). In a series of recent cases, however, the Court has sought to "bring some discipline to the use of th[e] term" "jurisdictional," *Henderson*, 131 S. Ct. at 1202–03, and has "pressed a stricter distinction between truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim-processing rules,' which do not." *Thaler*, 2012 WL at *5 (quoting *Kontrick v. Ryan*, 540 U.S. 443, 454–55 (2004)).

Amicus' argument that historical labeling of the AIA as "jurisdictional" should be given "dispositive weight," *Amicus* Br. 19, is at odds with this Court's "marked desire" to correct loose language and "drive-by jurisdictional rulings." *Reed Elsevier*, 130 S. Ct. at 1244. The best that can be said about the old cases *Amicus* offers is that they were "less than meticulous" in their use of the term "jurisdictional." *Kontrick*, 540 U.S. at 454.

2. Labels aside, the Court has consistently treated the AIA as non-jurisdictional.

As *Amicus* concedes, even as the Court labeled the AIA jurisdictional, it did not treat it as such. *Amicus* attempts to characterize the Court's construction of the AIA as "cyclical," infused only with "periods" in which the Court affirmatively rejected a jurisdictional interpretation. *Amicus* Br. 19. But those non-jurisdictional rulings cannot be dismissed as just youthful indiscretions or an experimental period. They are emblematic of this Court's interpretation of the AIA as a claims-processing rule that permits equitable exceptions. What is more, they are precedential decisions of this

Court that no one proposes overruling. It is simply too late in the day to say that the AIA is a jurisdictional statute not subject to forfeiture, waiver, or equitable exceptions.

1. At the outset, the AIA's *non*-jurisdictional status is confirmed by the very decision that *Amicus* acknowledges is the Court's "capstone" interpretation of the Act: *Enochs v. Williams Packing*. *See Amicus* Br. 7. In *Williams Packing*, the Court of Appeals had enjoined a tax on grounds that "collection would destroy [the taxpayer's] business." 370 U.S. at 2. Although this Court reversed, it did not do so because the AIA is a jurisdictional statute that admits of no exceptions. Quite the contrary, the Court reiterated that the AIA does *not* apply when "it is clear that under no circumstances could the Government ultimately prevail" and "equity jurisdiction otherwise exists." *Id.* at 7. The Court then went on to conclude that those circumstances did not exist in the case at hand. *See id.* at 8 (reversing after examining merits and concluding that "[t]he record before us clearly reveals that the Government's claim of liability was not without foundation").

Williams Packing's merits-based requirement that the federal government's claim of liability have "foundation" would make no sense if the AIA were a truly jurisdictional statute. That inquiry into the merits cannot be dismissed as analogous to the *Bell v. Hood*, 327 U.S. 678, 683 (1946), notion that a claim that is wholly frivolous does not trigger a court's subject-matter jurisdiction. The *Williams Packing* test is more demanding of the federal government, and in all events applies to the federal government's defense, not the taxpayer's claim. The

notion that a complete jurisdictional bar has an exception if the merits of the defendant's position are wholly without foundation would be a complete anomaly. The notion that the AIA provides the federal government a defense, except when its position on the merits is extremely weak, is far less anomalous.

The existence of the "judicially-created" *Williams Packing* exception, *Regan*, 465 U.S. at 372, is fatal to *Amicus'* effort to construe the AIA as jurisdictional. It is hornbook law that, if a limit is truly jurisdictional, "[t]he prohibition is absolute." *Dolan v. United States*, 130 S. Ct. 2533, 2538 (2010). Courts have "no authority to create equitable exceptions to jurisdictional requirements." *Bowles v. Russell*, 551 U.S. 205, 214 (2007); *Kontrick*, 540 U.S. at 452 ("Only Congress may determine a lower federal court's subject-matter jurisdiction"); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Yet *Williams Packing* explicitly confirms that courts may adjudicate pre-enforcement tax disputes notwithstanding the AIA. *Cf. Bob Jones*, 416 U.S. at 748–49 ("Without deciding the merits, we think that petitioner's First Amendment, due process, and equal protection contentions are sufficiently debatable to foreclose any notion that 'under no circumstances could the Government ultimately prevail."). That only confirms that the AIA is a claims-processing rule that directs certain litigants to a statutorily provided refund remedy, and is not truly jurisdictional in the sense of limiting "the

courts' statutory or constitutional *power* to adjudicate the case." *Steel Co.*, 523 U.S. at 89.

2. This Court's decision in *South Carolina v. Regan* also underscores that the AIA is a claims-processing statute that directs certain litigants to statutorily provided refund actions, not a jurisdictional statute that limits the adjudicatory authority of courts. *Regan* teaches that it is who sues and when—not the nature of the suit—that matters. Those are not "jurisdictional" inquiries.

In *Regan*, South Carolina challenged the constitutionality of "a tax on the interest earned on state obligations issued in bearer form." 465 U.S. at 372. No one disputed that an *identical* challenge brought by a bondholder would have been subject to the AIA. *See id.* If the AIA were jurisdictional and directed to the courts' authority, that would have ended the matter. Analyzing the Act's purposes, however, the Court held that South Carolina could sue under another exception to the Act. Using claims-processing language, the Court concluded that the AIA only "prohibited injunctions in the context of a statutory scheme that provided an alternative remedy," and "was merely intended to require taxpayers to litigate their claims in a designated proceeding." *Id.* at 374. The AIA, in other words, protects certain defendants from certain suits by certain plaintiffs, but does not cordon off an entire subject matter from the courts' jurisdiction. *See id.* (AIA "was also designed as 'protection of the collector from litigation pending a suit for a refund'" (quoting *Williams Packing*, 370 U.S. at 7–8)). The AIA directs certain litigants to a favored forum, but it is not directed to the courts'

power. Since South Carolina was "unable to utilize any statutory procedure to contest the constitutionality of" the bond provision, the AIA did not bar South Carolina's action. *Id.* at 378.

Amicus maintains that the limitation on the AIA's scope recognized in *Regan* does not affect its "jurisdictional" status. *Amicus* Br. 20. But *Regan*'s exception for claims without an alternative remedy is irreconcilable with a jurisdictional bar. This Court is not in the business of arrogating to itself jurisdiction where none exists; if a limit is truly jurisdictional, it admits of no equitable exception, even if application of a strict jurisdictional limit leaves a litigant wholly without a remedy. *Dolan*, 130 S. Ct. at 2538; *Bowles*, 551 U.S. at 214; *Arbaugh*, 546 U.S. at 514; *Kontrick*, 540 U.S. at 452.

3. Even in earlier cases, the Court consistently treated the AIA as non-jurisdictional. Most notably, in *Helvering v. Davis*, 301 U.S. 619 (1937), the Court relied upon the federal government's waiver of an AIA "defense" and proceeded to address the merits of plaintiff's motion to enjoin taxation. *Id.* at 640. This Court's decision on the merits conclusively demonstrates that (at least) a majority of this Court concluded that the AIA is not jurisdictional. *See Bowles*, 551 U.S. at 216 ("[I]f a limit is taken to be jurisdictional, waiver becomes impossible.").

Amicus' only answer is to label *Davis* "an anomaly." *Amicus* Br. 22 n.7. It is not. *Davis* is consistent with a long line of cases treating the AIA as a claims-processing statute. From the early 1900s, the Court has treated the AIA as heightening the standard for equitable review by forbidding "the

enjoining of a tax *unless* by some extraordinary and entirely exceptional circumstance its provisions are not applicable." *Dodge v. Osborn*, 240 U.S. 118, 122 (1916) (emphasis added). In other words, the Court has long held the AIA "inapplicable" when "extraordinary and exceptional circumstance[s]" exist. *Bailey v. George*, 259 U.S. 16, 20 (1922); *Dodge v. Brady*, 240 U.S. 122, 126 (1916) ("[W]e think that this [tax] case is so exceptional in character as not to justify us in holding that reversible error was committed by the court below in passing upon the case upon its merits.").

In 1922, the Court also repeatedly held the AIA inapplicable to tax statutes that operate as enforcement mechanisms for regulatory commands. *See Hill v. Wallace*, 259 U.S. 44 (1922); *Lipke v. Lederer*, 259 U.S. 557 (1922); *Regal Drug Corp. v. Wardell*, 260 U.S. 386 (1922). While the Court subsequently clarified the scope of that exception, holding that it would not apply to "truly revenue-raising tax statutes," the Court did not repudiate the underlying equitable exception. *Bob Jones*, 416 U.S. at 743 (citing *Graham v. Du Pont*, 262 U.S. 234 (1923)); *see also id.* (describing AIA as "merely 'declaratory of the principle' that equity usually, *but not always*, disavows interference with tax collection" (quoting *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932); emphasis added)); *Allen v. Regents of the University System of Georgia*, 304 U.S. 439 (1938) (same). Jurisdictional statutes are not descriptions of generally applicable equitable principles. They are strict limits on a court's power.

These early cases—from *Brady* to *Miller* to *Davis*—all affirmatively reject the notion that the AIA is jurisdictional in any sense of the word, and the more recent cases discussed above are equally inconsistent with jurisdictional status. Indeed, the non-jurisdictional status of the AIA is plain from *Williams Packing*, which confirms that courts possess discretion to exercise jurisdiction if a particularly strong showing of success on the merits is made. 370 U.S. at 7. And under the even more recent *Regan*, courts retain the discretion to exercise jurisdiction when the alternative remedy provided by Congress is unavailable. 465 U.S. at 380. Thus, if there is any "anomaly," it is the Court's occasional characterization of the AIA's limits as absolute, *see, e.g.*, *Snyder v. Marks*, 109 U.S. 189, 194 (1883), and the more frequent loose language concerning jurisdiction mentioned above.

Certainly, principles of *stare decisis* counsel in favor of treating the AIA as non-jurisdictional. Any anomalous decisions referring to the AIA as jurisdictional or treating its limits harshly pose no serious issue. This Court has been adding clarity to the law by cleaning up loose language and turning square corners in a number of contexts. And, of course, even a claims-processing rule can be "mandatory" and non-waivable in certain circumstances. *See Henderson*, 131 S. Ct. at 1205. But this Court's decisions recognizing exceptions to the AIA and finding it waivable are real obstacles to treating the statute as truly jurisdictional. *See id.* ("mandatory prescriptions" are not all "properly typed jurisdictional"). *Amici* does not suggest that the Court should overrule any of its earlier decisions.

Thus, the only path open to this Court that is faithful to its precedents is to recognize that the AIA is not jurisdictional. If the Court reaches that conclusion, it need consider the AIA no further, and can reach the weighty constitutional issues implicated by the mandate.

II. Even Assuming The AIA Is Jurisdictional, It Is Not An Obstacle To The States.

Even if the AIA were a jurisdictional bar to some challenges to the individual mandate, it is not a bar to the States' challenge. The States fall squarely within the exception that this Court recognized in *Regan* since the alternative remedy of a refund action is not available to them. For the States, it is this action or nothing. Indeed, the AIA, properly construed, does not even apply to States, as States are not "persons" within the meaning of the statute. Accordingly, the AIA, even were it jurisdictional, would pose no bar to consideration of the States' claim.

A. The States Have Standing to Challenge the Individual Mandate.

At the outset, there is no merit to *Amicus*' attempt to sidestep the question of the AIA's applicability to the States by arguing that the States lack standing to challenge the mandate. *See Amicus* Br. 53–57. The States have standing for at least three separate and independent reasons.

1. The individual mandate requires nearly all individuals to maintain insurance, including individuals who are either newly eligible for Medicaid or were previously eligible but had not

opted to enroll. *See* 26 U.S.C. § 5000A(a). Thus, because of the mandate, millions more individuals will enroll in Medicaid, imposing millions of dollars in additional costs upon the States. The Act makes the link direct by specifying that Medicaid coverage satisfies the mandate, *see* ACA § 5000A(f)(1)(A)(ii), and by providing no alternative mechanism for low-income individuals to comply, *see* Br. for State Petrs. on Medicaid 11–13. The States' injury is essentially no different from the injury suffered by a company with an agreement with the federal government to provide a product at a subsidized rate to all individuals who request it. If the federal government passed a law making the purchase of that product mandatory, not voluntary, the company would suffer an immediate and enormous financial hit and would clearly have standing to sue.

Contrary to *Amicus*' contention, there is nothing "'conjectural or hypothetical'" about that injury. *Amicus* Br. 55 (quoting *Steel Co.*, 523 U.S. at 103). According to the federal government's own studies, of the 16 to 18 million individuals expected to enroll in Medicaid as a result of the ACA, a full 6 to 7 million would not enroll if there were no individual mandate requiring them to do so. *See supra*, p. 5. As those numbers confirm, the increase in enrollment and the corresponding increase in the States' financial obligations under Medicaid are neither speculative nor the product of "unfettered choices made by independent actors." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.). Those increases are instead a direct, inevitable, and intended consequence of the individual mandate.

Amicus alternatively contends the States' claim is premature because the federal government will cover the costs of newly eligible Medicaid enrollees through 2016. *Amicus* Br. 56. But even assuming the claim were premature as to those individuals (and it is not), *Amicus* simply ignores the States' uncontested evidence that the mandate will *immediately* increase their Medicaid costs in a very substantial way by forcing currently eligible but unenrolled individuals to enroll. Because the ACA's initial offer of 100% federal funding applies only to *newly* eligible enrollees, States will continue to pay up to 50% of the costs generated by enrollment of the currently eligible but unenrolled. ACA § 2001(a)(3). Florida, for example, has projected that solely as a result of enrolling the currently eligible, its share of Medicaid spending will increase by more than $500 million annually by the end of the decade. JA 76 ¶¶ 17–18. That enormous cost is associated directly with the individual mandate. These are additional costs to the States from servicing individuals for whom the difference between a voluntary option to enroll and a mandate is determinative.

Amicus also misses the mark by insisting that the States' injury is insufficient to establish standing because it "result[]s 'from decisions by their respective legislatures'" to participate in Medicaid. *Amicus* Br. 54 (quoting *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (per curiam)). Whatever the nature of the States' decision to participate in Medicaid, the States did not agree to participate in Medicaid under the condition that federal law would require every eligible individual to enroll. The States' standing to challenge the mandate is no

different from their standing to challenge any other statute that alters States' obligations under a spending program, something that even the federal government concedes States have standing to do. While the individual mandate does not *expressly* alter the terms of the States' participation in Medicaid, it has precisely that effect to the tune of hundreds of millions of dollars. If Medicaid were amended to require States to ensure that a greater percentage of eligible individuals were, in fact, enrolled, the States' standing would be unquestionable. There is no reason for a different result when the mandate has the same effect.

Neither of the cases upon which *Amicus* relies (at 54) even hints that a State lacks standing to challenge an injury that relates to its participation in a spending program. *Massachusetts v. Mellon*, 262 U.S. 477 (1923), involved a State's challenge to a spending program in which the State had chosen *not* to participate. *Id.* at 479. In rejecting that challenge, the Court did not conclude that States somehow "forfeit" standing to challenge injuries arising out of programs in which they voluntarily participate; it merely recognized that the State never acquired standing in the first place because it declined to participate in the challenged program. *Id.* at 480.

Pennsylvania v. New Jersey is even less relevant. That case involved Pennsylvania's challenge to New Jersey's tax scheme, which taxed the in-state income of out-of-state residents but did not tax out-of-state income of its own residents if that income was taxed by the State where it was earned. *See Pennsylvania*, 426 U.S. at 663. Because

Pennsylvania exempted its own residents from taxation on out-of-state income if that income was taxed where earned, Pennsylvania complained that New Jersey was unconstitutionally "diverting" tax dollars from Pennsylvania's treasury. *Id.* The problem with that claim was that New Jersey was not actually "diverting" anything from Pennsylvania's treasury; Pennsylvania had merely made a voluntary decision not to impose additional taxes on its own residents. Thus, to the extent that there was *any* injury, it was plainly "self-inflicted." *Id.* at 664.

The injury that the individual mandate will cause the States is not remotely analogous to *Mellon* or *Pennsylvania*. The States are not complaining about Congress' authority to enact a program in which they are not participating or unfair benefits to other States as a consequence of their own voluntary choices. They are complaining that by flipping a switch that makes previously voluntary Medicaid participation mandatory, the ACA effectively amends the terms of a program they actually participate in, with a net impact of hundreds of millions of dollars. The hundreds of millions of dollars that States will be forced to spend surely qualifies as injury in fact; it is directly traceable to Congress' decision to make voluntary participation mandatory; and it is obviously redressable, as invalidating the mandate will restore the status quo ante and save the States millions.

2. The States also have standing to argue that the individual mandate is unconstitutional because they have adequately alleged that the mandate is inextricably intertwined with provisions of the ACA

that unquestionably injure the States. Contrary to *Amicus*' contentions, that injury readily satisfies the rule that "'[a] plaintiff must demonstrate standing for each claim he seeks to press' and 'for each form of relief sought.'" *Amicus* Br. 56 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). Indeed, this Court allowed just such a claim in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987). There, the plaintiffs claimed that the congressional-veto provision of the Airline Deregulation Act was unconstitutional and that an entire section of the Act must fall with it. *Id.* at 683. The plaintiffs did not allege that they were injured by the veto provision itself, or that the Act's other provisions were independently unconstitutional or invalid. They instead argued only that the veto provision was unconstitutional, and that the other provisions must be invalidated as a result. This Court and each court below adjudicated their claims without suggesting that their lack of independent standing to challenge the veto provision deprived them of standing to argue that the provisions they had standing to challenge must fall as a consequence of the veto provision's unconstitutionality. *See Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1556 (D.C. Cir. 1985) (rejecting other ripeness and standing arguments).

Here, the States have plainly demonstrated that they are inured in fact by, *inter alia*, the ACA's Medicaid expansion and employer regulations. They thus have standing to seek invalidation of the Act on the basis that the mandate is unconstitutional.

3. As a matter of first principles, the States also have an obvious interest in challenging the

individual mandate because it is a direct assault on the "'residuary and inviolable sovereignty,'" that the Constitution "reserved explicitly to the States." *New York v. United States*, 505 U.S. 144, 188 (1992) (quoting The Federalist No. 39 (C. Rossiter ed. 1961) at 245). To the extent that the Court's decision in *Mellon* is to the contrary, more recent cases cast doubt on its reasoning.

As the Court reiterated just this past Term, "[t]he federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011); *see also Texas v. White*, 74 U.S. 700, 725 (1868) ("[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government."). Thus, when a State argues that Congress has overstepped its bounds, the State is not merely "protect[ing] citizens of the United States from the operations of the statues thereof." *Mellon*, 262 U.S. at 485. It is also protecting its *own* "integrity, dignity, and residual sovereignty," as preserved by the Constitution. *Bond*, 131 S. Ct. at 2364.

In rejecting the argument that States are the only ones with standing to raise Tenth Amendment objections to federal statutes that impact state residents, this Court in no way suggested that only individuals can bring those claims. To the contrary, *Bond* recognizes that the Tenth Amendment reserves powers not delegated to the new federal government to both the States and the people, and emphasizes that they both have important rights to

vindicate. *See id.* at 2366. Indeed, the Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), underscores that States are uniquely well-suited to litigate claims to vindicate their own sovereignty. *See id.* at 518 (stressing "the special position and interest of" the State and finding it "of considerable relevance that the party seeking review [t]here [wa]s a sovereign State and not ... a private individual").

To the extent that *Mellon* forecloses States from challenging federal incursions into their sovereignty on the theory that only individuals have a cognizable interest in enforcing the Constitution's structural constraints, *Mellon* is inconsistent with the Court's more recent precedents and should be overruled. As the federal government has argued elsewhere, *stare decisis* has little force as to questions of this Court's jurisdiction, as reliance interests cannot justify continued application of misinterpretations of the courts' authority under Article III. *See* Govt.'s Reply Br. 19, *Hein v. Freedom From Religion Found., Inc.* (No. 06-157). That said, the Court need not consider the continuing vitality of *Mellon* to conclude that the States have standing to challenge the mandate because the States quite obviously have standing as a result of the mandate's direct and substantial effect on their fiscal obligations under Medicaid.

4. Finally, there is no merit to *Amicus*' contention that the States lack *prudential* standing to challenge the mandate under third-party standing principles, as that argument is squarely foreclosed by at least two of the Court's cases. *See Amicus* Br. 57. The very question before the Court in *Regan* was whether a State could proceed with an original action to

challenge a tax that applied to individuals but not the State. In concluding that the AIA did not bar that suit, the Court expressly rejected the notion that a State should be "required to depend on the mere possibility of persuading a third party to assert his claims." *Regan*, 465 U.S. at 381. It would be passing strange for this Court to devise an exception to the AIA for the explicit purpose of allowing a State to pursue a challenge to a tax that applied only to individuals—and then to adjudicate that very challenge on the merits, *see South Carolina v. Baker*, 485 U.S. 505 (1988)—if prudential standing principles counseled against allowing a State to proceed with such a claim.

Amicus' prudential standing argument also rests on the same arguments that the Court rejected just last Term in *Bond*. As the Court explained, because "[t]he principles of limited national powers and state sovereignty are intertwined," a law that oversteps Congress' enumerated powers interferes with both the rights of individuals *and* the sovereignty of the States. 131 S. Ct. at 2366. Just as an individual "is not forbidden to object that her injury results from disregard of the federal structure of our Government" in a way that injures the States, *id.*, a State is not forbidden to object that its injury results from disregard of the enumeration of powers in a way that injures individuals. Accordingly, here too "[t]here is no basis to support the Government's proposed distinction between different federalism arguments for purposes of prudential standing rules." *Id.*

Indeed, if anything, the manner in which the ACA operates only underscores why the States are proper parties to challenge the individual mandate

and the very real injury that it causes them. Because the penalty that is the gateway for later judicial review—as distinct from the mandate—does not apply to many of the individuals who are Medicaid-eligible, *see* 26 U.S.C.A. § 5000A(e)(2) (exempting individuals with income under federal poverty level), many of the individuals that the mandate will force to enroll in Medicaid, thereby injuring the States, will have the least ability and incentive to challenge it. Indeed, their standing would depend on convincing a court that their autonomy interest in not enrolling for a government benefit would confer standing in the absence of a financial injury. But while those individuals actually stand to *benefit* financially from being forced onto the rolls, States suffer a huge financial hit. Particularly in those circumstances, it makes no sense to suggest that the States should be "required to depend on the mere possibility of persuading [those individuals] to assert [their] claims." *Regan*, 465 U.S. at 381.

B. The States Fall Squarely Within *Regan*'s Exception to the AIA.

Once it is clear that States have standing to object to the mandate, it is equally clear that the AIA is no obstacle to the States' suit in light of this Court's decision in *Regan*. Indeed, aside from his erroneous standing objection and the related suggestion that the States are not "aggrieved parties," *Amicus* does not quarrel with application of *Regan* to this case. *Amicus* Br. 52. Nor could he, as the States' challenge to the mandate falls squarely within the *Regan* exception.

In *Regan*, South Carolina challenged the constitutionality of "a tax on the interest earned on state obligations issued in bearer form." 465 U.S. at 372. The tax burden fell on individual bondholders, not South Carolina. *Id.* Because South Carolina would "incur no tax liability," it could not raise its constitutional claims pursuant to the statutorily provided refund remedy. *Id.* at 379–80. Looking to the purpose and circumstances of the ACA's enactment, the Court concluded that "Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy." *Id.* at 378. As a result, the AIA was no bar to the State's constitutional claims. *Id.* at 380.

The States' challenge to the individual mandate is on all fours with South Carolina's challenge in *Regan*. Although the mandate imposes burdens upon the States—not unlike the regulatory burdens that the bearer bonds tax provision placed on South Carolina—neither the mandate nor its penalty provision applies directly to the States. To the extent that payment of the mandate's penalty might constitute a "tax" subject to challenge in a refund suit, the States "will be unable to utilize any [such] statutory procedure to contest the constitutionality of" the mandate because they "will incur no tax liability" under its penalty provision. *Id.* at 379–80. "Because Congress did not prescribe an alternative remedy for the plaintiff[s] in this case, the Act does not bar this suit." *Id.* at 381.

Regan makes clear that it is one thing to channel particular litigants to particular remedies, but it is another thing entirely to eliminate any

remedy altogether. That concern is precisely what led the Court to conclude that the AIA "bar[s] a suit only in situations in which Congress had provided the aggrieved party with an alternative legal avenue by which to contest the legality of a particular tax." *Id.* at 373; *see also Bob Jones*, 416 U.S. at 746 & 747 n.21 (noting that its conclusion that AIA forbade suit "might well be different" if "aggrieved party ha[d] no access at all to judicial review" and leaving open question whether due process would be satisfied if an organization had to rely on a "friendly donor" to obtain judicial review).

Precluding the States' suit under the AIA "would entirely deprive the State[s] of any opportunity to obtain review of [their] claims." *Regan*, 465 U.S. at 380–81. That position is inconsistent not only with this Court's interpretation of the AIA, but also with the principle that the Constitution protects the "integrity, dignity, and residual sovereignty of the States." *Bond*, 131 S. Ct. at 2364. Because the AIA "appl[ies] only when Congress has provided an alternative avenue for an aggrieved party to litigate its claims on its own behalf," *Regan*, 465 U.S. at 381, it cannot and does not bar the States' claim.

C. States Are Not Persons Within the Meaning of the AIA.

Even if *Regan* did not render the AIA irrelevant, the AIA would still be no bar to the States because it applies to "persons" and contains no indication that it reaches States. *See* 26 U.S.C. § 7421(a). *Amicus'* contention to the contrary is unavailing for a number of reasons.

When interpreting a statute's use of the term "person," a court "must apply [the] longstanding interpretive presumption that 'person' does not include the sovereign." *Vt. Agency*, 529 U.S. at 780. That presumption "may be disregarded *only* upon some affirmative showing of statutory intent to the contrary." *Id.* at 781 (emphasis added); *see also Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 82–83 (1991) ("[I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." (internal quotation marks omitted)); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 275 (1947) (same).

The presumption that "person" does not include "State" is a straightforward application of "the ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Vt. Agency*, 529 U.S. at 787 (internal quotation marks omitted). That "clear statement principle reflects an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 544 (2002) (internal quotation marks omitted); *cf. Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004) ("[F]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism."). Because

"statutes should be construed so as to avoid difficult constitutional questions," the Court will not lightly assume that Congress meant to impose obligations or restrictions upon States absent an "affirmative showing" of such intent. *Vt. Agency*, 529 U.S. at 787.

The AIA contains no such affirmative showing. By its plain text, the statute applies to "any person," not "any State." *See* 26 U.S.C. § 7421(a). For purposes of the tax code, "the term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, company, or corporation." *Id.* § 7701(a)(1). A State does not fall within that definition. While the tax code's definitional provision further provides that "the term 'includes' ... shall not be deemed to exclude other things otherwise within the meaning of the term defined," *Id.* 7701(c), that is triply irrelevant. The definition of "person" uses both "mean and include," so section 7701(c)'s caution is inapplicable. Moreover, the States' argument is not that States are not any of the entities on the inclusive definitional list, but that they are not within the defined term—"persons"—in the first place. Finally, none of this remotely constitutes the kind of affirmative showing that this Court's precedents require before the term "person" will deemed to include the sovereign.

Amicus does not attempt to divine any congressional intent to reach States from the text or history of the AIA, but instead merely avers that "[t]his Court has construed these definitions and held that the term 'person,' as used in various provisions of the Code, includes States." *Amicus* Br. 49 (citing *Ohio v. Helvering*, 292 U.S. 360 (1934), and *Sims v. United States*, 359 U.S. 108 (1959)). But this

Court has already rejected the argument that because the term "person" includes States in one part of a statute, it must include States throughout the statute. *See Vt. Agency*, 529 U.S. at 784 (acknowledging that States are persons for purposes of initiating False Claims Act cases, but not for provision identifying proper defendants). What is more, the cases upon which *Amicus* relies only underscore why, even if "person" might be construed to include "States" in certain provisions of the tax code, it should not be construed to do so in the AIA.

Helvering involved whether a State was subject to a retail tax upon "[e]very person who sells or offers for sale" alcohol. 292 U.S. at 367–68. The Court concluded that the statute reached the States because the tax would apply only when a State "engage[d] in a business of a private nature," and thus was "exercis[ing] nongovernmental functions." *Id.* at 368. In reaching that conclusion, the Court did not adopt a blanket rule that a State is *always* a "person" for purposes of tax code provisions. Quite the contrary, the Court stressed that "[w]hether the word 'person' or 'corporation' includes a state ... depends upon the connection in which the word is found." *Id.* at 370. Given that the *particular* provision in question applied only "[w]hen a state ... divests itself of its quasi sovereignty pro tanto," *id.* at 369, the Court concluded that Congress intended *that* statute to reach States because doing so would not run afoul of the "firmly established" rule "that 'the instrumentalities, means and operations whereby the states exert the governmental powers belonging to them are ... exempt from taxation by the United States.'" *Id.* at 368 (quoting *Indian*

Motorcycle Co. v. United States, 283 U.S. 570, 575 (1931)).[5]

Sims also underscores that a State is not always a "person" for purposes of the tax code. At the outset, *Sims* did not even involve interpretation of "person" under the tax code's definitional provision; it instead involved whether a state auditor was a "person" under a tax code provision that defined "person" to include any "employee of a corporation." *Sims*, 359 U.S. at 109 n.3 (quoting 26 U.S.C. § 6332(a) & (c)). In concluding that the statute reached the state auditor, the Court once again reiterated that "[w]hether the term 'person' when used in a federal statute includes a State cannot be abstractly declared, but depends upon its legislative environment." *Id.* at 112 (citing *Helvering*, 292 U.S. at 376). Examining "the subject matter, the context, the legislative history, and the executive interpretation, *i.e.*, the legislative environment, of" the particular provision in question, the Court found "it plain that Congress intended to and did include States within the term 'person' *as used in § 6332*." *Id.* at 112 (emphasis added).

As is clear, *Helvering* and *Sims* establish nothing more than that a State *can* be a person for

---

[5] While the Court subsequently rejected that view of the federal government's power to tax States in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985), that only underscores the need for caution when determining whether Congress meant to sweep States within the reach of tax code provisions. There is little reason to think Congress intended such a provision to apply to States if that application would have been unconstitutional under the Court's precedents as they existed when the provision was enacted.

purposes of a tax code provision when the provision would not infringe on the States' sovereignty or when its "legislative environment" evinces Congress' specific intent to include States. Neither of those conditions is satisfied here. Unlike the statute in *Helvering*, the AIA is not a statute that would apply to States only when they are acting outside their sovereign capacity, and thus a statute that would not "alter the usual constitutional balance between States and the Federal Government," *Vt. Agency*, 529 U.S. at 787, if read to apply to the States. This case illustrates the danger that the AIA could be invoked even when a State exercises core sovereign functions and seeks to vindicate its sovereignty. More broadly, if the AIA applies to States, it would be dramatically invasive, as it would preclude States from challenging the validity of federal taxes unless and until they have paid those taxes to the federal government. And unlike in *Sims*, there are no surrounding provisions or executive interpretations evincing Congress' clear intent to impose that kind of burden on States. *Compare Sims*, 359 U.S. at 112 (emphasizing that immediately preceding provision expressly applied same restriction to federal employees).[6]

---

[6] There is no merit to *Amicus*' suggestion that the States' argument is "undermined," *Amicus* Br. 51, by the Court's seeming assumption in *Regan* that the AIA applies to States. In *Regan*, South Carolina did not argue that "person" did not include States. Even if it had, it would have still been the narrower ground to hold the AIA inapplicable to the particular state claim at issue in *Regan*, as opposed to inapplicable to all state claims. The same narrow ground is available here. *See supra*, Part II.B.

Indeed, the very manner in which the AIA operates underscores why it would be wholly inappropriate to read the statute to apply to States. The whole purpose of the AIA is to deprive litigants of the opportunity to proceed directly to an Article III court when they want to challenge a tax. A litigant not only must wait until the tax has been paid, but also must begin the claim with an administrative refund proceeding against the Secretary. *See* 26 U.S.C. § 7422. It is one thing for Congress to impose federal taxes on States. It is another thing entirely for Congress to withdraw from the federal courts jurisdiction to hear claims brought by States, and to channel States into administrative proceedings before they can obtain judicial review even of constitutional challenges to federal taxes. *Cf. Federal Maritime Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 760 n.11 (2002) (arguably a great affront for State to be hauled in front of an administrative tribunal). Given the unique litigating status that both the Constitution and this Court have afforded States, *see* U.S. Const. art. III, § 2, cl. 2, *Massachusetts*, 549 U.S. at 518, the concerns animating the clear statement rule are at their zenith when sweeping States within a generic reference to "person" would impair their ability to obtain immediate judicial review of federal statutes.

That is all the more true given the Court's renewed commitment to enforcing the clear statement rule with vigor. In a whole host of contexts, the Court has been increasingly reluctant to read federal statutes to encroach upon state sovereignty when Congress has not made its intent to do so clear. *See, e.g.*, *Mo. Mun. League*, 541 U.S.

at 140; *Raygor*, 534 U.S. at 544; *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 432 (2002) ("We would hesitate before interpreting [a] statute to effect ... a substantial change in the balance of federalism unless that is the manifest purpose of the legislation."); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (reading statute to "avoid ... significant constitutional and federalism questions" when no "clear statement" of intent to impose "significant impingement of the States' traditional and primary power over land and water use"); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides th[e federal-state] balance" (internal quotation marks omitted)). This Court should decline *Amicus*' invitation to read the AIA to impose a significant burden upon the States' core sovereign litigating function when there is nothing in the text, structure, or history of the statute evincing Congress' intent—clear or otherwise—to do so.

III. In All Events, The AIA Does Not Apply To Challenges To The Individual Mandate.

A. The States Are Challenging the Mandate, Not the Penalty.

The AIA bars any "suit for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a). By its plain terms, that proscription has no application here because the purpose of the States' suit is to challenge the individual mandate, not the mechanism by which it is enforced. Indeed, the States' injury flows

primarily from the mandate's effect on individuals who are exempt from the penalty.

The States "seek injunctive and declaratory relief to prevent anyone from being subject to the mandate ... irrespective of the means Congress chooses to implement it." *Seven-Sky v. Holder*, 661 F.3d 1, 8–9 (2011). That distinction is "critical," *id.* at 9, because the mandate and the penalty are distinct. The mandate is a stand-alone command that every "applicable individual shall" obtain and maintain insurance. 26 U.S.C.A. § 5000A(a). That command makes it unlawful for an "applicable individual" (which means nearly any individual) to live in the United States without approved health care insurance.

While section 5000A(b) imposes a "penalty" on individuals "who fail[] to meet the requirement" that the mandate imposes, § 5000A(b)(1), that penalty provision only underscores that the mandate is, itself, a separate legal command. First, the penalty does not apply as broadly as the mandate because it is subject to its own set of exemptions, and exemption from the penalty does not obviate the need to comply with the mandate. *Compare* § 5000A(e), *with* § 5000A(d). Second, payment of the penalty does not satisfy the mandate; an individual paying the penalty is still in violation of the mandate. The penalty is a "penalty" precisely because it *penalizes* individuals who violate the mandate's applicable substantive command. *See United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) ("[I]f the concept of penalty means anything, it means punishment for an unlawful act or omission.").

The purpose of the States' suit is to invalidate the substantive command that the mandate imposes, not to restrain enforcement of the penalty that would fall on a subset of its violators. Indeed, whether the penalty stands or falls is ultimately irrelevant to the States, as their injury flows from the mandate's effect on individuals who will *comply* with the mandate by enrolling in Medicaid even though they would not do so absent the mandate's command. *See* CBO, *Effects of Eliminating the Individual Mandate* (estimating that 6 to 7 million fewer individuals would enroll in Medicaid without mandate); 26 U.S.C.A. § 5000A(f)(1)(A)(ii) (enrollment in Medicaid satisfies mandate). That the States' injury is a product of the mandate, not the penalty, is only underscored by the fact that many Medicaid-eligible individuals are subject to the mandate but not the penalty. Those individuals will enroll in Medicaid not to avoid a penalty that does not apply to them, but because of the mandate to obtain insurance. Because it is *that* command that both injures the States and is the target of this action, the suit is not one "for the *purpose* of restraining" the penalty, and is thus not within the scope of the AIA. 26 U.S.C. § 7421(a) (emphasis added).

Indeed, as Private Respondents' situation vividly illustrates, applying the AIA to bar such a suit would produce bizarre and unintended results. Private Respondents are individuals who fully intend to *comply* with the mandate if it is constitutional. Thus, like the States, their injury flows from the mandate itself, and its requirement that they purchase costly insurance that they do not want or need. Precisely because they intend to abide

by that requirement so long as it stands, they will not pay the penalty imposed on violators and thus do not anticipate ever being in a position to file a refund suit. Unlike taxpayers who have the option of paying taxes under protest and initiating a refund action in which they can contest the validity of the tax, the Private Respondents do not have the option of paying insurance premiums under protest and seeking a refund. Thus, if the AIA precludes their suits, they will have no forum to vindicate their view that the mandate is unconstitutional. The AIA is inapplicable in such circumstances. *See Regan*, 465 U.S. at 380.

This anomaly flows from the fact that the ACA's penalty is not a mechanism to ensure compliance with the tax laws, but a penalty for failing to engage in independent conduct. If the penalty were a penalty for not paying a tax, the taxpayer could pay under protest and retain the option to challenge the tax in a refund action. Compliance does not require acquiescence. But when the penalty is for something else—here, not entering a compelled contract with a third party—there is no obvious way to comply without forfeiting any ability to challenge the mandate's constitutionality. There is no reason to think that the AIA was intended to have this latter dramatic effect, or to force individuals to violate a law just to challenge it. To the contrary, when a party seeks to challenge an affirmative command, rather than the penalty that enforces it, the purpose of that suit is not to restrain the collection of any tax or even the penalty. The purpose is to enjoin the primary obligation, and the AIA is inapplicable.

Contrary to *Amicus'* contentions, neither *Bob Jones* nor *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974), supports reading the AIA to apply in the circumstances at hand. *See Amicus* Br. 45. Both of those cases involved formerly tax-exempt non-profit organizations seeking to challenge revocation of their tax-exempt status. In holding those claims barred by the AIA, the Court did not conclude that the AIA bars suits for the purpose of restraining anything that touches upon taxes or penalties. Rather, the Court merely concluded that "[u]nder any reasonable construction of the statutory term 'purpose,' the objective of th[ose] suit[s] was to restrain the assessment and collection of taxes" from the groups or their contributors. *Americans United*, 416 U.S. at 760–61; *see also Bob Jones*, 416 U.S. at 727 (finding "little doubt that a primary purpose of [the] lawsuit [was] to prevent the Service from assessing and collecting income taxes from petitioner").

The Court reached that conclusion because the tax-exempt status determinations were simply a mechanism for establishing whether contributions to the groups would be subject to taxes, meaning the challengers "would not be interested in obtaining the declaratory and injunctive relief requested if that relief did not effectively restrain the taxation of its contributors." *Americans United*, 416 U.S. at 761; *see also Bob Jones*, 416 U.S at 727 (petitioner's claimed "irreparable injury" was "'substantial' federal income tax liability" it would incur if tax-exempt status were revoked).

Thus, the "crucial distinction" between those cases and this one is that the "challenges to IRS

letter-rulings revoking tax-exempt status [we]re *inextricably linked* to the assessment and collection of taxes." *Seven-Sky*, 661 F.3d at 10. In that unique situation, it would be entirely "circular to conclude ... that respondent's primary design was not to remove the burden of taxation from those presently contributing but rather to avoid the disposition of contributed funds away from the corporation." *Americans United*, 416 U.S. at 761 (internal quotation marks omitted). What is more, in those cases, neither the organizations nor the taxpayers faced the dilemma faced by those who believe the mandate is unconstitutional, but would prefer to comply (and obtain insurance) rather than pay an equivalent penalty (and get nothing). Those organizations and their contributors could pay their taxes under protest and seek to vindicate the organizations' tax-exempt status in a refund action.

That is not remotely the case here. The mandate is not some mere means of establishing tax (or even penalty) consequences for the uninsured; it is a stand-alone substantive command to obtain health care insurance. The States' challenge to that command is not a "circular" effort to get at the penalty; it is a challenge to the unconstitutional command itself. Because that is not a "suit for the purpose of restraining" a tax (or even a penalty), 26 U.S.C. § 7421(a), the AIA is simply irrelevant.

B. The Individual Mandate Is Enforced by a Penalty, Not a Tax.

The AIA is inapplicable not only to a challenge to the mandate (which is what the States have brought), but to a challenge to the penalty itself.

The AIA applies to taxes, not penalties, and when Congress wants to treat penalties as taxes, it says so explicitly. Congress did nothing of the sort here.

The AIA is strong medicine: It creates a near-absolute bar to challenging a tax until after a tax has been paid. Indeed, even "the constitutional nature of a taxpayer's claim ... is of no consequence under the Anti-Injunction Act." *Americans United*, 416 U.S. at 759; *see also United States v. Am. Friends Serv. Comm.*, 419 U.S. 7, 11 (1974). That bar makes sense in the context of taxes because a tax may be paid without waiving the right to a refund suit, meaning that an individual may comply with a tax law but still challenge it. By contrast, as noted, a penalty will apply only if an individual violates a legal command, which means denying pre-enforcement review of penalties would require individuals to break the law in order to challenge it.

Precisely because applying the AIA to penalties would produce that bizarre and often unintended result, courts should not lightly presume that Congress intended to sweep penalty provisions within the AIA's broad prohibition on pre-enforcement challenges to "any *tax*." At the very least, Congress' intent to treat a penalty as a "tax" must be clear before the AIA can apply. Here, not only is there no clear indication that Congress intended to treat the mandate's penalty provision as a "tax"; it is abundantly clear that Congress intended to do precisely the opposite.

1. First and foremost, Congress intentionally and explicitly refused to label the mandate's enforcement mechanism a "tax." As explained, *see*

supra, pp. 5–7, Congress considered several other health care reform bills, many of which would have imposed a straightforward and self-identified "tax" on the uninsured. Yet when it came to the bill finally passed by both houses of Congress, Congress "pointedly rejected proposals to designate the shared responsibility payment as a 'tax,' instead labeling it a 'penalty.'" *Seven-Sky*, 661 F.3d at 6. Congress not only referred to the mandate's enforcement mechanism as a "penalty" in the operative provision of section 5000A; it did so in each of its 15 references to the provision throughout the statute. *See* 26 U.S.C.A. § 5000A(b), (c), (e), (g).

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) (internal quotation marks omitted); *cf. Russello v. United States*, 464 U.S. 16, 23–24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."); *Brewster v. Gage*, 280 U.S. 327, 337 (1930) ("The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended."). Congress considered and rejected proposals to impose a "tax" on the uninsured in favor of imposing a "penalty" on some of those who fail to comply with a separate mandate to purchase insurance. The Court should give full effect to that decision to impose a penalty rather than a tax, which removes the penalty provision from the AIA's reach.

The deliberateness of Congress' decision is underscored by comparing the penalty provision to other provisions of the ACA that quite clearly impose "taxes." *See supra*, pp. 6–7. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Dean v. United States*, 129 S. Ct. 1849, 1854 (2009) (quoting *Russello*, 464 U.S. at 23). As those other provisions confirm, Congress knows how to impose a tax and chose not to do so in section 5000A(b). *See Seven-Sky*, 661 F.3d at 6 ("That Congress called numerous other provisions in the Act 'taxes' indicates that its decision to use the word 'penalty' here was deliberate.").

That Congress knew it was not imposing a tax is also underscored by its findings accompanying section 5000A. Nothing in those findings "suggest[s] that Congress's purpose was to raise revenue"; quite the contrary, they emphasize that "the goal is universal coverage, not revenues from penalties." *Id.* The Congressional Joint Committee on Taxation evinced the same understanding when it did not include penalty payments among the tax revenues that the ACA would be produce. *See supra*, p. 7.

In short, by its plain text, section 5000A(b) imposes a penalty, not a tax. Thus, the AIA does not apply because it bars only "suit[s] for the purpose of restraining the assessment or collection of any *tax*." 26 U.S.C. § 7421 (emphasis added).

2. *Amicus* contends that even if the penalty is not a "tax," it should still be treated like a tax for

purposes of the AIA. *Amicus* arrives at that conclusion by reasoning that the penalty "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68," § 5000A(g)(1), and the tax code states that "penalties and liabilities provided by [Subchapter B of chapter 68] ... shall be assessed and collected in the same manner of taxes," 26 U.S.C. § 6671(a). *See Amicus* Br. 24. According to *Amicus*, the penalty cannot be "assessed and collected" like assessable penalties or taxes if the AIA does not bar litigants from challenging the penalty before it is assessed and collected. That argument is flawed in multiple respects.

At the outset, *Amicus*' argument gets him nowhere because the AIA does not "address[] the manner in which taxes are assessed and collected." *Amicus* Br. 26. It addresses the manner in which taxes are *challenged in courts*. *See Seven-Sky*, 661 F.3d at 11; *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 540 (6th Cir. 2011). To be sure, the AIA's requirement that an individual may not challenge a tax before it has been paid *affects* assessment and collection of taxes by precluding courts from interfering with the Secretary's efforts. But that does not mean that an instruction to *the Secretary* to assess and collect a penalty in the same manner as a tax (or, here, as a penalty that, in turn, is assessed and collected like a tax) carries with it the implication that Congress intended to bar individuals from challenging the penalty before the Secretary assesses and collects it.

In any event, Congress' direction to assess and collect the penalty "in the same manner as an

assessable penalty under subchapter B of chapter 68" only underscores that the mandate's penalty is something *other than* an "assessable penalty" under that subchapter. Setting aside the fact that the penalty is housed in chapter 42, not chapter 68, if it were in fact an "assessable penalty" in its own right, Congress would not need to state that it should be treated like one. For the same reason, that a penalty imposed under chapter 68 "shall be deemed" a tax, *see id.* § 6671(a), does not mean that the mandate's penalty shall be deemed a tax as well. The penalty is *not* imposed under chapter 68, and while Congress invoked the language of the first sentence of section 6671(a) to instruct that it "shall be assessed and collected" like such a penalty, it did not invoke the section sentence to instruct that it "shall be deemed" a tax as well. Congress' decision not to do so is only further proof that, while the mandate's penalty may be assessed and collected like an assessable penalty or tax, it is neither of those things.

Moreover, *Amicus* omits a critical piece of section 5000A(g)(1): The statute states that the penalty "shall be assessed and collected" like an assessable penalty "*except as provided in paragraph (2).*" Paragraph (2) then denies the Secretary the very enforcement tools typically used to collect taxes and assessable penalties. *See* § 5000A(g)(2)(A) (Secretary may not enforce through "any criminal prosecution or penalty"); § 5000A(g)(2)(B) (Secretary may not use liens or levies on individual's property). By "prohibit[ing] the IRS from using traditional criminal enforcement or levying powers to collect" the mandate's penalty, *Seven-Sky*, 661 F.3d at 6, Congress confirmed that the penalty may *not* be

"assessed and collected" in the same manner as a "tax" or "assessable penalty," which only confirms that Congress did *not* intend the penalty to be treated as an assessable penalty or a tax.

3. Relying on *Bailey v. George*, 259 U.S. 16 (1922), and *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), *Amicus* contends that the AIA should apply nonetheless because *George* "demonstrates the broad scope of the Anti-Inunction Act." *Amicus* Br. 38. *Amicus* gets the implication of those cases exactly backwards.

Both cases involved a statute entitled "The Child Labor Tax Law," which imposed a heavy tax upon employers who used child laborers. In *Drexel Furniture*, an employer paid the tax under protest and then brought suit alleging that the law was an unconstitutional "regulation of the employment of child labor" rather than a "tax." 259 U.S. at 36. The Court agreed, and held the "so-called tax" in fact an unconstitutional penalty for failure to abide by a regulatory command that was beyond Congress' power under the Court's then-current view of the Commerce Clause. *Id.* In *George*, by contrast, an employer sought to challenge the same law without first paying the levied taxes. 259 U.S. at 20. Even though the Court's decision deeming that "so-called tax" an impermissible penalty came down on the very same day, the Court held the *George* suit barred by the AIA. *Id.*

Amicus claims these cases demonstrate that the AIA applies "broadly," irrespective of the labels Congress uses. *Amicus* Br. 37. In fact, they show just the opposite—the AIA applies "broadly" *when a*

provision is labeled a "tax." Indeed, the whole point of *George* is that Congress' label *does* control, such that the AIA may apply to something designated a "tax" even if that so-called tax is not a tax at all.[7] Because the plain text of the Child Labor Tax Law labeled the exaction a "tax," Congress clearly intended the exaction to be a tax for purposes of the AIA, even though, as it turned out, it was not a constitutional tax.

Thus, to the extent that *Drexel Furniture* and *George* say anything about the applicability of the AIA here, they only undermine *Amicus*' argument. Unlike in those cases, Congress did *not* designate the penalty accompanying the individual mandate a "tax." It deliberately, expressly, and repeatedly labeled it a "penalty," and treated it as something distinct from assessable penalties and taxes found elsewhere in the tax code.

What is more, because the exaction in *Drexel Furniture* was both labeled a tax and exacted as a tax, Drexel Furniture had the option of paying the tax under protest and vindicating the Constitution in a refund proceeding. That option is not available for parties challenging the mandate. Payments of insurance premiums under protest will not secure "applicable individuals" a refund action. And while the penalty could be incurred and paid under protest, nothing in the AIA remotely requires a party to go through those steps when Congress has

---

[7] Of course, the *Williams Packing* exception cabins the reach of that holding, as it renders the AIA inapplicable when the federal government's defense of a provision labeled a "tax" is meritless. *See supra*, Part I.B.1.

assiduously avoided labeling either the mandate or even the penalty a tax.

4. *Amicus* invokes separation of powers principles to argue that Congress, not the courts, should decide whether the AIA applies. *Amicus* Br. 58. *Amicus'* contentions are beside the point because Congress *did* make the decision—it decided to impose a mandate and to enforce it with a penalty that it declined to label a tax. But even apart from that, the principles *Amicus* invokes only underscore why Congress must speak clearly when it wants to bring a provision within the ambit of a statute that, by *Amicus'* and the federal government's reading, deprives courts of jurisdiction over suits to restrain constitutional violations.

Like all federalism principles inherent in our Constitution, separation of powers "carries with it a diffusion of accountability," ensuring that "the public can[] 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010) (quoting The Federalist No. 72, p. 487 (J. Cooke ed. 1961) (A. Hamilton)). When Congress deliberately eschews the label "tax" and the President assures the public that a statute is not a tax, it would circumvent political accountability entirely for a court to then treat that provision as the very thing the political branches insisted it was not. Particularly when doing so would deprive litigants of the opportunity to challenge unprecedented exercises of federal power without violating the law, the accountability that separation of powers is designed to protect only underscores the need for a clear

indication from Congress that a provision either is a tax or, at the very least, should be treated as one. Because section 5000A(b) contains no such indication, and in fact contains many unambiguous indications that it imposes a "penalty," not a "tax," the AIA plainly does not bar the Court from reaching the critical constitutional questions presented.

CONCLUSION

For the foregoing reasons, the Court should hold that the AIA does not bar the States' challenge to the individual mandate.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
CONOR B. DUGAN
ERIN M. HAWLEY
Bancroft PLLC
1919 M Street, NW
Suite 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

PAMELA JO BONDI
Attorney General of Florida
SCOTT D. MAKAR
Solicitor General
LOUIS F. HUBENER
TIMOTHY D. OSTERHAUS
BLAINE H. WINSHIP
Office of the Attorney General of Florida
The Capitol, Suite PL-01
Tallahassee, FL 32399
(850) 414-3300

KATHERINE J. SPOHN
Special Counsel to the Attorney General
Office of the Attorney General of Nebraska
2115 State Capitol Building
Lincoln, NE 68508
(402) 471-2834

BILL COBB
Deputy Attorney General for Civil Litigation
Office of the Attorney General of Texas
P.O. Box 12548
Capitol Station
Austin, TX 78711
(512) 475-0131

February 6, 2012

Counsel for State Respondents

RESPONDENT'S BRIEF

No. 11-398

In the
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR STATE RESPONDENTS ON THE MINIMUM COVERAGE PROVISION

PAMELA JO BONDI
Attorney General of Florida
SCOTT D. MAKAR
Solicitor General
LOUIS F. HUBENER
TIMOTHY D. OSTERHAUS
BLAINE H. WINSHIP
Office of the Attorney General of Florida
The Capitol, Suite PL-01
Tallahassee, FL 32399
(850) 414-3300

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
Bancroft PLLC
1919 M Street, NW
Suite 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

February 6, 2012 *(Additional Counsel Listed on Inside Cover)*

GREG ABBOTT
Attorney General of Texas
BILL COBB
Deputy Attorney General for Civil Litigation
Office of the Attorney General of Texas
P.O. Box 12548
Capitol Station
Austin, TX 78711
(512) 475-0131

JON BRUNING
Attorney General of Nebraska
KATHERINE J. SPOHN
Special Counsel to the Attorney General
Office of the Attorney General of Nebraska
2115 State Capitol Building
Lincoln, NE 68508
(402) 471-2834

ALAN WILSON
Attorney General of South Carolina
P.O. Box 11549
Columbia, SC 29211

MARK L. SHURTLEFF
Attorney General of Utah
Capitol Suite #230
P.O. Box 142320
Salt Lake City, UT 84114

LUTHER STRANGE
Attorney General of Alabama
501 Washington Avenue
Montgomery, AL 36130

JAMES D. "BUDDY" CALDWELL
Attorney General of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804

BILL SCHUETTE
Attorney General of Michigan
P.O. Box 30212
Lansing, MI 48909

JOHN W. SUTHERS
Attorney General of Colorado
1525 Sherman Street
Denver, CO 80203

ROBERT M. MCKENNA
Attorney General
of Washington
1125 Washington Street
SE
P.O. Box 40100
Olympia, WA 98504

LAWRENCE G. WASDEN
Attorney General of Idaho
P.O. Box 83720
Boise, ID 83720

THOMAS W. CORBETT, JR.
Governor
LINDA L. KELLY
Attorney General
Commonwealth of
Pennsylvania
16th Floor
Strawberry Square
Harrisburg, PA 17120

JOSEPH SCIARROTTA, JR.
General Counsel
Office of Arizona Governor
JANICE K. BREWER
TOM HORNE
Attorney General of Arizona
1700 W. Washington Street,
9th Floor
Phoenix, AZ 85007

MARTY J. JACKLEY
Attorney General
of South Dakota
1302 East Highway 14
Pierre, SD 57501

WAYNE STENEJHEM
Attorney General
of North Dakota
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

GREGORY F. ZOELLER
Attorney General of
Indiana
302 W. Washington Street
Indianapolis, IN 46204

BRIAN SANDOVAL
Governor of Nevada
State Capitol Building
101 North Carson Street
Carson City, NV 89701

SAMUEL S. OLENS
Attorney General of
Georgia
40 Capitol Square, SW
Atlanta, GA 30334

MICHAEL C. GERAGHTY
Attorney General
of Alaska
P.O. Box 110300
Juneau, AK 99811

MICHAEL DEWINE
Attorney General of Ohio
DAVID B. RIVKIN
LEE A. CASEY
Baker & Hostetler LLP
Special Counsel
30 East Broad Street
17th Floor
Columbus, OH 43215

MATTHEW MEAD
Governor of Wyoming
State Capitol
200 West 24th Street
Cheyenne, WY 82002

WILLIAM J. SCHNEIDER
Attorney General of Maine
Six State House Station
Augusta, ME 04333

TERRY BRANSTAD
Governor of Iowa
107 East Grand Avenue
Des Moines, IA 50319

MICHAEL B. WALLACE
Counsel for the State of Mississippi by and through Governor
PHIL BRYANT
Wise Carter Child & Caraway, P.A.
P.O. Box 651
Jackson, MS 39205

DEREK SCHMIDT
Attorney General of Kansas
Memorial Hall
120 SW 10th Street
Topeka, KS 66612

J.B. VAN HOLLEN
Attorney General of Wisconsin
114 East State Capitol
Madison, WI 53702

QUESTION PRESENTED

The question presented is whether the minimum coverage provision of the Affordable Care Act exceeds Congress' powers under Article I of the Constitution.

PARTIES TO THE PROCEEDING

Petitioners, who were the appellants/cross-appellees below, are the U.S. Department of Health & Human Services; Kathleen Sebelius, Secretary, U.S. Department of Health & Human Services; the U.S. Department of Treasury; Timothy F. Geithner, Secretary, U.S. Department of Treasury; the U.S. Department of Labor; and Hilda L. Solis, Secretary, U.S. Department of Labor.

The State Respondents, who were the appellees/cross-appellants below, are 26 States: Florida, by and through Attorney General Pam Bondi; South Carolina, by and through Attorney General Alan Wilson; Nebraska, by and through Attorney General Jon Bruning; Texas, by and through Attorney General Greg Abbott; Utah, by and through Attorney General Mark L. Shurtleff; Louisiana, by and through Attorney General James D. "Buddy" Caldwell; Alabama, by and through Attorney General Luther Strange; Attorney General Bill Schuette, on behalf of the People of Michigan; Colorado, by and through Attorney General John W. Suthers; Pennsylvania, by and through Governor Thomas W. Corbett, Jr., and Attorney General Linda L. Kelly; Washington, by and through Attorney General Robert M. McKenna; Idaho, by and through Attorney General Lawrence G. Wasden; South Dakota, by and through Attorney General Marty J. Jackley; Indiana, by and through Attorney General Gregory F. Zoeller; North Dakota, by and through Attorney General Wayne Stenehjem; Mississippi, by and through Governor Phil Bryant; Arizona, by and through Governor Janice K. Brewer and Attorney General Thomas C. Horne; Nevada, by and through

Governor Brian Sandoval; Georgia, by and through Attorney General Samuel S. Olens; Alaska, by and through Attorney General Michael C. Geraghty; Ohio, by and through Attorney General Michael DeWine; Kansas, by and through Attorney General Derek Schmidt; Wyoming, by and through Governor Matthew H. Mead; Wisconsin, by and through Attorney General J.B. Van Hollen; Maine, by and through Attorney General William J. Schneider; and Governor Terry E. Branstad, on behalf of the People of Iowa. The National Federation of Independent Business, Kaj Ahlburg, and Mary Brown are also Respondents, and were also appellees below. Individuals Dana Grimes and David Klemencic were also made Respondents by this Court's order of January 17, 2012.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

INTRODUCTION 1

STATEMENT OF THE CASE 2

A. The Individual Mandate 2

B. The Proceedings Below 7

1. The District Court's Decision 7

2. The Eleventh Circuit's Decision 8

SUMMARY OF ARGUMENT 10

ARGUMENT 15

I. The Individual Mandate Is Not A Valid Exercise Of Congress' Commerce Power 15

A. The Mandate is Not a Permissible Regulation of Interstate Commerce 15

1. The power to regulate commerce does not include the power to compel individuals to enter into it 15

2. The individual mandate rests on unbounded assertions of federal power 24

B. The Mandate Is Not a Necessary and Proper Means of Executing the Commerce Power 33

1. The mandate is not a "Law ... proper for carrying into Execution" the commerce power 33

2. Congress may not circumvent the Constitution's restraints by enacting a "comprehensive regulatory scheme" 39

3. No matter how powerful the federal interest, unconstitutional means remain unconstitutional..... 43

4. The federal government's attempts to prove the mandate necessary and proper only underscore why it is not 46

II. The Individual Mandate Is Not A Valid Exercise of Congress' Tax Power 51

CONCLUSION 65

TABLE OF AUTHORITIES

Cases

Alston v. United States,
274 U.S. 289 (1927) 58

Bailey v. Drexel Furniture Co.,
259 U.S. 20 (1922) 58, 59, 63

Barnes v. Glen Theatre, Inc.,
501 U.S. 560 (1991) 38

Barsky v. Bd. of Regents,
347 U.S. 442 (1954) 38

Bob Jones Univ. v. Simon,
416 U.S. 725 (1974) 59

Bond v. United States,
131 S. Ct. 2355 (2011) 29, 31, 42

Champion v. Ames,
188 U.S. 321 (1903) 17

Clark v. Martinez,
543 U.S. 371 (2005) 63

Dep't of Revenue of Mont. v. Kurth Ranch,
511 U.S. 767 (1994) 57, 59, 61

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) 56

Garcia v. San Antonio Metro. Transit Auth.,
469 U.S. 528 (1985) 46

Gibbons v. Ogden,
22 U.S. 1 (1824) 16, 21, 24, 37

Gloucester Ferry Co. v. Pennsylvania,
114 U.S. 196 (1885) 16

Gonzales v. Raich,
545 U.S. 1 (2005) 26, 35, 39, 40

Gregory v. Ashcroft,
501 U.S. 452 (1991) 18, 36

Head v. N.M. Bd. of Exam'rs in Optometry,
374 U.S. 424 (1963) 38

Heart of Atlanta Motel v. United States,
379 U.S. 241 (1964) 16

Helwig v. United States,
188 U.S. 605 (1903) 59

Hill v. Colorado,
530 U.S. 703 (2000) 37

Hill v. Wallace,
259 U.S. 44 (1922) 59

Hodel v. Indiana,
452 U.S. 314 (1981) 42

I.N.S. v. Chadha,
462 U.S. 919 (1983) 35

I.N.S. v. Cardoza-Fonseca,
480 U.S. 421 (1987) 55

Jacobson v. Massachusetts,
197 U.S. 11 (1905) 38

License Tax Cases,
72 U.S. 462 (1867) 60

Lipke v. Lederer,
259 U.S. 557 (1922) 59

Marbury v. Madison,
5 U.S. 137 (1803) 11

McCulloch v. Maryland,
17 U.S. 316 (1819) ..... *passim*

Missouri v. Jenkins,
495 U.S. 33 (1990) 56

Nelson v. Sears, Roebuck & Co.,
312 U.S. 359 (1941) 57

New York v. United States,
505 U.S. 144 (1992) ..... *passim*

N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,
514 U.S. 645 (1995) 37

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) 24

Printz v. United States,
521 U.S. 898 (1997) ..... *passim*

Raines v. Byrd,
521 U.S. 811 (1997) 24

Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) 22, 28, 31, 52

Sonzinsky v. United States,
300 U.S. 506 (1937) 57, 60

Thomas v. United States,
192 U.S. 363 (1904) 62

Thomas More Law Ctr. v. Obama,
651 F.3d 529 (6th Cir. 2011) 22

United States v. Butler,
297 U.S. 1 (1936) 45

United States v. Comstock,
130 S. Ct. 1949 (2011) ..... *passim*

United States v. Darby,
312 U.S. 100 (1941) 16

United States v. Kahriger,
345 U.S. 22 (1953) 58

United States v. La Franca,
282 U.S. 568 (1931) 55, 57

United States v. Lopez,
514 U.S. 549 (1995) ..... *passim*

United States v. Morrison,
529 U.S. 598 (2000) 17, 28, 36, 40

United States v. Reorganized CF&I Fabricators of Utah, Inc.,
518 U.S. 213 (1996) 53, 55, 57

United States v. Sanchez,
340 U.S. 42 (1950) 57

Wickard v. Filburn,
317 U.S. 111 (1942) 23, 39, 40

Constitutional Provisions

U.S. Const. art. I, § 8, cl. 1 51

U.S. Const. art. I, § 8, cl. 3
(Commerce Cl.) ..... *passim*

U.S. Const. art. I, § 8, cls. 5, 12-14 19

U.S. Const. art. I, § 8, cls. 7, 9 20

U.S. Const. art. I, § 8, cl. 18
(Necessary & Proper Cl.) ..... *passim*

U.S. Const. art. I, § 9 62

U.S. Const. amend. II 19

U.S. Const. amend. III 19

U.S. Const. amend. V
(Due Process Cl.) 31, 32

U.S. Const. amend. IX..... 32

U.S. Const. amend. X..... 32, 42

U.S. Const. amend. XVI 62

Statutes

26 U.S.C.A. § 5000A..... 54, 55, 62, 63

26 U.S.C.A. § 5000A(a) 3, 5, 52

26 U.S.C.A. § 5000A(b) 4, 5, 52

26 U.S.C.A. § 5000A(b)(1) 52, 54

26 U.S.C.A. § 5000A(d) 3, 52

26 U.S.C.A. § 5000A(e)..... 4, 52

42 U.S.C. § 4012a 23

Anti-Injunction Act, 42 U.S.C. § 7421 52

Emergency Medical Treatment & Labor Act,
42 U.S.C. § 1395dd..... 48-51

Patient Protection and Affordable Care Act,
Pub. L. No. 111-148, as amended by the
Health Care and Education and
Reconciliation Act of 2010, Pub. L. No.
111-152 (ACA) ..... *passim*

ACA § 1201..... 6

ACA § 1501(a) 6

ACA § 1501(b) 3, 5, 52

ACA § 1501(a)(2)(A)..... 6, 26, 27

ACA § 1501(a)(2)(B) 27

ACA § 1501(a)(2)(D) 3

ACA § 1501(a)(2)(I) 6, 7, 25, 34, 64

Supplemental Appropriations Act of 2009, Pub. L. 111-32, 123 Stat. 1859, Title XIII 23

State Law Authorities

Ariz. Const. art. XXVII (2010), § 2 38

Ga. Code Ann. § 31-1-11 (2011) 38

Idaho Code Ann. § 39-90 (2010) 38

Ind. Code § 4-1-12 (2011) 38

Kan. Stat. Ann. § 65-6231 (2011) 38

La. Rev. Stat. Ann. § 22:1018 (2010) 38

Mo. Const. art. I, § 35 (2010) 38

N.H. Rev. Stat. Ann. § 400-A:14-a (2011) 38

N.D. Cent. Code § 26.1-36 (2011) 38

Ohio Const. art. I, § 21 (2011) 38

Okla. Const. art. II, § 37 (2010) 39

Tenn. Code Ann. § 56-7-1016 (2011) 39

Utah Code Ann. § 63M-1-2505.5 (2010) 39

Va. Code Ann. § 38.2-3430.1:1 (2010) 39

Other Authorities

Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate To Buy Health Insurance* (Aug. 1994) 4, 22

Cong. Research Serv., *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* (July 24, 2009) 5, 23

The Federalist No. 33 39

The Federalist No. 45 (Clinton Rossiter ed., 1961) 16, 18, 31

The Federalist No. 84 (Clinton Rossiter ed., 1961) 32

H.R. 3200, 111th Cong. § 401 (2009) 5

H.R. 3962, 111th Cong. § 501 (2009) 5

Obama: Requiring health insurance is not a tax increase, CNN (Sept. 20, 2009)) 5

The New Palgrave: A Dictionary of Economics (1988) 49

Paul Starr, *The Mandate Miscalculation*, The New Republic, Dec. 29, 2011 50

S. Willis & N. Chung, *Constitutional Decapitation and Healthcare*, Tax Notes, July 12, 2010 62

Samuel Johnson, 2 Dictionary of the English Language 1619 (4th ed. 1773) (reprinted 1978) 20

T. Sheridan, A Complete Dictionary of the English Language (2d ed.) (1789) 20

INTRODUCTION

The individual mandate rests on a claim of federal power that is both unprecedented and unbounded: the power to compel individuals to engage in commerce in order more effectively to regulate commerce. This asserted power does not exist. If Congress really had this remarkable authority, it would not have waited 220 years to exercise it. If this power really existed, both our Constitution and our constitutional history would look fundamentally different. We would not have a federal government with limited and enumerated powers, or States that continue to enjoy dignity and residual sovereignty. The extraordinary power that the federal government claims here is simply incompatible with our founding document.

The Constitution protects and promotes individual liberty, while the mandate's threat to liberty is obvious. The power to compel a person to enter into an unwanted commercial relationship is not some modest step necessary and proper to perfect Congress' authority to regulate existing commercial intercourse. It is a revolution in the relationship between the central government and the governed.

The Constitution grants the federal government only limited and enumerated powers and reserves the plenary police power to the States. There is nothing limited about the federal power asserted here. Given the breadth of the modern conception of commerce, there is almost no decision that Congress could not label "economic" and thereby compel under the federal government's theory. There is nothing

left of the residual authority reserved to the States if Congress really has the power claimed.

Finally, the Constitution divides and limits power to ensure accountability. Legislation, especially legislation raising taxes, is supposed to be difficult to pass. Those subjected to costly new regulations are expected to object. But if taxes can be disguised as mandates to enter into unwanted transactions and the regulated enticed by the promise of expanded business via those compelled transactions, the normal democratic process cannot perform its vital and intended limiting function.

By checking this first assertion of this unbounded power, this Court will endanger no other legislation. Nor will it imperil health care policy, as all agree that there are ample constitutional—though perhaps not politically feasible—alternatives to the mandate. However, by making clear that this uncabined authority is not among the limited and enumerated powers granted the federal government, this Court will preserve our basic constitutional structure and the individual liberty, state sovereignty, and government accountability it guarantees.

STATEMENT OF THE CASE

A. The Individual Mandate

The Patient Protection and Affordable Care Act (the "ACA" or "Act") imposes new and substantial obligations on every corner of society, from individuals to insurers to employers to States. Those obligations are designed to work together to expand both the demand for and the supply of health insurance, so as to achieve Congress' ultimate goal of

"near-universal" health insurance coverage. ACA § 1501(a)(2)(D).[1]

The centerpiece of the ACA and its goal of near-universal health insurance coverage is an unprecedented mandate that nearly every individual, "just for being alive and residing in the United States," Pet. App. 319a, must maintain health insurance at all times. In a provision entitled "Requirement to maintain minimum essential coverage," Congress commanded that every "applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month." ACA § 1501(b); 26 U.S.C.A. § 5000A(a). To be clear, "applicable individual" is just the ACA's legalistic and vaguely Orwellian way of referring to virtually every human being lawfully residing in this country. The mandate to maintain insurance applies to all individuals except foreign nationals or aliens residing here unlawfully, incarcerated individuals, and individuals falling within two very narrow religious exemptions. *Id.* § 5000A(d).

Significantly, although the individual mandate forces individuals to *obtain* insurance, it does not require individuals to *use* that insurance if and when they obtain health care services. Nor does any other provision of the ACA impose a requirement that

---

[1] All citations of provisions of the "ACA" are of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education and Reconciliation Act of 2010, Pub. L. No. 111-152.

individuals ever use the insurance that the Act requires them to secure.

The individual mandate is enforced by a separate statutory provision labeled euphemistically a "Shared Responsibility Payment." *Id.* § 5000A(b). Under that provision, "[i]f a taxpayer who is an applicable individual ... fails to meet the requirement" that the individual mandate imposes, "then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty." *Id.* This "penalty" has its own set of five "exemptions." *Id.* § 5000A(e). Importantly, though, individuals exempted from the *penalty* are *not* thereby exempted from the *mandate*. Thus, individuals fully subject to the mandate may be exempt from the penalty, but exemption from the penalty does not obviate their obligation to comply with the mandate to maintain a minimum level of health insurance coverage at all times.

The constitutionality of a mandate to maintain insurance was subject to serious question long before Congress enacted the ACA. While Congress considered various proposals to reform the health insurance industry throughout the twentieth century, none featured such a mandate. When the concept of imposing such a mandate first arose in the early 1990s, the Congressional Budget Office (CBO) informed Congress that "[a] mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action." CBO, *The Budgetary Treatment of an Individual Mandate To Buy Health Insurance* ("CBO Report") 1 (August 1994). In the course of debate over the current legislation, the Congressional Research Service (CRS) advised that "[d]espite the breadth of powers

that have been exercised under the Commerce Clause, it is unclear whether the clause would provide a solid constitutional foundation for legislation containing a requirement to have health insurance." CRS, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* ("CRS Report") 3 (July 24, 2009). CRS deemed that constitutional uncertainty "the most challenging question posed by such a proposal." *Id.*

During the legislative process, Congress considered multiple proposals to enact a "tax" on the uninsured rather than a mandate forcing individuals to obtain insurance. *See, e.g.*, H.R. 3962, § 501, 111th Cong. (2009); H.R. 3200, § 401, 111th Cong. (2009). Ultimately, however, Congress rejected those proposals in favor of a command to obtain insurance, enforced by a separate provision expressly labeled a "penalty" for "fail[ure] to meet the requirement" that the mandate imposes. ACA § 1501(b); 26 U.S.C.A. § 5000A(a), (b). In keeping with Congress' decision to discard tax proposals, the President emphatically insisted that the penalty for failure to obtain insurance was not a tax. *See, e.g.*, *Obama: Requiring health insurance is not a tax increase*, CNN (Sept. 20, 2009) ("For us to say you have to take responsibility to get health insurance is absolutely not a tax increase.").[2]

The individual mandate is accompanied by a set of congressional findings expressly addressing Congress' authority to impose the "Requirement to

---

[2] *Available at* http://articles.cnn.com/2009-09-20/politics/obama.health.care_1_health-insurance-coverage-mandate-medicare-advantage?_s=PM:POLITICS.

maintain minimum essential coverage," *i.e.*, the mandate. ACA § 1501(a). Those findings repeatedly characterize the mandate as a "requirement" grounded in Congress' power to "regulate" under the Commerce Clause. They make no mention of the penalty or "Shared Responsibility Payment" through which Congress chose to enforce the individual mandate, and do not attempt to ground either the penalty or the mandate in Congress' tax power.

According to the findings, the individual mandate "regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased." ACA § 1501(a)(2)(A). Underscoring its intent to preclude individuals from choosing to remain outside the health insurance market, Congress explained that the mandate would prevent individuals from "mak[ing] an economic and financial decision to forgo health insurance coverage." *Id.* Congress also emphasized that the mandate was designed not just to target individuals who want or need health insurance, but also to "broaden the health insurance risk pool to include healthy individuals," ACA § 1501(a)(2)(I), who are less likely to use the insurance that they nonetheless must purchase.

In that respect, Congress intended the mandate to subsidize costs created by other provisions of the Act, specifically, regulations that prohibit insurers from denying, canceling, capping, or increasing the cost of coverage based on an individual's preexisting health conditions or history. *See id.*; ACA § 1201. By forcing individuals less to likely to use insurance into the market, Congress endeavored to subsidize

the costs created by requiring the insurance industry to insure individuals who are very likely to need expensive care. Congress also explained that the mandate was intended to counteract the adverse effects of those insurance market regulations. In Congress' view, "if there were no requirement [that currently healthy individuals purchase insurance], many individuals would wait to purchase health insurance until they needed care." ACA § 1501(a)(2)(I). By forcing all individuals to purchase insurance regardless of their needs or desires, Congress expected the mandate to "minimize this adverse selection." *Id.*

B. The Proceedings Below

Shortly after the ACA was enacted, Florida and 12 other States brought this action seeking a declaration that the individual mandate is facially unconstitutional and the Act as a whole is invalid. They have since been joined by 13 additional States, the National Federation of Independent Business, and multiple individuals.

1. The District Court's Decision

The District Court concluded that the individual mandate is unconstitutional and granted summary judgment to the States. Pet. App. 296a–350a. The court recognized that "[n]ever before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive and residing in the United States," and concluded that "[i]t would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause." Pet. App. 319a, 324a. As the court explained, "[i]f some type of already-

existing activity or undertaking were not considered to be a prerequisite to the exercise of commerce power, ... it would be virtually *impossible* to posit *anything* that Congress would be without power to regulate." Pet. App. 325a.

The court also rejected the federal government's argument that the mandate is permissible under the Necessary and Proper Clause, concluding that "the individual mandate is neither within the letter nor the spirit of the Constitution." Pet. App. 348a. And it concluded that the mandate may not be upheld under Congress' tax power because Congress enacted not a tax, but "a penalty imposed in aid of an enumerated power." Pet. App. 429a.

2. The Eleventh Circuit's Decision

The Eleventh Circuit affirmed the District Court's holding that the individual mandate is unconstitutional. Pet. App. 63a–172a. In a joint opinion by Chief Judge Dubina and Judge Hull, the court concluded that "[t]he federal government's assertion of power, under the Commerce Clause, to issue an economic mandate for Americans to purchase insurance from a private company for the entire duration of their lives is unprecedented, lacks cognizable limits, and imperils our federalist structure." Pet. App. 155a–56a.

Like the District Court, the Court of Appeals recognized that the mandate is "unprecedented" and that "th[is] Court has never ... interpret[ed] the Commerce Clause to allow Congress to dictate the financial decisions of Americans through an economic mandate." Pet. App. 104a–05a. The court found the utter lack of such mandates "telling" given that "[f]ew

powers, if any, could be more attractive to Congress than compelling the purchase of certain products." Pet. App. 106a. Observing that "[t]he power to regulate commerce, of course, presupposes that something exists to regulate," the court concluded that the mandate does not regulate any existing commerce, and that "[a]pplying aggregation principles" to hold that "an individual's decision not to purchase a product" substantially affects commerce "would expand the substantial effects doctrine to one of unlimited scope." Pet. App. 98a, 113a.

The court also rejected the federal government's attempt to characterize the mandate as regulating participation in the market for health care services, as opposed to the market for health insurance, noting that the "mandate does *not* regulate behavior at the point of consumption" or "even require those who consume health care to pay for it with insurance when doing so." Pet. App. 118a–19a. And the court found the federal government's claim that the health care and insurance markets are unique neither factually accurate nor constitutionally relevant. Pet. App. 120a–25a. Although the court noted that Congress has regulated certain facets of both markets, it concluded that "[i]t simply will not suffice to say that, because Congress has regulated broadly in a field, it may regulate in any fashion it pleases." Pet. App. 135a. Emphasizing that the Constitution's "*structural* limits ... are of equal dignity to the express prohibitions," and that health care laws have always been a core component of the States' police power, the court also found it relevant "that the individual mandate supersedes a multitude of state policy choices in these key areas of

traditional concern." Pet. App. 135a, 141a. Adding "this federalism factor ... to the numerous indicia of constitutional infirmity," the court concluded that mandate "cannot be sustained as a valid exercise of Congress's [commerce] power." Pet. App. 143.

The Court of Appeals also rejected the federal government's argument that the mandate is permissible under the Necessary and Proper Clause because it is "essential to a larger regulatory scheme." Pet. App. 144a. The court first noted that this Court "has to date never sustained a statute on the basis of t[hat] doctrine in a facial challenge, where plaintiffs contend that the entire class of activities is outside the reach of congressional power." Pet. App. 145a. But even assuming the doctrine might be applicable to some facial challenges, the court found it inapplicable here because "the individual mandate does not remove an obstacle to Congress's [other] regulation[s]." Pet. App. 150a.

Finally, the court concluded that "[t]he individual mandate as written cannot be supported by the tax power" because it is enforced by "a civil regulatory penalty and not a tax." Pet. App. 171a–72a. Indeed, Judge Marcus concurred in that portion of the court's opinion, while dissenting with respect to the Commerce and Necessary and Proper Clauses. Pet. App. 189a–262a.

SUMMARY OF ARGUMENT

The individual mandate is an unprecedented law that rests on an extraordinary and unbounded assertion of federal power. Under any faithful reading of the Constitution's enumeration of limited

federal powers, the mandate cannot survive constitutional scrutiny.

The Constitution grants Congress the power to *regulate* commerce, not the power to compel individuals to enter into commerce. That distinction is fundamental. A power to regulate existing commercial intercourse is precisely what the framers sought to confer upon the new federal government. The power to compel individuals to enter commerce, by contrast, smacks of the police power, which the framers reserved to the States. And while this distinction would have been both obvious and vital to the framing generation, it has become even more essential in light of the breadth of the modern conception of commerce. An individual can do very little to avoid the long arm of the federal government other than refrain from entering into the commerce that Congress may regulate. If Congress not only can regulate individuals once they decide to enter into commerce, but can compel them to enter commerce in the first place, then there is nothing left of the principle that Congress' powers "are defined, and limited," *Marbury v. Madison*, 5 U.S. 137, 176 (1803), as Congress could simply force within its regulatory reach all those who would remain outside it.

Congress itself recognized for the first 220 years of its existence that the Commerce Clause does not encompass such an unbounded power or eliminate the Constitution's reservation of the police power to the States. The individual mandate is the first *ever* law of its kind. That is remarkable. Surely, as the nation has grown, developed a truly continental economic market, suffered through depressions and recessions, and waged two world wars, Congress has

not lacked for motive or opportunity to force individuals into countless interstate markets. How much easier, for example, to support the price of wheat by compelling individuals to purchase wheat than to devise an elaborate system of subsidies and quotas and limit on-farm consumption to prevent an indirect effect on prices. And how much easier to stimulate the economy and promote the automobile industry by compelling new car purchases rather than by merely offering incentives, such as "cash for clunkers." The only explanation for the utter absence of comparable mandates is the utter absence of constitutional authority to enact them.

Rather than attempt to place any meaningful limits on the power that Congress *actually* asserted in the ACA, the federal government focuses most of its efforts on recharacterizing the individual mandate as a regulation of "the timing and method of financing the purchase of health care services." Govt.'s Br. 23. But the federal government's euphemistic description cannot obscure the simple reality that that is not what the individual mandate does. The mandate forces individuals to purchase *insurance*. It does not require individuals to *use* that insurance if and when they ultimately obtain health care *services*. Congress itself recognized as much when it characterized the mandate not as a regulation of commercial transactions for health care services, but as a purported regulation of "economic decisions" not to purchase insurance.

The implications of Congress' newly minted theory of its commerce power are breathtaking. *Every* decision not to purchase a good or service has a substantial effect on the interstate market for that

good or service once aggregated with the similar decisions of other individuals. A power to control every class of decisions that has a substantial effect on interstate commerce would be nothing less than a power to control nearly every decision that an individual makes.

Nor may the federal government save the mandate by resort to that "last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause." *Printz v. United States*, 521 U.S. 898, 923 (1997). The individual mandate is not a "La[w] ... for carrying into Execution" the commerce power, U.S. Const. art. I, § 8, cl. 18; it is a law for carrying into execution a "great substantive and independent power" that the Constitution does not grant. *McCulloch v. Maryland*, 17 U.S. 316, 411 (1819). Even were that not the case, it is not a "La[w] ... *proper* for carrying into Execution" the commerce power because it is not "consist[ent] with the letter and spirit of the constitution." *Id.* at 421.

The federal government may not avoid that inescapable conclusion simply by arguing that the otherwise impermissible provision is part of a "comprehensive regulatory scheme." It would be an odd notion of limited and enumerated powers that allowed the comprehensiveness of surrounding legitimate regulations to empower Congress to go the final mile and compel individuals to enter into its regulatory sphere. Contrary to the federal government's assertions, the Court has not hesitated to strike down laws that are not proper, even when they are integral components of otherwise permissible regulatory schemes. Indeed, this Court has done so

while rejecting challenges to the balance of the regulatory scheme.

In all events, the federal government's attempts to prove that the mandate is a necessary and proper regulation of the health care market only underscore why it is not. The focus on the purported "uniqueness" of the health care market and the centrality of the individual mandate might explain why this is the *first* time Congress has asserted this unprecedented power, but it does not explain why it will be the *last*. Nor does it explain why the Court should give Congress *carte blanche* to resort to means wholly inconsistent with the Constitution's structural limitations when Congress quite clearly could achieve its objectives through means as constitutionally unobjectionable as increasing taxes and making transparent its effort to have healthy individuals subsidize the costly reforms that the insurance companies otherwise would have resisted.

The federal government's last ditch effort to abandon its earlier rhetoric and defend the mandate as a tax fails for the simple reason that, regardless of its enforcement mechanism, the mandate itself is not a tax. Moreover, any conception that the structural provisions of the Constitution ensure accountability in government decision-making is surely offended by the notion that Congress can enact legislation that would not have passed had it been labeled a tax and then turn around and defend it as a valid exercise of the tax power.

In short, there is no way to uphold the individual mandate without doing irreparable damage to our basic constitutional system of

governance. If this is to remain a system of limited and enumerated federal powers that respects individual liberty, accountability, and the residual dignity and sovereignty of the States, the individual mandate cannot stand.

ARGUMENT

I. The Individual Mandate Is Not A Valid Exercise Of Congress' Commerce Power.

A. The Mandate is Not a Permissible Regulation of Interstate Commerce.

The Commerce Clause does not grant Congress the power to compel individuals to enter into commerce. As Congress itself has recognized for the past 220 years, it has the power to "regulate" extant commerce, not the power to bring commerce into existence. Both the text and the structure of the Constitution make that critical distinction clear. It could hardly be otherwise, as that limitation is essential to prevent the Commerce Clause from becoming a grant of the very police power that all concede the Constitution withholds from Congress and reserves to the States. Because the individual mandate does not regulate commerce, but instead simply commands individuals to enter into commerce, the mandate is not a valid exercise of Congress' commerce power.

1. The power to regulate commerce does not include the power to compel individuals to enter into it.

The Constitution grants Congress the power "[t]o regulate Commerce ... among the several States." U.S. Const. art. I, § 8, cl. 3. While the term

"commerce" has not always been "marked ... by a coherent or consistent course" of interpretation, *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring), the term "regulate" has: For nearly two centuries, the Court has defined "the power to regulate" as the power "to prescribe the rule by which commerce is to be governed." *Gibbons v. Ogden*, 22 U.S. 1, 75 (1824); *see also, e.g.*, *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203 (1885) ("The power to regulate [interstate] commerce ... is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted[.]"); *United States v. Darby*, 312 U.S. 100, 113 (1941) (same); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 254–55 (1964) (same); *Lopez*, 514 U.S. at 553 (same).

It is axiomatic that the power to "regulate commerce" presupposes the existence of commerce to be regulated. It is not the power to compel individuals to engage in commerce so that Congress has something to regulate. The difference between the two is self-evident. The power to regulate is far more modest and allows Congress to reach individuals only if they decide to engage in conduct that constitutes (or substantially affects) interstate commerce. The difference would have been obvious to the framing generation. The commerce power was viewed as a relatively innocuous power, *see* The Federalist No. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961) ("The regulation of commerce ... [is] an addition which few oppose, and from which no apprehensions are entertained."), designed to give the new federal government the power to regulate ongoing commercial intercourse

between States and to remedy a glaring inadequacy in the Articles of Confederation. The power to regulate that ongoing commercial intercourse is precisely what the framers intended to confer. The power to force individuals to engage in commercial transactions against their will was the kind of police power that they reserved to state governments more directly accountable to the people (or "applicable individuals," as the ACA would have it).

That distinction, obvious to the framers, is if anything more fundamental in light of subsequent developments, including the breadth of this Court's modern Commerce Clause jurisprudence. The modern commerce power is a broad one, as there is little left of the "distinction between what is truly national and what is truly local" under the Court's present-day notions of "commerce." *United States v. Morrison*, 529 U.S. 598, 617–18 (2000). But even as the Court has expanded its conception of "commerce," it has not wavered from the notion that the power to "regulate" is the power to prescribe rules for commerce, and it has never suggested that power includes the power to compel the existence of commerce in the first place.[3] The breadth of the modern conception of "commerce" only underscores the importance of preserving that distinction.

---

[3] This Court has made clear that the power to prescribe the rule by which commerce is to be governed includes the power to strictly limit or even prohibit interstate commerce in a particular article. *See, e.g.*, *Champion v. Ames*, 188 U.S. 321 (1903). But a rule forbidding or strictly limiting commerce is just a classic example of a rule governing pre-existing commerce. Indeed, such a law has no effect in the absence of pre-existing voluntary commerce.

It is common ground that the powers of the federal government "'are few and defined'" and those of the States "'numerous and infinite.'" *Lopez*, 514 U.S. at 552 (quoting The Federalist No. 45, at 292–93). But if those fundamental precepts are to be anything more than slogans honored only in the breach, the difference between regulating commerce and compelling individuals to engage in it must be reaffirmed. Precisely because Congress' power to regulate commerce extends so broadly, it would be "difficult to perceive any limitation on federal power," *id.* at 564, or any exclusive "residuum of power remaining" in the States, *United States v. Comstock*, 130 S. Ct. 1949, 1967 (2011) (Kennedy, J., concurring), if Congress could compel individuals to enter into any commerce that Congress may regulate. Indeed, such a power to compel commerce the better to regulate it would allow Congress to control the most basic of decisions about how to live life—in other words, to withhold from individuals the very liberty that the Constitution was designed to protect. *See Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) ("In the tension between federal and state power lies the promise of liberty."). The notion that a power so invasive and so antithetical to the core values of our Nation was smuggled into the Constitution through the seemingly innocuous power "[t]o regulate ... commerce"—a power that, at the time, "few oppose[d], and from which no apprehensions [we]re entertained," The Federalist No. 45, at 293—is incredible.

That the Commerce Clause is not susceptible to the federal government's implausibly boundless interpretation is confirmed not just by the traditions

upon which our Nation was founded, and the basic structure of the limited federal government created by the Constitution, but by the text of the founding document itself. The provisions immediately surrounding the Commerce Clause confirm that the power to regulate does not encompass the power to create the thing to be regulated. In the only two other provisions of Article I, section 8 that grant Congress a power to regulate, the Constitution first grants Congress the *separate* power to bring into existence the object of regulation. Thus, section 8 grants Congress the power "[t]o coin Money" before granting the power "to regulate the Value thereof," and the powers to "raise and support Armies" and "provide and maintain a Navy" before the power "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I., § 8, cls. 5, 12–14.

Had the power "to regulate" been commonly understood as sufficient to call into existence the thing to be regulated, those separate, anterior, and far more controversial powers would have been redundant. The power to raise a standing army was perhaps the most controversial provision in the proposed Constitution and gave rise to the Second and Third Amendments. By contrast, the power to regulate a standing army, if one were to be raised at all, was not controversial, as there is little to be said for an unregulated standing army. In the same way, the power to regulate existing commerce between the States created "no apprehensions," while a power to compel people to engage in unwanted commercial transactions would have raised a firestorm—and produced several additional constitutional

amendments to cabin it in the unlikely event such a power survived at all.

Moreover, when the Constitution does grant Congress the power to bring something into existence, it does so in language that is unmistakably clear. For example, Congress has the power "[t]o *establish* Post Offices and post Roads" and "[t]o *constitute* Tribunals inferior to the Supreme Court." Art. I, § 8, cl. 7, 9 (emphasis added). The Constitution does not grant Congress a separate and anterior power to "establish" or "constitute" interstate commerce because the Commerce Clause quite logically presupposes the existence of the commerce to be regulated, and empowers Congress to do nothing more (and nothing more apprehensive) than to prescribe the rule by which *that* commerce will be governed.

The federal government's half-hearted attempt to suggest otherwise is unconvincing. The federal government admits that the primary definition of "regulate" when the Constitution was drafted was "[t]o adjust by rule or method," but it emphasizes the secondary definition "[t]o direct," a term that, in turn, had its own fifth alternative definition of "to order; to command." Govt.'s Br. 48 (quoting Samuel Johnson, 2 Dictionary of the English Language 1619 (4th ed. 1773) (reprinted 1978), and T. Sheridan, A Complete Dictionary of the English Language (2d ed.) (1789)). The notion that this second-to-the-fifth definitional chain is what governed the popular understanding of the power granted to the new federal government is wholly implausible. The lack of apprehensions about the new power and the contrast between "regulate" and the surrounding

terms that far more naturally empowered the federal government to establish, constitute, raise, coin, or otherwise bring things into existence suffices to make the point. The contention is even less plausible given that the first kind of commerce that the text empowered the new Congress to regulate was that "with foreign nations," not an area where the fledgling republic was well-positioned to issue orders, directions, or commands, as opposed to regulating ongoing voluntary intercourse.

Moreover, even accepting the attenuated and farfetched contention that the Constitution was commonly understood as empowering Congress to "order or command commerce," the fact remains that "[t]he subject to be regulated is commerce," not individuals. *Gibbons*, 22 U.S. at 72. While Congress unquestionably has the power to regulate (and perhaps "direct" or "command") individuals when they choose to participate *in commerce*, that is a far cry from the power to command individuals to enter into commerce in the first place. *Cf. New York v. United States*, 505 U.S. 144, 176 (1992) (recognizing distinction between permissible regulation of States' participation in commerce and impermissible "command[s] to state governments" to regulate commerce).

Congress itself appreciated the distinction between the power to regulate commerce and the power to compel individuals to enter into commerce for the first 220 years of its existence. The federal code books are replete with provisions regulating the conduct of individuals who engage in commercial transactions, as well as provisions encouraging, enticing, and incentivizing individuals to enter into

commercial transactions of all stripes. But neither the federal government nor the numerous lower courts to consider the constitutionality of the individual mandate have identified a single other federal law throughout our Nation's entire history that simply *compels* individuals to enter into commerce. *See, e.g.*, Pet. App. 106a ("Congress has never before exercised this supposed authority"); Pet. App. 319a (same); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 560 (6th Cir. 2011) (Sutton, J., concurring) (same); *Seven-Sky v. Holder*, 661 F.3d 1, 14 (D.C. Cir. 2011) (same).

Not surprisingly, the federal government no longer even attempts to ground the individual mandate in any comparable historical or modern-day practice. Congress' own advisors warned of the unprecedented nature and dubious constitutionality of such a mandate long before Congress decided to impose one. When the idea first arose during debate over health care reform in the mid-1990s, the CBO candidly advised Congress that a "mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action." CBO Report 1. As the CBO explained, Congress "has never required people to buy any good or service as a condition of lawful residence in the United States," but has instead limited itself to imposing regulations that "apply to people as parties to economic transactions." *Id.* at 2. When the idea resurfaced during debate over the ACA, the CRS confirmed the same, and cautioned that "[d]espite the breadth of powers that have been exercised under the Commerce Clause, it is unclear whether the clause would provide a solid constitutional

foundation for legislation containing a requirement to have health insurance." CRS Report 3.

That "[t]here is not only an absence of" such mandates "in early Congresses, but ... in our later history as well," *Printz*, 521 U.S. at 916, is truly a remarkable thing. Congress surely has not lacked incentives to exercise such a "highly attractive power." *Id.* at 905. How much easier to support the price of wheat directly by compelling individuals to buy wheat than to devise an intricate system of quotas and subsidies in hopes of preventing wheat for on-farm consumption from having an indirect effect on prices. *But see Wickard v. Filburn*, 317 U.S. 111 (1942). Or to compel all individuals living in flood plains to purchase and maintain flood insurance rather than to attach a flood insurance requirement only as a condition applicable to homes purchased in federally regulated transactions. *But see* 42 U.S.C. § 4012a; Pet. App. 107a–08a. Or to compel well-off individuals to purchase new cars rather than to subsidize the cost of purchase for individuals who volunteer to trade in their old ones. *But see* Supplemental Appropriations Act of 2009, Pub. L. 111-32, 123 Stat. 1859, Title XIII (establishing "cash for clunkers" program).

Yet even as Congress struggled to devise creative and novel responses to the shift from a more localized to a more centralized economy, to the protracted Great Depression and other economic crises, and to the instability of two world wars, Congress *never* saw fit to attempt to stabilize or stimulate any market by forcing individuals to enter into it. The sheer "numerousness of ... statutes" carefully crafted to encourage wider participation in

countless markets, "contrasted with the utter lack of statutes" conscripting individuals into markets in dire need of stimulation, is powerful evidence of "an assumed *absence* of such power." *Printz*, 521 U.S. at 907–08; *compare Gibbons*, 22 U.S. at 72 (finding instructive that power to regulate navigation "ha[d] been exercised from the commencement of the government, ha[d] been exercised with the consent of all, and ha[d] been understood by all to be a commercial regulation"). Indeed, the failure to seize on this power even once during the massive expansion of Congress' conception of its commerce power over the last century is particularly telling. "That prolonged reticence would be amazing if such [laws] were not understood to be constitutionally proscribed." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995); *cf. Raines v. Byrd*, 521 U.S. 811, 826 (1997).

2. The individual mandate rests on unbounded assertions of federal power.

The power that the federal government asserts is as unbounded as it is unprecedented. Indeed, the federal government's effort to liken it to more familiar legislation only succeeds in highlighting the complete absence of any limiting principle for the power asserted.

The federal government attempts to minimize the lack of constitutional grounding for a mandate to purchase health care insurance by recharacterizing it as something it is not: a "regulat[ion of] ... the way in which individuals finance their participation in the health care market." Govt.'s Br. 18. That is

simply not true. The mandate does not regulate or even speak to how "individuals finance their participation in the *health care market*." Nowhere in the mandate—or anywhere else in entire 2,700 pages of the ACA—did Congress require individuals to actually *pay* for health care services with the insurance that the mandate requires them to obtain. The mandate neither addresses the "health care services" market nor regulates the method of financing purchases in that market. All the mandate does is force individuals to purchase *insurance*, which they are free to use or not use in the event that they actually need health care services. Indeed, Congress quite plainly explained that the mandate is largely directed at "*healthy* individuals," in hopes that they will *not* use the insurance they are required to obtain, and will instead subsidize costs generated by *other* individuals who use insurance to finance *their* participation in the market for health care services. ACA § 1501(a)(2)(I) (emphasis added).

That distinction between markets matters not because Congress' authority to regulate the market for health care services differs from its authority to regulate the market for health care insurance, or because the Constitution compels some sort of categorical distinction between the two. *But see* Govt.'s Br. 41. It matters because there is a critical difference between a mandate that individuals obtain insurance and a mandate that individuals who obtain health care services use insurance when they do so. Whereas the latter would regulate *actual participation* in the market for health care services, the former is an unprecedented command to *enter*

into the market for insurance. That is why the federal government gains nothing from its strained attempts to portray the mandate as merely "regulating" the purchase of health care services in advance of some inevitable point of consumption. Even assuming it were inevitable that all individuals would obtain health care services someday, the mandate *does not regulate the purchase of health care services*, whether at, before, or after the point of service. The federal government's felt-need to conflate the purchase of insurance with the purchase of services only underscores the importance of the distinction and how unprecedented the mandate, accurately characterized, really is.

As Congress itself recognized, what the mandate actually purports to "regulate" is not participation in any market at all, but rather "economic and financial *decisions*," namely, the decision whether to purchase health insurance. ACA § 1501(a)(2)(A) (emphasis added); *see also id.* (recognizing that, without the mandate, "some individuals would make *an economic and financial decision* to forego health insurance coverage" (emphasis added)). Economic or not, a "decision" whether to purchase a good or service cannot plausibly be construed as "commerce in the ordinary and usual sense of that term." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). Congress instead asserted control over such decisions through its third and most attenuated category of Commerce Clause power: "the power to regulate activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). In Congress' words, it may force individuals to purchase insurance because the decision whether to

do so is "commercial and economic in nature." ACA § 1501(a)(2)(A)–(B).

The implications of that theory are breathtaking. To be sure, the decision whether to purchase insurance can have economic consequences, both for the individual who decides not to purchase it and for those who *do* participate in the insurance market. But *every* decision whether to purchase a service or product has an economic or commercial effect on the market for that service or product, in much the same way that "any conduct in this interdependent world of ours has an ultimate commercial origin or consequence." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring). If the "economic" nature of a decision were enough to allow Congress to displace the decision-making power of individuals and *compel* them to make whatever decisions Congress deems useful for the more efficient regulation of commerce, it would be "difficult to perceive any limitation on federal power," *id.* at 564, or any "residuum of power" reserved to the States, *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring).

The federal government's theory would allow for no meaningful distinction, for example, between a decision not to purchase health insurance and a decision not to purchase a car. Both are "economic and financial decisions" that, when aggregated with the decisions of other individuals, could be said to have a "tangible, direct, and strong" effect on interstate commerce. Govt.'s Br. 23. There is no principled reason why the asserted power to compel individuals to purchase insurance could not be exercised to compel individuals to purchase cars. Indeed, when presented with that very premise, the

federal government did not—and could not—disagree. Pet. App. 330a; *see also Seven-Sky*, 661 F.3d at 14–15 ("at oral argument, the Government could not identify *any* mandate to purchase a product or service in interstate commerce that would be unconstitutional ... under the Commerce Clause" (emphasis added)).

Nor would the federal government's logic end with mandates to purchase products or services. Just like the "costs of crime" and "national productivity" reasoning that the Court emphatically rejected in *Lopez* and *Morrison*, its rationale could "be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of [decisions relating to] marriage, divorce, and childrearing on the national economy is undoubtedly significant." *Morrison*, 529 U.S. at 615–16; *see also Lopez*, 514 U.S. at 565 ("depending on the level of generality, any activity can be looked upon as commercial").

Precisely because the one undeniable feature of our Constitution is that it "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation," *id.* at 566, such boundless interpretations of the Commerce Clause must be "rejected as unworkable if we are to maintain the Constitution's enumeration of powers." *Morrison*, 529 U.S. at 615. That is true not just because of the limited nature of the powers the Constitution confers on Congress, but also because of the powers that it "reserve[s] to the States," which consist of the "the whole, undefined residuum of power remaining after taking account of powers granted to the National Government." *Comstock*,

130 S. Ct. at 1967 (Kennedy, J., concurring). If the Commerce Clause granted to Congress the very residuum of power that the Constitution purports to reserve to the States, it would be impossible to conclude that the Constitution "preserves the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

Once again, the modern-day breadth of the substantial effects doctrine and the deference it affords Congress only make the problem more acute. Unless the Court wants to get into the business of second-guessing congressional determinations as to which "decisions" have a sufficiently "tangible, direct, and strong" effect on interstate commerce to count, Govt.'s Br. 23, there would be almost no end to the "economic decisions" that Congress could compel. To pick an example from the "health care services" realm, some of the high costs generated by emergency dental care could have been prevented by regular trips to the dentist's office. The dynamic involves the same cost-shifting potential arising from the humane impulse not to deny care in emergency situations that the federal government suggests makes the mandate unique. It would hardly be "irrational" for Congress to attempt to reduce that burden on the health care services market by mandating that everyone visit the dentist twice a year.

And the potential to eliminate that kind of indirect burden on the health care services market is nothing compared to Congress' ability to employ this new-found power to compel economic decisions in more obviously economic markets. Problems in the

automobile industry could be solved by mandatory new car purchases. The congressional interest in ensuring the viability of the agricultural industry, which has typically been addressed through subsidies, could be furthered instead by compelling the purchase of agricultural products. Individuals' surprising unreceptiveness to substantial incentives to invest in 401(k) accounts could be overcome by mandating such investments. And so on. Most economic problems involve questions of demand and supply, and if Congress has the power not just to regulate commercial suppliers and those who voluntarily enter the market, but to compel demand as well, then we have truly entered a brave, new world. The possibilities are quite literally endless.

While the unpopularity of these potential mandates may put some check on their proliferation, that is not a sufficient answer. This Court has steadfastly declined to step aside and leave enforcement of the Constitution's critical structural protections to the political process. *See Lopez*, 514 U.S. at 578 (Kennedy, J., concurring) ("[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scale too far."). And here, part of the perniciousness of the individual mandate is its tendency to undermine the healthy democratic restraints on government action. While taxpayers can be expected to resist new taxes and insurance companies can ordinarily be expected to resist burdensome new regulations, the mandate ensured the quiescence of the latter (forced purchases are good for business,

after all), while cloaking the burden on individuals in terms that avoid the politically unpopular nomenclature of new taxes. Indeed, it is hard to imagine what regulations the automobile industry would not accept in exchange for a car-purchase mandate or what rules dentists would not embrace for a federal mandate of twice-annual visits.

Confronted with the irrefutable implications of its logic, the federal government elsewhere has "concede[d] ... the lack of any doctrinal limiting principles" on its theory, *Seven-Sky*, 661 F.3d at 14, and does not attempt to identify any now. It instead simply insists that concerns about Congress' ability to compel countless actions with economic consequences are beside the point because they "'seem[] more redolent of Due Process Clause arguments' than any principled enumerated powers analysis." Govt.'s Br. 51 (quoting *Seven-Sky*, 661 F.3d at 19). The federal government severely misunderstands the purpose of the enumeration of powers in the Constitution.

"Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity." *Bond*, 131 S. Ct. at 2364. By delegating to the federal government powers "few and defined," and reserving to the States powers "numerous and indefinite," The Federalist 45 at 313, "federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York*, 505 U.S. at 181. In "denying any one government complete jurisdiction over all the concerns of public life," and limiting the most pervasive powers to governments closer to the governed, "federalism protects the liberty of the individual from arbitrary power." *Bond*, 131 S. Ct.

at 2364. Thus, the argument that Congress has exceeded its enumerated powers and the argument that Congress has encroached upon individual liberty are, in fact, one and the same.

To be sure, the Due Process Clause and other amendments serve as essential backstops when the Constitution's structural protections fail to prevent such encroachments. But the mere presence of those *additional* restraints on federal power does not mean "that the Constitution's enumeration of powers does not presuppose something not enumerated." *Lopez*, 514 U.S. at 566. Indeed, the framers were acutely aware of that flawed argument and drafted the Ninth and Tenth Amendments to guard against it. *See* The Federalist No. 84 at 573–74 (A. Hamilton) (arguing that a bill of rights was "unnecessary" and "dangerous" because it "would afford a colorable pretext to claim more [powers] than were granted"). To require resort to the murky doctrine of substantive due process to impose any meaningful limits on the commerce power would deprive of all meaning the structural protections that those amendments were enacted to reinforce.

Indeed, if anything, the Bill of Rights is powerful evidence that the Commerce Clause does *not* grant Congress the remarkable power asserted here. If the Constitution were understood to empower Congress to seize control over decisions so basic as to how the people spend their money and order their affairs, surely the Bill of Rights would have been longer and specific amendments would have been proposed to cabin the exercise of such an extraordinary power. If the power to raise a standing army generated two amendments, surely a

power to compel commerce the better to regulate it would have inspired several more. But such amendments were not proposed even by anti-federalists deeply suspicious of the power of the new federal government for the rather obvious reason that the Commerce Clause was not some vortex of authority that rendered the entire process of enumeration beside the point.

B. The Mandate Is Not a Necessary and Proper Means of Executing the Commerce Power.

Implicitly recognizing the lack of any viable theory of the Commerce Clause that would render the individual mandate itself a permissible regulation of commerce, the federal government channels much of its energy into that "last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause." *Printz*, 521 U.S. at 923. But all of the federal government's efforts to establish that the mandate is integral to the ACA's permissible regulations of interstate commerce are for naught, as the mandate does not "carry[] into Execution" Congress' power to regulate interstate commerce, let alone do so through "necessary and proper" means. U.S. Const. art. I, § 8, cl. 18.

1. The mandate is not a "Law ... proper for carrying into Execution" the commerce power.

The federal government's attempt to ground the individual mandate in the Necessary and Proper Clause fails at the outset because the mandate is not a "Law ... for carrying into Execution" the power to regulate interstate commerce. It is a law for

carrying into execution a power that Congress does not have: the power to compel individuals to enter into commerce. As Chief Justice Marshall concluded for the Court nearly two centuries ago, the Necessary and Proper Clause does not give Congress any "great substantive and independent power" that may be "used for its own sake." *McCulloch*, 17 U.S. at 411. It gives Congress the authority only to employ "means by which other objects are accomplished." *Id.* The power to compel individuals into commerce is exercised not to effectuate regulation of existing commerce, but rather to *create* commerce so that Congress may regulate it. That is a "great substantive and independent power"—indeed, as noted, it is a power that would rival if not exceed the power to "raise and support armies" in degree of controversy—that "cannot be implied as incidental to" the power to regulate commerce. *Id.*

The federal government maintains the mandate is not an end in itself, but merely a means of "mak[ing] effective the Act's core reforms of the insurance market," namely, the guaranteed issue and community ratings provisions. Govt.'s Br. 24. That argument distorts the concept of a law that serves "the purpose of effecting something else." *McCulloch*, 17 U.S. at 411. The problem with the guaranteed issue and community ratings provisions is not that they would be ineffective without the individual mandate. Quite the contrary, the problem is that those provisions would work far too well—many would "tak[e] advantage of" those guarantees by "'wait[ing] to purchase health insurance until they needed care.'" Govt.'s Br. 29 (quoting ACA § 1501(a)(2)(I)). Congress deemed the mandate

necessary to *counteract* the effectiveness of those provisions by forcing individuals to purchase a product they may neither want nor need. The Constitution authorizes Congress to "carry[] into Execution" its enumerated powers, not to expand its enumerated powers by creating problems in need of extraconstitutional solutions. *See Raich*, 545 U.S. at 38 (Scalia, J., concurring) ("the power to enact laws enabling effective regulation of interstate commerce ... extends only to those measures necessary to make the interstate regulation effective").

In any event, even assuming the mandate might be construed as a means of executing the commerce power, rather than an exercise of a power that Congress does not have, it is not a "Law ... *proper* for carrying into Execution" that power. Congress may execute its enumerated powers through only those "means ... consist[ent] with the letter and spirit of the constitution." *McCulloch*, 17 U.S. at 421. That "[t]hese phrases are not merely hortatory," *Raich*, 545 U.S. at 39 (Scalia, J., concurring), is beyond peradventure after this Court's decisions in *New York* and *Printz*, both of which held unconstitutional federal regulations of interstate commerce on the ground that the means Congress employed were "inconsistent with the federal structure of our Government established by the Constitution." *New York*, 505 U.S. at 177; *see also Printz*, 521 U.S. at 923–24. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983).

As the Court's decisions reflect, "the precepts of federalism embodied in the Constitution inform which powers are properly exercised by the National Government in the first place." *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring). The most basic and enduring of those precepts is that "[t]he Constitution created a Federal Government of limited powers," *Gregory*, 501 U.S. at 457, and "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *Lopez*, 514 U.S. at 566; *see also Morrison*, 529 U.S. at 619 n.8 ("the principle that the Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States, is deeply ingrained in our constitutional history" (internal quotation marks and alterations omitted)). That power belongs to States, and so Congress may not exercise its enumerated powers in a way that "ingfring[es] upon th[at] core of state sovereignty." *New York*, 505 U.S. at 177.

When the primary problem with the federal government's view of the commerce power is that it lacks any limiting principle, it is no answer to suggest that it is the Necessary and Proper Clause that allows Congress to go the final mile. Any theory of Congress' power that obliterates any meaningful boundaries on Congress' limited and enumerated powers cannot be squared with the Constitution. And any law that amounts to an exercise of the very police power that the Constitution reserves to the States and withholds from Congress is not a law "consist[ent] with the letter and spirit of the constitution." *McCulloch*, 17 U.S. at 421.

For all the reasons already discussed, *see* Part I, *supra*, the individual mandate is just such a law. A power to compel individuals to enter into commerce would amount to a plenary power to compel individuals to live their day-to-day lives according to Congress' dictates. That is not a power "narrow in scope," *Comstock*, 130 S. Ct. at 1964, but rather could be exercised as least as broadly as (and far more intrusively than) the commerce power itself. Congress could use such a power to control every "class" of decisions that has a substantial effect on interstate commerce, which is to say, nearly every decision. To read such an extraordinary and invasive power into the Constitution "would require [the Court] to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated," *Lopez*, 514 U.S. at 567, which the Necessary and Proper Clause does not license the Court to do.

That Congress is attempting to exercise this unprecedented power in the realm of health care only underscores how dangerous, unbounded, and improper that power is. Since its earliest days, the Court has recognized that "health laws of every description" are among "that immense mass of legislation ... which can be most advantageously exercised by the States themselves." *Gibbons*, 22 U.S. at 203. Even as Congress has played an increased role in the health care industry, predominantly through its spending power, the Court has repeatedly reiterated that "[i]t is a traditional exercise of the States' police powers to protect the health and safety of their citizens," *Hill v. Colorado*, 530 U.S. 703, 715 (2000) (internal

quotation marks omitted); *see also, e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991); *Head v. N.M. Bd. of Exam'rs in Optometry*, 374 U.S. 424, 428 (1963); *Barsky v. Bd. of Regents*, 347 U.S. 442, 449 (1954); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and Congress has been quite careful not to displace that role. *See, e.g.*, *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 661 (1995) ("nothing in [ERISA] indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern"). If Congress can exercise this power over a sector traditionally left to the States, and where Congress has generally acted through its spending power, its authority to compel individual activity in more traditional interstate markets is truly without limit.

"It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause[.]" *Comstock*, 130 S. Ct. at 1967–68 (Kennedy, J., concurring). There is no question that the individual mandate usurps the States' police power to protect the health and liberty of their residents. Indeed, a dozen States have enacted police power legislation explicitly protecting their residents from the very requirement that the individual mandate imposes.[4] If Congress could wield

---

[4] Ariz. Const. art. XXVII (2010), § 2; Ga. Code Ann. § 31-1-11 (2011); Idaho Code Ann. § 39-90 (2010); Ind. Code § 4-1-12 (2011); Kan. Stat. Ann. § 65-6231 (2011); La. Rev. Stat. Ann. § 22:1018 (2010); Mo. Const. art. I, § 35 (2010); N.H. Rev. Stat. Ann. § 400-A:14-a (2011); N.D. Cent. Code § 26.1-36 (2011); Ohio Const. art. I, § 21 (2011); Okla. Const. art. II, § 37 (2010);

that same power as to every "class of decisions" that touches upon interstate commerce, the Necessary and Proper Clause would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567; *compare Comstock*, 130 S. Ct. at 1962 ("[T]he statute properly accounts for state interests."). Precisely because the individual mandate rests on such an untenable theory of federal power, it "is not a 'La[w] ... *proper* for carrying into Execution' the Commerce Clause and is thus, in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'" *Printz*, 521 U.S. at 923–24 (quoting The Federalist No. 33, at 204 (A. Hamilton)).

2. Congress may not circumvent the Constitution's restraints by enacting a "comprehensive regulatory scheme."

The federal government insists it does not matter whether the mandate is itself a "La[w] ... *proper* for carrying into Execution" the Commerce Clause because the mandate "is an integral part of a comprehensive scheme of economic regulation" that Congress had the authority to enact. Govt.'s Br. 24. That argument rests on a fundamental misreading of this Court's precedents. Neither *Wickard* nor *Raich* gives "Congress *carte blanche* to enact unconstitutional regulations so long as such enactments [a]re part of a broader, comprehensive regulatory scheme." Pet. App. 148a–49a. Those

---

Tenn. Code Ann. § 56-7-1016 (2011); Utah Code Ann. § 63M-1-2505.5 (2010); Va. Code Ann. § 38.2-3430.1:1 (2010).

cases instead establish the much more limited—and ultimately irrelevant—proposition that the Court will not "excise individual *applications* of a concededly valid statutory scheme." *Raich*, 545 U.S. at 23 (emphasis added). But an otherwise invalid statutory provision derives no immunity from the company it keeps.

The federal government's contentions to the contrary overlook a simple but "pivotal" distinction between the States' challenge to the individual mandate and the challenges at issue in *Wickard* and *Raich*: The States' challenge is a facial one, and those challenges were as-applied. *See id.* The Court drew just that distinction when explaining that *Lopez* and *Morrison* did not resolve *Raich*—the former involved "assert[ions] that a particular statute or provision fell outside Congress' commerce power in its entirety," whereas the latter involved challenges only to "individual applications of a concededly valid statutory scheme." *Id.* Like the challengers in *Lopez* and *Morrison*, the States are not asking the Court to "excise, as trivial, individual" applications of the individual mandate. *Id.* (internal quotation marks omitted). They are asking the Court to invalidate the mandate itself. The Court cannot avoid entirely the question of the mandate's facial validity simply because *other* provisions of the ACA are constitutional.

Nor is the federal government correct that, since *Wickard*, "the Court has not once invalidated a provision enacted by Congress as part of a comprehensive scheme of national economic regulation." Govt.'s Br. 26–27. The Court did exactly that in both *New York* and *Printz*. What is more, the

Court did so for the very same reason that dooms the federal government's arguments here: because the means Congress adopted were neither valid exercises of the commerce power itself nor means "proper for carrying into Execution" that power.

New York involved a facial challenge to isolated provisions of a comprehensive federal scheme for regulation of radioactive waste disposal. *New York*, 505 U.S. at 151. The Court independently analyzed the constitutionality of each of those provisions even after expressly acknowledging that "[r]egulation ... of the interstate market in waste disposal is ... well within Congress' authority under the Commerce Clause." *Id.* at 160. The Court never questioned Congress' determination that compelling States to take title to waste produced within their borders was "a particularly well-adapted means," Govt.'s Br. 23, of achieving its "objective of encouraging the States to attain local or regional self-sufficiency in the disposal of low level radioactive waste." *New York*, 505 U.S. at 187. Yet the Court did not hesitate to hold the take-title provision facially unconstitutional once it concluded that the means Congress employed in *that* provision were "inconsistent with the federal structure of our Government established by the Constitution." *Id.* at 177.

Printz is no different. That case involved a facial challenge to provisions integral to a comprehensive scheme to regulate the interstate market for firearms. *Printz*, 521 U.S. at 902. The Court did not question that the provision mandating States' officers to enforce the act's national background check scheme was "'an integral part of the regulatory program [or] that the regulatory

scheme when considered as a whole' [wa]s within the commerce power." Govt.'s Br. 25 (quoting *Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981)). Yet the Court nonetheless concluded that the particular means Congress had chosen—"command[ing] the States' officers ... to administer or enforce a federal regulatory program"—rendered the challenged provisions unconstitutional, regardless of how necessary or integral they were. *Printz*, 521 U.S. at 935.[5]

As *New York* and *Printz* make clear, even assuming the individual mandate is "an integral part of a comprehensive scheme of economic regulation," Govt.'s Br. 24, that does not immunize the mandate from constitutional review or automatically render it a "La[w] ... proper for carrying into Execution" other permissible provisions. Indeed, even the federal government implicitly recognizes as much, as it does not go so far as to contend that *every* integral piece of the ACA automatically passes constitutional muster. To take just one example, the ACA's vast expansion of Medicaid is undoubtedly one of the most critical

---

[5] Nor can *Printz* and *New York* be distinguished as Tenth Amendment cases. This Court was at pains in both cases to underscore that it was not relying on a Tenth Amendment principle unrelated to the absence of an enumerated power. *See New York*, 505 U.S. at 159; *Printz*, 521 U.S. at 923. The fundamental problem with the provisions struck down in both cases is that they were not proper legislation and so could not be sustained under the Necessary and Proper Clause. *See New York*, 505 U.S. at 166; *Printz* 521 U.S. at 924. Indeed, just last Term this Court unanimously rejected the federal government's effort to distinguish commandeering claims as distinct from enumerated power claims. *See Bond*, 131 S. Ct. at 2366–67.

pieces of Congress' comprehensive regulatory scheme—that expansion *alone* will cover fully 50% of individuals expected to obtain insurance as a result of the ACA. *See* Br. for State Petrs. on Severability 49–50. But the federal government has never suggested that it may overtly compel states to expand their Medicaid programs, notwithstanding the commandeering doctrine, just because that expansion is integral to the ACA's broader regulation of the market for health care insurance. In short, just as Congress may not compel States to regulate simply because it enacts a comprehensive regulatory scheme, Congress may not compel individuals to enter into every market that it comprehensively regulates.

3. No matter how powerful the federal interest, unconstitutional means remain unconstitutional.

The federal government alternatively attempts to demonstrate that the individual mandate *is* proper because "[i]nsurance ... is the predominant method of paying for health care in this country." Govt.'s Br. 35. The federal government confuses the inquiry. The relevant question is not whether insurance is an "ordinary means" of financing health care services, but whether compelling individuals to purchase insurance is an "ordinary means of execut[ing]" the commerce power. *McCulloch*, 17 U.S. at 409. 220 years of constitutional history make clear that compulsion to enter into commerce is not the ordinary means of executing the commerce power. *See* Part I.A, *supra*. There is no "longstanding history" of federal mandates compelling individuals to purchase insurance or any other product or service. *Compare*

McCulloch, 17 U.S. at 401 ("The power now contested was exercised by the first congress elected under the present constitution."), *and Comstock*, 130 S. Ct. at 1958 (detailing "longstanding history" of federal civil commitment statutes), *with New York*, 505 U.S. at 177 ("The take title provision appears to be unique."), *and Printz*, 521 U.S. at 909 (emphasizing "the utter lack of statutes imposing obligations on the States' executive"). Quite the contrary, Congress has *never* before exercised that "highly attractive power," *id.*, which itself is powerful evidence that the mandate is not "consist[ent] with the letter and spirit of the constitution." *McCulloch*, 17 U.S. at 421.

Notwithstanding more than "two centuries of apparent congressional avoidance of the practice," *Printz*, 521 U.S. at 918, the federal government attempts to identify a number of characteristics that purportedly render such a mandate permissible *here*, even though Congress apparently never considered it permissible anywhere else. *See* Govt.'s Br. 35–37. Those arguments are entirely beside the point because "[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to" enact legislation that is "inconsistent with the federal structure of our Government." *New York*, 505 U.S. at 177–78.

Indeed, the Constitution imposes structural limits "precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Id.* at 187. To hold that Congress may employ constitutionally impermissible means whenever "conditions throughout the nation have created a situation of national concern ... is but to say that

whenever there is a widespread similarity of ... conditions, Congress may ignore constitutional limitations upon its own powers." *United States v. Butler*, 297 U.S. 1, 74–75 (1936). The Court has consistently and emphatically rejected the federal government's invitations to "license[] extraconstitutional government with each issue of comparable gravity." *New York*, 505 U.S. at 187–88.

In all events, the federal government undermines its argument for true necessity by repeatedly reiterating the undisputed existence of permissible means through which it could accomplish the same end result as the mandate. The mere fact that an *end* is "legitimate" does not render all *means* to that end "appropriate"; only those means "which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 17 U.S. at 421. That there are ordinary and constitutional means through which Congress could further the same objectives underscores why the Court should not legitimize an unprecedented power to compel individuals to enter into commerce. The Court should not lightly read the Necessary and Proper Clause to empower Congress to execute its enumerated powers through extraordinary and unprecedented means when the same ends could be achieved by means "not less usual, not of higher dignity, not more requiring a particular specification than other means." *Id.*

Moreover, there is one thing that distinguishes many of the alternative means from the mandate: accountability. While it is true that a similar end could be achieved by increased taxes and subsidies

for the insurance industry, no one familiar with the dynamic of the ACA's final passage believes such initiatives would have been enacted. As Congress itself explained, a central purpose of the individual mandate is to pay for costly new regulations of the insurance industry. Congress was well aware that the insurance industry would vehemently oppose those regulations without some form of federal subsidy to offset their costs, yet it was also aware that the public would not support a general tax increase to pay for that subsidy. By imposing an unprecedented command that healthy individuals simply subsidize the insurance industry directly by buying insurance they did not want or were unlikely to use, Congress neatly avoided the political constraints that the Constitution contemplates will limit its power to enact unpopular regulations and general taxes. Even in contexts where the Court has forsworn judicial efforts to limit Congress' intrusion on the States, it has taken comfort in the "safeguards of the political process." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985). The fact that the mandate allowed Congress to circumvent those safeguards is just one more reason to be wary of the federal government's claim that the power Congress asserts is "consist[ent] with the letter and spirit of the constitution." *McCulloch*, 17 U.S. at 421.

4. The federal government's attempts to prove the mandate necessary and proper only underscore why it is not.

In all events, the federal government's efforts to demonstrate why a mandate to enter into commerce

is appropriate *here* only underscore the utter lack of meaningful limits on the power Congress asserts. While those arguments might explain why this is the *first* context in which Congress has imposed such a mandate, they do not remotely explain why it will be the last.

The federal government's basic argument is a simple one: Congress has a uniquely strong interest in forcing individuals to maintain health care insurance because most people are likely to need health care services sometime in their lives but cannot predict the timing and magnitude of that need in advance, and may shift the costs of such services if they do not have insurance when the need arises. All of that may be true, but the health care market is hardly the only market that fits that description. For instance, life insurance and burial insurance both finance far more universal needs that are every bit as likely to arise "from a bolt-from-the-blue event," Govt.'s Br. 35 (internal quotation marks omitted), and will be paid for one way or another even if individuals fail to plan for them. It would be no less reasonable for Congress to conclude that mandates requiring individuals to finance those needs before they arise would help alleviate the inevitable cost-shifting that occurs when individuals fail to do so.

Moreover, the federal government's logic would apply equally to markets where the need for insurance is less universal but just as vital. For example, most individuals living in a flood zone will suffer flood-related losses at some point, and those losses are likely to be shifted to the rest of society through mechanisms such as publicly funded

disaster relief. And the same kind of cost-shifting is just as inevitable in markets for basic necessities such as food and clothing, even though they are not financed by insurance. The federal government attempts to distinguish those examples on the ground that the need is less universal or the potential for cost-shifting of a lesser magnitude, but those are differences in degree not kind. The federal government spends billions of dollars feeding the hungry, clothing the poor, and sheltering the homeless. By the same logic employed in defense of the individual mandate, it would be equally reasonable for Congress to compel individuals to make financial decisions that would obviate or at least alleviate the cost-shifting that results from "the deeply ingrained societal norms," Govt.'s Br. 39, that we will not deny such basic necessities to people who cannot afford them.

Precisely because cost-shifting is so ubiquitous, the federal government gains little from its attempt to portray the individual mandate as a uniquely necessary response to the "societal norm," reflected in state laws and the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd, that hospitals will not turn away those in need of emergent care, regardless of their ability to pay for it. The notion that an individual will not fully internalize the potential costs of emergency medical services (and therefore fail fully to internalize the benefits of insurance) because the government or someone else will shoulder the costs is hardly unique to the health care context. Economists have long acknowledged such "moral hazards" and recognized that they are pervasive. *See* The New Palgrave: A Dictionary of

Economics 869 (1988). Indeed, insurance creates moral hazards of its own, as the insured may engage in riskier behavior or overuse medical services because they incur little marginal cost.

The fact that the failure to internalize costs originates with EMTALA is not a limiting principle. The logic of the federal government's position would allow Congress to compel purchases any time it determines that consumers are purchasing something in suboptimal quantities because they have failed to internalize its benefits, whether due to government policies or market failures. The failure of individuals to buy "enough" insurance because of EMTALA is just one of countless examples. Moreover, if anything, the fact that the cost-shifting at issue here is largely a product of Congress' own making is a reason to *reject* the argument that it licenses Congress to use extraordinary and unprecedented means to combat it. Congress can hardly expand its constitutional authority by creating problems that it lacks the power to fix.

The federal government's admission that the individual mandate is in substantial part a response to EMTALA also reveals that it is the federal government that "fundamental[ly] misunderstand[s] ... the economics of insurance." Govt.'s Br. 51. The federal government insists "[t]he point of obtaining insurance is to internalize risk." *Id.* That is fundamentally wrong. The point of obtaining insurance is to diversify risk, not to internalize it. It may be that the *federal government's* point in *forcing* people to buy insurance they do not want is to cause them to internalize the costs associated with emergency care that EMTALA may lead them to view

as externalities. But forcing individuals to buy insurance is hardly the only or most direct means to force would-be-cost-shifters to internalize those costs. And in all events, it is not a constitutional means.

The federal government insists it has no choice but to impose such a mandate because imposing a requirement for insurance or cash payment at the point of consumption of health care services would effectively abandon "the deeply ingrained societal norms" that we will not deny critical care to those who cannot afford it. Govt.'s Br. 39. The federal government attacks a straw man. The States have not argued, and the Court of Appeals did not hold, that requiring individuals to purchase insurance or make a cash payment at the point of consumption is "Congress's *only* permissible option" of ensuring that individuals who can afford to do so pay for the health care services they consume. Govt.'s Br. 38 (emphasis added).

For example, Congress could have conditioned an individual's right to guaranteed issue or community rating on obtaining qualifying insurance during an initial fixed enrollment period, so that individuals could obtain the full benefit of those regulations but could not "buy their insurance on the way to the hospital." Govt.'s Br. 39 (internal quotation marks omitted); *see, e.g.*, Paul Starr, *The Mandate Miscalculation*, The New Republic, Dec. 29, 2011, at 11–13. Congress also has many permissible means through which it could spread throughout society the costs that those regulations and EMTALA create. Most obviously, Congress could impose a national tax increase to fund, *inter alia*, critical medical care for those who cannot afford it,

subsidies to insurance companies that insure high-risk individuals, or government-sponsored insurance for every individual. That there is not the political will to do so does not give Congress license to resort to a shortcut for which there was just barely the presence of political will, but the absence of constitutional authority.

II. The Individual Mandate Is Not A Valid Exercise of Congress' Tax Power.

The federal government's final resort is to defend the mandate as a valid exercise of Congress' power "[t]o lay and collect Taxes, Duties, Imposts and Excises," U.S. Const. art. I, § 8, cl. 1, by arguing that the "penalty" provision that Congress enacted to enforce the mandate is a constitutionally permissible tax. That argument fails at the outset because the States are challenging the mandate, not the penalty. The mandate is a distinct regulatory requirement that must be supported by a distinct regulatory authority. The federal government may not avoid that reality by attempting to reconceptualize the mandate as a tax statute that Congress made a deliberate decision not to enact. Nor may the Court simply treat the penalty as a tax, as it is well settled that a penalty for violation of a separate legal command is not a tax. In all events, the federal government gains nothing by asking the Court to jettison both the mandate and the penalty and replace them with a tax, as the hypothetical tax statute the federal government proposes would be no more constitutional than the statute Congress actually enacted.

1. The States "seek injunctive and declaratory relief to prevent anyone from being subject to the mandate ... irrespective of the means Congress chooses to implement it." *Seven-Sky*, 661 F.3d at 8–9. That distinction is "critical," *id.* at 9, because the mandate and the penalty are distinct. The mandate is a stand-alone command that every "applicable individual shall" obtain and maintain insurance. 26 U.S.C.A. § 5000A(a). That command makes it unlawful for an "applicable individual" (which means nearly any individual) to live in the United States without approved health care insurance.

While section 5000A(b) imposes a "penalty" on individuals "who fail[] to meet the requirement" that the mandate imposes, § 5000A(b)(1), that penalty provision only underscores that the mandate is, itself, a separate legal command. First, the penalty does not apply as broadly as the mandate because it is subject to its own set of exemptions, and exemption from the penalty does not obviate the need to comply with the mandate. *Compare* § 5000A(e), *with* § 5000A(d). Indeed, the States are injured most obviously by the effect of the mandate on the very needy, who are *not* subject to the penalty but *are* subject to the mandate. *See* Br. for State Respts. on Anti-Injunction Act 3. Second, payment of the penalty does not satisfy the mandate; an individual paying the penalty remains in breach of the mandate. Indeed, the penalty is a "penalty" precisely because it *penalizes* individuals who violate the mandate by failing to obtain insurance. *See United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) ("[I]f the concept

of penalty means anything, it means punishment for an unlawful act or omission.").

That the mandate and the penalty are distinct means that the federal government must justify the constitutionality of both provisions. Just as the constitutional invalidity of an enforcement provision would not necessarily undermine the validity of the mandate, the constitutional validity of an enforcement mechanism does not give Congress power it would otherwise lack. Respondents are challenging the mandate, not the means by which Congress chose to enforce it. Whether Congress enforces the mandate through a penalty, a tax, denial of federal benefits, or criminal consequences, the question concerning the constitutionality of the mandate remains the same. That question is whether Congress has the authority to impose the mandate, not whether it has the authority to impose whatever enforcement mechanism accompanies it. Even the federal government does not contend that the tax power is so expansive as to authorize Congress to command individuals to enter into commerce so that the federal government may tax them. Accordingly, the federal government's attempt to change the subject by pointing to its power to impose the penalty is unavailing. The question before the Court is whether the mandate is constitutional. The tax power adds nothing to that question.

2. Implicitly recognizing that it cannot rely on the constitutionality of an enforcement mechanism to establish the constitutionality of a separate legal command, the federal government attempts to abandon defense of the mandate to the extent that it applies to individuals exempt from the penalty, and

to focus all of its efforts on defending the penalty as a tax. Its efforts fail because the federal government defends a statute that Congress made a deliberate decision not to enact.

In the federal government's words, the mandate is nothing more than a "predicate for tax consequences imposed by the rest of the section." Govt.'s Br. 60. Even if true, that observation would in no way obviate the federal government's need to establish the power to create the predicate. But it is not true. The description of the mandate as a mere predicate for the tax consequences imposed by the penalty fundamentally conflates what is the tail and what is the dog. Indeed, it is belied by the federal government's repeated emphasis on the centrality of the mandate. The argument simply ignores the text, structure and statutory history of section 5000A. The statute does not impose a "tax" dischargeable by a payment to the federal government or to a third person. It imposes a freestanding mandate enforced (as to a subset of those subject to the broader mandate) by a "penalty" for "failure" to abide by the "requirement" that the mandate creates. *See* ACA § 1501(b); 26 U.S.C.A. § 5000A(b)(1) ("[i]f ... an applicable individual ... fails to meet the *requirement* of subsection (a) ..., then ... there is hereby imposed on the taxpayer *a penalty*" (emphasis added)).

Congress' decision to label the mandate's enforcement mechanism a "penalty" (and repeatedly refer to it as such) was not some linguistic oversight; Congress called it a penalty because it operates in precisely the manner that distinguishes a penalty from a tax—it enforces a separate legal command. *See Reorganized CF&I Fabricators*, 518 U.S. at 224

("'A tax is an enforced contribution to provide for the support of the government; a penalty ... is an exaction imposed by a statute as punishment for an unlawful act.'" (quoting *United States v. La Franca*, 282 U.S. 568, 572 (1931)); *infra*, pp. 57–62. Indeed, Congress considered proposals to enact the kind of tax statute the federal government now defends, and it rejected each of them in favor of a mandate enforced by a penalty. *See supra*, p. 5. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 422–23 (1987).

That Congress understood the consequences of its decision to eschew the tax model is evident in the findings accompanying section 5000A. Those findings do not attempt to establish Congress' authority to impose the *penalty*. They attempt to establish Congress' authority to impose the *mandate*. What is more, they do so by invoking Congress' power to *regulate* interstate commerce. That matters not because it evinces Congress' intent to "disavow[]" reliance on an otherwise applicable tax power, Govt.'s Br. 57, but because it evinces Congress' correct understanding that it was imposing a regulatory command, not a tax. Indeed, the federal government itself has recognized in this very litigation that section 5000A is not an exercise of Congress' tax power: In the District Court, the federal government initially insisted that the penalty need not satisfy constitutional restrictions on Congress' tax power because "[t]h[o]se

requirements apply only to statutes enacted exclusively in the exercise of Congress's taxing power, and not to statutory penalties *in aid of other constitutional authorities*." Govt.'s Mem. Supp. Mot. Dismiss 55 [R.E. 150] (emphasis added).

Constitutional avoidance is a powerful doctrine, but it is not a license to rewrite a statute in a way that bears no resemblance to the enacted text and is "plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *compare New York*, 505 U.S. at 170 ("The Act could plausibly be understood either as a mandate to regulate or as a series of incentives."). That is all the more true in the context of Congress' tax power, a power that by design is constrained principally by the very unpopularity of its exercise. The reason why the mandate's penalty provision is not labeled a tax, is not structured as a tax, and is not grounded in Congress' tax power, and why the President emphatically assured the public that it is not a tax, is because the political branches lacked the public support to enact a tax. To eliminate the mandate and convert its penalty provision into a tax therefore would create more constitutional problems than it would avoid, as it would license Congress to use the courts to impose taxes that it lacks the political support to enact, thus eliminating the most potent constraint on Congress' vast tax power. *See Missouri v. Jenkins*, 495 U.S. 33, 68 (1990) (Kennedy, J., concurring) ("In our system the legislative department alone has access to the pockets of the people, for it is the Legislature that is

accountable to them and represents their will." (internal quotation marks and citation omitted)).

3. The federal government insists the Court need not resort to constitutional avoidance because, notwithstanding the plain text and Congress' clear intent not to impose a tax, the "'practical operation'" of the penalty makes it "materially indistinguishable" from a tax. Govt. Br. 52 (quoting *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941)), 60. But that argument is another dead end because the penalty plainly operates as a penalty, not a tax.

What makes a penalty a penalty, as distinct from a tax, is that it is "imposed ... as punishment for an unlawful act." *La Franca*, 282 U.S. at 572; *see also Reorganized CF&I Fabricators*, 518 U.S. at 224 ("[I]f the concept of penalty means anything, it means punishment for an unlawful act or omission."). Thus, the operative question is whether a monetary exaction is imposed as a consequence for failure to abide by a separate legal command. If it is, labeling it a "tax" does not make it a tax, as "the so-called tax ... loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.'" *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 779 (1994) (internal quotation marks omitted); *see, e.g.*, *United States v. Sanchez*, 340 U.S. 42, 45 (1950) (examining whether tax was imposed on something "made an unlawful act under the statute"); *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937) (examining whether tax was "attended by an offensive regulation"); *Alston v. United States*, 274 U.S. 289, 294 (1927) (examining whether tax had any

"necessary connection with any requirement of the act which may be subject to reasonable disputation").

That distinction may be of little consequence "[w]here the sovereign enacting the law has power to impose both tax and penalty." *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922). But "when one sovereign can impose a tax only, and the power of regulation rests in another," the validity of a "so-called" tax that operates as a penalty depends on the validity of the regulatory command that it enforces, as the power to tax does not include the power to use taxes (or penalties) to enforce impermissible laws. *Id.* Thus, Congress may not use its tax power to circumvent the Constitution's enumeration of limited *regulatory* powers by "enact[ing] a detailed measure of complete regulation of [a] subject and enforc[ing] it by a so-called tax upon departures from it." *Id.; see also United States v. Kahriger*, 345 U.S. 22, 31 (1953) ("Penalty provisions in tax statutes added for breach of a regulation concerning activities in themselves subject only to state regulation have caused this Court to declare the enactments invalid."). When it purports to do so, both the so-called tax and the regulatory command must fall, as neither has any constitutional grounding.

That is what makes the federal government's insistence on examining the "practical operation" of the penalty so counterproductive. If Congress *had* called the penalty for failure to comply with the individual mandate a "tax," that would only have underscored the need to examine the constitutionality of the mandate, as the tax itself could not be constitutional unless the mandate were as well, since its "practical operation" would still be

as a penalty, not a tax. By asking the Court to treat the penalty as a tax even though it enforces a separate legal command, the federal government asks the Court to create the very tax power problem that Congress attempted to avoid by calling the provision what it is: a penalty. Congress thought it could avoid that problem because it thought it possessed the power to impose the mandate under its commerce power. If Congress lacked that power, that is the end of the matter as far as the statute that Congress actually passed is concerned.

The federal government attempts to sidestep the tax power problem it would create by insisting that the Court has "abandoned the view that bright-line distinctions exist between regulatory and revenue-raising *taxes*.'" Govt.'s Br. 55 (quoting *Bob Jones Univ. v. Simon*, 416 U.S. 725, 743 n.17 (1974); emphasis added). But that is doubly irrelevant. First, there *is* no analogous doctrine under which Congress treats penalties as taxes, which is why the federal government cannot identify a single case in which the Court concluded that a penalty was actually a tax. *Compare Bailey*, 259 U.S. at 38 (construing "so-called tax" as penalty); *Helwig v. United States*, 188 U.S. 605, 617 (1903) (same); *Lipke v. Lederer*, 259 U.S. 557, 561–62 (1922) (same); *Hill v. Wallace*, 259 U.S. 44, 67 (1922); *Kurth Ranch*, 511 U.S. at 781–83 (same).[6] Thus, even were it correct

---

[6] To the extent that the federal government suggests the Court did so in *New York*, it is mistaken. The provision it alludes to authorized the federal government to collect a percentage of a surcharge that the statute authorized States to impose on certain radioactive waste transactions. *See New York*, 505 U.S. at 171. While the Court concluded that the "collection of a

that the Court had abandoned its efforts to determine which taxes are really penalties, *but see id.* at 779, that would hardly be a reason to start treating penalties as taxes. Moreover, to the extent that the Court has been more reluctant to treat a tax as a penalty when Congress expressly imposed a tax, it would be quite bizarre to invoke that as a justification for treating a penalty as a tax when Congress expressly imposed a penalty. If Congress' intent is controlling, it is just as controlling when Congress deliberately imposes a penalty as when Congress deliberately imposes at tax.

Nor is there any reason to treat this penalty as a tax just because it is housed in the tax code and will be "'productive of some revenue.'" Govt.'s Br. 55 (quoting *Sozinsky*, 300 U.S. at 514). Contrary to the federal government's assumption, penalties do not become taxes—or valid exercises of Congress' tax power—simply because they are housed in the tax code and collected by the Internal Revenue Service. To be sure, Congress may invoke its tax power (in conjunction with its power under the Necessary and Proper Clause) to impose penalties that enforce *tax* laws. But that is because Congress has the power to enforce the laws that it has the power to enact, not because such a penalty is itself a tax. *See License Tax Cases*, 72 U.S. 462, 474 (1866) (penalty for failure to pay license taxes "is only a mode of enforcing the payment of such taxes"). Nor is every

---

percentage of the surcharge" was "a federal tax on interstate commerce," it concluded that the provision authorizing States to impose the surcharge (*i.e.*, the piece that might resemble a penalty) was an exercise of Congress' commerce power. *Id.*

revenue-raising measure in the tax code a tax. "Criminal fines, civil penalties, [and] civil forfeitures ... all ... generate government revenues," *Kurth Ranch*, 511 U.S. at 778, but that does not mean those measures suddenly become permissible exercises of the tax power just because Congress decides to place them (or the commands they enforce) in the tax code.

In any event, the federal government's effort to reconceptualize the mandate as a tax does not provide the limiting principle it otherwise lacks or help it locate a historical analogue for this unprecedented power. The bottom line is that Congress has never compelled individuals to enter into a transaction and backed such a mandate by a penalty keyed to the amount it would cost to engage in the required transaction. The framers did not grant the new, limited federal government the power to compel transactions in order to tax them (or penalize the failure to transact) any more than it granted the power to compel commerce the better to regulate it. Indeed, if anything, the federal government's tax power argument is even more alarming than its commerce power theory because Congress is not limited to taxing commercial transactions.

In short, the federal government's efforts to shift the Court's focus to the "practical operation" of the mandate's penalty provision only succeed in confirming what has been obvious to nearly every court that has considered the issue: Congress called the penalty a penalty because it is, in fact, a penalty. Thus, the federal government ends up right back where it started, as the constitutionality of a penalty

depends on the constitutionality of the legal command that it enforces.

4. In all events, the federal government's attempts to read both the mandate and the penalty out of the ACA and convert section 5000A into a tax statute ultimately get it nowhere because the statute the federal government defends is no more constitutional than the statute Congress enacted.

Congress' tax power is not limited to commercial transactions, but it is not without limits. The Constitution distinguishes between "direct" taxes and indirect "Duties, Imposts and Excises," and requires direct taxes to be apportioned according to population. *See* U.S. Const. art. I, § 9. The tax the federal government proposes—a tax imposed simply because an individual does not purchase insurance—would not qualify as an indirect tax levied on the "importation, consumption, manufacture, [or] sale of [any] commodities, privileges, particular business transactions, vocations, occupations, [or] the like." *Thomas v. United States*, 192 U.S. 363, 370 (1904). Nor would it constitute a tax imposed on any derived income. *See* U.S. Const. amend. XVI (exempting taxes on derived income from apportionment requirement). It would instead be a direct tax on an individual's wealth, simply because the individual chooses to keep that wealth rather than spend it to purchase insurance. *See* S. Willis & N. Chung, *Constitutional Decapitation and Healthcare*, Tax Notes, July 12, 2010. There is no question that such a tax would fail the apportionment requirement, thus rendering it an unconstitutional direct tax.

Indeed, the federal government identifies no other tax that is imposed only upon individuals who refrain from purchasing a costly good or service. Moreover, it is both telling and troubling that the amount of the so-called tax would be keyed to the amount of the insurance an "applicable individual" is forced to purchase. Thus, the statute would levy what is essentially an unavoidable sanction. At the very least there are grave doubts as to the constitutionality of such a statute, which only underscores why it would be inappropriate to rewrite section 5000A in the manner that the federal government advocates. Constitutional avoidance does not serve its purpose when the constitutionality of the statute as reconceived by the Court would be no more certain than the constitutionality of the one that Congress actually enacted. *Cf. Clark v. Martinez*, 543 U.S. 371, 381 (2005) ("[O]ne of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions.").

* * *

In the end, the federal government's tax power argument suffers from the very same failing as every other constitutional argument that it advances in defense of the ACA. Congress may not "break down all constitutional limitation [on its] powers ... and completely wipe out the sovereignty of the states" by invoking its tax power to enforce commands that it lacks the authority to impose. *Bailey*, 259 U.S. at 38. The federal government implicitly recognizes as much when it acknowledges that the Court would have to read the individual mandate out of section 5000A to uphold the statute under the tax power. Govt.'s Br. 60–62. That the federal government's tax power

argument would require this Court to effectively ignore what Congress itself described as an "essential" piece of the Act, ACA § 1501(a)(2)(I), is reason enough to reject it. The statute the federal government defends under the tax power is not the statute that Congress enacted. In *that* statute, the penalty provision is merely the tail and the mandate is the proverbial dog, not vice-versa. And *that* statute imposes a command that is unprecedented and invokes a power that is both unbounded and not included among the limited and enumerated powers granted to Congress. It is therefore unconstitutional, no matter what power the federal government purports to invoke.

CONCLUSION

For the foregoing reasons, the Court should hold the individual mandate unconstitutional and the ACA invalid.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
Bancroft PLLC
1919 M Street, NW
Suite 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

PAMELA JO BONDI
Attorney General of Florida
SCOTT D. MAKAR
Solicitor General
LOUIS F. HUBENER
TIMOTHY D. OSTERHAUS
BLAINE H. WINSHIP
Office of the Attorney General of Florida
The Capitol, Suite PL-01
Tallahassee, FL 32399
(850) 414-3300

KATHERINE J. SPOHN
Special Counsel to the Attorney General
Office of the Attorney General of Nebraska
2115 State Capitol Building
Lincoln, NE 68508
(402) 471-2834

BILL COBB
Deputy Attorney General for Civil Litigation
Office of the Attorney General of Texas
P.O. Box 12548
Capitol Station
Austin, TX 78711
(512) 475-0131

February 6, 2012

Counsel for State Respondents

RESPONDENT'S BRIEF

No. 11-398

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

v.

FLORIDA, ET AL.,

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PRIVATE RESPONDENTS ON THE ANTI-INJUNCTION ACT

KAREN R. HARNED
NFIB SMALL BUSINESS LEGAL CENTER
1201 F St. NW, Suite 200
Washington, DC 20004

PROF. RANDY E. BARNETT
GEORGETOWN UNIV. LAW CENTER
600 New Jersey Ave. NW
Washington, DC 20001

MICHAEL A. CARVIN
Counsel of Record
GREGORY G. KATSAS
C. KEVIN MARSHALL
HASHIM M. MOOPPAN
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Private Respondents

QUESTION PRESENTED

Congress effected a sweeping and comprehensive restructuring of the Nation's health-insurance markets in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 109 (2010) (collectively, the "Act" or the "ACA"). The Act contains a "minimum coverage" provision, which mandates that virtually every individual American must obtain health insurance. 26 U.S.C.A. § 5000A(a). Here, the question presented is:

Whether the suit brought by respondents to challenge the minimum coverage provision is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a) ("AIA").

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Three private individuals or organizations were Plaintiffs-Appellees below and are Respondents here: National Federation of Independent Business ("NFIB"); Kaj Ahlburg; and Mary Brown. Two other private individuals were made Respondents here by this Court's order of January 17, 2012: Dana Grimes and David Klemencic. NFIB is a nonprofit mutual benefit corporation that promotes and protects the rights of its members to own, operate, and grow their businesses across the fifty States and the District of Columbia. NFIB is not a publicly traded corporation, issues no stock, and has no parent corporation. There is no publicly held corporation with more than a 10% ownership stake in NFIB.

26 States, by and through their Attorneys General or Governors, were Plaintiffs-Appellees/Cross-Appellants below and are Respondents here: Alabama; Alaska; Arizona; Colorado; Florida; Georgia; Idaho; Indiana; Iowa; Kansas; Louisiana; Maine; Michigan; Mississippi; Nebraska; Nevada; North Dakota; Ohio; Pennsylvania; South Carolina; South Dakota; Texas; Utah; Washington; Wisconsin; and Wyoming.

Six federal officers or agencies were Defendants-Appellants/Cross-Appellees below and are Petitioners here: Kathleen Sebelius, in her official capacity as Secretary of Health and Human Services; Timothy F. Geithner, in his official capacity as Secretary of the Treasury; Hilda L. Solis, in her official capacity as Secretary of Labor; and the United States Departments of Health and Human Services, of the Treasury, and of Labor.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

BRIEF FOR PRIVATE RESPONDENTS ON THE ANTI-INJUNCTION ACT 1

RESTATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 9

I. THE AIA DOES NOT APPLY TO THIS CHALLENGE TO THE INDIVIDUAL INSURANCE MANDATE 9

A. Under The AIA, The "Purpose" Of This Suit Is To Invalidate The Mandate, Not To "Restrain" A "Tax" 10

1. The Mandate Itself Is A Substantive Legal Requirement To Obtain Insurance 11

2. In A Suit Challenging The Mandate, The Monetary Sanction For Non-Compliance Is Irrelevant 12

3. Applying The AIA To Substantive Legal Requirements Would Have Perverse Consequences For The Rule Of Law 22

B. Under The AIA, The "Penalty" For Non-Compliance With The Mandate Is Not A "Tax" And Should Not Be Treated As A "Tax" 26

1. A Sanction Imposed For An Unlawful Act Or Omission Is Not A Tax 26

2. Congress Clearly Designed The Mandate's Sanction As A Penalty 32

3. The Tax Code Does Not Extend The AIA To Cover The Mandate's Penalty 33

II. THE AIA SHOULD NOT BE CONSIDERED BECAUSE IT IS NON-JURISDICTIONAL AND HAS BEEN DISAVOWED BY THE GOVERNMENT 41

A. Congress Did Not Clearly Rank The AIA As A Jurisdictional Restriction 42

1. The AIA's Text Is Non-Jurisdictional 43

2. The AIA's Location Is Non-Jurisdictional 44

3. The AIA's Character Is Non-Jurisdictional 45

4. The AIA Is Distinguishable From Related Statutes That Are Jurisdictional 46

B. This Court Has Not Treated The AIA As A Jurisdictional Restriction 48

1. The AIA Can Be Expressly Waived By The Government 49

2. The AIA Has A Judicially Created Equitable Exception 52

C. This Court Should Accept The Government's Express Litigation Concession That The AIA Does Not Bar This Suit 57

CONCLUSION 58

STATUTORY PROVISIONS INVOLVED 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Alexander v. 'Americans United' Inc.,
416 U.S. 752 (1974) ..... *passim*

Arbaugh v. Y & H Corp.,
546 U.S. 500 (2006) 42, 43, 49, 50

Arkansas Best Corp. v. Comm'r of Internal Revenue,
485 U.S. 212 (1988) 29

Arkansas v. Farm Credit Servs. of Cent. Ark.,
520 U.S. 821 (1997) 51

Arlington Heights v. Metropolitan Housing Dev. Corp.,
429 U.S. 252 (1977) 19

Bailey v. George,
259 U.S. 16 (1922) 28

Bell v. Hood,
327 U.S. 678 (1946) 56

Bob Jones Univ. v. Simon,
416 U.S. 725 (1974) ..... *passim*

Bowles v. Russell,
551 U.S. 205 (2007) 52, 56, 57

Capron v. Van Noorden,
6 U.S. (2 Cranch) 126 (1804) 50

Child Labor Tax Case,
259 U.S. 20 (1922) 27, 28, 31, 32

Davis v. Passman,
442 U.S. 228 (1979) 46

Eberhart v. United States,
546 U.S. 12 (2005) 48

Enochs v. Williams Packing & Navigation Co.,
370 U.S. 1 (1962) ..... *passim*

Gonzales v. Raich,
545 U.S. 1 (2005) 55

Graham v. Dupont,
262 U.S. 234 (1923) 27

Grosjean v. Am. Press Co.,
297 U.S. 233 (1936) 55

Helvering v. Davis,
301 U.S. 619 (1937) 49, 50, 51, 52

Henderson ex rel. Henderson v. Shinseki,
131 S. Ct. 1197 (2011) ..... *passim*

Hibbs v. Winn,
542 U.S. 88 (2004) 47

John R. Sand & Gravel Co. v. United States,
552 U.S. 130 (2008) 51

Key v. Doyle,
434 U.S. 59 (1977) 44

Liberty Univ., Inc. v. Geithner,
No. 10-2347, 2011 WL 3962915
(4th Cir. Sept. 8, 2011) ..... *passim*

Miller v. Standard Nut Margarine Co. of Fla.,
284 U.S. 498 (1932) 53, 57

Mobile Republican Assembly v. United States,
353 F.3d 1357 (11th Cir. 2003) 28, 30, 40, 41

New York v. United States,
505 U.S. 144 (1992) 21, 22

Paul v. Davis,
424 U.S. 693 (1976) 23

Reed Elsevier, Inc. v. Muchnick,
130 S. Ct. 1237 (2010) 43, 44, 45, 48

Reno v. Bossier Parish Sch. Bd.,
528 U.S. 320 (2000) 19

Russello v. United States,
464 U.S. 16 (1983) 21

Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) ..... *passim*

Sloan v. United States,
No. 4:90-cv-303, 1991 WL 311898
(N.D. Ga. Oct. 30, 1991) 40

Sonzinsky v. United States,
300 U.S. 506 (1937) 31, 32

South Carolina v. Regan,
465 U.S. 367 (1984) 22, 24

Spencer v. Kemna,
523 U.S. 1 (1998) 25

Steffel v. Thompson,
415 U.S. 452 (1974) 23

Thomas More Law Ctr. v. Obama,
651 F.3d 529 (6th Cir. 2011) ..... *passim*

United States v. Kahriger,
345 U.S. 22 (1953) 32

United States v. La Franca,
282 U.S. 568 (1931) 27, 30

United States v. Norton,
97 U.S. 164 (1877) 20

United States v. Reorganized CF&I Fabricators of Utah, Inc.,
518 U.S. 213 (1996) 26, 27, 32

United States v. Rubashkin,
655 F.3d 849 (8th Cir. 2011) 25

Warren v. United States,
874 F.2d 280 (5th Cir. 1989) 40

Whitman v. Am. Trucking Ass'ns, Inc.,
531 U.S. 457 (2001) 34

Zipes v. Trans World Airlines, Inc.,
455 U.S. 385 (1982) 45

STATUTORY PROVISIONS

17 U.S.C. § 411(a) 43

26 U.S.C. § 302(b) 19

26 U.S.C. § 6201(a) ..... *passim*

26 U.S.C. § 6301 36

26 U.S.C. § 6305(b) 47

26 U.S.C. § 6665(a) 3, 30, 35, 36

26 U.S.C. § 6671(a) ..... *passim*

26 U.S.C. § 6720A 13, 19

26 U.S.C. § 7421(a) ..... *passim*

26 U.S.C. § 7422(a) 29

26 U.S.C. § 7423 44

26 U.S.C. § 7430 44

26 U.S.C. § 7806 45

28 U.S.C. § 1341 ..... 46, 47

29 U.S.C. § 104 46

26 U.S.C.A. § 4980H 4, 21

26 U.S.C.A. § 5000A ..... *passim*

26 U.S.C.A. § 5000A(a) ..... *passim*

26 U.S.C.A. § 5000A(b) ..... *passim*

26 U.S.C.A. § 5000A(c) 2

26 U.S.C.A. § 5000A(d) 2, 3

26 U.S.C.A. § 5000A(e) 2, 3
26 U.S.C.A. § 5000A(f) 2
26 U.S.C.A. § 5000A(g) ..... *passim*
42 U.S.C.A. § 18091(a) 4, 23

OTHER AUTHORITIES

8 C.F.R. § 316.10(b) 25
28 C.F.R. § 2.204(a) 25
CBO, *Key Issues in Analyzing Major Health Insurance Proposals*, at 53 (Dec. 2008), http://www.cbo.gov/ftpdocs/99xx/doc9924/12-18-KeyIssues.pdf 4

BRIEF FOR PRIVATE RESPONDENTS ON THE ANTI-INJUNCTION ACT

Private Respondents respectfully submit this brief arguing that the AIA does not bar their challenge to the ACA's individual mandate.

RESTATEMENT OF THE CASE

Having already comprehensively described the ACA and this litigation, Private Petrs. Severability Br. 1-26, we focus here on why this challenge to the ACA's mandate to obtain health insurance (26 U.S.C.A. § 5000A(a)) is not barred by the AIA's prohibition on "suit[s] for the purpose of restraining the assessment or collection of any tax," 26 U.S.C. § 7421(a).

1. The individual mandate is a free-standing legal requirement obligating virtually every American to obtain health insurance. It is enforced through a monetary penalty on a certain subset of the individuals who unlawfully remain uninsured. The text, structure, and context of the ACA all show that the mandate is *separate and independent* from the penalty. Specifically, individuals covered by the mandate have an unconditional legal duty to obtain insurance, such that an uninsured individual's payment of the penalty—unlike payment of a "tax"—does not legally excuse his non-compliance with the mandate, let alone constitute legal satisfaction of his federal duty to obtain insurance.

a. The ACA mandates that every "applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month." 26 U.S.C.A. § 5000A(a);

see also id. § 5000A(f) (defining minimum essential coverage). For purposes of this legal "[r]equirement to maintain minimum essential coverage" (*id.* § 5000A(a)), every "individual" in this country is an "applicable individual," with three narrow exceptions: (1) individuals covered by specified "[r]eligious exemptions"; (2) "[i]ndividuals not lawfully present"; and (3) "[i]ncarcerated individuals." *Id.* § 5000A(d).

The individual mandate in § 5000A(a) is enforced through a "penalty" for non-compliance, which is imposed on most "taxpayer[s]" who "fail[] to meet the requirement" to obtain insurance. *Id.* § 5000A(b)(1); *see also id.* § 5000A(c) (providing the amount of the penalty). Five classes of individuals are subject to the mandate yet exempt from the penalty: (1) individuals who, under a statutory formula, "cannot afford coverage"; (2) "[t]axpayers with income below [a specified] filing threshold"; (3) "[m]embers of [defined] Indian tribes"; (4) individuals uninsured during certain "short coverage gaps"; and (5) individuals "determined by the Secretary of Health and Human Services ... to have suffered a hardship." *Id.* § 5000A(e).

With certain limitations, the penalty for non-compliance with the mandate "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68" of the Tax Code. *Id.* § 5000A(g)(1). Such penalties, in turn, are "assessed and collected in the same manner as taxes." 26 U.S.C. § 6671(a). The mandate's penalty, however, is not *itself* a penalty located in Chapter 68 of the Code: Congress instead placed it in Chapter 48 of the Code. *See* 26 U.S.C.A. § 5000A(b). That is noteworthy, because "penalties ... provided by"

Chapter 68 are statutorily "deemed" to be "tax[es]" for *all* Tax Code purposes, including the AIA. 26 U.S.C. §§ 6665(a)(2), 6671(a). There is no analogous "deemer" provision in Chapter 48 or the ACA.

b. Every relevant aspect of the ACA's text, structure, and context confirms that the mandate in § 5000A(a) is a free-standing legal duty to obtain insurance—*i.e.*, compliance with the mandate is neither satisfied nor excused by paying the penalty in § 5000A(b) for failure to obtain insurance, as would be the case if the mandate merely described the voluntary predicate for avoiding a tax on being uninsured.

First, the mandate in § 5000A(a) is an *unconditional* "[r]equirement" with which covered individuals "shall" comply. Likewise, the monetary sanction in § 5000A(b) is imposed, not as a *conditional* "tax" on individuals who *lawfully choose* to remain uninsured, but as a "penalty" on those who *unlawfully* "fail[] to meet the requirement" to obtain insurance.

Second, § 5000A(d) exempts three classes of individuals from the mandate, but § 5000A(e) exempts five other classes of individuals *solely* from the penalty. *Supra* at 2. The only conceivable reason to create two separate sets of exemptions is that Congress intended and expected that individuals who are exempt from the penalty but subject to the mandate must nonetheless comply, even absent a sanction for non-compliance.

Third, Congress decided *not* to structure § 5000A as a provision that affords individuals the *voluntary choice* whether to obtain insurance or pay a tax. For

example, the statutory predecessors to § 5000A that were initially proposed and passed in the House were structured that way. *See* Private Petrs. Severability Br. 7-8. Likewise, immediately following the "individual responsibility" mandate in the ACA is the employer "responsibility" assessment, which gives large employers the choice whether to offer insurance to their employees or pay a monetary exaction. *See id.* 21; *see also* 26 U.S.C.A. § 4980H. Yet Congress eschewed those structures in § 5000A, instead adopting an unconditional "requirement" enforced through a "penalty" for non-compliance.

Fourth, Congress' decision to impose a legal "requirement" to obtain insurance, rather than a "tax" on the uninsured, is easily explained on grounds of both substantive policy and strategic politics. As for policy, having deemed it "essential to creating effective health insurance markets" to "broaden the health insurance risk pool," 42 U.S.C.A. § 18091(a)(2)(I), Congress was well aware that more people would likely obtain insurance if doing so was a formal legal requirement, rather than merely the voluntary predicate for avoiding a tax. CBO, for example, has explained that "[m]any individuals ... would comply with a mandate, even in the absence of penalties, because they believe in abiding by the nation's laws."[1] As for politics, President Obama had pledged during the campaign not to raise taxes on families earning less than $250,000 per year. *See* Private Petrs. Severability Br. 8. Structuring

---

[1] CBO, *Key Issues in Analyzing Major Health Insurance Proposals*, at 53 (Dec. 2008), http://www.cbo.gov/ftpdocs/99xx/doc9924/12-18-KeyIssues.pdf.

§ 5000A as a legal requirement enforced through a penalty allowed the President to claim that the mandate, which applies to individuals in almost every such family, was "absolutely not a tax." Pet.App. 408a n.5.

Finally, having structured § 5000A(a)'s mandate as a legal requirement rather than a voluntary predicate for avoiding a tax, Congress consistently refrained from treating § 5000A(b)'s sanction for non-compliance like a tax. Specifically, as the courts below explained, not only does the ACA repeatedly characterize the sanction as a "penalty" rather than a "tax," *id.* 159a-161a, but the Act justifies the mandate solely under Congress' commerce power, *id.* 163a-164a, while designating numerous monetary exactions on lawful conduct as "taxes" intended to generate revenue, *id.* 162a-163a, 416a-418a.

2. Private Respondents NFIB, Ahlburg, and Brown, along with 26 States, brought this action challenging the ACA's facial validity. *Id.* 2a. As relevant here, they argued that the Act's individual mandate exceeds Congress' Article I authority. *Id.* 3a.

In the district court, the Government argued that the AIA barred a pre-enforcement challenge to the mandate, but the court rejected that argument. *Id.* 278a n.4, 401a-430a. On the merits, the court concluded that the mandate is unconstitutional. *Id.* 350a. Although Respondents had requested both declaratory and injunctive relief against the mandate, JA 124, the court concluded that declaratory relief was sufficient, Pet.App. 364a, 367a.

In the Eleventh Circuit, the Government declined to appeal the ruling that the AIA does not bar this suit. Govt. Cert. Pet. 32. To the contrary, in two parallel challenges, the Government formally adopted the position that the AIA is inapplicable. *Id.* 32-33. On the merits, the Eleventh Circuit affirmed the district court's declaratory judgment to the extent that it held that the mandate is unconstitutional. Pet.App. 188a.

SUMMARY OF ARGUMENT

I. The AIA is clearly inapplicable here. Whether one focuses (correctly) on the ACA's mandate "[r]equir[ing]" individuals to obtain insurance, 26 U.S.C.A. § 5000A(a), or (incorrectly) on the ACA's "penalty" for failure to comply with the mandate, *id.* § 5000A(b), this is not a "suit for the *purpose* of restraining the assessment or collection of any *tax*." 26 U.S.C. § 7421(a) (emphases added).

First, the threshold and dispositive reason that the AIA does not apply is that Private Respondents' "purpose" is to invalidate the ACA's mandate that they must purchase costly insurance from private companies, not to restrain "assessment or collection" of the "penalty" for non-compliance. The individual mandate is a substantive legal requirement that cannot possibly be characterized as a "tax" and that exists independently of the ACA's non-compliance penalty. *Amicus* Long thus errs by fixating on whether that penalty should be treated as a "tax" under the AIA. As law-abiding citizens, Private Respondents are not challenging the penalty, but rather the antecedent legal duty to purchase insurance, with which they must comply unless the

mandate is invalidated. It is therefore legally irrelevant that the "necessary effect" of eliminating their duty to comply with the mandate will be to invalidate the penalty for non-compliance. Indeed, accepting *Amicus*'s contrary interpretation of the AIA would have the perverse consequence of compelling law-abiding citizens to break the law in order to challenge it. Specifically, because the AIA requires that challenges to "taxes" be brought only in post-enforcement "refund" actions—rather than pre-enforcement suits for equitable relief—applying the AIA to a substantive legal requirement enforced through the Tax Code would force putative plaintiffs to violate the requirement just to incur the "tax" that would be the prerequisite to suit. More concretely, here, Private Respondents would have to violate the mandate in 2014 by refraining from purchasing insurance, precisely contrary to Congress' intent.

Second, not even the mandate's "penalty" is a "tax." This Court has never deviated, under the AIA or in any other context, from the traditional and intuitive definition of a non-tax "penalty" as a monetary sanction imposed as punishment for an unlawful act or omission. The mandate's penalty clearly fits that definition, and Congress clearly intended to adhere to it. Yet *Amicus* ignores it completely, arguing instead that any monetary exaction contained in the Tax Code and enforced by the IRS is a "tax." That expansive definition, however, is contradicted by this Court's precedent and the Tax Code itself, both of which make abundantly clear that "taxes" and "penalties" are legally distinct. *Amicus* likewise errs in arguing that, because Congress instructed the IRS to assess

and collect the mandate's "penalty" under the same authority, and in the same manner, as a "tax," *see* 26 U.S.C. § 6201(a); 26 U.S.C.A. § 5000A(g)(1), federal courts should treat the mandate's "penalty" as a "tax" under the AIA. Just as there is an obvious and fundamental difference between "taxes" and "penalties," there is an obvious and fundamental difference between the Executive Branch's "assessment and collection" of an exaction and the Judicial Branch's review of that exaction's "assessment and collection." That Congress instructed the IRS to treat the mandate's "penalty" like a "tax" for enforcement purposes does not remotely mean that Congress instructed federal courts to treat the "penalty" like a "tax" for purposes of the AIA's bar on pre-enforcement review.

II. In any event, this Court need not decide whether the AIA applies, because the Solicitor General has expressly agreed that the AIA does not bar this suit. That concession can and should be accepted, because the AIA is not jurisdictional under this Court's recent cases establishing a principled framework for determining jurisdictional status.

First, Congress did not clearly rank the AIA as jurisdictional. Unlike related statutes, the AIA does not speak to the power of the courts, is not located in the jurisdictional section of the U.S. Code, and is a mere claim-processing rule that governs the timing of federal-tax challenges that indisputably fall within the subject-matter jurisdiction of federal courts.

Second, despite some less-than-meticulous language in its older cases, this Court has consistently treated the AIA as non-jurisdictional

whenever it actually mattered. It has accepted an express waiver of the AIA by the Government, and it has created an equitable exception to the AIA for legally indefensible taxes, neither of which would have been permissible if the AIA were truly jurisdictional. Indeed, given that this Court has previously accepted an express waiver by the Solicitor General of the putatively jurisdictional AIA, the Solicitor General's express assertion that the AIA is inapplicable in this case is sufficient basis not to apply it here, *whether or not* it is jurisdictional.

ARGUMENT

I. THE AIA DOES NOT APPLY TO THIS CHALLENGE TO THE INDIVIDUAL INSURANCE MANDATE

The AIA bars "suit[s] for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a). *Amicus* Long is correct that "[this] text ... 'could scarcely be more explicit.'" *See* Long AIA Br. 22. But it is *Amicus* who advocates an interpretation of the AIA that is irreconcilable with its "explicit" language. Textually, there are two independent reasons why the AIA's restriction on pre-enforcement challenges to the federal assessment and collection of taxes is clearly inapplicable to this pre-enforcement challenge to a federal requirement to obtain health insurance. *First*, the "purpose" of this suit is to invalidate the ACA's individual mandate, which is a *substantive legal requirement* to purchase costly insurance from private companies, not a "tax" that is paid to the federal treasury. *See* 26 U.S.C. § 7421(a). *Second*, even focusing (erroneously) on the ACA's monetary

sanction rather than the mandate itself, that sanction also is not a "tax," but instead a *penalty* for the failure to comply with the statutory mandate. *See id.* *Amicus* seeks to evade these points by essentially amending the AIA's clear language to bar any "suit ~~for~~ [*with*] the ~~purpose~~ [*necessary effect*] of restraining the assessment or collection of any ~~tax~~ [*monetary sum that is assessed and collected under the same authority, or in the same manner, as a tax*]." *Contra* 26 U.S.C. § 7421(a). Because such extensive revision is not permissible interpretation, *Amicus*'s position must be rejected.

A. Under The AIA, The "Purpose" Of This Suit Is To Invalidate The Mandate, Not To "Restrain" A "Tax"

The AIA is obviously inapplicable where, as here, plaintiffs challenge a federal statute that renders unlawful their substantive conduct unrelated to the tax-enforcement process. The "purpose" of Private Respondents' suit is to invalidate the legal requirement that they must purchase costly insurance. Whether the monetary sanction for failure to comply with that mandate constitutes a "tax" for AIA purposes is entirely irrelevant. Respondents are attacking the insurance mandate that Congress intentionally created as a free-standing legal duty, not preemptively defending against the sanction that would be imposed for any non-compliance with that binding obligation. Indeed, as law-abiding citizens, they intend to comply with the mandate so long as it remains on the books, which underscores that "restraining" enforcement of the sanction is not the "purpose" of their suit, but will merely be an incidental effect if

they successfully invalidate the underlying mandate. Accordingly, construing the AIA to bar pre-enforcement challenges to substantive legal requirements, simply because those requirements are enforced through the Tax Code, would perversely compel individuals to break the law in order to challenge the law. The AIA does no such thing.

1. The Mandate Itself Is A Substantive Legal Requirement To Obtain Insurance

With exceptions not relevant here, the AIA bars "suit[s] for the *purpose* of restraining the assessment or collection of any *tax*." 26 U.S.C. § 7421(a) (emphases added). That prohibition primarily serves "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference," by "requir[ing] that the legal right to the disputed sums be determined in a suit for refund." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-37 (1974).

This suit, however, is not about "disputed sums" that Private Respondents allegedly must pay the Government. Rather, Private Respondents are challenging Congress' authority to mandate that they purchase health insurance from private businesses. Specifically, they claim that Congress exceeded its enumerated powers by adopting a free-standing substantive "[r]equirement" that every "applicable individual shall ... ensure that the individual ... is covered under minimum essential coverage." 26 U.S.C.A § 5000A(a).

Private Respondents' "purpose" in challenging that mandate, of course, is to eliminate their *legal duty to purchase costly insurance*. *E.g.*, JA 152 ("I do

not wish to have [qualifying health] insurance and I do not believe that the costs associated with health insurance are a wise or acceptable use of my financial resources."); *accord id.* 141, 143-44, 155 (similar). And that substantive "[r]equirement" obviously is not *itself* a "tax" shielded by the AIA directly or through any conceivable statutory cross-reference. *See* 26 U.S.C. § 7421(a); 26 U.S.C.A. § 5000A. Tellingly, neither *Amicus* nor anyone else has argued otherwise, let alone cited even a single non-ACA case holding that the AIA bars a suit brought for the purpose of invalidating a legal requirement that proscribes substantive conduct unrelated to the tax-enforcement process.

This simple analysis, standing alone, establishes that the AIA does not apply to this suit. *See Seven-Sky v. Holder*, 661 F.3d 1, 8-10, 12-13 (D.C. Cir. 2011) (relying in part on this reasoning when holding the AIA inapplicable to the mandate); *cf. Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 552, 554 (6th Cir. 2011) (stressing that the mandate is a distinct "substantive provision" when analyzing whether it is a "tax" for constitutional purposes, which "inquiry" is "a kissing cousin" to the "statutory question[] ... under the [AIA]"); Pet.App. 161a (similar constitutional analysis by the Eleventh Circuit).

2. In A Suit Challenging The Mandate, The Monetary Sanction For Non-Compliance Is Irrelevant

Eschewing the analysis above, *Amicus* fixates on the "tax"-related means that Congress adopted to enforce compliance with the mandate. In particular, because Congress placed the mandate's substantive

"[r]equirement" in the Tax Code, 26 U.S.C.A. § 5000A(a), then imposed a "penalty" on certain "taxpayer[s] who ... fail[] to meet the requirement," *id.* § 5000A(b)(1), and finally directed the IRS to "assess[] and collect[]" that "penalty" "in the same manner" as a "tax," *id.* § 5000A(g)(1); 26 U.S.C. § 6671(a), *Amicus* devotes most of his analysis to an intricate parsing of whether that "penalty" should be *treated like a* "tax" for AIA purposes. *See* Long AIA Br. 23-43; *see also Seven-Sky*, 661 F.3d at 29-40 (Kavanaugh, J., dissenting); *Liberty Univ., Inc. v. Geithner*, No. 10-2347, --- F.3d ----, 2011 WL 3962915, at *5-11 (4th Cir. Sept. 8, 2011).

But that whole line of inquiry is fundamentally misdirected. Regardless of whether the "penalty" is a "tax" under the AIA—either directly by its text or indirectly because it is "assessed and collected" as, or like, a "tax"—the "purpose" of this suit is not to restrain the enforcement of that monetary sanction, but to eliminate the *antecedent legal duty* to comply with the costly insurance mandate itself. Indeed, no such "penalty" for non-compliance with the mandate has been, or will likely ever be, incurred by Private Respondents, because they intend to comply if the mandate is not invalidated.

a. Under the AIA, there is a textual and common-sense distinction between challenging a substantive legal requirement and challenging a monetary non-compliance sanction that is deemed a "tax." For example, the Tax Code imposes a "penalty" for violations of "EPA regulations" governing diesel fuels, 26 U.S.C. § 6720A(a), and that penalty is unambiguously "deemed" a "tax" for purposes of the AIA and the rest of the Code, *id.* §

6671(a). But, while the AIA therefore bars a pre-enforcement challenge to the IRS' imposition of the "penalty" on a non-compliant diesel-fuel seller, no one could possibly think that the AIA also bars a pre-enforcement challenge to the validity of the diesel-fuel regulations themselves. The reason, of course, is that the "purpose" of the latter suit is to attack the substantive regulations, not to preemptively defend against the monetary penalty that would be incurred by non-compliance.

Here, likewise, Private Respondents are not preemptively defending against the "penalty" that § 5000A(b) would impose *if* they were to violate the mandate, but instead are attacking § 5000A(a)'s *unconditional* legal "[r]equirement" to purchase insurance in the first place. In fact, Private Respondents are challenging the mandate rather than the penalty precisely because they are *law-abiding citizens* who intend to comply with the mandate unless it is invalidated. As the district court found, they "are needing to take investigatory steps and make financial arrangements now *to ensure compliance* [in 2014]." Pet.App. 292a (emphasis added); *accord* JA 153 ("I must investigate what impact the costs of compliance with the individual insurance mandate will have on my priorities, and especially whether, in light of those costs, my independent business can continue to be a viable going concern, or whether to comply I would have to close my business and seek employment that provides qualifying health insurance coverage as a benefit."); *id.* 142, 144-45, 156 (similar).

Indeed, Congress acknowledged that "[m]any individuals ... would comply with a mandate, even in

the absence of penalties, because they believe in abiding by the nation's laws." *Supra* at 4. That finding readily confirms the common-sense proposition that the interest of law-abiding citizens in challenging burdensome legal requirements exists independently of the sanction that would be imposed for non-compliance. While the Government's interest in enforcing that sanction ensures a justiciable controversy, *see Seven-Sky*, 661 F.3d at 13, Private Respondents' interest is focused on eliminating the legal duty imposed by the mandate itself.

This challenge to the mandate is thus critically different from the tax challenges that are barred by the AIA. There, unlike here, a federal law merely attaches adverse tax consequences to conduct rather than flatly prohibiting it. In such cases, the "obvious purpose" in bringing a pre-enforcement challenge is necessarily to "restrain the taxation," because the plaintiff is *already free* to engage in the conduct if it is willing to bear the tax consequences. *See, e.g.*, *Alexander v. 'Americans United' Inc.*, 416 U.S. 752, 754-755, 760-61 (1974) (barring suit by nonprofit that lost its tax-exempt status because it had engaged in lobbying). But that is not true where, as here, a federal law proscribes conduct through an absolute ban, which happens to be enforced through a monetary exaction in the Tax Code. In such cases, as the D.C. Circuit held, the "purpose of enjoining [the] regulatory command" is for the plaintiff to avoid the "legal obligation," wholly "irrespective of the means Congress cho[se]" to sanction non-compliance. *See Seven-Sky*, 661 F.3d at 8-9.

b. *Amicus* and the Government have three rejoinders. They are all meritless.

First, *Amicus* argues that Private Respondents in fact have challenged the penalty as well as the mandate, because their complaint referenced the penalty and also sought an injunction against "enforcement" of the mandate, which will occur only through the penalty. *See* Long AIA Br. 44-45; *see also Seven-Sky*, 661 F.3d at 41 n.29 (Kavanaugh, J., dissenting). This argument is doubly wrong.

Dispositively, even if the AIA would have barred an *injunction* against enforcement of the *penalty*, no such remedy is at issue here. Respondents specifically requested a *declaration* that the *mandate* is unconstitutional, *see* JA 124, and that is the *only* relief they obtained, *see* Pet.App. 364a, 367a; *see also id.* 188a. The AIA thus poses no bar to the judgment under review in this Court.

More fundamentally, even if an injunction against enforcement of the penalty had been obtained, the *purpose* of this suit would still be the invalidation of the mandate. The fact that this purpose would be *effectuated* through an injunction against the Secretary of the Treasury does not alter that purpose; it merely reflects the practical reality that the named defendant in a challenge to a federal law is the officer designated to enforce that law. Any injunction against the penalty's enforcement thus would be at most an *effect* of accomplishing this suit's purpose to invalidate the mandate.

Second, *Amicus* asserts that, under *Bob Jones* and *'Americans United'*, it is "circular" to claim that the *purpose* of this suit is to invalidate § 5000A(a)'s mandate, because the inevitable *effect* would be to invalidate § 5000A(b)'s penalty. *See* Long AIA Br.

45-48; *see also* Govt. Cert. Resp. 18 (similarly interpreting *Bob Jones* to bar any suit that "would necessarily preclude" tax enforcement); *Seven-Sky*, 661 F.3d at 41-43 (Kavanaugh, J., dissenting); *Liberty Univ.*, 2011 WL 3962915, at *14 n.14. But *Bob Jones* and *'Americans United'* held only that the "purpose" of the suits at issue was to restrain the collection of "taxes" on third parties, in order to avoid the adverse financial consequences to the plaintiffs flowing from those third-party taxes. The cases nowhere suggested that the AIA also reaches suits with the non-tax-related purpose of eliminating a legal requirement, whenever such suits merely will have the "effect" of restraining enforcement of a "tax" triggered by noncompliance with the requirement.

Bob Jones and *'Americans United'* were not challenges to substantive legal duties, but rather were straightforward challenges to the IRS' revocation of the *tax-exempt status* of two non-profit organizations. *Bob Jones*, 416 U.S. at 726-27. To evade the AIA's bar, the organizations asserted that their "purpose" in seeking pre-enforcement relief was to avoid the inevitable reduction in charitable contributions that would occur while they were contesting the loss of their tax-exempt status in a post-enforcement refund action. *Id.* at 738-39; *'Americans United'*, 416 U.S. at 760-61. As this Court observed, however, the decrease in the organizations' charitable receipts was the consequence of the loss of "tax deductible" status for "contributions" by their "donors," which meant that the organizations were simply "seek[ing] to lower the taxes of those other than [themselves]." *Bob Jones*, 416 U.S. at 739. Indeed, that tax-reducing "purpose"

was "obvious," because their tax-exempt status had no consequences *other* than on the amount of taxes paid by them and their donors: the organizations indisputably "would not be interested in obtaining the declaratory and injunctive relief requested if that relief did not effectively restrain the taxation of [their] contributors." *'Americans United'*, 416 U.S. at 760-61.

Accordingly, the reason that the organizations' arguments were "circular" was that their professed "goal" of preserving the flow of donations "c[ould] be accomplished only by restraining the assessment and collection of [their donors'] tax[es]." *Id.* at 761. That circular connection was the fatal way in which the suit "would necessarily preclude the collection of ... taxes." *Bob Jones*, 416 U.S. at 732; *see also Seven-Sky*, 661 F.3d at 10 (explaining that "tax-exempt status [is] *inextricably linked* to the assessment and collection of taxes"). That connection, however, completely distinguishes *Bob Jones* and *'Americans United'* from this case. Private Respondents' suit does not "necessarily preclude" tax enforcement in the way that those cases did, because Respondents' non-tax "purpose" of avoiding the costly mandate to purchase insurance is not "circular": their financial injury lacks any connection to the non-compliance penalty and instead *flows directly* from compliance with the mandate itself.

By construing *Bob Jones* and *'Americans United'* more expansively, *Amicus* and the Government are essentially interpreting those cases to have replaced the AIA's "purpose" element with an "effect" element, thereby rewriting the statute to read: "no suit [*with the necessary effect*] of restraining the assessment or

collection of any tax." Yet *Bob Jones* emphasized that the suit there fell "within the literal scope ... of the [AIA]," 416 U.S. at 732, 739, and, unlike in '*Americans United*', it is decidedly not "a[] reasonable construction of the statutory term 'purpose[]'" to simply substitute "necessary effect," *compare* 416 U.S. at 760. The legal distinction between "purpose" and "effect" is "well established in a variety of contexts," *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977), and Congress thus has enacted "innumerable statutes" treating the two separately, *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 331-32 (2000), including in the Tax Code, *e.g.*, 26 U.S.C. § 302(b)(2)(D) ("any redemption made pursuant to a plan the purpose or effect of which is ..."). Indeed, replacing the AIA's "purpose" requirement with a "necessary effect" test would cause absurd results. For example, as previously noted, a successful APA challenge to the EPA's diesel-fuel regulations would "necessarily preclude" collection of the "penalty" for violating those regulations, which is deemed a "tax" under the AIA. 26 U.S.C. §§ 6671, 6720A(a).

In sum, *Bob Jones* and *'Americans United'* simply held that the AIA's plain text bars suits brought for the "purpose of" restraining the "collection of any tax" paid by third parties. That straightforward interpretation of the AIA in no way supports amending the statute's plain text to reach suits brought for the purpose of invalidating underlying legal duties, just because their *effect* is to restrain Treasury collections.

Finally, the Government argues that the mandate in § 5000A(a) does not actually "create[] an

independent legal obligation," but rather "serves only as the predicate for [avoiding] tax consequences imposed by the rest of the section." *See* Govt. Mandate Br. 60-62. Tellingly, not even *Amicus* is willing to embrace that remarkable position. *Cf.* Long AIA Br. 48 ("As a *practical* matter, taxpayers could choose whether to obtain minimum coverage" "[a]bsent the penalty provision." (emphasis added)). His reluctance is understandable, for the Government's position is literally lawless.

The mandate imposes an *unconditional* "[r]equirement" that applicable individuals "shall ... ensure" that they are "covered under minimum essential coverage." 26 U.S.C.A. § 5000A(a). Nowhere does it say that individuals need not comply so long as they pay the "penalty." To the contrary, the "penalty" is imposed on "taxpayer[s]" who "fail[] to meet the requirement" to obtain insurance. *Id.* § 5000A(b)(1). It is startling that the federal Government asserts that individuals can freely ignore a "requirement" imposed by federal law, so long as they pay the statutory "penalty."

The Government responds that the mandate "serves no other purpose in the statutory scheme" than describing "the predicate for [avoiding] tax consequences." *See* Govt. Mandate Br. 60. That is false. Not only did imposing a legal mandate allow the President to keep his pledge *not* to raise "taxes," *supra* at 4-5, but, more substantively, Congress knew that there are countless uninsured individuals who would incur the monetary "penalty" if given a *choice*, but who will "comply with [the] mandate" simply "because they believe in abiding by the nation's laws." *Supra* at 4; *see also United States v. Norton*,

97 U.S. 164, 168 (1877) ("It is a presumption of law that ... citizens obey the law and do their duty.").

Moreover, if Congress had intended § 5000A(a) to be a mere predicate for avoiding a "tax" rather than an independent legal duty, then Congress would have retained the structure of the initial House versions of § 5000A, which afforded individuals a choice whether to purchase insurance or pay a "tax," particularly because Congress used that same structure in the final version of the employer "responsibility" assessment in § 4980H, which likewise gives large employers the choice whether to offer insurance to their employees or pay a monetary exaction. *Supra* at 3-4; *see also Russello v. United States*, 464 U.S. 16, 23-24 (1983) (drawing inferences of intent from Congress' decisions to "delete[] [language] prior to enactment" and to "include[] particular language in one section of a statute but omit[] it in another"). Indeed, there is dispositive proof that Congress intended the mandate to be legally distinct from the penalty: it created *separate* sets of exemptions for the mandate and the distinct penalty, such that *some* individuals are subject to the mandate but not the penalty. *Supra* at 2.

Accordingly, this case is nothing like *New York v. United States*, 505 U.S. 144 (1992). There, a federal law announced that "each State shall be responsible for providing ... for the disposal of ... low-level radioactive waste," but then set forth a detailed "set[] of incentives" for States to do that very thing. *See id.* at 169-70 In that specific context, the law "could plausibly be understood *either* as a mandate [for States] to regulate *or* as a series of *incentives*," and so this Court adopted the latter "interpretation,"

particularly given the need for "certain[ty]" before regulating sovereign states. *See id.* (emphases added). Here, in stark contrast, "[c]onstr[uing] [the ACA] as a whole" (*id.* at 170) underscores that § 5000A(a) *unambiguously* imposes an independent legal "[r]equirement" to obtain insurance.

3. Applying The AIA To Substantive Legal Requirements Would Have Perverse Consequences For The Rule Of Law

Cognizant of the serious Due Process concerns that typically would be presented if the AIA "entirely deprive[d] [a party] of any opportunity to obtain review of its claims," this Court has held that "Congress intended the [AIA] to bar a suit only in situations in which Congress ha[s] provided the aggrieved party with an alternative legal avenue by which to contest the legality of a particular tax." *See South Carolina v. Regan*, 465 U.S. 367, 373, 375, 381 (1984); *see also Bob Jones*, 416 U.S. at 746-47 & n.21. Yet construing the AIA to bar pre-enforcement challenges to substantive legal requirements merely because they are enforced through the Tax Code would conflict with *South Carolina*'s holding, because there generally would not be any "alternative *legal way* to challenge" such requirements. *See* 465 U.S. at 373 (emphasis added). Specifically, under *Amicus*'s position that the AIA requires that challenges to the mandate must be brought in a refund action, Private Respondents would be forced *to violate the legal requirement* imposed by the mandate in order to incur the *non-compliance* sanction that supposedly is the necessary prerequisite to suit.

This Court "should not lightly attribute to Congress" the perverse intent of conditioning access to judicial review on *becoming a law-breaker*. *See id.* at 381. Indeed, this Court has long recognized that an individual should not be forced to "expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Yet, under the approach advanced by *Amicus* and the Government, a pre-enforcement challenge to a substantive legal requirement would appear to be barred so long as at least one non-compliance sanction was statutorily treated as a "tax" for AIA purposes, *even if* there existed additional *criminal* or *civil non-tax* penalties for non-compliance. And regardless, even assuming their interpretation somehow could be limited to substantive requirements enforced *solely* through AIA-protected "taxes," that still would require Private Respondents to "alter[] [their] legal status" as law-abiding citizens, with the attendant "stigma" that rightly attaches to scoff-laws. *Cf. Paul v. Davis*, 424 U.S. 693, 707-09 (1976) (recognizing that such circumstances present Due Process concerns).

Applying the AIA to challenges against legal requirements would not only be fundamentally unfair to citizens, but would also perversely undermine *Congress'* intent by forcing prospective plaintiffs *to engage in the very conduct* that Congress deemed harmful enough to ban. Here, for example, Congress thought it was "essential to creating effective health insurance markets" to "require[]" that virtually every American purchase insurance. *See* 42 U.S.C.A. § 18091(a)(2)(I). Yet if

putative plaintiffs could challenge the mandate only in a refund action for the penalty, then they would be compelled to remain uninsured in order to trigger that penalty, directly contrary to Congress' goal. Similarly, returning to an earlier example, Congress presumably prefers that would-be challengers of the EPA's diesel-fuel regulations continue selling compliant fuel while bringing a conventional APA challenge, rather than being compelled to sell non-compliant fuel just to incur the penalty-deemed-tax as a prerequisite to suit under the AIA. *Supra* at 13-14. Such perverse results would be the direct opposite of the normal effect of the AIA, which furthers Congress' goal of "expeditious[]" *adherence to the law*, by requiring that citizens comply first and sue second. *See Bob Jones*, 416 U.S. at 736.

Furthermore, construing the AIA to cause all these perverse consequences is particularly unwarranted in the context of the ACA's mandate, because doing so would not even ensure the professed goal of preventing judicial interference with the IRS' enforcement of the mandate's penalty. After all, numerous law-abiding individuals are subject to the mandate's requirement but *exempt from its penalty*, *supra* at 2, and the AIA would not bar them from bringing an immediate pre-enforcement challenge to the mandate, since they have no "alternative remedy" given the unavailability of a refund action. *South Carolina*, 465 U.S. at 378; *but see* Long AIA Br. 48 (overlooking *South Carolina* when contending that even penalty-exempt individuals are barred by the AIA). Admittedly, there is a question whether all such individuals would have standing to challenge

the mandate absent any statutory sanction. *Seven-Sky*, 661 F.3d at 12-13. Regardless, however, collateral consequences from failure to comply with the mandate undoubtedly will support standing to challenge the mandate, *see Spencer v. Kemna*, 523 U.S. 1, 7-8 (1998), and some individuals subject to the mandate but exempt from the penalty will clearly suffer such consequences.[2]

Accordingly, rather than preventing pre-enforcement review of the mandate altogether, applying the AIA here would mean that pre-enforcement challenges could be brought only by individuals who are *least directly injured*. As the D.C. Circuit correctly concluded, courts should "be quite reluctant to endorse such a strange scheme for judicial review." *Seven-Sky*, 661 F.3d at 13.

In sum, this Court need not and should not consider the mandate's sanction when deciding whether the AIA bars Private Respondents' challenge to the mandate. Instead, this Court should focus on the mandate itself, which imposes an unconditional legal duty to obtain insurance that is not even arguably protected from pre-enforcement judicial review by the AIA.

---

[2] *E.g.*, 28 C.F.R. § 2.204(a)(5)(i) (condition of federal supervised release that "[t]he releasee shall not violate any law"); *see also, e.g.*, 8 C.F.R. § 316.10(b)(3)(iii) (whether applicant for naturalization has "[c]ommitted unlawful acts" may "adversely reflect upon the applicant's moral character"); *United States v. Rubashkin*, 655 F.3d 849, 855 (8th Cir. 2011) (describing an indictment for fraud premised on the representation that a corporation was not "in violation of any law").

B. Under The AIA, The "Penalty" For Non-Compliance With The Mandate Is Not A "Tax" And Should Not Be Treated As A "Tax"

Even assuming that the AIA barred "suits [*with*] the [*necessary effect*] of restraining the assessment or collection of any tax," it still would not apply here, because this suit will have the effect of restraining only a "penalty," not "any tax." The classic definition of a non-tax "penalty" is an exaction imposed for failure to comply with a legal requirement. The mandate's sanction clearly falls within that "penalty" definition, and Congress clearly intended to adhere thereto. Nor does any other provision of the Tax Code somehow subject the mandate's "penalty" to the AIA's bar on pre-enforcement review of "any tax."

1. A Sanction Imposed For An Unlawful Act Or Omission Is Not A Tax

The mandate's sanction is squarely covered by the core definition of a non-tax "penalty." Yet *Amicus* ignores that definition, urging an expansive definition that is unprecedented and untenable.

a. In a variety of contexts, this Court has been required to determine whether a monetary sanction is a "tax" or a "penalty." One constant in that jurisprudence is the basic principle that, "if the concept of penalty means anything, it means punishment for an unlawful act or omission." *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996). That fundamental distinction between "taxes" and "penalties" is entirely consistent with the ordinary understanding of those terms—*e.g.*, a $5-per-pack "tax" on lawful cigarettes cannot possibly be equated with a legal

prohibition on cigarettes enforced through a $5-per-pack "penalty." *See United States v. La Franca*, 282 U.S. 568, 572 (1931) ("The two words are not interchangeable.") To be sure, there may be room for debate over precisely when an "enforced contribution to provide for the support of government" is a "tax" *if* the exaction is not formally imposed as a sanction for an unlawful act. *See Reorganized CF&I Fabricators*, 518 U.S. at 224. But what is beyond dispute is that "an exaction imposed by statute as punishment for an unlawful act" is necessarily a "penalty." *Id.*

Indeed, in the D.C. Circuit, the Government *admitted* that "the taxing power may not be used to impose 'punishment for an unlawful act.'" *See* Govt. *Seven-Sky* C.A. Br. 58 (quoting *LaFranca*, 282 U.S. at 572). And that was consistent with its earlier concession in *Child Labor Tax Case*, 259 U.S. 20 (1922), which remains perhaps the clearest formulation of this core distinction: where an exaction "is imposed" for "the privilege of doing" a lawful act, that is "an excise tax," but "where the statute prohibits the doing of an act and as a sanction imposes a pecuniary punishment for violating the [statute], then it is a penalty, and not a tax at all." *Id.* at 21-22.

This Court has applied that bedrock distinction in its AIA cases. Even where a monetary exaction was in the form of a "tax"—*i.e.*, it was *not* formally triggered as a sanction for an unlawful act—this Court still has inquired whether the exaction is *effectively* "a penalty in the form of a tax," an inquiry undertaken precisely because the AIA reaches only "taxes," not "penalties." *Compare Graham v. Dupont*, 262 U.S. 234, 257-58 (1923) (citing several

cases holding that formal "taxes" were "penalties" for AIA purposes), *with Bailey v. George*, 259 U.S. 16, 19-20 (1922) (holding that a formal "tax" was subject to the AIA, despite the fact that it was an unconstitutional "penalty" under *Child Labor Tax Case*). More importantly, this Court has *never* suggested, let alone held, that a monetary exaction that *is* formally imposed as a sanction for an unlawful act can somehow be a "tax." Accordingly, neither *Amicus* nor anyone else has cited even a single non-ACA case holding that a "penalty" for a non-tax-related substantive legal violation is directly covered as a "tax" under the AIA's plain text.[3]

b. *Amicus* has two responses to the foregoing caselaw. They are both meritless.

First, like the Fourth Circuit, *Amicus* asserts that the word "tax" in the AIA broadly encompasses any monetary exaction "codified in the [Tax] Code" and enforced "by revenue officers." *See* Long AIA Br. 37-38; *see also Liberty Univ.*, 2011 WL 3962915, at *5-6 ("any exaction imposed by the [Tax] Code"). But that sweeping definition is contradicted, not just by the precedent above, but by the Tax Code itself.

---

[3] Unable to cite any such decision by this Court, the closest anyone has come is *Mobile Republican Assembly v. United States*, 353 F.3d 1357 (11th Cir. 2003), which applied the AIA to "penalties imposed for violating the conditions of [a certain] tax status." *Id.* at 1362 & n.5. Yet even that case expressly distinguished such tax-law-related penalties from "penalties imposed for substantive violations of laws not directly related to the tax code." *Id.* Thus, whether or not *Mobile Republican* was correct about tax-law-related penalties, it provides no support for the non-tax-law-related penalty imposed by the ACA, which is triggered by the failure to obtain adequate health insurance.

At the outset, *Amicus's* proposed definition is irreconcilable with various provisions of the Tax Code that unambiguously treat "penalties" as distinct from "taxes." For example, 26 U.S.C. § 7422(a), which immediately follows the AIA in the Tax Code, provides that "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue *tax* alleged to have been erroneously or illegally assessed or collected, or of *any penalty* claimed to have been collected without authority, ... until a claim for refund or credit has been duly filed with the [IRS]." *Id.* (emphases added). The separate references to "any ... tax" and "any penalty" in § 7422(a) make crystal clear that the two terms are not synonymous in § 7421(a). Likewise, as noted, *some* "penalties" are expressly "deemed" "tax[es]" for purposes of the Tax Code. *Id.* §§ 6665(a)(2), 6671(a). That would be unnecessary if *all* "penalties" fell within the ordinary meaning of the word "tax." Admittedly, the "complex" Tax Code does occasionally contain surplusage. *See* Long AIA Br. at 31-32. But even the Code should not *needlessly* be interpreted to contain such obvious, significant, and inexplicable surplusage. *See, e.g.*, *Arkansas Best Corp. v. Comm'r of Internal Revenue*, 485 U.S. 212, 218 (1988) ("[W]e are unwilling to read [a Code provision] in a manner that makes surplusage" of other Code provisions.).

Amicus defends his proposal by observing that the 1860 version of Webster's dictionary defined a "tax" as virtually any monetary sum "for the use of the nation or state" or "for supplying the public treasury." *See* Long AIA Br. 37. But that dictionary definition is entirely consistent with this Court's

classic definition of a "penalty," which specifically distinguished "enforced contribution[s] *to provide for the support of government*" from "an exaction imposed by statute as punishment *for an unlawful act*." *La Franca*, 282 U.S. at 572 (emphases added).

Amicus and other proponents of his position also cite a few cases, but, as noted above, not a single one actually applied the AIA to a "penalty" formally imposed for non-compliance with a substantive legal requirement unrelated to taxes. *See* Long AIA Br. 37-38 (citing cases involving monetary exactions that were not formally imposed as sanctions for unlawful acts); *Liberty Univ.*, 2011 WL 3962915, at *5-6 (citing similar cases, and the *Mobile Republican* penalty for violating a tax law); Caplin/Cohen AIA Br. 16-18 (citing various "penalties" expressly "deemed" taxes by 26 U.S.C. §§ 6665(a)(2), 6671(a), plus *Mobile Republican*); *see also* Cato AIA Br. 8-22 (distinguishing every case cited by proponents of the position that the AIA applies here). In short, *Amicus* does not and cannot dispute that no non-ACA case has ever held that a pure "penalty" is directly covered as a "tax" under the AIA's plain text.

Second, *Amicus* also argues that *Bob Jones* abrogated the settled distinction between "taxes" and "penalties," because it applied the AIA while refusing to consider whether the monetary exactions at issue were imposed with a regulatory motive. *See* Long AIA Br. 5-6, 47; *see also Seven-Sky*, 661 F.2d at 33-34 (Kavanaugh, J., dissenting); *Liberty Univ.*, 2011 WL 3962915, at *15. But *Bob Jones* merely rejected certain arguments that atextually tried to exempt from the AIA's scope exactions that indisputably were in the form of a "tax." That case never

suggested that the AIA atextually covers "penalties" formally imposed as sanctions for unlawful acts.

The "penalty" definition was not implicated in *Bob Jones*, because that case involved a dispute over a university's loss of tax-exempt status due to its lawful admissions policy, rather than a challenge to a sanction for an unlawful act. *See* 416 U.S. at 734-35. Even though the dispute was purely about "taxes"—*i.e.*, the university's and its donors', *supra* at 17-18—the university argued for an exception to the AIA because the IRS' alleged "motive[]" in revoking its tax-exempt status was "to regulate [its] admissions policies" rather than "protect the revenues." *See id.* at 739-40. This Court rejected that effort to carve out a subset of "taxes" from the AIA's coverage, observing that it had "abandoned" the "distinction[] between regulatory and revenue-raising taxes." *Id.* at 740-41 & n.12 (citing *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)). That distinction was forsaken because it required a hopeless inquiry into the "hidden motives which may move Congress" and the "deterrent effect on the activities taxed." *Sonzinsky*, 300 U.S. at 513-14.

But this Court's repudiation of that futile effort to distinguish *among* "taxes," based on the asserted motive of Congress or the IRS in any particular case, in no way suggests that it has abandoned the core distinction reflected in its cases between "taxes" and "penalties," thereby categorically extending the AIA to reach the latter. To the contrary, *Sonzinsky* itself stressed that the tax at issue there was "not attended by an offensive regulation" and thus was not "a penalty resorted to as a means of enforcing [a] regulation[]." *Id.* (citing, *inter alia*, *Child Labor Tax*

Case). Likewise, *Bob Jones* described the AIA cases involving "penalties in the form of a tax" (*see supra* at 27-28) as being "of narrow scope," without ever suggesting that they had been overruled in this particular respect, let alone that the AIA applies to a pure penalty for an unlawful act. 416 U.S. at 743.

Thus, neither *Sonzinsky* nor *Bob Jones* can plausibly be read to have rejected the fundamental "penalty" definition. That is particularly true because, even in the wake of each decision, this Court continued to cite that definition favorably. *See United States v. Kahriger*, 345 U.S. 22, 31 (1953) (citing *Child Labor Tax Case* for the invalidity of "provisions in [federal] tax statutes added for breach of a regulation concerning activities in themselves subject only to state regulation"); *Reorganized CF&I Fabricators*, 518 U.S. at 224 ("penalty ... means punishment for an unlawful act or omission").

2. Congress Clearly Designed The Mandate's Sanction As A Penalty

The mandate's monetary sanction falls within the core definition of a "penalty." To repeat, the ACA imposes a legal "[r]equirement" that every "applicable individual shall ... ensure that the individual ... is covered under minimum essential coverage," 26 U.S.C.A § 5000A(a), and then imposes a "penalty" on some taxpayers who unlawfully "fail[] to meet th[at] requirement," *id.* § 5000A(b)(1). This indisputably constitutes "punishment for an unlawful act or omission." *Reorganized CF&I Fabricators*, 518 U.S. at 224; *cf.* Pet.App. 161a (so holding for constitutional purposes); *Thomas More*, 651 F.3d at 552 (same).

The critical structure of the "penalty" cannot be dismissed as a meaningless formality, because it is quite clear that Congress selected it deliberately. *Supra* at 20-21 (discussing the separate exemptions for the mandate and the penalty, the policy and political reasons why Congress used this structure, and the different provisions that did not use this structure). Indeed, having declined to structure the mandate as a "tax," Congress justified the mandate solely under its commerce power, and it repeatedly and exclusively described the mandate's sanction as a "penalty," while listing other exactions as revenue-raising "taxes." *Supra* at 5. And that consistent Congressional treatment as a "penalty" mirrored the President's emphatic position that the mandate was "absolutely not a tax." *Id.*

In sum, it is beyond reasonable dispute that the mandate's sanction is a "penalty" rather than a "tax" under the plain terms of both the ACA and the AIA. The AIA thus does not bar this suit even if one focuses on the sanction rather than the mandate.

3. The Tax Code Does Not Extend The AIA To Cover The Mandate's Penalty

Amicus also contends that, due to certain statutory cross-references in the Tax Code that govern how the IRS will assess and collect the mandate's "penalty," the AIA's bar on pre-enforcement federal-court review of "any tax" must be extended to that "penalty." In effect, *Amicus* contends that the AIA has been rewritten through cross-reference to read: "no suit for the purpose of restraining the assessment or collection of any tax, [*or of any penalty that is assessed or collected under*

the same authority, or in the same manner, as a tax], shall be maintained in any court." It would be extraordinary had Congress so drastically expanded the AIA's bar on *pre-enforcement judicial review* through such indirect references in provisions that instead regulate the *executive enforcement process*. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Not surprisingly, it turns out that Congress did nothing of the sort.

a. *Amicus* argues that the mandate's "penalty" should be *deemed* a "tax" under the AIA, simply because the IRS' authority to assess penalties is *included* within its power to assess taxes. *See* Long AIA Br. 39-41; *see also Seven-Sky*, 661 F.3d at 38-40 (Kavanaugh, J., dissenting); *Liberty Univ.*, 2011 WL 3962915, at *6. This argument essentially proceeds in two steps: *first*, the IRS "is authorized and required to make ... *assessments* of all *taxes* (*including* interest, additional amounts, additions to the tax, and *assessable penalties*) imposed by [title 26]," 26 U.S.C. § 6201(a) (emphases added); and *second*, because the mandate's penalty and other such "assessable penalties" are "included" within the IRS' authority to assess taxes, they likewise must be "included" within the AIA's bar on "restraining the assessment ...of any tax," *id.* § 7421(a). In short, the "§ 6201(a) argument" is that the AIA should be construed to read: "restraining the assessment ... of any tax [*or any non-tax assessed under the same authority as a tax*]."

This argument is irreconcilable with the relevant statutory language: (1) under the AIA, "tax" does not include "non-taxes assessed under the same authority as taxes"; and (2) under § 6201(a), the directive that the IRS *assess* penalties under its tax assessment authority hardly means that "penalties" *are* "taxes" for purposes of the AIA's restriction on federal-court review. Specifically, the fact that "penalties" are explicitly included within "taxes" in the provision governing assessment *authority* does not even remotely suggest that "penalties" are therefore implicitly "included" within "taxes" in all other provisions that are somehow related to assessment, let alone a provision like the AIA that regulates judicial review of assessment rather than executive assessment itself. *See Seven-Sky*, 661 F.3d at 10; *see also Thomas More*, 651 F.3d at 539-40. To the contrary, § 6201(a) confirms that, when Congress wants "penalties" to be included as "taxes" in a certain Tax Code provision, it says so explicitly. Likewise, when Congress wants "penalties" to be included as "taxes" in multiple Tax Code provisions, it says so explicitly, as it did for penalties codified in Chapter 68. 26 U.S.C. §§ 6665(a)(2), 6671(a) (those penalties "deemed" taxes for all Tax Code purposes). Yet *nowhere* did Congress say that the mandate's penalty in Chapter 48 should be "included" as a tax *under the AIA*.

Moreover, reading § 6201(a) as having equated "penalties" with "taxes" for all assessment-related provisions renders superfluous those assessment-related provisions that reference both "taxes" and "penalties." For example, while § 6671(a) provides that the "penalties" in Subchapter B of Chapter 68

"shall be assessed and collected in the same manner as taxes," that *already* would be the case if § 6201(a) had "included" "penalties" within "taxes" for *all* assessment-related purposes. Tellingly, *Amicus* does not cite a single non-ACA case adopting his position that § 6201(a) automatically renders all "assessable penalties" equivalent to "taxes" for all assessment-related purposes, even where that "penalty" is not codified in Chapter 68 (and thus not "deemed" a tax by §§ 6665(a)(2), 6671(a)).

Finally, even if the § 6201(a) argument were correct, it still would not bar this suit, because it would not prohibit relief restraining *collection* of the mandate's penalty. Importantly, unlike the general grant of assessment authority in § 6201(a), the general grant of collection authority *lacks* a parenthetical clause "including ... penalties": it simply states that the IRS "shall collect the taxes imposed by the internal revenue laws." *Id.* § 6301. But the absence of that supposedly critical parenthetical in § 6301 eliminates the entire basis of the argument for construing the AIA to read: "restraining the ... collection of any tax [*or any non-tax collected under the same authority as a tax*]."[4]

Thus, even accepting the § 6201(a) argument on its own terms, the IRS would be protected from pre-enforcement challenges to penalty *assessment*, but

---

[4] *Amicus* elides this problem by claiming § 6301 requires the IRS "to collect the taxes that must be assessed under [§] 6201." *See* Long AIA Br. 39-40. But § 6301 does not reference "§ 6201" or "assessment." Without that reference, or an "including" parenthetical, the § 6201(a) argument that "penalties" are included within "taxes" for the AIA's bar on review of assessment does not extend to its bar on review of collection.

not penalty *collection*. And the latter form of review would be sufficient for this suit to proceed, since this Court could preclude collection of the penalty. Of course, the absurdity of that dichotomy between assessment and collection illustrates the more fundamental flaw with the argument. Congress clearly did not extend the bar on pre-enforcement judicial review in § 7421(a) through a parenthetical reference in § 6201(a) concerning the scope of the IRS' executive assessment authority.

b. *Amicus* also argues that the mandate's "penalty" should be *treated like* a "tax" under the AIA, because the IRS must assess and collect the "penalty" and "taxes" *in the same way*. *See* Long AIA Br. 24-29; *see also Seven-Sky*, 661 F.3d at 31-34 (Kavanaugh, J., dissenting). Here again, this argument proceeds in two steps: *first*, the mandate's "penalty ... shall be assessed and collected *in the same manner* as an assessable penalty under subchapter B of chapter 68," 26 U.S.C.A. § 5000A(g)(1) (emphasis added), which in turn "shall be assessed and collected *in the same manner as taxes*," 26 U.S.C. § 6671(a) (emphasis added); and *second*, because the mandate's penalty must be assessed and collected *like a* tax, it likewise must fall within the AIA's bar on suits "restraining the assessment or collection of any tax," *id.* § 7421(a). In short, the "§ 5000A(g) argument" is that the AIA should be construed to read: "restraining the assessment or collection ... of any tax [*or any non-tax assessed and collected in the same manner as a tax*]."

Once again, this argument is irreconcilable with the relevant statutory language: (1) under the AIA, "tax" does not include "non-taxes assessed and

collected like taxes"; and (2) under § 5000A(g), the directive that the IRS *assess and collect* penalties like taxes hardly means that "penalties" *are* "taxes" for purposes of the AIA's restriction on federal-court review. Specifically, the fact that Congress explicitly required that "the [IRS] employ[]" the "same manner" of *executive* "mechanisms ... to enforce" both taxes and the mandate's penalty does not even remotely suggest that Congress implicitly decreed that the penalty also falls within the *judicial* "bar against pre-enforcement challenges to taxes." *Thomas More*, 651 F.3d at 540. Instead, enforcing the mandate's penalty "in the same manner as a tax" simply means that the IRS must use tax "methodology and procedures" when "recording the liability of the taxpayer" (*i.e.*, "assessment") and "impos[ing] ... payment" (*i.e.*, "collection"). *Seven-Sky*, 661 F.3d at 11; *see also* Long AIA Br. 25 (acknowledging these settled definitions of "assessment" and "collection"). Indeed, to the extent that it is relevant at all, § 5000A(g)'s express requirement that the IRS assess and collect "penalties" like it does "taxes" confirms again that "penalties" are *different* than "taxes."

Tellingly, *Amicus* himself acknowledges that the AIA "addresses *restraints* on assessment and collection" of taxes, *not* "assessment and collection" themselves. *See* Long AIA Br. 30 (emphasis added). That is a fundamental concession, because the statutory provisions governing judicial restraints on enforcement are entirely distinct from the provisions governing enforcement itself. To instruct the IRS to assess and collect the mandate's "penalty" like it does "taxes" does not instruct federal courts to treat

that "penalty" like a "tax" under the AIA—the AIA does not reach "non-taxes assessed and collected like taxes," and the fact that the Tax Code requires that "penalties" be treated *like* "taxes" in some circumstances simply reinforces that "penalties" and "taxes" are different. Conversely, the mandate's "penalty" *will be* assessed and collected precisely like "taxes" by the IRS, pursuant to the statutory directive in § 5000A(g). To be sure, a citizen's lawsuit to *restrain* executive assessment and collection of that "penalty" will be treated differently than a citizen's lawsuit to restrain such enforcement of "taxes," but that in no way alters the fact that assessment and collection procedures are the same for both.

Amicus, however, insists that the mandate's penalty will not be "assessed and collected in the same manner as a tax" if the AIA does not protect it, objecting that the IRS either (1) will not have the opportunity to assess and collect the mandate's penalty at all—*i.e.*, if it loses in litigation, or (2) will assess and collect the mandate's penalty only at a later time—*i.e.*, after it prevails in litigation. *See* Long AIA Br. 26-29; *see also Seven-Sky*, 661 F.3d at 32-34 (Kavanaugh, J., dissenting). But this objection conflates executive assessment and collection with judicial restraints on assessment and collection. The mandate's "penalty" will be assessed and collected in precisely the same manner as taxes, because the IRS will use precisely the same "methodology and procedures" when "recording the liability of the taxpayer" and "impos[ing] ... payment." *Seven-Sky*, 661 F.3d at 11 (majority opinion).

Again, that the judiciary reviews assessment and collection of the mandate's "penalty" differently than assessment and collection of "taxes" does not mean that the "penalty" and "taxes" are assessed and collected differently. It just means that citizens have not been deprived of their right to bring a pre-enforcement challenge to the former. All the differences identified by *Amicus* concerning the IRS' "timing" and "opportunity" for assessing and collecting the mandate's "penalty" simply reflect the fact that a pre-enforcement challenge to the "penalty" is available. In short, *Amicus*'s reasoning is circular: that the IRS' ability to assess and collect the mandate's "penalty" free from judicial review will be eliminated *if* the AIA does not apply hardly *proves* that the AIA does apply.

Once more, it is telling that *Amicus* does not cite a single non-ACA case adopting his position that a "penalty" is automatically rendered subject to the AIA merely because it is "assessed and collected in the same manner as taxes." The cases discussed in the treatise cited by *Amicus* (*see* Long AIA Br. 29), are inapposite: two of them involved Chapter 68 penalties, which, as noted, are separately "deemed" taxes, *see Warren v. United States*, 874 F.2d 280, 282 (5th Cir. 1989); *Sloan v. United States*, No. 4:90-cv-303, 1991 WL 311898, at *1 (N.D. Ga. Oct. 30, 1991), and the third is *Mobile Republican*, which, as noted, involved "penalties imposed for violating the conditions of [a certain] tax status," rather than "penalties imposed for substantive violations of laws

not directly related to the tax code," *see* 353 F.3d at 1362 & n.5.[5]

In sum, neither § 5000A(g) nor § 6201(a) even arguably extends the AIA to cover suits with the "purpose of restraining the assessment or collection of any [*penalty that is assessed or collected under the same authority, or in the same manner, as a*] tax." Instead, the AIA is limited to suits for the "purpose of restraining the assessment or collection of any tax." Thus, because neither the mandate nor its penalty is a "tax," the AIA is inapplicable.

II. THE AIA SHOULD NOT BE CONSIDERED BECAUSE IT IS NON-JURISDICTIONAL AND HAS BEEN DISAVOWED BY THE GOVERNMENT

Ultimately, this Court need not decide whether the AIA applies in this case, given the Government's litigation concession that the AIA does not bar this suit. Under "the normal operation of our adversarial system, ... courts are generally limited to addressing the claims and arguments advanced by the parties." *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011). Here, not only has the Solicitor General failed to advance the argument that the AIA bars this suit, but he has expressly agreed that it does not. Govt. Cert. Pet. 32-33.

---

[5] Likewise, to the extent that certain penalties for violation of laws related to alcohol and tobacco taxation are subject to the AIA, *see* Long AIA Br. 35-36—a proposition that *Amicus* simply assumes without authority—those penalties are equivalent to the tax-law-related penalties in *Mobile Republican* and therefore distinguishable.

This Court may accept the Government's concession, because the AIA's application does not present a "jurisdictional question[]" that must be considered even when "the parties ... elect not to press [it]." *Henderson*, 131 S. Ct. at 1202. To be sure, this Court has often described the AIA as "jurisdictional." *See* Long AIA Br. 16. But "[t]his Court, no less than other courts, has sometimes been profligate in its use of the term" "'[j]urisdiction,' ... [which] is a word of many, too many, meanings." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006). "[I]n recent cases," therefore, this Court "ha[s] tried ... to bring some discipline to the use of th[e] term." *Henderson*, 131 S. Ct. at 1202.

Under the framework established by those cases, there are two reasons why the AIA is properly characterized as non-jurisdictional: *first*, Congress did not clearly rank the AIA as a jurisdictional restriction on the power of the courts; and *second*, this Court has consistently treated the AIA as non-jurisdictional whenever that distinction has mattered, notwithstanding the loose language invoked by *Amicus*.

A. Congress Did Not Clearly Rank The AIA As A Jurisdictional Restriction

This Court now requires that Congress must have provided "a[] 'clear' indication that [it] wanted [a] rule to be 'jurisdictional.'" *Henderson*, 131 S. Ct. at 1203 (citing *Arbaugh*, 546 U.S. at 515-16). This recent insistence on clarity regarding "the jurisdictional label" reflects the fact that "the consequences that attach ... may be so drastic." *Id.* at 1202. Accordingly, "to capture Congress' likely

intent and also provide[] helpful guidance for courts and litigants," this Court has established a set of "'readily administrable bright line' rule[s]" for determining jurisdictional status. *See id.* at 1203 (citing *Arbaugh*, 546 U.S. at 514-16). Under those rules, Congress did *not* clearly "rank [the AIA] as jurisdictional." *Arbaugh*, 546 U.S. at 516.

1. The AIA's Text Is Non-Jurisdictional

As a threshold matter, the AIA's text "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 515. The textual object of the AIA's restriction is not "jurisdiction" or "the courts," but the plaintiff's *cause of action*: "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." 26 U.S.C. § 7421(a). The AIA is thus materially indistinguishable from the Copyright Act restriction that "no civil action for infringement ... shall be instituted until preregistration or registration of the copyright claim has been made," 17 U.S.C. § 411(a), which this Court held "says nothing about whether a federal court has subject-matter jurisdiction to adjudicate claims for infringement of unregistered works." *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1245 (2010).

To be sure, the restrictions on the plaintiff's cause of action here and in *Reed Elsevier* are "cast in mandatory language." *Henderson*, 131 S. Ct. at 1205. But not "all mandatory prescriptions, however emphatic, are ... properly typed jurisdictional." *Id.* Such labeling is especially inapt for the AIA, the "mandatory" nature of which is undermined by the "[e]xcept[ions]" that the Tax Code "provide[s] in

sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), and 7426(a) and (b)(1), 7429(b), and 7436." *See* 26 U.S.C. § 7421(a). As this Court has observed, "[i]t would be at least unusual to ascribe jurisdictional significance to a condition subject to these sorts of exceptions." *Reed Elsevier*, 130 S. Ct. at 1246.[6]

2. The AIA's Location Is Non-Jurisdictional

Likewise, the location of the AIA's "placement within the [U.S. Code]" "provides no clear indication that Congress wanted [the AIA] to be treated as having jurisdictional attributes." *Henderson*, 131 S. Ct. at 1205. The AIA is not codified in "Chapter 85 of Title 28, ...[which] governs the jurisdiction of the United States district courts." *Key v. Doyle*, 434 U.S. 59, 66 n.12 (1977). Instead, it is codified within Subtitle F of the Tax Code, which governs "Procedure and Administration." More specifically, it is codified in Subchapter B of Chapter 76, which contains a variety of non-jurisdictional rules for "Judicial Proceedings" brought by "Taxpayers and Third Parties." *E.g.*, 26 U.S.C. § 7423 (authorizing reimbursement of federal officers for judgments and costs); *id.* § 7430 (authorizing certain litigation costs and fees for a prevailing party). Although Congress has instructed the courts not to draw a negative inference from the location of particular sections

---

[6] Accordingly, it is irrelevant that many of these exceptions reference the "jurisdiction" of the courts authorized to invoke them. *See* Long AIA Br. 18 & n.6. That does not overcome the fact that jurisdictional statutes typically are not rife with statutory exceptions, let alone does it provide a *clear* indication that the AIA itself is a jurisdictional bar despite the absence of any jurisdictional language.

within the Tax Code, *id.* § 7806(b), it remains the case that the AIA's codification among such patently non-jurisdictional provisions reveals no affirmative indication of jurisdictional status, much less a clear one. *Henderson*, 131 S. Ct. at 1205; *Reed Elsevier*, 130 S. Ct. at 1245-46.

3. The AIA's Character Is Non-Jurisdictional

The AIA also lacks an inherently jurisdictional character, as it does not restrict "the classes of cases" (or persons) over which courts possess "adjudicatory authority." *Reed Elsevier*, 130 S. Ct. at 1243. Rather than completely depriving federal courts of the "statutory or constitutional *power* to adjudicate" legal challenges concerning the "subject-matter" of federal taxes, *id.*, the AIA simply determines the *timing* of judicial review, by "requir[ing] that the legal right to the disputed sums be determined in a suit for refund" *after* the challenged tax has been paid under protest, *Bob Jones*, 416 U.S. at 736-37. The AIA thus imposes a "threshold requirement[] that claimants must complete, or exhaust, before filing a lawsuit," which is "a type of pre-condition to suit that supports nonjurisdictional treatment under [this Court's] precedents." *Reed Elsevier*, 130 S. Ct. at 1246-47; *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (holding non-jurisdictional the requirement in Title VII that discrimination claimants must file a timely EEOC charge before filing a civil action in federal court). In short, the AIA is nothing more than a non-jurisdictional "claim-processing rule[]" for federal tax challenges, which "seek[s] to promote the orderly progress of litigation by requiring that the parties

take certain procedural steps at certain specified times." *Henderson*, 131 S. Ct. at 1203.

Using jurisdictional language that nowhere appears in the AIA, *Amicus* alternatively describes the statute as a restriction on courts' "adjudicatory capacity" to award a pre-enforcement remedy in federal tax challenges. *See* Long AIA Br. 19. But even characterizing the AIA as a remedial restriction rather than a claim-processing rule does not make it jurisdictional. There is a well-settled distinction between "*jurisdiction*," which is the "question of whether a federal court has the power ... to hear a case," and "*relief*," which is the "question of the various remedies a federal court may make available." *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979). That is why, when Congress wants remedial restrictions to be jurisdictional, it says so expressly. *E.g.*, 29 U.S.C. § 104 ("No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit ... any of the following acts...."). The AIA contains no remotely comparable language.

4. The AIA Is Distinguishable From Related Statutes That Are Jurisdictional

Finally, the non-jurisdictional nature of the AIA's text, location, and character is perhaps best demonstrated by the stark contrast between the AIA and the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, which provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts

of such State." Unlike the AIA, the TIA clearly ranks as jurisdictional: (1) it textually regulates the "district courts" themselves, by restricting their review of state taxes; (2) it is placed in Chapter 85 of Title 28, along with the other provisions governing the jurisdiction of federal district courts; and (3) it generally removes challenges to state taxes from the adjudicatory authority of federal district courts, because post-enforcement state-tax refund actions are brought in state court and reviewable only in this Court. *See id.*; *see also, e.g.*, 26 U.S.C. § 6305(b) ("No court of the United States ... shall have jurisdiction of any action ... brought to restrain or review the assessment and collection of [certain certified child-support obligations]."). Thus, "[i]f Congress had wanted the [AIA] to be treated as jurisdictional, it could have cast that provision ... like" the TIA (or § 6305(b)). *Henderson*, 131 S. Ct. at 1204-05.

Turning this contrast on its head, *Amicus* argues that the TIA's clearly jurisdictional status instead bolsters the AIA's claim to jurisdictional status, simply because Congress "modeled" the TIA upon the AIA. *See* Long AIA Br. 17; *see also* Govt. Cert. Reply 3-4. But, while Congress used the AIA as a template for the TIA, the fundamental differences between the two show that Congress ranked *only* the TIA as a jurisdictional restriction on the power of federal courts. And it is readily apparent why Congress would have made the TIA more stringent than the AIA: judicial review presents unique federalism concerns in the state-tax context (and also in the child-support context at issue in § 6305(b)). *See Hibbs v. Winn*, 542 U.S. 88, 104-05 (2004).

B. This Court Has Not Treated The AIA As A Jurisdictional Restriction

Jurisdictional status also will be recognized where "a long line of this Court's decisions left undisturbed by Congress ... has *treated* a similar requirement as 'jurisdictional.'" *Henderson*, 131 S. Ct. at 1203 (emphasis added). Importantly though, "the relevant question here is not" merely "whether [the statute] itself has long been *labeled* jurisdictional." *Reed Elsevier*, 130 S. Ct. at 1248 (emphasis added). Such a simplistic approach would give undue weight to this Court's "drive-by jurisdictional rulings," which, without analysis, "have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations," *id.* at 1243-44, and thus caused lower courts to do the same, *Eberhart v. United States*, 546 U.S. 12, 19 (2005) (per curiam). *But see* Long AIA Br. 16-17 & n.5 (relying upon such "drive-by" jurisdictional labels and lower-court opinions). Instead, the correct inquiry is whether this Court's precedents have treated "the type of limitation that [the statute imposes] [as] one that is properly ranked as jurisdictional," *Reed Elsevier*, 130 S. Ct. at 1248, such that it can be confidently "presume[d] that Congress intended to follow that course" when it enacted or recodified the statute at issue, *Henderson*, 131 S. Ct. at 1203. That inquiry reveals that this Court has "treated" the AIA as non-jurisdictional in the two situations where the characterization actually mattered.

1. The AIA Can Be Expressly Waived By The Government

Jurisdictional rules "can never be forfeited or waived," *Arbaugh*, 546 U.S. at 514, but this Court nonetheless has accepted an express waiver of the AIA by the Government. Specifically, in *Helvering v. Davis*, 301 U.S. 619 (1937), a shareholder brought suit to enjoin his corporation from paying allegedly unconstitutional Social Security taxes. *Id.* at 634, 637. After the IRS Commissioner intervened as a defendant and petitioned for certiorari, the Solicitor General proffered a "waiver of a defense under" the AIA's predecessor statute and made an "earnest request that [this Court] determine whether the law shall stand or fall." *Id.* at 638-39. Accepting that request, a majority of this Court chose to exercise "discretion" to decide the constitutional question given the "extraordinary features" of the case. *Id.* at 639-40. Indeed, it appears that this Court was *unanimous* in its view that the AIA was not a jurisdictional barrier to resolving the case on the merits. Although four Justices would have held that "the suit for an injunction should be dismissed," even they were relying *only* "upon th[e] ground" that "a cause of action in equity [was] neither pleaded nor proved," apparently due to "the absence of an adequate showing of irreparable injury." *See id.* at 639; *see also id.* ("[T]his course should be followed in adherence to the general rule that constitutional questions are not to be determined in the absence of strict necessity."); *but see* Long AIA Br. 22 (erroneously suggesting that four Justices would have dismissed the suit under the AIA).

A variety of arguments have been made to explain why the AIA is jurisdictional despite the Government's successful waiver in *Davis*. Those arguments all fail.

First, *Amicus* seeks to minimize *Davis* because this Court gave a "limited explanation" that did not *expressly* "indicate that five Justices had concluded ... that the [AIA] is non-jurisdictional." *See* Long AIA Br. 21-22. But *Amicus* does not even attempt to provide any alternative explanation for how at least five Justices saw fit to resolve the case *on the merits*. As *Amicus* concedes, the Government in *Davis* argued that the AIA applied and made no argument for why the suit could be adjudicated *other* than its waiver. *See id.* 21. To the extent *Amicus* characterizes the decision as "an anomaly predating more stringent jurisdictional limitations," *see id.* 22 n.7, this Court's strict refusal to allow parties to waive jurisdictional limitations long predates *Davis*. *See, e.g.*, *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804) (vacating adverse judgment against plaintiff for lack of diversity jurisdiction even though plaintiff himself had initiated suit in federal court).

Second, the Government attempts to distinguish *Davis* on the ground that this Court's basis for declining to apply the AIA was a "waiver," rather than a "forfeiture." *See* Govt. Cert. Reply 6; *see also Seven-Sky*, 661 F.3d at 28 (Kavanaugh, J., dissenting). But any technical distinction between waiver and forfeiture is entirely irrelevant, because jurisdictional rules "can never be forfeited *or waived*." *Arbaugh*, 546 U.S. at 514 (emphasis added). Moreover, whatever theoretical distinctions between waiver and forfeiture might generally exist,

they are illusory where, as here, the Solicitor General *expressly agrees* that the AIA should not bar this suit.

Third, the Government also attempts to distinguish *Davis* on the theory that the case *interpreted* the AIA to implicitly permit Government waivers under the canon that "the Government is not bound by its own legislative restrictions on the exercise of remedial rights unless the intent to bind it is express." *See* Govt. Cert. Reply 6-7. But that canon reflects a presumption that Congress would not have intended a general jurisdictional statute (like the TIA) to restrict the Government's own rights in those cases where the Government *happens to be the plaintiff*. *See, e.g.*, *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 827 (1997). The canon is thus obviously inapplicable to jurisdictional statutes where Congress itself has specifically protected the Government's *unique* interests *as a defendant*. *See, e.g.*, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 132-34 (2008) (ignoring the Government's forfeiture of the statute of limitations for suits in the Court of Federal Claims, because that defense is jurisdictional). Put differently, where Congress bars a type of suit that can be brought *only against* the Government, Congress' "intent to bind [the Government] is express." *Farm Credit Servs.*, 520 U.S. at 827. Plus, again, even if Congress did implicitly intend to allow the Solicitor General to expressly waive the AIA in *Davis*, then it also would have wanted this Court to accept the Solicitor General's express concession here that the AIA should not bar this suit.

Finally, Judge Kavanaugh attempted to distinguish *Davis* on the theory that the AIA was facially inapplicable there because the suit was nominally brought by a shareholder against his corporation, rather than against federal tax officials. *See Seven-Sky*, 661 F.3d at 28 (dissenting opinion). But, despite that initial procedural posture, the shareholder's suit to bar his corporation from paying a federal tax had the indisputable "purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a). After all, the *Davis* shareholder obviously "would not [have been] interested in obtaining the ... injunctive relief requested if that relief did not effectively restrain the taxation of [his corporation]." *'Americans United'*, 416 U.S. at 760-61. And regardless, the suit in *Davis* ultimately was brought against a federal tax official, who had intervened as a party-defendant and was the sole litigating petitioner in this Court. 301 U.S. at 638-39; *see also* 26 U.S.C. § 7421(a) ("no [covered] suit ... shall be *maintained in any court*" (emphasis added)).

In sum, the AIA was not a bar in *Davis* because this Court accepted the Solicitor General's waiver, which proves that this Court has not treated the AIA as a jurisdictional restriction.

2. The AIA Has A Judicially Created Equitable Exception

"[T]his Court has no authority to create equitable exceptions to jurisdictional requirements," *Bowles v. Russell*, 551 U.S. 205, 214 (2007), but it nonetheless has created such an exception to the AIA. Specifically, this Court has deemed the AIA inapplicable, notwithstanding its "literal terms," in

cases where a plaintiff seeking pre-enforcement relief from a tax can demonstrate "certainty of success on the merits." *Bob Jones*, 416 U.S. at 737. The genesis of that exception was in *Miller v. Standard Nut Margarine Co. of Fla.*, 284 U.S. 498 (1932), where this Court stated that "extraordinary and exceptional circumstances render[ed] [the AIA's predecessor statute] inapplicable," and then held that such "special" circumstances exist where "[a] valid ... tax could by no legal possibility have been assessed against [the plaintiff]." *Id.* at 510-11. To be sure, in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), this Court cabined *Standard Nut* to the precise scenario where "it is clear that under no circumstances could the Government ultimately prevail." *Id.* at 6-7; *see also Bob Jones*, 416 U.S. at 744-45. Nevertheless, "the 'under no circumstances' test announced in *Williams Packing*" remains a "judicially created exception[]" to the AIA. *See Bob Jones*, 416 U.S. at 742.

Amicus and the Government, however, both contend that *Williams Packing* did not create an "exception" to the AIA, but merely construed the statute in light of its text and purpose. *See* Long AIA Br. 20-21; *see also* Govt. Cert. Reply 4-5. Although differing somewhat in the details, their revisionist readings of *Williams Packing* as garden-variety statutory interpretation are both wrong.

First, *Amicus* contends that *Williams Packing* declined to apply the AIA to indefensible taxes because that would not further the statute's purpose. *See* Long AIA Br. 20; *see also Seven-Sky*, 661 F.3d at 28 n.8 (Kavanaugh, J., dissenting). To the contrary, however, this Court itself has recognized that

Williams Packing was a "judicially created exception[]," consistent with its equitable genesis in *Standard Nut*. *See Bob Jones*, 416 U.S. at 742; *see also id.* at 745 ("*Williams Packing* switched the focus of [*Standard Nut*'s] extraordinary and exceptional circumstances test ... to the requirement that it be established that the [Government's] action is plainly without a legal basis."). And that is telling, given that the sole reason that *Bob Jones* discussed *Williams Packing* was in order to reject the plaintiff's request for *another* "judicially created exception[]." *Id.* at 742. If this Court had believed that *Williams Packing* was *not* itself "a judicial departure from" "the plain meaning of the [AIA]," but instead a permissible construction of the AIA's text in light of its purpose, then it surely would have said so, rather than saying precisely the opposite. *See id.*

Furthermore, *Amicus* is simply wrong in contending that it would not further the AIA's purposes to bar pre-enforcement challenges to indefensible taxes. To be sure, where the challenged tax is indefensible, the "central purpose" of the AIA—*i.e.*, the "prompt collection of ... lawful revenue"—"is inapplicable." *Williams Packing*, 370 U.S. at 7. But the AIA also has the "collateral objective" of "protect[ing] ... the [individual] collector from litigation pending a suit for refund" against the IRS, *see id.* at 7-8, and *that* purpose is implicated even where the challenged tax is indefensible. This underscores that the true basis of *Williams Packing* was not a statutory construction of the AIA's text in light of its purpose, but instead a willingness to create equitable exceptions that trump both the statutory text and purpose.

Second, the Government argues that *Williams Packing* is consistent with the AIA's plain text, because if there are "no circumstances" where the challenged exaction could be a lawful "tax," then that "exaction is merely in 'the guise of a tax,'" rather than an actual "tax." *See* Govt. Cert Reply 4-5 (quoting *Williams Packing*, 370 U.S. at 7). But this Court has stated unambiguously that the "under no circumstances" rule of *Williams Packing* allows "the literal terms of § 7421(a) [to] be avoided." *Bob Jones*, 416 U.S. at 737. This Court's mere use of the "guise of a tax" phrase in *Williams Packing* does not somehow mean that the "under no circumstances" rule was a *textual interpretation* of the word "tax." This Court often uses that phrase when describing "taxes" without remotely suggesting that the exaction at issue is anything other than a "tax." *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 10 (2005) ("[M]ost domestic drug regulations prior to 1970 generally came in the guise of revenue laws."); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) ("The [state-law] tax here involved ... is bad because ... it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of [protected] information."). The irrelevance of the phrase likely explains why *Bob Jones* did not even mention it, let alone use it as a basis to recharacterize the foundation of the *Williams Packing* rule. *See* 416 U.S. at 737, 742-46. And, again, *Bob Jones* had ample reason to so hold if it were plausible, given that the plaintiff there was seeking *another* "judicial departure from" "the plain meaning of the [AIA]." *See id.* at 742.

Moreover, the Government's revisionist interpretation of *Williams Packing* is itself atextual. The Government concedes that an illegal or unconstitutional "tax" is protected by the AIA, *'Americans United'*, 416 U.S. at 759-60, but nevertheless contends that an indefensible "tax" is not. That distinction is irreconcilable with the definition of a "tax" under ordinary English and governing precedent, *supra* at 26-27, which in no way turns on whether the Government's legal defense is frivolous as opposed to meritless. For this reason, the Government errs by analogizing *Williams Packing* to *Bell v. Hood*, 327 U.S. 678, 682-83 (1946), which held that a "frivolous" federal claim does not "arise under" federal law for purposes of subject-matter jurisdiction. *See* Govt. Cert. Reply 5. It is at least textually possible that whether a claim actually "arises under" federal law turns on the strength of the claim's connection to federal law. But it is textually impossible that whether a monetary exaction in the form of a "tax" actually is a "tax" under the AIA turns on the strength of its legal justification. An indefensible "tax" is still a "tax."

Indeed, the notion that this Court would engage in such semantic gamesmanship to avoid a jurisdictional barrier is irreconcilable with *Bowles*. There, an appeal was dismissed as untimely because a habeas petitioner had relied on a district court order that mistakenly granted him an extra 17 days to file an appeal when the jurisdictional limit was a "14-day period." *See* 551 U.S. at 206-07. Given the district court's error, this Court surely could have held that the appeal was filed "within the guise of" a "14-day period"—indeed, that would have been far

more plausible than the Government's assertion here that an indefensible "tax" is an "exaction in the guise of a tax." Instead, however, this Court in *Bowles* unflinchingly applied the jurisdictional time-limit literally, refusing to consider the compelling policy argument for an exception. *Id.* at 213-15. That absolutist approach to a truly jurisdictional statute starkly contrasts with this Court's flexible and equitable approach to the AIA in *Miller Nut* and *Williams Packing*. This contrast underscores the non-jurisdictional reasoning used in the latter cases.

In sum, *Williams Packing* established an equitable exception to the AIA for indefensible taxes, which further proves that this Court has not treated the AIA as a jurisdictional restriction.

C. This Court Should Accept The Government's Express Litigation Concession That The AIA Does Not Bar This Suit

As noted, in "our adversarial system," "[c]ourts do not usually raise claims or arguments on their own." *Henderson*, 131 S. Ct. at 1202. And this Court's *sua sponte* resolution of the non-jurisdictional AIA issue would be especially inappropriate in the context of this case. There exists an urgent national need for a prompt determination whether the ACA is invalid, in light of that statute's scope and significance. *See generally* Private Petrs. Severability Br. 2-6, 10-25. Yet dismissal under the AIA could potentially delay judicial resolution by roughly four years—*i.e.*, until an individual pays the penalty for non-compliance with the mandate in April of 2015 and then litigates the issue back up to this Court. There is no reason to

impose that harm on the Nation by forcing an unwanted and non-jurisdictional AIA defense on the Government, particularly given that the delayed effective date itself attenuates any conceivable interest that the Government would have under the AIA in expeditious collection of the mandate's penalty.

Indeed, even if the AIA were jurisdictional, the Government's litigating position is sufficient basis not to apply it in this case, under the authority of *Davis*. As previously discussed, there is no meaningful distinction between the Solicitor General's express waiver of the AIA in *Davis* and the Solicitor General's express assertion here that the AIA does not apply. In both cases, the Solicitor General expressly contended that the AIA should not bar the suit, despite full knowledge of all AIA arguments potentially available to him. Thus, even accepting the dubious premise that the AIA is jurisdictional despite the successful waiver in *Davis*, that case itself provides sufficient authority to accept the Government's virtually indistinguishable position here.

CONCLUSION

This Court should hold that the AIA does not bar Private Respondents' suit and review the judgment below on the merits.

Respectfully submitted,

KAREN R. HARNED
NFIB SMALL BUSINESS
LEGAL CENTER
1201 F St. NW, Suite 200
Washington, DC 20004

PROF. RANDY E. BARNETT
GEORGETOWN UNIV.
LAW CENTER
600 New Jersey Ave. NW
Washington, DC 20001

MICHAEL A. CARVIN
Counsel of Record
GREGORY G. KATSAS
C. KEVIN MARSHALL
HASHIM M. MOOPPAN
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Private Respondents

Dated: February 6, 2012

APPENDIX

TABLE OF CONTENTS

	Page
26 U.S.C. § 6201	1a
26 U.S.C. § 6301	5a
26 U.S.C. § 6665	6a
26 U.S.C. § 6671	7a
26 U.S.C. § 6720A	8a
26 U.S.C. § 7421	9a
26 U.S.C. § 7422	10a
26 U.S.C.A. § 4980H	16a
26 U.S.C.A. § 5000A	22a
28 U.S.C. § 1341	34a

26 U.S.C. § 6201 provides:

§ 6201. Assessment authority

(a) **Authority of Secretary.**—The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) **Taxes shown on return.**—The Secretary shall assess all taxes determined by the taxpayer or by the Secretary as to which returns or lists are made under this title.

(2) **Unpaid taxes payable by stamp.**—

(A) **Omitted stamps.**—Whenever any article upon which a tax is required to be paid by means of a stamp is sold or removed for sale or use by the manufacturer thereof or whenever any transaction or act upon which a tax is required to be paid by means of a stamp occurs without the use of the proper stamp, it shall be the duty of the Secretary, upon such information as he can obtain, to estimate the amount of tax which has been omitted to be paid and to make assessment therefor upon the person or persons the Secretary determines to be liable for such tax.

(B) **Check or money order not duly paid.**—In any case in which a check or money order received under authority of section 6311 as payment for stamps is not duly paid, the unpaid amount may be immediately assessed as if it were a tax

imposed by this title, due at the time of such receipt, from the person who tendered such check or money order.

(3) **Erroneous income tax prepayment credits.**—If on any return or claim for refund of income taxes under subtitle A there is an overstatement of the credit for income tax withheld at the source, or of the amount paid as estimated income tax, the amount so overstated which is allowed against the tax shown on the return or which is allowed as a credit or refund may be assessed by the Secretary in the same manner as in the case of a mathematical or clerical error appearing upon the return, except that the provisions of section 6213(b)(2) (relating to abatement of mathematical or clerical error assessments) shall not apply with regard to any assessment under this paragraph.

(4) **Certain orders of criminal restitution.**—

(A) **In general.**—The Secretary shall assess and collect the amount of restitution under an order pursuant to section 3556 of Title 18, United States Code, for failure to pay any tax imposed under this title in the same manner as if such amount were such tax.

(B) **Time of assessment.**—An assessment of an amount of restitution under an order described in subparagraph (A) shall not be made before all appeals of such order are concluded and the right to make all such appeals has expired.

(C) **Restriction on challenge of assessment.**—The amount of such restitution may not be challenged by the person against whom assessed on the basis of the existence or amount of the underlying tax liability in any proceeding authorized under this title (including in any suit

or proceeding in court permitted under section 7422).

(b) **Amount not to be assessed.**—

(1) **Estimated income tax.**—No unpaid amount of estimated income tax required to be paid under section 6654 or 6655 shall be assessed.

(2) **Federal unemployment tax.**—No unpaid amount of Federal unemployment tax for any calendar quarter or other period of a calendar year, computed as provided in section 6157, shall be assessed.

(c) **Compensation of child.**—Any income tax under chapter 1 assessed against a child, to the extent attributable to amounts includible in the gross income of the child, and not of the parent, solely by reason of section 73(a), shall, if not paid by the child, for all purposes be considered as having also been properly assessed against the parent.

(d) **Required reasonable verification of information returns.**—In any court proceeding, if a taxpayer asserts a reasonable dispute with respect to any item of income reported on an information return filed with the Secretary under subpart B or C of part III of subchapter A of chapter 61 by a third party and the taxpayer has fully cooperated with the Secretary (including providing, within a reasonable period of time, access to and inspection of all witnesses, information, and documents within the control of the taxpayer as reasonably requested by the Secretary), the Secretary shall have the burden of producing reasonable and probative information concerning such deficiency in addition to such information return.

(e) Deficiency proceedings.—
For special rules applicable to deficiencies of income, estate, gift, and certain excise taxes, see subchapter B.

26 U.S.C. § 6301 provides:

§ 6301. Collection authority

The Secretary shall collect the taxes imposed by the internal revenue laws.

26 U.S.C. § 6665 provides:

§ 6665. Applicable rules

(a) **Additions treated as tax.**—Except as otherwise provided in this title—

(1) the additions to the tax, additional amounts, and penalties provided by this chapter shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes; and

(2) any reference in this title to "tax" imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this chapter.

(b) **Procedure for assessing certain additions to tax.**—For purposes of subchapter B of chapter 63 (relating to deficiency procedures for income, estate, gift, and certain excise taxes), subsection (a) shall not apply to any addition to tax under section 6651, 6654, or 6655; except that it shall apply—

(1) in the case of an addition described in section 6651, to that portion of such addition which is attributable to a deficiency in tax described in section 6211; or

(2) to an addition described in section 6654 or 6655, if no return is filed for the taxable year.

26 U.S.C. § 6671 provides:

§ 6671. Rules for application of assessable penalties

(a) Penalty assessed as tax.—The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) Person defined.—The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

26 U.S.C. § 6720A provides:

§ 6720A. Penalty with respect to certain adulterated fuels

(a) In general.—Any person who knowingly transfers for resale, sells for resale, or holds out for resale any liquid for use in a diesel-powered highway vehicle or a diesel-powered train which does not meet applicable EPA regulations (as defined in section 45H(c)(3)), shall pay a penalty of $10,000 for each such transfer, sale, or holding out for resale, in addition to the tax on such liquid (if any).

(b) Penalty in the case of retailers.—Any person who knowingly holds out for sale (other than for resale) any liquid described in subsection (a), shall pay a penalty of $10,000 for each such holding out for sale, in addition to the tax on such liquid (if any).

26 U.S.C. § 7421 provides:

§ 7421. Prohibition of suits to restrain assessment or collection

(a) Tax.—Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

(b) Liability of transferee or fiduciary.—No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of—

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3713(b) of title 31, United States Code[1] in respect of any such tax.

---

[1] So in original. A comma should appear here.

26 U.S.C. § 7422 provides:

§ 7422. Civil actions for refund

(a) No suit prior to filing claim for refund.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(b) Protest or duress.—Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress.

(c) Suits against collection officer a bar.—A suit against any officer or employee of the United States (or former officer or employee) or his personal representative for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected shall be treated as if the United States had been a party to such suit in applying the doctrine of res judicata in all suits in respect of any internal revenue tax, and in all proceedings in the Tax Court and on review of decisions of the Tax Court.

(d) Credit treated as payment.—The credit of an overpayment of any tax in satisfaction of any tax liability shall, for the purpose of any suit for refund of such tax liability so satisfied, be deemed to be a

payment in respect of such tax liability at the time such credit is allowed.

(e) Stay of proceedings.—If the Secretary prior to the hearing of a suit brought by a taxpayer in a district court or the United States Court of Federal Claims for the recovery of any income tax, estate tax, gift tax, or tax imposed by chapter 41, 42, 43, or 44 (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the United States Court of Federal Claims, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund. If the taxpayer does not file a petition with the Tax Court for a redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit, or intervene in the event of a suit as described in subsection (c) (relating to suits against officers or employees of the United States), within the period of the stay of proceedings notwithstanding that the time for such pleading may have otherwise expired. The taxpayer shall have the burden of proof with respect to the issues raised by such counterclaim or intervention of the United States except as to the issue of whether the taxpayer has been guilty of fraud with intent to evade tax. This subsection shall not apply to a suit by a taxpayer which, prior to the date of enactment of this title, is

commenced, instituted, or pending in a district court or the United States Court of Federal Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes).

(f) Limitation on right of action for refund.—

(1) General rule.—A suit or proceeding referred to in subsection (a) may be maintained only against the United States and not against any officer or employee of the United States (or former officer or employee) or his personal representative. Such suit or proceeding may be maintained against the United States notwithstanding the provisions of section 2502 of Title 28 of the United States Code (relating to aliens' privilege to sue) and notwithstanding the provisions of section 1502 of such Title 28 (relating to certain treaty cases).

(2) Misjoinder and change of venue.—If a suit or proceeding brought in a United States district court against an officer or employee of the United States (or former officer or employee) or his personal representative is improperly brought solely by virtue of paragraph (1), the court shall order, upon such terms as are just, that the pleadings be amended to substitute the United States as a party for such officer or employee as of the time such action commenced, upon proper service of process on the United States. Such suit or proceeding shall upon request by the United States be transferred to the district or division where it should have been brought if such action initially had been brought against the United States.

(g) Special rules for certain excise taxes imposed by chapter 42 or 43.—

(1) Right to bring actions.—

(A) **In general.**—With respect to any taxable event, payment of the full amount of the first tier tax shall constitute sufficient payment in order to maintain an action under this section with respect to the second tier tax.

(B) **Definitions.**—For purposes of subparagraph (A), the terms "taxable event", "first tier tax", and "second tier tax" have the respective meanings given to such terms by section 4963.

(2) **Limitation on suit for refund.**—No suit may be maintained under this section for the credit or refund of any tax imposed under section 4941, 4942, 4943, 4944, 4945, 4951, 4952, 4955, 4958, 4971, or 4975 with respect to any act (or failure to act) giving rise to liability for tax under such sections, unless no other suit has been maintained for credit or refund of, and no petition has been filed in the Tax Court with respect to a deficiency in, any other tax imposed by such sections with respect to such act (or failure to act).

(3) **Final determination of issues.**—For purposes of this section, any suit for the credit or refund of any tax imposed under section 4941, 4942, 4943, 4944, 4945, 4951, 4952, 4955, 4958, 4971, or 4975 with respect to any act (or failure to act) giving rise to liability for tax under such sections, shall constitute a suit to determine all questions with respect to any other tax imposed with respect to such act (or failure to act) under such sections, and failure by the parties to such suit to bring any such question before the Court shall constitute a bar to such question.

(h) **Special rule for actions with respect to partnership items.**—No action may be brought for a refund attributable to partnership items (as defined

in section 6231(a)(3)) except as provided in section 6228(b) or section 6230(c).

(i) **Special rule for actions with respect to tax shelter promoter and understatement penalties.**—No action or proceeding may be brought in the United States Court of Federal Claims for any refund or credit of a penalty imposed by section 6700 (relating to penalty for promoting abusive tax shelters, etc.) or section 6701 (relating to penalties for aiding and abetting understatement of tax liability).

(j) **Special rule for actions with respect to estates for which an election under section 6166 is made.**—

(1) **In general.**—The district courts of the United States and the United States Court of Federal Claims shall not fail to have jurisdiction over any action brought by the representative of an estate to which this subsection applies to determine the correct amount of the estate tax liability of such estate (or for any refund with respect thereto) solely because the full amount of such liability has not been paid by reason of an election under section 6166 with respect to such estate.

(2) **Estates to which subsection applies.**—This subsection shall apply to any estate if, as of the date the action is filed—

(A) no portion of the installments payable under section 6166 have been accelerated;

(B) all such installments the due date for which is on or before the date the action is filed have been paid;

(C) there is no case pending in the Tax Court with respect to the tax imposed by section 2001 on the estate and, if a notice of deficiency under section 6212 with respect to such tax has been issued, the time for filing a petition with the Tax

Court with respect to such notice has expired; and

(D) no proceeding for declaratory judgment under section 7479 is pending.

(3) **Prohibition on collection of disallowed liability.**—If the court redetermines under paragraph (1) the estate tax liability of an estate, no part of such liability which is disallowed by a decision of such court which has become final may be collected by the Secretary, and amounts paid in excess of the installments determined by the court as currently due and payable shall be refunded.

(k) **Cross references.**—

(1) For provisions relating generally to claims for refund or credit, see chapter 65 (relating to abatements, credit, and refund) and chapter 66 (relating to limitations).

(2) For duty of United States attorneys to defend suits, see section 507 of Title 28 of the United States Code.

(3) For jurisdiction of United States district courts, see section 1346 of Title 28 of the United States Code.

(4) For payment by the Treasury of judgments against internal revenue officers or employees, upon certificate of probable cause, see section 2006 of Title 28 of the United States Code.

26 U.S.C.A. § 4980H provides:

§ 4980H. Shared responsibility for employers regarding health coverage

(a) Large employers not offering health coverage.— If—

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

(b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.—

(1) In general.—If—

(A) an applicable large employer offers to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to 1/12 of $3,000.

(2) **Overall limitation.**—The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

[(3) **Repealed.** Pub.L. 112-10, Div. B, Title VIII, § 1858(b)(4), Apr. 15, 2011, 125 Stat. 169]

(c) **Definitions and special rules.**—For purposes of this section—

(1) **Applicable payment amount.**—The term "applicable payment amount" means, with respect to any month, 1/12 of $2,000.

(2) **Applicable large employer.**—

(A) **In general.**—The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.

(B) **Exemption for certain employers.**—

(i) **In general.**—An employer shall not be considered to employ more than 50 full-time employees if—

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) **Definition of seasonal workers.**—The term "seasonal worker" means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including workers covered by section 500.20(s)(1) of title 29, Code of Federal Regulations and retail workers employed exclusively during holiday seasons.

(C) **Rules for determining employer size.**—For purposes of this paragraph—

(i) **Application of aggregation rule for employers.**—All persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

(ii) **Employers not in existence in preceding year.**—In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(iii) **Predecessors.**—Any reference in this subsection to an employer shall include a

reference to any predecessor of such employer.

(D) **Application of employer size to assessable penalties.**—

(i) **In general.**—The number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating—

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).

(ii) **Aggregation.**—In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be allowed with respect to such persons and such reduction shall be allocated among such persons ratably on the basis of the number of full-time employees employed by each such person.

(E) **Full-time equivalents treated as full-time employees.**—Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

(3) **Applicable premium tax credit and cost-sharing reduction.**—The term "applicable premium tax credit and cost-sharing reduction" means—

(A) any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

(4) **Full-time employee.**—

(A) **In general.**—The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

(B) **Hours of service.**—The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) **Inflation adjustment.**—

(A) **In general.**—In the case of any calendar year after 2014, each of the dollar amounts in subsection (b) and paragraph (1) shall be increased by an amount equal to the product of—

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

(B) **Rounding.**—If the amount of any increase under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the next lowest multiple of $10.

(6) **Other definitions.**—Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same

meaning as when used in such Act.

(7) Tax nondeductible.—For denial of deduction for the tax imposed by this section, see section 275(a)(6).

(d) **Administration and procedure.**—

(1) In general.—Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Time for payment.—The Secretary may provide for the payment of any assessable payment provided by this section on an annual, monthly, or other periodic basis as the Secretary may prescribe.

(3) Coordination with credits, etc.—The Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or cost-sharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

26 U.S.C.A. § 5000A provides:

§ 5000A. Requirement to maintain minimum essential coverage

(a) **Requirement to maintain minimum essential coverage.**—An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

(b) **Shared responsibility payment.**—

(1) **In general.**—If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).

(2) **Inclusion with return.**—Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

(3) **Payment of penalty.**—If an individual with respect to whom a penalty is imposed by this section for any month—

(A) is a dependent (as defined in section 152) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

(B) files a joint return for the taxable year including such month, such individual and the spouse of such individual shall be jointly liable for such penalty.

(c) **Amount of penalty.**—

(1) **In general.**—The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to the lesser of—

(A) the sum of the monthly penalty amounts determined under paragraph (2) for months in the taxable year during which 1 or more such failures occurred, or

(B) an amount equal to the national average premium for qualified health plans which have a bronze level of coverage, provide coverage for the applicable family size involved, and are offered through Exchanges for plan years beginning in the calendar year with or within which the taxable year ends.

(2) **Monthly penalty amounts.**—For purposes of paragraph (1)(A), the monthly penalty amount with respect to any taxpayer for any month during which any failure described in subsection (b)(1) occurred is an amount equal to 1/12 of the greater of the following amounts:

(A) **Flat dollar amount.**—An amount equal to the lesser of—

(i) the sum of the applicable dollar amounts for all individuals with respect to whom such failure occurred during such month, or

(ii) 300 percent of the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

(B) **Percentage of income.**—An amount equal to the following percentage of the excess of the taxpayer's household income for the taxable year over the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer

for the taxable year:

(i) 1.0 percent for taxable years beginning in 2014.

(ii) 2.0 percent for taxable years beginning in 2015.

(iii) 2.5 percent for taxable years beginning after 2015.

(3) **Applicable dollar amount.**—For purposes of paragraph (1)—

(A) In general.—Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $695.

(B) Phase in.—The applicable dollar amount is $95 for 2014 and $325 for 2015.

(C) Special rule for individuals under age 18.—If an applicable individual has not attained the age of 18 as of the beginning of a month, the applicable dollar amount with respect to such individual for the month shall be equal to one-half of the applicable dollar amount for the calendar year in which the month occurs.

(D) Indexing of amount.—In the case of any calendar year beginning after 2016, the applicable dollar amount shall be equal to $695, increased by an amount equal to—

(i) $695, multiplied by

(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year, determined by substituting "calendar year 2015" for "calendar year 1992" in subparagraph (B) thereof.

If the amount of any increase under clause (i) is not a multiple of $50, such increase shall be rounded to the next lowest multiple of $50.

(4) **Terms relating to income and families.**—For purposes of this section—

(A) **Family size.**—The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year.

(B) **Household income.**—The term "household income" means, with respect to any taxpayer for any taxable year, an amount equal to the sum of—

(i) the modified adjusted gross income of the taxpayer, plus

(ii) the aggregate modified adjusted gross incomes of all other individuals who—

(I) were taken into account in determining the taxpayer's family size under paragraph (1), and

(II) were required to file a return of tax imposed by section 1 for the taxable year.

(C) **Modified adjusted gross income.**—The term "modified adjusted gross income" means adjusted gross income increased by—

(i) any amount excluded from gross income under section 911, and

(ii) any amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax.

[(D) **Repealed.** Pub.L. 111-152, Title I, § 1002(b)(1), Mar. 30, 2010, 124 Stat. 1032]

(d) **Applicable individual.**—For purposes of this section—

(1) **In general.**—The term "applicable individual" means, with respect to any month, an individual

other than an individual described in paragraph (2), (3), or (4).

(2) **Religious exemptions.**—

(A) **Religious conscience exemption.**—Such term shall not include any individual for any month if such individual has in effect an exemption under section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act which certifies that such individual is—

(i) a member of a recognized religious sect or division thereof which is described in section 1402(g)(1), and

(ii) an adherent of established tenets or teachings of such sect or division as described in such section.

(B) **Health care sharing ministry.**—

(i) **In general.**—Such term shall not include any individual for any month if such individual is a member of a health care sharing ministry for the month.

(ii) **Health care sharing ministry.**—The term "health care sharing ministry" means an organization—

(I) which is described in section 501(c)(3) and is exempt from taxation under section 501(a),

(II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,

(III) members of which retain membership even after they develop a medical condition,

(IV) which (or a predecessor of which) has

been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without interruption since at least December 31, 1999, and

(V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.

(3) **Individuals not lawfully present.**—Such term shall not include an individual for any month if for the month the individual is not a citizen or national of the United States or an alien lawfully present in the United States.

(4) **Incarcerated individuals.**—Such term shall not include an individual for any month if for the month the individual is incarcerated, other than incarceration pending the disposition of charges.

(e) **Exemptions.**—No penalty shall be imposed under subsection (a) with respect to—

(1) **Individuals who cannot afford coverage.**—

(A) **In general.**—Any applicable individual for any month if the applicable individual's required contribution (determined on an annual basis) for coverage for the month exceeds 8 percent of such individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act. For purposes of applying this subparagraph, the taxpayer's household income shall be increased by any exclusion from gross income for any portion of the required contribution made through a salary reduction arrangement.

(B) **Required contribution.**—For purposes of this paragraph, the term "required contribution" means—

(i) in the case of an individual eligible to purchase minimum essential coverage consisting of coverage through an eligible-employer-sponsored plan, the portion of the annual premium which would be paid by the individual (without regard to whether paid through salary reduction or otherwise) for self-only coverage, or

(ii) in the case of an individual eligible only to purchase minimum essential coverage described in subsection (f)(1)(C), the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides (without regard to whether the individual purchased a qualified health plan through the Exchange), reduced by the amount of the credit allowable under section 36B for the taxable year (determined as if the individual was covered by a qualified health plan offered through the Exchange for the entire taxable year).

(C) **Special rules for individuals related to employees.**—For purposes of subparagraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by reason of a relationship to an employee, the determination under subparagraph (A) shall be made by reference to required contribution of the employee.

(D) **Indexing.**—In the case of plan years beginning in any calendar year after 2014,

subparagraph (A) shall be applied by substituting for '8 percent' the percentage the Secretary of Health and Human Services determines reflects the excess of the rate of premium growth between the preceding calendar year and 2013 over the rate of income growth for such period.

(2) **Taxpayers with income below filing threshold.**—Any applicable individual for any month during a calendar year if the individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act is less than the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer.

(3) **Members of Indian tribes.**—Any applicable individual for any month during which the individual is a member of an Indian tribe (as defined in section 45A(c)(6)).

(4) **Months during short coverage gaps.**—

(A) **In general.**—Any month the last day of which occurred during a period in which the applicable individual was not covered by minimum essential coverage for a continuous period of less than 3 months.

(B) **Special rules.**—For purposes of applying this paragraph—

(i) the length of a continuous period shall be determined without regard to the calendar years in which months in such period occur,

(ii) if a continuous period is greater than the period allowed under subparagraph (A), no exception shall be provided under this paragraph for any month in the period, and

(iii) if there is more than 1 continuous period

described in subparagraph (A) covering months in a calendar year, the exception provided by this paragraph shall only apply to months in the first of such periods.

The Secretary shall prescribe rules for the collection of the penalty imposed by this section in cases where continuous periods include months in more than 1 taxable year.

(5) **Hardships.**—Any applicable individual who for any month is determined by the Secretary of Health and Human Services under section 1311(d)(4)(H) to have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.

(f) **Minimum essential coverage.**—For purposes of this section—

(1) **In general.**—The term "minimum essential coverage" means any of the following:

(A) **Government sponsored programs.**—Coverage under—

(i) the Medicare program under part A of title XVIII of the Social Security Act,

(ii) the Medicaid program under title XIX of the Social Security Act,

(iii) the CHIP program under title XXI of the Social Security Act,

(iv) medical coverage under chapter 55 of title 10, United States Code, including coverage under the TRICARE program;

(v) a health care program under chapter 17 or 18 of title 38, United States Code, as determined by the Secretary of Veterans Affairs, in coordination with the Secretary of Health and Human Services and the Secretary,

(vi) a health plan under section 2504(e) of title 22, United States Code (relating to Peace Corps volunteers); or

(vii) the Nonappropriated Fund Health Benefits Program of the Department of Defense, established under section 349 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337; 10 U.S.C. 1587 note).

(B) **Employer-sponsored plan.**—Coverage under an eligible employer-sponsored plan.

(C) **Plans in the individual market.**—Coverage under a health plan offered in the individual market within a State.

(D) **Grandfathered health plan.**—Coverage under a grandfathered health plan.

(E) **Other coverage.**—Such other health benefits coverage, such as a State health benefits risk pool, as the Secretary of Health and Human Services, in coordination with the Secretary, recognizes for purposes of this subsection.

(2) **Eligible employer-sponsored plan.**—The term "eligible employer-sponsored plan" means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to the employee which is—

(A) a governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act), or

(B) any other plan or coverage offered in the small or large group market within a State.

Such term shall include a grandfathered health plan described in paragraph (1)(D) offered in a group market.

(3) **Excepted benefits not treated as minimum**

essential coverage.—The term "minimum essential coverage" shall not include health insurance coverage which consists of coverage of excepted benefits—

(A) described in paragraph (1) of subsection (c) of section 2791 of the Public Health Service Act; or

(B) described in paragraph (2), (3), or (4) of such subsection if the benefits are provided under a separate policy, certificate, or contract of insurance.

(4) **Individuals residing outside United States or residents of territories.**—Any applicable individual shall be treated as having minimum essential coverage for any month—

(A) if such month occurs during any period described in subparagraph (A) or (B) of section 911(d)(1) which is applicable to the individual, or

(B) if such individual is a bona fide resident of any possession of the United States (as determined under section 937(a)) for such month.

(5) **Insurance-related terms.**—Any term used in this section which is also used in title I of the Patient Protection and Affordable Care Act shall have the same meaning as when used in such title.

(g) **Administration and procedure.**—

(1) **In general.**—The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) **Special rules.**—Notwithstanding any other provision of law—

(A) **Waiver of criminal penalties.**—In the case of

any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.

(B) **Limitations on liens and levies.**—The Secretary shall not—

(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

(ii) levy on any such property with respect to such failure.

28 U.S.C. § 1341 provides:

§ 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

RESPONDENT'S BRIEF

No. 11-398

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

v.

STATE OF FLORIDA, ET AL.,

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PRIVATE RESPONDENTS ON THE INDIVIDUAL MANDATE

KAREN R. HARNED
NFIB SMALL BUSINESS LEGAL CENTER
1201 F St. NW, Suite 200
Washington, DC 20004

PROF. RANDY E. BARNETT
GEORGETOWN UNIV. LAW CENTER
600 New Jersey Ave. NW
Washington, DC 20001

MICHAEL A. CARVIN
Counsel of Record
GREGORY G. KATSAS
C. KEVIN MARSHALL
HASHIM M. MOOPPAN
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Private Respondents

QUESTION PRESENTED

Congress effected a sweeping and comprehensive restructuring of the Nation's health-insurance markets in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 109 (2010) (collectively, the "Act" or the "ACA"). Here, the question presented is:

Whether Congress exceeded its Article I authority when it enacted the ACA's mandate that virtually every individual American must obtain health insurance, 26 U.S.C.A. § 5000A(a).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Three private individuals or organizations were Plaintiffs-Appellees below and are Respondents here: National Federation of Independent Business ("NFIB"); Kaj Ahlburg; and Mary Brown. Two other private individuals were made Respondents here by this Court's order of January 17, 2012: Dana Grimes and David Klemencic. NFIB is a nonprofit mutual benefit corporation that promotes and protects the rights of its members to own, operate, and grow their businesses across the fifty States and the District of Columbia. NFIB is not a publicly traded corporation, issues no stock, and has no parent corporation. There is no publicly held corporation with more than a 10% ownership stake in NFIB.

26 States, by and through their Attorneys General or Governors, were Plaintiffs-Appellees/Cross-Appellants below and are Respondents here: Alabama; Alaska; Arizona; Colorado; Florida; Georgia; Idaho; Indiana; Iowa; Kansas; Louisiana; Maine; Michigan; Mississippi; Nebraska; Nevada; North Dakota; Ohio; Pennsylvania; South Carolina; South Dakota; Texas; Utah; Washington; Wisconsin; and Wyoming.

Six federal officers or agencies were Defendants-Appellants/Cross-Appellees below and are Petitioners here: Kathleen Sebelius, in her official capacity as Secretary of Health and Human Services; Timothy F. Geithner, in his official capacity as Secretary of the Treasury; Hilda L. Solis, in her official capacity as Secretary of Labor; and the United States Departments of Health and Human Services, of the Treasury, and of Labor.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

BRIEF FOR PRIVATE RESPONDENTS ON THE INDIVIDUAL MANDATE 1

RESTATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 7

ARGUMENT 11

I. CONGRESS' POWERS ARE LIMITED AND ENUMERATED TO PROTECT INDIVIDUAL LIBERTY, WHICH IS THREATENED BY THE ACT'S UNPRECEDENTED PURCHASE MANDATE 11

II. THE ACT'S MANDATE THAT INDIVIDUALS MUST PURCHASE INSURANCE EXCEEDS CONGRESS' COMMERCE POWER 15

A. Under The Commerce Clause, The Mandate Does Not Regulate Interstate Commerce Itself, In Either Its Channels Or Instrumentalities 15

B. Under The Necessary And Proper Clause, The Mandate Does Not Regulate Conduct That Substantially Affects Interstate Commerce Or The Regulation Thereof 19

1. The Nature And Scope Of The "Substantial Effects" Doctrine 19

2. The Mandate Is Not A "Necessary" Means Of Carrying Into Execution Congress' Commerce Power 28

a. Lowering Premiums By Forcing Healthy Individuals Into The Risk Pool 28

b. Preventing Strategic "Adverse Selection" 37

c. Reducing "Cost-Shifting" 47

3. The Mandate Is Not A "Proper" Means Of Carrying Into Execution Congress' Commerce Power 56

III. THE ACT'S MANDATE THAT INDIVIDUALS MUST PURCHASE INSURANCE EXCEEDS CONGRESS' TAX POWER 63

A. Neither The Mandate Nor The Non-Compliance Penalty Is A Tax 63

B. Any Tax Here Would Be A Direct Tax That Congress Failed To Apportion 65

CONCLUSION 67

TABLE OF AUTHORITIES

Page(s)

CASES

Allied Structural Steel Co. v. Spannaus,
438 U.S. 234 (1978) 62

Armstrong v. United States,
364 U.S. 40 (1960) 40, 61

Bond v. United States,
131 S. Ct. 2355 (2011) 12, 60

Bromley v. McCaughn,
280 U.S. 124 (1929) 66

Calder v. Bull,
3 U.S. (3 Dall.) 386 (1798) 13, 61

Camps Newfound/Owatonna, Inc. v. Town of Harrison,
520 U.S. 564 (1997) 16

Child Labor Tax Case,
259 U.S. 20 (1922) 64

City of Boerne v. Flores,
521 U.S. 507 (1997) 60

Cohens v. Virginia,
19 U.S. (6 Wheat.) 264 (1821) 42

Consolidated Edison Co. v. NLRB,
305 U.S. 197 (1938) 51, 52

De Buono v. NYSA-ILA Med. & Clinical Servs. Fund,
520 U.S. 806 (1997) 59

E. Enters. v. Apfel,
524 U.S. 498 (1998) 14, 62

Fernandez v. Wiener,
326 U.S. 340 (1945) 66

FMC Corp. v. Holliday,
498 U.S. 52 (1990) 59

Gibbons v. Ogden,
22 U.S. (9 Wheat.) 1 (1824) ..... *passim*

Gloucester Ferry Co. v. Pennsylvania,
114 U.S. 196 (1885) 17

Gonzales v. Raich,
545 U.S. 1 (2005) ..... *passim*

Heart of Atlanta Motel, Inc. v. United States,
379 U.S. 241 (1964) 22, 50

Ingersoll-Rand Co. v. McClendon,
498 U.S. 133 (1990) 21

Jefferson Cnty. v. Acker,
527 U.S. 423 (1999) 67

Jinks v. Richland Cnty.,
538 U.S. 456 (2003) ..... *passim*

Katzenbach v. McClung,
379 U.S. 294 (1964) 45, 51

Kinsella v. United States ex rel. Singleton,
361 U.S. 234 (1960) 12

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) ..... *passim*

New York v. United States,
505 U.S. 144 (1992) 12, 31, 61

NLRB v. Jones & Laughlin Steel Corp.,
301 U.S. 1 (1937) ..... *passim*

Perez v. United States,
402 U.S. 146 (1971) 16, 27, 49

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) 58

Pollock v. Farmers' Loan & Trust Co.,
158 U.S. 601 (1895) 65, 66

Printz v. United States,
521 U.S. 898 (1997) .....*passim*

Rancho Viejo v. Norton,
334 F.3d 1158 (D.C. Cir. 2003) 27

Rust v. Sullivan,
500 U.S. 173 (1991) 32

S. Ry. Co. v. United States,
222 U.S. 20 (1911) 16

Selective Draft Cases,
245 U.S. 366 (1918) 58

Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) .....*passim*

Shreveport Rate Cases,
234 U.S. 342 (1914) 19, 21

Sonzinsky v. United States,
300 U.S. 506 (1937) 64

Thomas More Law Ctr. v. Obama,
651 F.3d 529 (6th Cir. 2011) .....*passim*

Thomas v. United States,
192 U.S. 363 (1904) 65, 66

Trs. of Dartmouth College v. Woodward,
17 U.S. (4 Wheat.) 518 (1819) 61

United States v. Comstock,
130 S. Ct. 1949 (2010) .....*passim*

United States v. Darby,
312 U.S. 100 (1941) .....*passim*

United States v. DeWitt,
76 U.S. 41 (1869) 43, 44

United States v. Lopez,
514 U.S. 549 (1995) ..... *passim*

United States v. Morrison,
529 U.S. 598 (2000) ..... *passim*

United States v. Reorganized CF&I Fabricators of Utah, Inc.,
518 U.S. 234 (1996) 64

United States v. Sanchez,
340 U.S. 42 (1950) 64

United States v. Se. Underwriters Ass'n,
322 U.S. 533 (1944) 15, 16

United States v. Wrightwood Dairy Co.,
315 U.S. 110 (1942) ..... *passim*

US Term Limits, Inc. v. Thornton,
514 U.S. 779 (1995) 60

Vanhorne's Lessee v. Dorrance,
2 U.S. (2 Dall.) 304 (1795) 13, 61

W. Lynn Creamery, Inc. v. Healy,
512 U.S. 186 (1994) 11, 18

Westinghouse Elec. Corp. v. Tully,
466 U.S. 388 (1984) 18

Wickard v. Filburn,
317 U.S. 111 (1942) ..... *passim*

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 43

CONSTITUTIONAL AUTHORITIES AND STATUTORY PROVISIONS

U.S. Const., amend. X 14, 60

U.S. Const., art. I, § 8, cl. 1 63

U.S. Const., art. 1, § 8, cl. 3 15

U.S. Const., art. 1, § 8, cl. 18 ..... 15, 19, 41

U.S. Const., art. I, § 9, cl.4 ..... 63, 65
42 U.S.C. § 1395ww(d) 41
26 U.S.C.A. § 5000A(a) 2, 6, 63
26 U.S.C.A. § 5000A(b) 6, 54, 63, 67
26 U.S.C.A. § 5000A(c) 67
26 U.S.C.A. § 5000A(d) 6
26 U.S.C.A. § 5000A(e) 67
42 U.S.C.A. § 300gg-1(b) 3
42 U.S.C.A. § 300gg-7 3
42 U.S.C.A. § 18091(a) ..... *passim*

OTHER AUTHORITIES

"A Friend to the Union," *reprinted in John Marshall's Defense of McCulloch v. Maryland* (Gerald Gunther ed., 1969) 44

1 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) 15, 16, 41

Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267 (1993) ..... *passim*

Prosser & Keeton on the Law of Torts (5th ed. 1984) 13

2 St. George Tucker, *Blackstone's Commentaries* (1803) 13

3 Joseph Story, *Commentaries on the Constitution of the United States* (1833) 61

BRIEF FOR PRIVATE RESPONDENTS ON THE INDIVIDUAL MANDATE

Private Respondents respectfully submit this brief arguing that the ACA's individual mandate is unconstitutional.

RESTATEMENT OF THE CASE

Having already comprehensively described the ACA and this litigation, Private Petrs. Severability Br. 1-26, we focus here on why the mandate exceeds Congress' Article I authority.

1. As its title reflects, the Patient Protection and Affordable Care Act had two primary goals in restructuring the Nation's health-insurance markets: increasing health-insurance coverage and decreasing health-insurance costs. *See id.* 2-5. Among its most significant means of increasing coverage, the Act contains regulations forcing insurers to provide below-cost insurance to the less healthy. But those burdensome regulations alone would undermine the goal of decreasing costs. Congress thus adopted the individual mandate, which forces healthier people to purchase above-cost insurance, thereby counteracting the regulations' inflationary effect on premiums. In short, the mandate's primary purpose and effect is not to regulate uninsured individuals engaging in harmful economic activity, but to compel the uninsured into engaging in economic activity that is harmful for them but beneficial to third parties. Never before has Congress enacted such a regulatory mandate.

a. The Act prohibits insurer practices that Congress believed were "discrimination based on health status," such as declining to insure individuals who are already sick or setting premiums

based on individual actuarial risk. *Id.* 3-4, 10-11. As of 2014, the Act thus requires insurers to provide "guaranteed-issue" coverage and charge "community-rated" premiums. *Id.* 10-11. It relatedly limits their ability to restrict the scope and duration of covered services. *Id.* 11.

Consequently, the Act effectively compels insurers to offer limitless health insurance to any individual, no matter how sick, at average rates that ignore actuarial risk. These measures further the goal of expanding coverage, but undermine the goal of reducing costs. The Congressional Budget Office ("CBO") found that the various insurance regulations, standing alone, would raise costs in the individual market by roughly *27-30%*. *See id.* 11.

b. To counteract those regulations' inflationary effect, Congress heeded the insurance industry's lobbying for a mandate compelling individuals to obtain insurance. *See id.* 12; *see also* AHIP Severability Br. 8 ("Congress adopted its insurance-market reforms ... together with the mandate as a package deal."). Congress claimed that the "[r]equirement" for virtually every American "to maintain minimum essential coverage" (26 U.S.C.A. § 5000A(a)) reduces premiums in three ways.

First, and most significantly, Congress found that the mandate directly subsidizes costs for insurers and their customers by "broaden[ing] the health insurance risk pool." *See* 42 U.S.C.A. § 18091(a)(2)(I). Specifically, it "will add millions of new consumers to the health insurance market" (*id.* § 18091(a)(2)(C)), who will be profitable for insurers because they primarily will be "healthy individuals" (*id.* § 18091(a)(2)(I)) who otherwise would not have

purchased comprehensive and collectively-priced insurance. *See* Private Petrs. Severability Br. 13-14. Indeed, CBO estimates that the increased demand caused by the mandate will, in an inversion of the normal economic axiom, *lower* prices in the non-group market by *15-20%* (to $5800 from roughly $7000 annually)—essentially offsetting two-thirds of the increase caused by the insurance regulations and corresponding to a *$28-39 billion subsidy* in 2016 alone. *See id.* 14 & n.15; *see also* AARP Mandate Br. 30 (regulations "would increase rates and make coverage unaffordable for many if not offset by an expansion of the insurance risk pool accomplished by the [mandate]"). Congress thus correctly found that the mandate's conscription of "healthy individuals" was "essential" to "lower[ing] health insurance premiums" given the new regulations. *See* 42 U.S.C.A. § 18091(a)(2)(I).

Second, Congress asserted that the mandate protects insurers from a strategic type of "adverse selection" supposedly enabled by the bar on health-status "discrimination"—namely, that people "would wait to purchase health insurance until they need[] care." *See id.* The credibility of Congress' assertion, however, is seriously undermined by its lack of theoretical or empirical support.

Such gamesmanship is theoretically implausible because, as the Eleventh Circuit emphasized, the Act allows insurers to adopt limited enrollment-periods and coverage waiting-periods, which will make it enormously risky to delay purchasing insurance by gambling that coverage will be available when needed. *See* Pet.App. 178a n.139 (citing 42 U.S.C.A. §§ 300gg-1(b), 300gg-7). Notably, neither the

Government nor its countless *amici* have attempted to explain how such gamesmanship could be perpetrated. Moreover, no empirical evidence exists regarding the extent to which such gamesmanship might have occurred. Of course, there was testimony before Congress that the States which enacted guaranteed-issue and community-rating rules without a mandate had suffered from insurance "death spiral[s]," in which rising premiums caused individuals to drop coverage, which caused premiums to rise more. *See* Govt. Mandate Br. 15-16, 30. But no effort has been made to estimate the extent to which healthy individuals were delaying coverage based on the perceived ability to invoke the "nondiscrimination" protections later, rather than dropping coverage simply because they were unwilling to pay the inflated cost of premiums. *See, e.g.*, Blue Cross & Blue Shield of MA Mandate Br. 12-13 (describing this non-strategic reason for declining to purchase insurance when premiums are inflated by insurance regulations). Tellingly, had gamesmanship been a serious concern, Congress could have prevented it by imposing a cut-off date or age for invoking the "nondiscrimination" protections.

Third, Congress stated that the mandate indirectly lowers premiums by reducing the amount of uncompensated care. *See* 42 U.S.C.A. § 18091(a)(2)(F). Specifically, Congress asserted that some number of uninsured individuals received $43 billion of uncompensated care in 2008, causing average annual premiums to rise by $1,000 due to "cost-shifting" from providers to insurers. *See id.* But again, the credibility of Congress' assertion is seriously undermined by its lack of theoretical or empirical support.

As the Eleventh Circuit and expert economists have explained: (1) the overwhelming majority of uncompensated care is attributable to individuals unaffected by the mandate, such as those who will *voluntarily* purchase insurance under the Act's myriad means of expanding coverage or who will be *exempt* from the mandate; and conversely (2) those targeted by the mandate are *unlikely* to obtain annual healthcare at all and mostly *pay* when they do. *See* Private Petrs. Severability Br. 15-18; Economists Mandate Br.; *see also* AHIP Severability Br. 19 ("[H]alf of the population accounts for just 3% of health care spending," whereas "just 5% of the population accounts for almost 50% of all health care costs."). Again, neither the Government nor its *amici* have offered an estimate of the actual amount of uncompensated care the mandate would eliminate. Indeed, Congress' general ban on purchasing inexpensive catastrophic-coverage plans, *see* Pet.App. 35a, confirms that its goal was not preventing future uncompensated care, but compelling immediate subsidization of insurers and their voluntary customers.

In sum, the predominant purpose and effect of conscripting the uninsured individuals affected by the mandate was not to prevent *some* unidentified number of them from engaging in strategic "adverse selection" or "cost-shifting," but instead to force *most* of them to purchase insurance that was economically disadvantageous for them, but economically advantageous for insurers and their customers. Ultimately, though, whatever their relative factual support, none of these justifications legally establishes the mandate's constitutionality.

c. Precisely because it is "essential" to "broaden the health insurance risk pool" to "lower ... premiums," 42 U.S.C.A. § 18091(a)(2)(I), Congress imposed a *legal duty* for virtually everyone to obtain insurance. Specifically, the mandate is a substantive "[r]equirement" that every "applicable individual *shall* for each month beginning after 2013 ensure that the individual ... is covered under minimum essential coverage." 26 U.S.C.A. § 5000A(a) (emphasis added); *see also id.* § 5000A(d) (exempting only illegal aliens, incarcerated prisoners, and certain religious objectors). The mandate is enforced through a non-compliance "penalty" imposed on most "taxpayer[s]" who "fail[] to meet the requirement" to obtain insurance. *Id.* § 5000A(b)(1); *see also id.* § 5000A(e) (exempting from the penalty five classes of individuals who remain subject to the mandate).

As we have explained, the ACA's text, structure, and context establish that the mandate in § 5000A(a) is a free-standing legal duty to obtain insurance—*i.e.*, compliance with the mandate is neither satisfied nor excused by paying the penalty in § 5000A(b), as would be the case if the mandate merely described the voluntary predicate for avoiding a tax on being uninsured. *See* Private Resps. AIA Br. 3-5.

Congress knew its decision to impose a federal purchase mandate was unprecedented. The Congressional Research Service ("CRS") warned that "[w]hether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service." Pet.App. 105a-106a.

2. Private Respondents NFIB, Ahlburg, and Brown, along with 26 States, brought this action challenging the ACA's facial validity. *Id.* 2a. As relevant here, they argued that the Act's individual mandate exceeds Congress' Article I authority. *Id.* 3a. The district court held that the mandate is unconstitutional. *Id.* 365a.

The Eleventh Circuit affirmed that holding, in an opinion jointly authored by Chief Judge Dubina and Judge Hull, from which Judge Marcus dissented. The court summarized its analysis as follows: "This economic mandate represents a wholly novel and potentially unbounded assertion of congressional authority.... We have not found any generally applicable, judicially enforceable limiting principle that would permit us to uphold the mandate without obliterating the boundaries inherent in the system of enumerated congressional powers." *Id.* 187a.

SUMMARY OF ARGUMENT

I. The mandate imposes an extraordinary and unprecedented duty on Americans to enter into costly private contracts. By commanding citizens to subsidize voluntary participants in the insurance industry through disadvantageous contracts, it exemplifies the threat to individual liberty that occurs when Congress exceeds its limited and enumerated powers.

II. Under the Commerce Clause, Congress has the power to regulate interstate commerce by prescribing the rules that govern interstate commercial intercourse. But forcing people into commerce does not regulate commerce. Otherwise, Congress could compel the purchase of *any* product.

Under the Necessary and Proper Clause, Congress also may employ incidental means for carrying into execution its power to regulate interstate commerce. This Court has established the basic contours of that authority through its doctrine that Congress may regulate certain activities that "substantially affect" interstate commerce or its regulation.

The "substantial effects" cases have turned on whether the regulation is "necessary"—*i.e.*, whether the means selected are plainly adapted or otherwise rationally related to *implementing* the legitimate end of regulating interstate commerce. The Government erroneously reads those cases to allow Congress to choose *any* rational means that *advances or promotes* interstate commerce. But this Court's precedents instead demonstrate that the requisite connection exists only where the regulated conduct *itself* (1) substantially interferes with interstate commerce or its regulation, (2) is either economic in nature or an impediment to the effective execution of a commercial regulatory scheme, and (3) could be regulated without effectively authorizing plenary federal power. None of the mandate's asserted justifications satisfies these requirements.

Congress emphasized that the mandate will lower premiums by forcing healthy individuals into the insurance risk pool. The relevant question, however, is not whether Congress' *regulation* will beneficially affect commerce, but whether the *regulated conduct* negatively affects commerce in a cognizable way. And uninsured status neither interferes with commerce or its regulation nor constitutes economic activity. Instead, the

uninsured's *defining* characteristic is their *non-participation* in commerce. If that nonparticipation can be overridden simply to benefit voluntary market participants, then Congress could conscript Americans to purchase *any* product.

Studiously avoiding Congress' principal subsidization justification, the Government instead defends the mandate on two purportedly narrow grounds: *first*, that the mandate will prevent strategic "adverse selection" by some uninsured individuals who otherwise might delay purchasing insurance given the Act's promise of protection from later health-status "discrimination"; and *second*, that the mandate will reduce "cost-shifting" by some uninsured individuals who otherwise will receive uncompensated healthcare.

The threshold flaw with these seemingly fact-based defenses is that they are not judicially enforceable limits on Congress' authority to impose purchase mandates. The Government provides no principled legal reason why Congress has the power to mandate insurance purchases to prevent any strategic "adverse selection" or "cost-shifting" that some uninsured individuals might have caused in the future, but somehow lacks the power to mandate such purchases to achieve the far more significant and immediate effect of forcing all the uninsured to subsidize insurers so that they can lower premiums now. Instead, the Government's reasoning confirms that no constitutionally material distinction exists.

Moreover, the Government's defenses are flawed even on their own terms. As for strategic "adverse selection," even if that practice were to occur, the effective execution of the ACA's "nondiscrimination"

bar would not be undercut simply because it would be costly for the regulated insurers that uninsured individuals were invoking their statutory rights. Although Congress has the power to make a regulatory scheme effective by eliminating barriers to its complete enforcement, Congress lacks the power to *offset the costs* of a *fully executed* scheme by conscripting strangers to that scheme who are otherwise beyond its commerce power. As for "cost-shifting," the mandate does not regulate the failure to pay for healthcare, but rather the failure to purchase health insurance. Yet Congress lacks the power to regulate a practice that is *outside* the commerce power simply because *some* of those who engage in it are also statistically likely to engage in regulable conduct *in the future*. Both of the Government's expansive theories would enable Congress to mandate the purchase of any product. And this Court should be particularly loathe to accept either justification because the mandate's predominant purpose and effect was instead to conscript the uninsured to provide a $28-39 billion annual subsidy to insurers and their customers.

At a minimum, the mandate is not a "proper" means for carrying into execution Congress' power to regulate interstate commerce. Far from being an incidental means consistent with the Constitution's letter and spirit, the mandate is an unprecedented and draconian regulation that fails to accommodate the States' traditional regulatory role and compels individuals to subsidize legal strangers through economically disadvantageous contracts.

III. The mandate cannot be upheld under the tax power. The mandate itself is a substantive

regulatory requirement to purchase insurance, not a tax. The Government's startling suggestion that law-abiding citizens can ignore that requirement so long as they pay the non-compliance sanction is foreclosed by the mandate's unambiguous text and Congress' unambiguous intent. Moreover, the sanction for unlawfully failing to purchase insurance is a penalty, not a tax, and Congress affirmatively disavowed any invocation of its tax power regardless. Finally, any tax here would be a direct tax that Congress unconstitutionally failed to apportion.

ARGUMENT

I. CONGRESS' POWERS ARE LIMITED AND ENUMERATED TO PROTECT INDIVIDUAL LIBERTY, WHICH IS THREATENED BY THE ACT'S UNPRECEDENTED PURCHASE MANDATE

"[T]he Founders denied the National Government" a "plenary police power" and "reposed [it] in the States." *United States v. Morrison*, 529 U.S. 598, 618 (2000). Accordingly, while the powers that "remain in the State governments are numerous and indefinite," "[t]he powers delegated ... to the federal government are few and defined." *United States v. Lopez*, 514 U.S. 549, 552 (1995). The Commerce Clause, for example, "was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994). Similarly, the Necessary and Proper Clause was "not itself a grant of power, but a *caveat* that the Congress possesses all the means necessary to carry out [its] specifically

granted ... powers." *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960); *see also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406, 420-21 (1819) (the clause "remove[s] all doubts respecting ... incidental powers"). Of course, "the great changes that ha[ve] occurred in the way business [is] carried on" have "greatly expanded the ... authority of Congress" under its commerce power. *Lopez*, 514 U.S. at 556. But this Court has *always* admonished that appeals to "our complex society" can never be allowed to "effectually obliterate the distinction between what is national and what is local." *Id.* at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937)).

Preserving "our Government's federal structure" is essential, "not [to] protect the sovereignty of [the] States ... as abstract political entities," but "for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992). Our Federalism "enhances freedom" by "secur[ing] to citizens the liberties that derive from the diffusion of sovereign power." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). It protects against a *politically unresponsive* government, by protecting citizens from "having to rely solely upon the political processes that control a remote central power." *Id.* And it protects against a *substantively unchecked* government, "[b]y denying any one government complete jurisdiction over all the concerns of public life." *Id.* While it "may appear 'formalistic' in a given case to partisans of the measure at issue," the Constitution divides power "precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Printz v. United States*, 521 U.S. 898, 933 (1997).

The threat to individual liberty is especially acute when federal regulation elides the "deeply rooted" "difference ... between 'misfeasance' and 'nonfeasance'—[*i.e.*,] between [an individual's] active misconduct working positive injury to others" and his passive "failure to take steps to protect them from harm." *Prosser & Keeton on the Law of Torts* § 56, 373 (5th ed. 1984). That traditional distinction reflects the greater restraint on freedom from laws mandating activity: whereas restrictions against "the commission of ... acts of harm" only limit one's choices, "mandate[s]" directly "forc[e] men to help one another," leaving no other choices. *See id.* Mandates to act for third-party benefit thus infringe upon a fundamental principle of Anglo-American jurisprudence: "[l]et a man ... be ever so abandoned in his principles, or vitious in his practice[;] provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws." 2 St. George Tucker, *Blackstone's Commentaries*, 124 (1803).

Particularly suspect are mandates that "take[] property from A. and give[] it to B," thus usurping the power of individuals to preserve their property and to choose with whom they financially associate. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.). In the Framers' generation, this Court thought it "against all reason and justice" to "presume[]" that sovereigns could compel such private subsidization, *id.*, describing such mandates not only as "contrary both to the letter and spirit of the Constitution," but as "monster[s] in legislation [that] shock all mankind," *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795). That extreme skepticism persists in the modern era. *See,*

e.g., *E. Enters. v. Apfel*, 524 U.S. 498, 523 (1998) (plurality opinion); *id.* at 549-50 (Kennedy, J., concurring in the judgment and dissenting in part).

Thus, in depriving Congress of a "plenary police power," the Founders reduced the opportunity for "tyranny and abuse" that federal mandates pose. *See Lopez*, 514 U.S. at 552, 566. As the Eleventh Circuit noted, even though the authority to mandate activity is a "highly attractive power" (*Printz*, 521 U.S. at 905), Congress has historically restricted itself to a "limited set of personal mandates" that "contain clear foundations in the constitutional text" and are traditional "duties owed to the government attendant to citizenship." *See* Pet.App. 106a-109a.

CBO thus recognized that Congress "has never required people to buy any good or service as a condition of lawful residence in the United States," but instead regulated only "parties to economic transactions." *Id.* 105a. Over "two centuries of apparent congressional avoidance of th[is] practice," *standing alone*, "tends to negate the existence of the congressional power asserted." *Printz*, 521 U.S. at 918. More fundamentally, as demonstrated below, Congress' power to regulate interstate commerce does not remotely authorize it to regulate individuals whose defining characteristic is their commercial non-participation. Therefore, just as this Court rejected Congress' novel attempt to use the commerce power to impose a mandate that "commandeer[ed]" the States, *id.* at 925, 933, so too should it reject Congress' unprecedented mandate that commandeers "the people" to purchase insurance for the benefit of insurance market participants, *see* U.S. Const., amend. X.

II. THE ACT'S MANDATE THAT INDIVIDUALS MUST PURCHASE INSURANCE EXCEEDS CONGRESS' COMMERCE POWER

Under the Constitution, Congress has the power "[t]o regulate Commerce ... among the several States" and "[t]o make all Laws which shall be necessary and proper for carrying into Execution th[at] ... Power[]." U.S. Const., art. 1, § 8, cls. 3, 18. Under controlling precedent, there are "three broad categories of activity that Congress may regulate under [that] commerce power": (1) "the use of the channels of interstate commerce"; (2) the operation of "the instrumentalities of interstate commerce"; and (3) "those activities that substantially affect interstate commerce" or its regulation. *See Lopez*, 514 U.S. at 558-59, 561; *Gonzales v. Raich*, 545 U.S. 1, 16-17, 22 (2005). Yet none of those "categories of activity" covers the inactivity regulated by the mandate—*i.e.*, the non-purchase of health insurance.

A. Under The Commerce Clause, The Mandate Does Not Regulate Interstate Commerce Itself, In Either Its Channels Or Instrumentalities

The interstate "commerce" that Congress may regulate is "commercial intercourse." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824); *Lopez*, 514 U.S. at 553; *see also* 1 Samuel Johnson, *A Dictionary of the English Language* 421 (6th ed. 1785) (defining "commerce" as "exchange of one thing for another"; "trade"; "traffick"; or "intercourse"). That "include[s] ... business[es] in which persons b[uy] and s[ell], [or] bargain[] and contract[]," such as "insurance." *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 539 (1944). And Congress

"regulate[s]" that "commercial intercourse" by "prescribing rules for carrying [it] on." *Gibbons*, 22 U.S. at 189-90; *Lopez*, 514 U.S. at 553; *see also* 2 Johnson, *supra*, 483 (defining "to regulate" as "to adjust by rule or method" or "to direct").

Thus, at the core of Congress' commerce power is the authority to set rules for use of the "channels" and "instrumentalities" of commercial intercourse, "since they are the ingredients of interstate commerce itself." *Raich*, 545 U.S. at 34 (Scalia, J., concurring in the judgment). Congress may ensure that goods flowing in interstate channels are free from both invidious restraints, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997) (discriminatory state laws), and undesirable uses, *United States v. Darby*, 312 U.S. 100, 113-115 (1941) (goods made in sub-standard labor conditions). Likewise, Congress may protect the instrumentalities of interstate commerce from external impairment, *Perez v. United States*, 402 U.S. 146, 150 (1971) (aircraft destruction), or restrict their internal operation, *S. Ry. Co. v. United States*, 222 U.S. 20, 24 (1911) (railroad safety standards). In sum, the Commerce Clause broadly empowers Congress to prescribe the rules governing participation in interstate commercial intercourse.

But the non-purchase of insurance is not "commerce," and the mandate is not "regulating" commerce. An individual has not engaged in "commercial intercourse" by *refusing* to "bargain[] and contract[]" for insurance. *See Se. Underwriters Ass'n*, 322 U.S. at 539. As the Eleventh Circuit held, that refusal "is defined by the *absence* of" intercourse. Pet.App. 115a. Likewise, the mandate

does not "regulate" the commerce in health insurance (or healthcare) by "prescribing rules for carrying [it] on." *See Gibbons*, 22 U.S. at 189-90. The mandate governs neither the terms of health-insurance (or healthcare) contracts nor the existing parties to such contracts. Rather, the mandate "compel[s] non-market participants to *enter into* commerce so that Congress may regulate them" for the benefit of voluntary market participants. Pet.App. 152a.

Compelling commerce is not *regulating* commerce. As the Eleventh Circuit recognized, "[t]he power to regulate commerce, of course, presupposes that something exists to regulate." *Id.* 98a; *see also Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203 (1885) (describing the power as "prescrib[ing] ...the *conditions* upon which [commerce] shall be conducted" (emphasis added)). For example, although Congress may regulate the terms of voluntary contracts between General Motors and its customers, it may not compel individuals to enter into contracts with GM, because there is no pre-existing "commerce" to regulate. Otherwise, Congress could force individuals to purchase literally *any* product: factual distinctions among products would be irrelevant, because Congress, "[w]hatever [its] motive and purpose," has "plenary power" over "regulations of commerce." *Darby*, 312 U.S. at 115.

Nevertheless, the D.C. Circuit reasoned that because one meaning of "regulate" is "to direct," and one meaning of "direct" is "to command," it follows that "to 'regulate' can mean to require action" even by those who are *not* "already active in relation to an interstate market." *Seven-Sky v. Holder*, 661 F.3d 1, 16 (D.C. Cir. 2011). The court's reasoning ignores

that the *object* of Congress' power "to regulate" is "Commerce ... among the several States." Thus, under the Commerce Clause's text, Congress may certainly "direct" and "command" participants in interstate commerce—thereby "prescrib[ing] the rule by which commerce is to be governed," *Gibbons*, 22 U.S. at 196—but Congress may not "direct" or "command" non-participants to become (regulated) participants. The power to regulate traffic is the power to "direct" or "command" traffic, not to compel citizens to enter traffic, much less to require pedestrians to buy cars. Moreover, the court's reasoning is inconsistent with the Commerce Clause's purpose, which "was to create an area of free trade among the several States," *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 402 (1984), *not* to advance "the positive purposes of the General Government" by bolstering market participants, *see W. Lynn Creamery*, 512 U.S. at 193 n.9.

It thus is entirely implausible that the Founding-era public would have understood the Commerce Clause to authorize Congress to subsidize an industry by conscripting unwilling customers—*e.g.*, by forcing rich New York bankers to buy peaches from poor Georgia farmers—particularly because such "regulation" was then, as it remains now, an unprecedented and extraordinary intrusion on basic individual freedoms. *See* Former DOJ Officials Mandate Br. Yet, as the D.C. Circuit admitted, such raw subsidies are constitutionally indistinguishable from the ACA's mandate, given the absence of "any clear doctrinal principles [for] limiting congressional mandates that any American purchase any product or service." *Seven-Sky*, 661 F.3d at 18. Notably, therefore, even the Government does not argue that

the power to regulate interstate commerce itself authorizes the power to compel commerce.

B. Under The Necessary And Proper Clause, The Mandate Does Not Regulate Conduct That Substantially Affects Interstate Commerce Or The Regulation Thereof

Congress and the Government instead defend the mandate under the so-called "substantial effects" doctrine. Their sweeping view of that doctrine, however, contravenes the Constitution's plain text, this Court's precedent, and the entire concept of enumerated powers.

1. The Nature And Scope Of The "Substantial Effects" Doctrine

The "substantial effects" doctrine implements Congress' power under the Necessary and Proper Clause to "carry[] into Execution" its power to regulate interstate commerce. *See* U.S. Const., art. 1, § 8, cls. 18. The doctrine therefore has various important limits that the Government here obscures.

a. The Commerce Clause does not *itself* grant Congress the power, "as such," to regulate conduct with a substantial aggregate effect on interstate commerce or its regulation. *See Shreveport Rate Cases*, 234 U.S. 342, 353 (1914); *accord Raich*, 545 U.S. at 34, 38 (Scalia, J., concurring in the judgment). Textually, the power to regulate "interstate commerce" does not include the power to regulate "conduct with a substantial aggregate effect on interstate commerce or its regulation"—the latter power is entirely different from, and exponentially broader than, the former. Moreover, the power to regulate all classes of conduct that "substantially affect" interstate commerce or its regulation would

be indistinguishable from the police power that the Founders denied Congress, because *all* human endeavors—from crime to education to family—have a substantial aggregate effect on commerce. *Lopez*, 514 U.S. at 564-65.

Consequently, it must be the Necessary and Proper Clause that authorizes Congress to regulate "activities intrastate which [substantially] affect interstate commerce or the exercise of the power of Congress over it." *Darby*, 312 U.S. at 118-20 & n.3 (citing *McCulloch*, 17 U.S. at 421). The exercise of that *incidental* authority to "carry into execution" the commerce power is therefore permissible only if it is a necessary and proper "means to the attainment of a legitimate end"—*i.e.*, "the effective execution of the granted power to regulate interstate commerce." *See United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942).

This Court has held that the "necessary" prong generally requires that the means selected be "plainly adapted" to the legitimate end—a means-ends fit satisfied by laws that are "convenient," "useful," "conducive," or otherwise "rationally related to the implementation of [the] constitutionally enumerated power." *United States v. Comstock*, 130 S. Ct. 1949, 1956-57 (2010). Although this standard gives Congress wide leeway to carry its interstate commerce power into execution, it nevertheless imposes three important constraints on the "substantial effects" doctrine.[1]

---

[1] The "proper" prong imposes additional constraints. *Infra* at Part II.B.3.

First, the regulated intrastate conduct must be a substantial "burden[] [or] obstruction[]," *Jones & Laughlin*, 301 U.S. at 36-37, preventing the "effective execution" of Congress' preferred market conditions in "interstate commerce or ... the exercise of [Congress'] power to regulate [such commerce]," *Wrightwood Dairy*, 315 U.S. at 119, 121. No case has ever suggested that Congress may regulate conduct that is neither participation in interstate commerce nor a barrier to such commerce or its regulation, simply because the regulation itself will substantially affect interstate commerce. Instead, the "substantial effects" cases address the elimination of *impediments* to Congress' "implementation" of its commerce power. *See Comstock*, 130 S. Ct. at 1956-57.

Specifically, for "interstate commerce ... to be effectively controlled," Congress must often regulate local activities. *Darby*, 312 U.S. at 121. Even where individual instances of a local "practice" are each "*de minimis*," *Raich*, 545 U.S. at 17, the practice's "total incidence" (*id.*) may create "obstructions" or "stimulants" to interstate commerce, *id.* at 35 (Scalia, J., concurring in the judgment), or may otherwise create "enforcement difficulties" for the regulatory scheme, *id.* at 22 (majority opinion).

Thus, Congress may regulate intrastate conduct *obstructing* interstate commerce it wants to flourish. Most traditionally, it may eliminate state laws burdening interstate commerce. *E.g.*, *Shreveport Rate Cases*, 234 U.S. at 353-54 (local railroad rates undercutting federal interstate rates); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990) (conflicting local employee-benefits laws created

administrative and financial burdens). Similarly, it may eliminate private activities burdening interstate commerce. *E.g.*, *Wrightwood Dairy*, 315 U.S. at 118-21 (local milk prices undercutting out-of-state prices); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-58 (1964) (racial discrimination by certain public accommodations).

Conversely, Congress may regulate intrastate conduct *stimulating* interstate commerce it wants to restrict. In *Raich*, Congress' goal of eliminating the interstate marijuana market would have been impaired by the intrastate manufacture and possession of locally authorized "medical" marijuana, which could be diverted into the proscribed interstate market and which also created practical difficulties in enforcing the interstate ban. 545 U.S. at 12-14, 18-22, 25-32. Likewise, in *Wickard v. Filburn*, 317 U.S. 111 (1942), Congress limited the interstate wheat supply in order to increase interstate wheat prices. *Id.* at 113-15. Yet that regulation would have been impaired by farmers' excessive production of home-grown wheat, which could increase supply, particularly because of rising prices, and which also decreased the demand for purchasing the federally reduced interstate wheat supply. *Id.* at 127-29.

In sum, whether Congress seeks to encourage or discourage interstate commerce, it cannot regulate conduct that is not interstate commerce simply because *the regulation itself* would improve interstate commerce. Rather, it may regulate such conduct solely as a means of carrying into execution its regulation of interstate commerce. Thus, Congress may reach only intrastate conduct that

functions as a barrier or stimulant that interferes with Congress' preferred conditions in, or regulation of, interstate commerce.

Second, not even all such intrastate impediments fall within the "substantial effects" doctrine. Although "economic activity" is covered, *see Lopez*, 514 U.S. at 559-60, "noneconomic activity" is not, *see Morrison*, 529 U.S. at 610-11, 613, unless it "undercut[s]" "a larger regulation of economic activity," rather than merely affecting interstate commerce itself, *see Raich*, 545 U.S. at 24; *id.* at 36-37 (Scalia, J., concurring in the judgment). That is the essential teaching of *Lopez*, *Morrison*, and *Raich*.

Lopez invalidated a ban on gun possession near schools, and *Morrison* invalidated a civil remedy for gender-motivated violence, even though the regulated activities indisputably had serious deleterious effects on the Nation's commercial productivity. *Lopez*, 514 U.S. at 551, 563-64; *Morrison*, 529 U.S. at 601-02, 614-15. Indeed, the harms there fell on the very commercial markets referenced here to justify the mandate: gender-motivated violence "increase[d] medical and other costs" by "$5 to $10 billion a year," *Morrison*, 529 U.S. at 631-34 (Souter, J., dissenting), and the "substantial" costs of crime "are spread throughout the population" "through the mechanism of insurance," *Lopez*, 514 U.S. at 564. Despite the uncontestable economic *effects* from these significant barriers to commerce, this Court invalidated the laws attacking them, because the regulated activities were not *themselves* "economic." *Id.* at 567; *Morrison*, 529 U.S. at 617.

The reason for this distinction between "economic activity" and other human endeavors is straightforward. Intrastate economic activities—*i.e.*, the "sort[s] of economic endeavor[s]," *Morrison*, 529 U.S. at 611, that "arise out of or are connected with a commercial transaction," *Lopez*, 514 U.S. at 561—"ha[ve] a commercial character" akin to the commerce that Congress is empowered to regulate at the interstate level. *See id.* at 580 (Kennedy, J., concurring). While regulating such intrastate conduct is just beyond the express scope of the Commerce Clause, it is a "plainly adapted" incidental means under the Necessary and Proper Clause for carrying into execution interstate commerce regulation. *See McCulloch*, 17 U.S. at 421. After all, particularly in modern times, intrastate and interstate markets "in the commercial sphere" are closely intertwined into "a single [national] market," *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring), and distinguishing between them would create serious "enforcement difficulties" for regulating at the national level, especially when "fungible" products are involved, *Raich*, 545 U.S. at 18-19, 22; *id.* at 40-41 (Scalia, J., concurring in the judgment). Moreover, intrastate economic activity is less likely to involve the areas that states traditionally regulate under the police power. *See Lopez*, 514 U.S. at 564. Accordingly, because the Necessary and Proper Clause authorizes broad federal power to select "convenient" means for the commerce power's effective "implement[ation]," *Comstock*, 130 S. Ct. at 1956-57, it allows Congress essentially to override the distinction between interstate and intrastate "commerce."

But it cannot allow Congress to regulate noneconomic activities that lack any commercial character whatsoever, at *either* the local or national level, simply because they *affect* commerce in the aggregate. That would eviscerate all textual limits in the Commerce Clause and grant Congress "the police power [that] the Founders denied [it]," because even those areas that are the subjects of "traditional state regulation" have a "significant aggregate effect ... on the national economy." *Morrison*, 529 U.S. at 615-18. Noneconomic activity's lack of a commercial character thus inherently renders it too "attenuated" from interstate commerce: allowing Congress to regulate such activity based solely on its inevitable aggregate effect on interstate commerce would not be sanctioning a "plainly adapted" *means* of regulating commerce, but would be permitting Congress to expand its regulatory *ends* to any desired activity. *See Jinks v. Richland Cnty.*, 538 U.S. 456, 464 (2003) (citing *McCulloch*, *Lopez* and *Morrison*).

That said, although noneconomic activity may not be regulated based on its inevitable aggregate effect on interstate commerce, it may be regulated where it specifically "interfere[s] with," "obstruct[s]," or "undercut[s]" "a more general regulation of interstate commerce," such that its incidental regulation is "needed to make th[e] [larger] regulation effective." *Raich*, 545 U.S. at 36-37 (Scalia, J., concurring in the judgment). For example, whereas the *Raich* majority viewed marijuana possession as "quintessentially economic" activity, *id.* at 25-26, Justice Scalia's concurrence viewed it as "noneconomic activity" that could be regulated as a barrier to "compliance with the regulatory scheme" banning interstate marijuana

transactions, because all marijuana is "fungible" and "never more than an instant from the interstate market," *id.* at 37, 40. Regardless, so long as noneconomic activity may be regulated only where it undercuts the effective execution of valid commerce regulation, Congress' power under the Necessary and Proper Clause remains plainly tethered to its power under the Commerce Clause. *Id.* at 40.

Third, any attempt to use the "substantial effects" doctrine to "effectually obliterate the distinction between what is national and what is local" must be rejected. *Lopez*, 514 U.S. at 557, 567-68 (quoting *Jones & Laughlin*, 301 U.S. at 37). A law that "undermine[s] the enumeration of powers" can hardly be characterized as "plainly adapted" to carrying into execution that enumeration. *Jinks*, 538 U.S. at 464. This Court thus has carefully "consider[ed] the implications of the Government's arguments" and rejected them when "it [was] difficult to perceive any limitation on federal power." *Lopez*, 514 U.S. at 564, 567; *see also Comstock*, 130 S. Ct. at 1966 (Kennedy, J., concurring in the judgment) (warning against "congressional powers becom[ing] completely unbounded").

b. The Government's threshold characterization of the commerce power thus has two fundamental flaws. The Government suggests that Congress may regulate conduct outside of interstate commerce (1) if the regulation "advance[s]" or "promote[s]" interstate commerce, (2) with Congress possessing "broad power" to choose "what means to deploy to achieve that end." *See* Govt. Mandate Br. 21-23. Both parts of that assertion are wrong.

First, the correct question is not "whether the challenged *regulation* substantially affects interstate commerce, [but] rather ... whether the *activity* being regulated does so." *Rancho Viejo v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc). This Court has repeatedly emphasized that fundamental point: "the only function of courts is to determine whether the particular activity regulated ... is within the reach of the federal power." *Perez*, 402 U.S. at 152 (quoting *Darby*, 312 U.S. at 120-21). That is why *Jones & Laughlin*'s discussion of "advanc[ing]" or "promot[ing]" interstate commerce focused on eliminating "injurious" "burdens and obstructions." *See* 301 U.S. at 36-37. The *regulated conduct* thus must itself be the type of barrier to Congress' "effective execution" of the commerce power that justifies "the exertion of the power of Congress over it." *See Wrightwood Dairy*, 315 U.S. at 119. Otherwise, Congress' power would cover *any and all* legislation, because Congress will always be able to identify a substantial economic effect from its legislation, *Morrison*, 529 U.S. at 615-16, and courts cannot second-guess its "conception of public policy," *Darby*, 312 U.S. at 115.

Second, the *Constitution* limits the "means" available for addressing interference with commerce or its regulation, rather than leaving the "choice" to Congress' unfettered discretion. Although Congress has broad power to choose means "*within th[e] [commerce] power's outer bounds*," it has no power to exceed that constitutionally imposed "boundary." *Morrison*, 529 U.S. at 616 n.7. *Comstock* makes clear that the Necessary and Proper Clause enables Congress only to choose "means ... rationally related

to the *implementation* of a *constitutionally enumerated power*." 130 S. Ct. at 1956 (emphasis added). Thus, no matter how "rational" it may be, Congress cannot exercise the police power or otherwise regulate conduct that is too "remote" from the commercial sphere, *see Lopez*, 514 U.S. at 557, 566-67, for that would not "implement" the commerce power, but instead *expand* that power beyond the "end ... within the scope of the constitution," *see McCulloch*, 17 U.S. at 421; *see also Jinks*, 538 U.S. at 464. Again, it was undisputed in *Morrison* that gender-motivated violence created substantial healthcare costs, but the Constitution simply did not authorize Congress' chosen means of attacking the problem, however rational or effective it was. 529 U.S. at 615-17.

2. The Mandate Is Not A "Necessary" Means Of Carrying Into Execution Congress' Commerce Power

Congress justified the mandate because it will lower premiums by forcing healthy individuals to participate in the insurance risk pool (a justification ignored by the Government) and because it will supposedly prevent strategic "adverse selection" and reduce "cost-shifting" by some of the uninsured (the justifications advanced by the Government). Yet none of these rationales satisfies the "substantial effects" doctrine.

a. Lowering Premiums By Forcing Healthy Individuals Into The Risk Pool

Congress reasoned that the mandate's "individual responsibility requirement ... substantially affects interstate commerce," because it

"will lower ... premiums" by "broaden[ing]" the "risk pool to include [more] healthy individuals." *See* 42 U.S.C.A. § 18091(a)(1),(a)(2)(I). As noted, however, the relevant question is not whether *the mandate* beneficially affects interstate commerce, but whether *the uninsured* negatively affect it. And the uninsured neither interfere with commerce or its regulation, nor engage in economic activity by failing to purchase insurance, except insofar as Congress could mischaracterize the failure to buy *any* product as an economic decision harming voluntary market participants.

i. The fact that compelling the uninsured to buy insurance will lower premiums does not make their failure to do so a "burden[] [or] obstruction[]" on Congress' effective execution of the power to regulate insurance markets. *See Jones & Laughlin*, 301 U.S. at 36-37. As the Eleventh Circuit recognized, the defining characteristic of the individuals regulated by the mandate is that they are *declining* to participate in commerce. Pet.App. 115a. Unlike intrastate market participants, nonparticipants are strangers to the insurance market at both the local and national level, and thus they "in no way interfere[] with" participants in the market or Congress' regulation thereof. *Id.* 149a-150a. Willing buyers remain free to engage in "commercial intercourse" with willing sellers, and Congress remains free to "prescribe the rule by which [that intercourse] is to be governed." *See Gibbons*, 22 U.S. at 189-90, 196.

Wickard illustrates the fundamental distinction between obstructing commerce and not participating in commerce. The "substantial effects" doctrine

authorized restriction of Filburn's intrastate wheat *production* because that economic activity, in the aggregate, was *impairing* Congress' goal of raising interstate wheat prices. 317 U.S. at 113-15, 127-29. But that holding obviously did not imply that Congress could instead raise prices by mandating that Filburn or his neighbors *buy* wheat, even though that would directly counteract the *lower* demand and prices attributable to their *failure to purchase* wheat. In other words, while the "substantial effects" doctrine allows Congress to regulate local bootleggers because of their aggregate harm to the interstate liquor market, it may not conscript teetotalers merely because conditions in the liquor market would be improved if more people imbibed. Yet the uninsured regulated by the mandate are the teetotalers, not the bootleggers, of the health-insurance market.

The D.C. Circuit, however, remarkably suggested that regulating producers of home-grown wheat and commanding all citizens to buy wheat are materially indistinguishable. It opined that *Wickard* "comes very close to authorizing a mandate" to buy wheat, "at least indirectly," because restricting home-grown production, practically speaking, "forced some farmers into the market to buy [wheat]" to "suppl[y] [their] need." *Seven-Sky*, 661 F.3d at 17 (quoting *Wickard*, 317 U.S. at 128-29). In both premise and conclusion, this reasoning fundamentally misconstrues *Wickard*.

Congress did not "force" individuals to buy wheat by banning home-grown production. It is a basic precept of enumerated-powers law that Congress may incentivize indirectly even where it may not

mandate directly. Most obviously, although Congress may not commandeer "a State to adopt a legislative program," it may "encourage a State to regulate in a particular way," such as by "attach[ing] conditions on the receipt of federal funds" or by threatening that contrary "state law[s] [will be] pre-empted." *New York*, 505 U.S. at 166-67. The critical distinction is that the regulated entity retains "the choice" of how to respond to such "incentives." *Id.* In *Wickard*, specifically, rather than being "forced" to subsidize the out-of-state wheat industry by purchasing wheat at federally inflated prices, Filburn retained the *choice* to make do with less wheat or to switch to a substitute.

Moreover, even assuming that Congress' regulation of self-consuming producers "forced" them to purchase wheat to satisfy their own demand, such regulation cannot be equated with a mandate for non-consuming citizens to purchase wheat they do not demand. Those who produce products, even if only for self-consumption, are necessarily interfering with commerce and its regulation in a way that those who are simply not consuming the product inherently cannot. Self-producers are increasing the "supply" of intrastate products in competition with interstate products and undercutting the "demand" that otherwise naturally exists, *Raich*, 545 U.S. at 18-19, as well as creating "enforcement difficulties" by producing "fungible" products that cannot be distinguished from regulated interstate products, *id.* at 22. By contrast, non-consumers pose no such barriers to federal commerce regulation. While distillers of bathtub moonshine would interfere with federal attempts to raise liquor prices by restricting interstate supply, teetotalers would not. Just as the

"refusal" to contribute to candidates or pay for abortions does not "interfere with" the exercise of those rights, *Rust v. Sullivan*, 500 U.S. 173, 193 (1991), refusing to consume a good does not interfere with the market for that good or its regulation.

Instead the only way that market nonparticipants could be said to negatively affect the market or its regulation is *relative to* the beneficial effect from *compelling* their participation. But that truism is irrelevant, for it simply shows that the *legislation* beneficially affects commerce. Otherwise, again, Congress could mandate *any* product's purchase, because refusals to purchase will *always* negatively affect the product's seller *relative* to compelling individuals to buy from the seller. Pet.App. 113a-114a. Moreover, by that flawed logic, Congress could force uninsured healthy individuals simply *to reimburse* insurers for the loss incurred from insuring the less healthy at non-actuarial rates. That is economically indistinguishable from the mandate, which forces the healthy to buy at premiums exceeding their actuarial risk by the same amount. *Supra* at 2-3.

ii. The fact that compelling the uninsured to buy insurance will lower premiums also does not make their failure to do so "economic activity." *See Morrison*, 529 U.S. at 610. As the Eleventh Circuit reasoned, "[u]nder any framing, the regulated conduct" of being uninsured "is defined by the *absence* of ... 'the production, distribution, and consumption of commodities'—the broad definition of economics in *Raich*." Pet.App. 115a (quoting 545 U.S. at 25). More fundamentally, being uninsured, like all other inactivity, is not an "economic

endeavor," *Morrison*, 529 U.S. at 611, or an "activit[y] that arise[s] out of or [is] connected with a commercial transaction," *Lopez*, 514 U.S. at 561.

Anticipating this problem, Congress described an individual's failure to purchase insurance as an "economic and financial decision[]." 42 U.S.C.A. § 18091(a)(2)(A); *see also Seven-Sky*, 661 F.3d at 16-17. But that is mere wordplay. Relabeling non-participation in economic activity as an "economic decision" to be a non-participant cannot obscure that no "economic *activity*" has occurred. That "facile" characterization could be made about "any decision not to purchase a good or service." Pet.App. 114a-115a. For example, Congress could mandate that all schools purchase science-lab equipment and that all adults purchase condoms, simply by characterizing the contrary curricular and family-planning decisions as "economic decisions" to refrain from purchasing. *But see Lopez*, 514 U.S. at 564. Substantive constitutional principles cannot be evaded through such "semantic" distinctions. *Id.* at 569 (Kennedy, J., concurring).

Indeed, the failure to purchase insurance is even less "connected with a commercial transaction" than was the gun possession in *Lopez*. *See* 514 U.S. at 561. After all, "commodities" like guns can be possessed only *after* being "produc[ed], distribut[ed], and [acquired]" through commercial transactions. *Raich*, 545 U.S. at 25. Plus, Lopez himself was a *paid gun courier*. Pet.App. 118a n.100. As his "possession of a gun in a local school zone" was nevertheless deemed "in no sense an economic activity," *Lopez*, 514 U.S. at 567, that same conclusion necessarily follows for the uninsured's

continued estrangement from the insurance market, which leaves them even more "remote" from commerce than was Lopez, *id.* at 557.

Accordingly, it is irrelevant that "the means of paying for [healthcare] are 'quintessentially economic,'" *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 557-58 (6th Cir. 2011) (Sutton, J., concurring in relevant part), and that the uninsured could be described as "self-insur[ing]," 42 U.S.C. § 18091(a)(2)(A). As the Eleventh Circuit explained, the mandate does not regulate the "economic activity" of paying for healthcare (with "self-insured" funds or otherwise), but rather forces the uninsured to purchase insurance every month to reduce market premiums, whether or not the regulated actors will be obtaining healthcare, let alone failing to pay for it. Pet.App. 118a-119a, 128a-129a.

iii. Finally, allowing Congress to mandate insurance purchases to lower premiums would effectively "create a completely centralized government." *See Morrison*, 529 U.S. at 608. As discussed, *any* failure to purchase a product—"even in areas ... where States historically have been sovereign," *Lopez*, 514 U.S. at 564—could be equally mischaracterized as an "economic decision" that "harms" market participants. Thus, as CBO presciently warned, "a mandate-issuing government" could lead to "a command economy[] in which the President and the Congress dictated how much each individual and family spent on all goods and services." *See* Pet.App. 114a n.96. Indeed, upholding the ACA's mandate would ratify the "jarring prospect" that Congress could impose "criminal punishment—including imprisonment—for

failure to comply ... with future mandatory-purchase requirements." *Seven-Sky*, 661 F.3d at 51 (opinion of Kavanaugh, J.). The "implications" for "tyranny and abuse" underlying Congress' position are sufficient basis to reject it. *See Lopez*, 514 U.S. at 552, 564.

Apparently recognizing that Congress' unbounded premium-reduction rationale has no limit, the Government studiously ignores that Congressional purpose and instead tries to create the appearance of limiting principles by focusing on *economic* and *policy* considerations purportedly unique to health insurance—namely, strategic "adverse selection" and "cost-shifting." *See* Govt. Mandate Br. 17-20. But such *factual* distinctions provide no principled *constitutional* basis for limiting a federal mandatory-purchase power to the health-insurance context.

The threshold problem is that "such fact-based criteria can[not] serve as ... 'judicially enforceable' limitations on the commerce power," since courts are ill-suited to "sit in judgment" over complex policy questions. Pet.App. 122a. More fundamentally, as the Government itself emphasizes, Congress has "broad power to enact laws" that it rationally believes "are 'convenient, or useful' or 'conducive['] to the [enumerated] authority's 'beneficial exercise.'" Govt. Mandate Br. 22-23 (quoting *Comstock*, 130 S. Ct. at 1956). Thus, under the Government's conception of the Necessary and Proper Clause, upholding the mandate would authorize purchase mandates whenever *Congress* deemed them "useful," regardless of whether they overrode strategic "adverse selection," "cost-shifting," or any conceivably analogous factual problem.

Indeed, compelling purchases *solely* to subsidize an industry's customers is far *more* defensible under the Government's position than doing so for other reasons allegedly specific to the health-insurance context. The significant direct effect from conscripting all the uninsured into the risk pool is *more* "useful" to the "beneficial exercise" of lowering premiums than the smaller indirect effect from reducing the amount of strategic "adverse selection" or "cost-shifting" by some of the uninsured. *Supra* at 2-5. Likewise, the former effect is less "attenuated" than the latter, *Jinks*, 538 U.S. at 464, given that it does not require "pil[ing] inference upon inference" concerning how the uninsured will later act, *Lopez*, 514 U.S. at 567. Accordingly, the D.C. Circuit correctly observed that "the Government[] fail[s] to advance any clear doctrinal principles limiting congressional [purchase] mandates." *Seven-Sky*, 661 F.3d at 18.

Inexplicably, however, that court shrugged off this fatal defect, blithely opining that "[t]he right to be free from [such] federal regulation" must "yield[] to the imperative that Congress be free to forge national solutions to national problems, no matter how local ... their individual origins." *Id.* at 20. But it was precisely the fear of a "completely centralized [federal] government" imposing such "national solutions" that led the Framers to "den[y] the National Government" the police power. *Morrison*, 529 U.S. at 608, 618. And that limitation applies regardless of how well the States are exercising their police power. *See Lopez*, 514 U.S. at 581-83 (Kennedy, J., concurring). In *Morrison* itself, a "voluminous congressional record" proved the States were *exacerbating* the obstructions to commerce

caused by gender-motivated violence, by performing "insufficient investigation and prosecution." 529 U.S. at 615, 620. Congress nevertheless could not fill the breach, for fear that it "might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority." *Id.* at 615.

b. **Preventing Strategic "Adverse Selection"**

The Government seeks to justify the mandate as a necessary response to problems created for insurers by the ACA's guaranteed-issue and community-rating rules. *See* Govt. Mandate Br. 25-30. To be sure, the mandate's conscription of healthy people offsets the various costs imposed on insurers by the ACA's provisions banning "discrimination" against the less healthy. That the mandate subsidizes costs for regulated insurers, however, hardly renders it a valid means of carrying into execution Congress' commerce power. Although Congress may reach even noneconomic activity interfering with the execution of its regulatory scheme, that power to make its regulations effective does not allow it *to counteract* the costs of its own *fully executed* scheme by regulating non-interfering individuals who are otherwise outside the reach of its commerce power. Stated differently, given that Congress cannot conscript the uninsured just to lower premiums, it cannot somehow acquire that power simply because the Act itself raises premiums by imposing costs on insurers. The Government's contrary position would allow Congress to compel the purchase of any product burdened in any way by federal regulation, which is every product.

i. At the outset, the full scope of the Government's argument must be clarified. As noted, the Act's insurance regulations, including especially the "nondiscrimination" rules, would impose two types of economic harm on insurers standing alone. Most significantly, the regulations would drastically increase insurers' coverage costs, which the CBO estimated would raise premiums by roughly 27-30%. *Supra* at 1-2. Of course, that price increase would directly undermine Congress' goal of affordable premiums and further undermine it by causing fewer people to buy the higher priced insurance, potentially leading to a premium "death spiral." *Supra* at 2-4. Additionally, some individuals may instead engage in strategic "adverse selection," by *delaying* their insurance purchases until it becomes economically advantageous under the non-actuarially-priced insurance required by the "nondiscrimination" rules—although neither CBO nor anyone else estimated the extent to which this unlikely gamesmanship would occur in the face of serious deterrents. *Supra* at 3-4. The mandate solves these two problems together: by forcing healthy individuals to immediately start paying inflated premiums that exceed their actuarial risk, the mandate does not just preclude any possible gamesmanship; more importantly, it provides insurers and their voluntary customers with a ***$28-39 billion annual subsidy***, thereby offsetting roughly two-thirds of the premium increases that the insurance regulations otherwise would have caused. *Supra* at 2-4.

Accordingly, it is misleading for the Government to focus exclusively on the mandate's role in preventing strategic "adverse selection." That

secondary and unquantified benefit is dwarfed by the mandate's primary and quantified role in conscripting the healthy to prevent the insurance regulations from massively increasing premiums. Indeed, even were gamesmanship *impossible—e.g.*, if there were a cut-off date or age for purchasing insurance under the Act's "nondiscrimination" protections—the mandate's conscription of the healthy *still* would be needed to offset the sizeable costs those rules would impose on insurers when *immediately* invoked by the less healthy. Yet the Government ignores this "essential" function of the mandate, even though Congress identified it, 42 U.S.C.A. § 18091(a)(2)(C),(I), and the Eleventh Circuit specifically addressed it, Pet.App. 128a-129a, 150a-151a.

Despite the Government's efforts to shift attention from Congress' unbounded subsidization rationale, it is necessarily implicated here. Again, under the Government's theory that preventing the insurance regulations from increasing premiums is a "beneficial exercise" of the commerce power, the large and concrete deflationary effect from forcing all the uninsured to purchase insurance is far more "useful," and far less "attenuated," than the limited and speculative effect from precluding any strategic "adverse selection." *Supra* at 35-36. Thus, while the Government will not openly defend the mandate's subsidization rationale, acceptance of the Government's strategic "adverse selection" justification would necessarily sanction a pure subsidization justification for future mandates to purchase any regulated product. In all events, as explained below, the Necessary and Proper Clause authorizes *no form* of this "offsetting" power.

ii. The failure to purchase insurance does not "undercut," "interfere with," or "obstruct" Congress from carrying into execution the guaranteed-issue and community-ratings rules. *See Raich*, 545 U.S. at 36-37 (Scalia, J., concurring in the judgment). Absent the mandate, those regulations still would prohibit insurers from considering pre-existing health conditions, and the failure of the uninsured to purchase insurance would not create any "enforcement difficulties," *id.* at 22 (majority opinion), that prevent the Government from "mak[ing] th[ose] regulation[s] effective," *id.* at 36 (Scalia, J., concurring in the judgment). Instead, the very premise of strategic "adverse selection"—*i.e.*, that some uninsured individuals will "tak[e] advantage" of those regulations, *see* Govt. Mandate Br. 29—*presumes compliance* with the Act's *fully executed* "nondiscrimination" rules.

Indeed, the notion that individuals who will later *avail themselves* of these "nondiscrimination" protections are somehow *undercutting* them is virtually a *non sequitor*. Nondiscrimination requirements often impose significant costs on regulated entities—*e.g.*, protections against disability discrimination—but no one would suggest the protected class is *interfering* with those protections simply by invoking them. If, however, Congress did not want to protect from future health-status "discrimination" any uninsured who delayed purchasing insurance, it could have limited protection to individuals who purchased insurance by a cut-off date or age. Alternatively, it could have made "the public as a whole" *pay* insurers for the costs imposed, *Armstrong v. United States*, 364 U.S. 40, 49 (1960), which is the traditional means of

compensating those required to provide below-cost services for the public welfare, *e.g.*, 42 U.S.C. § 1395ww(d)(5)(F) (subsidizing costs of federally mandated uncompensated care). Instead, Congress simply made the policy choice to impose an unlimited "nondiscrimination" requirement on insurers without subsidizing the costs imposed from the public fisc.

Thus, as the Eleventh Circuit explained, the mandate does not "enable the execution" of Congress' insurance regulations by "remov[ing] an obstacle" to their complete enforcement, but instead solely "counteract[s] the significant regulatory costs ... stemming from the fully executed reforms." Pet.App. 150a. Having compelled insurers to contract at any time with less-healthy people at below-cost premiums, Congress preemptively compelled more-healthy people to contract with insurers at above-cost premiums, thereby offsetting the various costs of its "nondiscrimination" policy. *Supra* at 2-4.

Ultimately, then, the Government's argument reduces to the remarkable proposition that the Necessary and Proper Clause empowers Congress to make its reforms effective, not just by eliminating barriers to "carrying [them] into Execution," U.S. Const., art. 1, § 8, cl. 18, but also by regulating third parties, even though they are neither barriers to the regulatory scheme nor otherwise within the reach of the commerce power, simply to undo the harm that the executed scheme has imposed on regulated parties. The Government never expressly defends that proposition, and it is indefensible.

iii. At the Founding, "to carry" meant "to bring forward" or "to effect," and "execution" meant "performance" or "practice." 1 Johnson, *supra*, 338,

727. Thus, laws that "carry into execution" commercial regulations are those that make effective the complete performance of the enacted regulations.

"[I]n its most basic sense," this "means to provide enforcement machinery, prescribe penalties, authorize the hiring of employees, appropriate funds, and so forth." Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 331 (1993). Furthermore, Congress may "make [its] regulation effective" by eliminating conduct that "interfere[s] with," "obstruct[s]," or "undercut[s]" the execution of "the regulatory scheme." *Raich*, 545 U.S. at 36-37 (Scalia, J., concurring in the judgment); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 429 (1821) (enumerated powers "carr[y] with [them] all those incidental powers which are necessary to [their] complete and effectual execution"). That is why, in his *Raich* concurrence, Justice Scalia concluded that a total ban on marijuana possession was justified by the enforcement difficulties that would be created from trying to carve out an exemption for certain types of possession from the generally valid ban. 545 U.S. at 40. Finally, because laws that eliminate barriers to commercial regulation might themselves face barriers to their execution, Congress may eliminate such downstream barriers to its overall scheme. *Comstock*, 130 S. Ct. at 1963-64.

But once all barriers to enforcement have been eliminated, the "legitimate end" of the regulation's "effective execution" has been achieved. *See Wrightwood Dairy*, 315 U.S. at 119 (citing *McCulloch*, 17 U.S. at 421). At that point, whatever

costs are imposed on the regulated parties simply reflect Congress' policy choices. As the Eleventh Circuit held, Congress cannot be allowed to regulate individuals who are otherwise outside its reach, just to offset the burdens it chose to impose on regulated parties through its fully executed regulations. Pet.App. 149a-151a. Congress' powers are derived from the Constitution, not its own statutes, and so Congress cannot be allowed *to bootstrap* additional regulatory powers based solely on its own statutes' burdens. Such an offsetting regulation is not "a means by which [the] object[]" of commerce regulation is "accomplished," but instead is impermissibly "used for its own sake." *See McCulloch*, 17 U.S. at 411.

In short, the Necessary and Proper Clause's authorization for Congress to "carry into execution" its commerce regulations does not remotely permit Congress to reduce a regulatory scheme's costs for regulated parties by further regulating strangers to that scheme who are otherwise beyond its power. That would be like the President employing his authority to "take Care that the Laws be faithfully *executed*," not just to ensure "that a congressional policy [is] executed in [the] manner prescribed by Congress," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952) (emphasis added), but also to make that policy work "better" by reimbursing costs that it imposed. Indeed, venerable precedent confirms the Necessary and Proper Clause does no such thing.

In *United States v. DeWitt*, 76 U.S. 41 (1869), the Government defended a federal ban on intrastate sales of certain "illuminating oils" by claiming the

ban "was in aid and support of the internal revenue tax imposed on other illuminating oils," because eliminating competition from the banned oils would "increas[e] the production and sale of [the taxed] oils and, consequently, the revenue derived from them." *Id.* at 44. Thus, as here, the regulation of third parties was defended as a way to "aid and support" parties burdened by government regulation and thereby make the regulatory scheme more "effective." Yet this Court unanimously held the ban was not "an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes." *Id.*

Likewise, when later explaining his *McCulloch* opinion, Chief Justice Marshall emphasized that Congress may not increase its ability to collect taxes by preempting state taxes that diminish the funds of its taxpayer-base:

> Now I deny that a law prohibiting the state legislatures from imposing a land tax would be an "appropriate" means, *or any means whatever*, to be employed in collecting the tax of the United States.... It is not a means "plainly adapted," or conducive to[,]" the end.

"A Friend to the Union," *reprinted in John Marshall's Defense of McCulloch v. Maryland* 78, 100 (Gerald Gunther ed., 1969) (emphasis added); *see also* Lawson & Granger, *supra*, at 331 ("To carry a law or power into execution ... does *not* mean to regulate unenumerated subject areas to make the exercise of enumerated powers more efficient.").

iv. Furthermore, allowing Congress to conscript third parties otherwise beyond its reach just to offset costs imposed on regulated parties would confer

plenary power to mandate purchases. There is nothing constitutionally unique about Congress' finding that the ACA's mandate is "essential" to prevent its insurance regulations from enabling strategic "adverse selection" in the "health insurance" market. 42 U.S.C.A. § 18091(a)(2)(I). Per the Government, Congress could regulate individuals who were not undercutting a regulatory scheme in *any* market (not just the "health insurance" market), if doing so was "convenient" (not just "essential"), for any "beneficial" reason (not just to avoid strategic "adverse selection" costs). *Supra* at 35-36.

Allowing Congress to offset regulatory burdens onto regulatory strangers would thus enable it to compel the purchase of any product related to a regulated industry. For example, Congress could: (1) compel uninsured individuals to buy exercise equipment and healthy foods, hoping to offset the costs that the "community-rating" rules would impose if those with unhealthy lifestyles later sought insurance; (2) force Filburn and his neighbors to purchase wheat, if federal price manipulation caused wheat sellers to make fewer sales, *compare Wickard*, 317 U.S. at 113-15, 127-29; and (3) require consumers to dine out, when federal anti-discrimination rules cause restaurants to "lose a substantial amount of business," *compare Katzenbach v. McClung*, 379 U.S. 294, 297 (1964).

Indeed, under the Government's position, there is no basis for limiting Congress to *offsetting* costs of its regulatory scheme, rather than simply *improving* the scheme's function. The Government argues that, if a measure is "part of a comprehensive scheme of national economic regulation," it suffices that the

measure "contribute[s] to the success of other measures in the [scheme]." *See* Govt. Mandate Br. 26-27, 31-32. Thus, Congress could compel any product's purchase to improve conditions in regulated markets. For example, Congress could require Americans to buy GM cars, not only to offset the costs of compliance with federal safety regulations, but also to "contribute to the success" of the "comprehensive scheme" to bail out GM.

In sum, as the Eleventh Circuit held, to prevent Congress from "eviscerat[ing] the Constitution's enumeration of powers and vest[ing] [itself] with a general police power," Congress is limited to "remov[ing] ... obstacle[s]" to "the execution of [its] regulations," as opposed "to counteract[ing] the significant regulatory costs ... from [its] fully executed reforms." Pet.App. 148a-151a. If this critical distinction nevertheless "appear[s] 'formalistic' in [this] case to partisans of the measure at issue" given the "perceived necessity" of achieving affordable near-universal coverage, it bears emphasis that "the Constitution protects us from our own best intentions ... so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Printz*, 521 U.S. at 933.

v. Finally, the Government's defense of the mandate based on strategic "adverse selection" is particularly untenable given the dubiousness of its factual premise. As noted, while many individuals would refuse to pay the inflated, roughly $7000 annual premiums caused by the insurance regulations alone, the Government fails to support the notion that some would do so based on the

gamble that they could safely delay purchasing insurance due to the "nondiscrimination" rules. That is theoretically implausible given limited enrollment-periods and coverage waiting-periods, and it is empirically unfounded given the absence of any attempt to estimate the degree to which it would occur. *Supra* at 3-4. There is thus no "demonstrated link in fact, based on empirical demonstration," for upholding the mandate due to strategic "adverse selection." *See Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring in the judgment).

Moreover, the predominant purpose and effect of the mandate is instead to force the uninsured to provide insurers and their voluntary customers with a multi-billion-dollar subsidy, *supra* at 2-3, and Congress notably eschewed solving any strategic "adverse selection" problem through the more straightforward means of adopting a cut-off date or age for the insurance regulations, *supra* at 4. Accordingly, there are compelling reasons to view the alleged gamesmanship "as a 'pretext' for 'the accomplishment of objects not entrusted to the federal government." *See Jinks*, 538 U.S. at 464 (quoting *McCulloch*, 17 U.S. at 423).

c. **Reducing "Cost-Shifting"**

The Government also seeks to justify the mandate as a rational means of reducing uncompensated care. *See* Govt. Mandate Br. 33-44. The mandate, however, does not regulate the activity of failing to pay for healthcare, but rather the status of being uninsured, which is held by countless individuals who fully pay for whatever limited care they may receive in any given month. Thus, the Government seeks to regulate a class of conduct that

falls outside Congress' commerce power simply because it overlaps with different, regulable activity engaged in by different people at different times. That position is squarely foreclosed by this Court's precedents and would allow Congress to reach non-regulable conduct whenever it is *statistically related* to regulable conduct, which will be always.

i. Because the failure to purchase insurance does not obstruct the health-insurance market or regulation of insurance contracts, that same failure cannot possibly obstruct the healthcare market or regulation of healthcare contracts. This common-sense observation does not "artificially isolat[e] [a market] from the overall commerce of which it is a part" or dispute "Congress' judgment about how to define the market it is regulating." *See id.* 41. Instead, it reflects the fact that failing to purchase insurance is *necessarily* more "remote" (*Lopez*, 514 U.S. at 557) and "attenuated" (*Jinks*, 538 U.S. at 464) from the health-*care* market than from the health-*insurance* market.

Similarly, given that Congress cannot reach noneconomic activity simply because it has an immediate aggregate "effect" on commerce, *Morrison*, 529 U.S. at 615-17, Congress plainly cannot reach noneconomic activity because it may, in turn, affect economic activity that will affect commerce. Nor is being uninsured itself an "economic activity," as some have claimed, simply because there is an economic effect if an uninsured individual later receives uncompensated care. *See Thomas More*, 651 F.3d at 556-58 (Sutton, J., concurring in part). Such "conflation" of "an economic effect" with "the activity being regulated" is a "question begging"

error, under which the law in *Morrison* "[w]ould be regarded as regulating the 'consumption of health care services,' because such consumption inevitably and empirically flows from gender-motivated violence." Pet.App. 134a n.119.

The Government does not seriously dispute these points—it is not illogically contending that the mere status of being uninsured is *itself* an economic activity burdening the healthcare market, *regardless* of whether the uninsured class would ever seek healthcare services, let alone fail to pay for them. Rather, the Government contends that *some* uninsured individuals will receive uncompensated care leading to "cost-shifting" onto insurers, and that Congress chose to prevent that burdensome economic activity by forcing virtually all the uninsured to purchase insurance. *See* Govt. Mandate Br. 34-35, 42-44. Ultimately, then, the Government's argument reduces to the remarkable proposition that the Necessary and Proper Clause empowers Congress to regulate individuals engaged in a class of conduct outside Congress' commerce power, simply because some of them will later engage in different conduct that is inside it. That proposition is foreclosed by principle and precedent.

ii. "In passing on the validity of legislation" where "Congress itself has said that a particular activity affects the commerce," "the *only function* of courts is to determine whether *the particular activity regulated* ... is within the reach of the federal power." *Perez*, 402 U.S. at 152 (emphases added). Here, the "particular [in]activity regulated" is being uninsured, so the "only" question is whether *that* decision "is within the reach of the federal power."

Applying that type of focused inquiry, this Court has consistently invalidated laws where the class of activity regulated exceeded Congress' commerce power, regardless of whether *some*, or even the *vast majority*, of the regulated individuals were engaged in *other* activity that could have been regulated.

For example, *Lopez* invalidated a blanket federal ban on gun possession near schools, even though roughly "95% of the firearms in the United States were transported across state lines" and thus "within Congress's regulatory authority," Pet.App. 116a n.97, and even though "Antonio Lopez himself was paid $40 to traffic the gun for which he was [prosecuted]," *id.* 118a n.100. Likewise, in *Morrison*, Justice Breyer's dissent *unsuccessfully* contended that a civil remedy for gender-motivated violence should be upheld because Congress could "reenact the present law in the form of 'An Act Forbidding Violence Against Women Perpetrated at Public Accommodations or by Those Who Have Moved in, or through the Use of Items that Have Moved in, Interstate Commerce.'" 529 U.S. at 659. Similarly, this Court has distinguished between an unconstitutional federal civil-rights law that indiscriminately applied to *all* public accommodations and a constitutional one that was "carefully limited" to a class of enterprises that had a "direct and substantial relation to the interstate flow of goods and people," even though *many* of the businesses covered by the former law undoubtedly had the requisite relation. *Heart of Atlanta*, 379 U.S. at 250. The contrary rule would render it unnecessary for Congress *ever* to use "jurisdictional element[s] [that] ensure, through case-by-case inquiry, that the [activity] in question affects

interstate commerce," *compare Lopez*, 514 U.S. at 561, because the Government could always identify some individuals engaged in regulable activity.

Ignoring this adverse precedent, the Government makes several arguments why the mandate may commandeer nearly all the uninsured. But its arguments are simply variations on the theme that all the uninsured may be regulated just because some will later engage in regulable conduct. That position, however formulated, is meritless.

First, the Government insists that, if some of the uninsured engage in regulable conduct, then "Congress may ... regulate the uninsured as a class." *See* Govt. Mandate Br. 42 (citing *Seven-Sky*, 661 F.3d at 20). But the "class of activities" cases merely hold that Congress may regulate the "entire class" of a harmful "practice" without "excis[ing], as trivial" or "*de minimis*," "individual instances" of that regulable practice. *Raich*, 545 U.S. at 17, 23. These cases never suggest that a "practice" that is not itself regulable can be reached simply because some of the individuals engaged in it also will engage in a regulable practice. Instead, the cases emphasize that the "entire class" (*id.* at 17) must be "similarly situated," *McClung*, 379 U.S. at 301, and "within the reach of federal power," *Raich*, 545 U.S. at 23. They thus provide no support for the proposition that the entire class of uninsured individuals may be reached *regardless of whether* they are engaged in the different "practice" of "cost-shifting" (or even the "economic activity" of consuming healthcare).

Second, the Government invokes *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 221-22 (1938) ("*Con. Ed.*"), for the proposition that Congress need

not "await the disruption of ... commerce," but instead may take "reasonable preventive measures" to forestall it. *See* Govt. Mandate Br. 42. But *Con. Ed.* "is wholly inapposite," because "Congress was regulating the labor practices of *utility companies*" who were "*presently* supplying economic services to instrumentalities of interstate commerce." Pet.App. 118a n.100. As the regulated utilities had entered the sphere of federal commerce regulation by providing "essential service to interstate and foreign commerce," Congress could proactively eliminate potential "interstate commerce ... injury" from the manner in which the service was provided. *Con. Ed.*, 305 U.S. at 220-22. *Con Ed.* thus holds only that, when determining whether an "economic 'class of activities' ... have a substantial effect on interstate commerce," Congress may "rational[ly]" consider the *potential* commercial effects of such activity *within* its regulatory sphere. *See Raich*, 545 U.S. at 17-19, 22, 25-26 (same, for wheat and marijuana production and possession).

That the *substance* of commerce regulation within its proper sphere may prevent harm before it occurs does not support the radically different proposition that the *reach* of the commerce power extends to individuals outside its sphere simply because some will predictably come within it eventually. While *Con. Ed.* would authorize a prophylactic condition that all mortgagees must purchase mortgage insurance to prevent potential disruptions from default, it does not authorize a mandate that all *citizens* must *now* purchase mortgage insurance since a large majority will ultimately buy a dwelling.

Third, the Government contends that "requiring insurance today and requiring it at a future point of sale amount to policy differences in degree." *See* Govt. Mandate Br. 38 (quoting *Thomas More*, 651 F.3d at 563 (Sutton, J., concurring in part)). To the contrary, the whole point of the "economic activity" requirement is to preserve spheres in which citizens remain free from federal superintendence. *Supra* at 23-26. That is no more of a "policy difference" than was *Lopez*'s invalidation of the blanket federal ban on *all* gun possession near schools, even though 95% of the guns were regulable under a more tailored law. Requiring college seniors to attend Title VII sexual-harassment training "today," simply because the vast majority will enter the labor market in the "future," is hardly a legitimate commerce regulation left to Congress' unfettered "policy" judgment.

Fourth, the Government objects that the mandate is "a more reasonable and humane" way to prevent uncompensated care than the permissible alternative of requiring that insurance be possessed "at the point at which healthcare services are provided." *See* Govt. Mandate Br. at 38-40. Again, though, the test for commerce regulation is not the *policy* question whether the regulation is more humane than other alternatives, but the *constitutional* question whether the regulated activity cognizably impairs commerce or its regulation. The fact that Congress may be unwilling, for humanitarian reasons, to exercise its power to regulate harmful economic activity does not give it the power to regulate nonharmful inactivity as an alternative means of preventing those economic harms. Indeed, in *Morrison*, Congress never would have denied victims of gender-motivated violence

access to healthcare in order to reduce the multi-billion-dollar social costs incurred, but that still did not allow Congress to regulate the perpetrators of the violence as a more humane alternative for preventing those costs. 529 U.S. at 615-17.

Regardless, there is nothing about a "point-of-consumption" alternative that is less *humane* for *patients*. The only difference between that alternative and the ACA is that the mandate to have insurance, though still enforced solely through a non-compliance "penalty," would be triggered *only* when an individual consumes healthcare, rather than "each month beginning after 2013." *Compare* 26 U.S.C.A. § 5000A(a),(b)(1). This difference in timing would be *better for patients*, who still never would be denied healthcare, and additionally would not be forced to pay costly premiums during the vast majority of the time when they were not obtaining care. Healthcare *providers*, too, still would be compensated through insurance. The only difference is that *insurers* would be *financially harmed* by decreased premiums. But that policy concern, though legitimate, underscores that the issue is *not* humaneness to patients, but *costs to insurers*.

Last, the Government suggests that it is fair to regulate all the uninsured based on "cost-shifting" by a few, because the healthcare market supposedly uniquely involves near-universal participation paired with unpredictable expenditures for essential services that will be provided regardless of ability to pay. *See* Govt. Mandate Br. 35-36, 39-40, 43-44. As noted, such factual distinctions cannot serve as constitutional limiting principles on Congress' ability to regulate people outside its commerce power.

Supra at 35-36. Moreover, these distinctions are largely illusory. Initially, many of the uninsured will *not* receive healthcare in any given month or year, let alone incur anywhere near the $5800 in annual expenses that they now must pay in premiums. *Supra* at 3, 5. More fundamentally, *whenever* individuals fail to pay for services rendered, the costs from their default are "shifted" to the provider and its other customers. Tellingly, the Government trumpets that Respondent Mary Brown's bankruptcy filing includes roughly $4500 in medical bills, but it ignores the remaining $55,000 in bills from utilities, retailers, and other unsecured creditors. *See* Govt. Mandate Br. 44. For each of those goods and services, the Government's reasoning would allow Congress to compel the purchase of insurance (or other products) that would have reduced the "cost-shifting" facilitated by bankruptcy laws and other government benefits for the needy. *See* Pet.App. 121a-122a. Yet modern societies provide the needy with all manner of essential goods and services, including food, shelter, transportation, education, and legal services, to name but a few.

iii. Finally, the Government's defense of the mandate based on "cost-shifting" is particularly untenable given the dubiousness of its factual premise. As noted, the mandate will not reduce uncompensated care anywhere near as much as Congress misleadingly suggested, because the Government's own data shows that 80% or more of that uncompensated care is attributable to individuals not affected by the mandate. *Supra* at 5. Indeed, the uninsured individuals affected by the mandate are *mostly* not responsible for *any* uncompensated care, and the $900 million to $8

billion that is attributable to some of them is roughly the same magnitude as the $3.3 billion attributable to the *insured*. *See* Private Petrs. Severability Br. 16-18.

If this Court were ever to create an exception allowing Congress to regulate people beyond the commerce power due to their nexus to people disrupting commerce, surely the closeness of the fit and the intensity of the problem would have to be far more precise and serious. That is especially true here, because the mandate's $28-39 billion subsidy for insurers is at least four times greater than its reduction of uncompensated care, and Congress notably eschewed the more tailored means of reducing "cost-shifting" by requiring the uninsured to buy actuarially-priced catastrophic coverage. *Supra* at 5. Thus, as with strategic "adverse selection," there are compelling reasons to suspect that "cost-shifting" was a pretext for Congress' real objective of conscripting *nearly all* uninsured individuals to pay roughly $5800 annually in subsidies to insurers. *Supra* at 47.

3. The Mandate Is Not A "Proper" Means Of Carrying Into Execution Congress' Commerce Power

Apart from lacking the "necessary" means-ends relationship, the mandate fails the separate requirement that it must be a "proper" means for implementing the commerce power. *See Jinks*, 538 U.S. at 462-64. Laws are "proper" only if they "consist with the letter and spirit of the constitution." *McCulloch*, 17 U.S. at 421. This Court's cases identify at least three important factors to that inquiry: whether the law (1) is an ordinary means of

executing the enumerated powers, (2) accommodates the States' sovereignty, and (3) respects the People's liberties. The mandate flunks all three.

a. Regulations are more likely to "consist with the letter and spirit of the constitution" if they invoke "the ordinary means of execution." *Id.* at 409, 421. The Necessary and Proper Clause merely confirms the existence of "incidental or implied powers" to execute Congress' enumerated authority, and the powers most readily "deduced from the nature of the objects themselves" are the "ordinary means of execution." *Id.* at 406-09, 420-21.

Accordingly, *McCulloch* upheld the Second National Bank because a corporation was a "usual" "means for carrying into execution the great powers vested in government," and a bank was the obvious corporation "required for ... fiscal operations." *Id.* at 421-22. *Raich* likewise observed that possession bans are "commonly utilized[] means of regulating commerce in [a] product." 545 U.S. at 26 & n.36. And *Comstock* emphasized that the provision there was "a modest addition" to, and "reasonabl[e] exten[sion]" of, the "longstanding civil-commitment system" governing federal prisoners. 130 S. Ct. at 1958-61. Conversely, when invalidating a federal law commandeering state officials to enforce part of a comprehensive regulation of firearms commerce, *Printz* observed that the "compelled enlistment of state executive officers for the administration of federal programs [was], until very recent years at least, unprecedented." 521 U.S. at 905.

Here, far from being "ordinary," "usual," "common," "modest," or otherwise "incidental or implied," the awesome power to compel commerce is

the type of "great and substantive independent power" that the Framers never would have left to mere inference from the traditional power to regulate commerce. *See McCulloch*, 17 U.S. at 411. That is why the mandate "plows thoroughly new ground and represents a sharp break with the long-standing pattern of federal ... legislation." *See Lopez*, 514 U.S. at 563. Aside from "supreme and noble dut[ies]" of citizenship grounded in express text and historical tradition, *e.g.*, *Selective Draft Law Cases*, 245 U.S. 366, 387-90 (1918); Pet.App. 109a, Congress had respected the traditional, fundamental distinction between free-standing mandates to act and restrictions or conditions on voluntary conduct, *supra* at 14. It did so even in trying circumstances where such mandates would have been "highly attractive." Pet.App. 106a-107a. "That prolonged reticence would be amazing if such [laws] were not understood to be constitutionally proscribed." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995); *accord Printz*, 521 U.S. at 905.

b. The degree to which the regulation "properly accounts for state interests" is another important factor. *Comstock*, 130 S. Ct. at 1962; *see also id.* at 1967-68 (Kennedy, J., concurring in the judgment) ("It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised."). That accords with Founding-era legal usage, which "suggests that a 'proper' law is one that is *within the peculiar jurisdiction or responsibility of the relevant governmental actor*." Lawson & Granger, *supra*, at 267, 291 (advancing this "jurisdictional interpretation" of the Necessary and Proper Clause).

Thus, *Comstock* praised the civil-commitment statute for "requir[ing] *accommodation* of state interests," as a State retained its "right, at any time, to assert its authority over the individual, which [would] prompt the individual's immediate transfer." 130 S. Ct. at 1962. By contrast, *Printz* condemned the statute commandeering state authorities to enforce federal gun regulations: where "a 'Law ... for carrying into Execution' the Commerce Clause violates the principle of state sovereignty ..., it is not a 'Law ... *proper* for carrying into Execution the Commerce Clause[.]'" 521 U.S. at 923-24 (citing Lawson & Granger, *supra*, at 297-326, 330-33). Notably, that was so even though commandeering state officials directly enforced federal commerce regulation, and no constitutional provision expressly barred the practice. *Id.* at 903-05, 918-19.

Here, the mandate evinces a clear lack of "account[] for state interests," *see Comstock*, 130 S. Ct. at 1962, by "foreclos[ing] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise," *see Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). Indeed, notwithstanding the Government's repeated invocation of ERISA, Congress in that statute and elsewhere has expressly refused to displace States as the primary regulators of "the business of [health] insurance," *FMC Corp. v. Holliday*, 498 U.S. 52, 57-58, 62-63 (1990), and this Court likewise recognizes that "matters of health and safety" are "presumpti[vely]" within the States' province, *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997). Yet, far from "requir[ing] *accommodation* of state interests," *Comstock*, 130 S. Ct. at 1962, the mandate

contravenes the view of (at least) the *26 State Plaintiffs* concerning "wise policy," *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). Accordingly, it "is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens," *see City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), and "the precepts of federalism" strongly suggest it was not "properly exercise[d] by the National Government," *see Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring).

c. Federal interference with *individual* autonomy, as with state autonomy, is also a critical factor. This parallel treatment makes sense because "the critical postulate" of our federalist system is that "sovereignty is vested in the people" and that *all* governmental "powers are granted by them." *US Term Limits, Inc. v. Thornton*, 514 U.S. 779, 794, 821 (1995). That precept is reflected in the Tenth Amendment's admonition that all powers not delegated to the Federal Government "are reserved to the States respectively, *or to the people*." U.S. Const., amend. X (emphasis added). Federalism and state sovereignty are "not just an end in [themselves]," but "protect[] the liberty of all persons ... by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Bond*, 131 S. Ct. at 2364. Thus, under the "jurisdictional interpretation" of the Necessary and Proper Clause relied upon in *Printz*, *supra* at 58, "laws that are peculiarly within the jurisdiction or competence of Congress ... do not tread on the retained rights of individuals." Lawson & Granger, *supra*, at 272.

Among citizens' most fundamental liberties is the power of choosing the private parties whom they will transfer property to or contract with. During the Founding era, *Calder v. Bull* warned against "presum[ing]" that the "people [have] entrust[ed] a Legislature" with the power to "take[] property from A. and give[] it to B." 3 U.S. at 388 (opinion of Chase, J.). Even "independently of the constitution of the United States," such laws contravene "the nature of republican and free governments." 3 Joseph Story, *Commentaries on the Constitution of the United States*, § 1393, 268 (1833). "Such an act" of conscription is "contrary both to the letter and spirit of the Constitution" even when solving "public exigencies," because it "lay[s] a burden upon an individual, which ought to be sustained by the society at large." *Vanhorne's Lessee*, 2 U.S. at 310; *see also Armstrong*, 364 U.S. at 49. Thus, Congress should not be presumed to have the power to force "a new contract" on a party "without [his] assent," for "the assent of all the parties to be bound by a contract be of its essence." *Cf. Trs. of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 662-63 (1819) (opinion of Washington, J.). Indeed, "creat[ing] a contract" is "within the same mischief, and equally unjust[] and ruinous," as unconstitutionally "impair[ing] or destroy[ing] one." 3 Story, *supra*, § 1392, 267. Just as Congress may not exercise the States' power to choose the laws they will create, it may not exercise individuals' power to choose the contracts they will create. *See New York*, 505 U.S. at 176.

These longstanding principles apply with particular force where, as here, the compelled contract is economically harmful. For example, this

Court invalidated a state law mandating that certain employers fund novel pension obligations, reasoning that it violated the Contracts Clause by "impos[ing] a completely unexpected liability in potentially disabling amounts" on a narrow class of employers. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 238-39, 247 (1978). Likewise, this Court invalidated a federal mandate that coal companies pay for certain health benefits of their retired former workers. *E. Enters.*, 524 U.S. at 522-23, 528-29, 537(plurality opinion). Citing *Calder*, the plurality concluded that compelling the companies to cover healthcare costs "unrelated to any commitment that the employers made or to any injury they caused" contravened the "fundamental principles of fairness underlying the Takings Clause," *id.* at 523, 537, and Justice Kennedy's concurrence reached the same result under the Due Process Clause, *id.* at 549-50.

A fortiori, these interests are gravely threatened by the ACA's mandate, which compels *individuals* to enter into disadvantageous contractual associations with *wealthier businesses* to reduce costs "unrelated to ... any injury ... caused" by those individuals. *See id.* at 537 (plurality opinion). That is hardly an "incidental or implied power[]." *See McCulloch*, 17 U.S. at 406. The limited "power of the Federal Government would be augmented immeasurably if it were able to impress [individuals] into its service ... at no cost to itself." *See Printz*, 521 U.S. at 919-22. Yet that "risk of tyranny and abuse," *see Lopez*, 514 U.S. at 576 (Kennedy, J., concurring), is not "properly within the reach" of Congress, for it is far from "consistent with the letter and spirit of the constitution," *see Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring in the judgment).

III. THE ACT'S MANDATE THAT INDIVIDUALS MUST PURCHASE INSURANCE EXCEEDS CONGRESS' TAX POWER

Congress has the power "[t]o lay and collect Taxes, Duties, Imposts and Excises," U.S. Const. art. I, § 8, cl. 1, though "[n]o capitation, or other direct, Tax shall be laid, unless in Proportion to the Census," *id.* art. I, § 9, cl. 4. But the ACA's mandate to purchase insurance, enforced through a non-compliance penalty, falls well outside this tax power.

A. Neither The Mandate Nor The Non-Compliance Penalty Is A Tax

The mandate is an independent legal requirement to obtain insurance, not a tax. Moreover, the sanction for unlawfully failing to comply is a penalty, not a tax. Congress clearly recognized these fundamental distinctions, and the Government's *post hoc* attempts to erase them fail.

1. The dispositive point here is that the mandate's legal "[r]equirement" that covered individuals "shall" obtain insurance, 26 U.S.C.A. § 5000A(a), cannot possibly *itself* be upheld as a tax. It is thus irrelevant whether the sanction for unlawfully "fail[ing] to meet th[at] requirement," *id.* § 5000A(b)(1), is a tax. That sanction cannot be imposed once the *mandate* is invalidated, because there will be no "requirement" left to "fail to meet."

The Government responds that the mandate in § 5000A(a) does not "create[] an independent legal obligation," but "serves only as the predicate for [avoiding] tax consequences imposed by the rest of the section." *See* Govt. Mandate Br. 60-62. Congress, however, intentionally and unambiguously structured the mandate as an unconditional

"requirement," separate from the "penalty," precisely because it wanted to deprive individuals of the *lawful choice* to remain uninsured by paying a "tax." *See* Private Resps. AIA Br. 3-5, 19-22.

2. Furthermore, even the non-compliance sanction is not a "tax," but a "penalty" imposed as "punishment for an unlawful act or omission." *See United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996); *see also* Private Resps. AIA Br. 26-27. This Court has always applied that bedrock distinction when reviewing the constitutionality of a purported "tax." *E.g.*, *United States v. Sanchez*, 340 U.S. 42, 45 (1950); *Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937); *Child Labor Tax Case*, 259 U.S. 20, 38 (1922); *see also* Private Resps. AIA Br. 30-32 (distinguishing "penalties" imposed for unlawful acts from "taxes" that, despite a regulatory motive, are imposed for acts without regard to their legality). Under that distinction, the ACA's "penalty" for unlawfully failing to comply with the mandate is not a "tax." Pet.App. 161a; *Thomas More*, 651 F.3d at 552. Tellingly, not even the Government contends that the "penalty" is a "tax" *if* it is imposed as a sanction for non-compliance with the mandate's legal requirement.

Moreover, and regardless, Congress and the President refused to invoke the tax power, by consistently treating the mandate's "penalty" differently from the ACA's "taxes." *See* Private Resps. AIA Br. 3-5, 33. Although the tax power need not be *expressly invoked*, *see* Govt. Mandate Br. at 58-59, it may be *affirmatively disavowed*, Pet.App. 164a; *Thomas More*, 651 F.3d at 553. The Government disputes this disavowal, noting that the

mandate is enforced by the IRS as part of the Tax Code and was defended by some legislators as a "tax." *See* Govt. Mandate Br. 57-58. But such weak indicia of legislative intent cannot overcome the overwhelming textual, structural, and contextual evidence that neither Congress nor the President intended the "penalty" to be treated as a "tax." Pet.App. 159a-166a, 169a-171a; *Thomas More*, 651 F.3d at 551-52.

B. Any Tax Here Would Be A Direct Tax That Congress Failed To Apportion

In any event, the mandate's so-called "tax" is not apportioned based on population. That alone is fatal, since taxing the failure to purchase insurance would be a direct tax that required apportionment.

1. After identifying a "capitation" (or head tax) as a "direct" tax that must be apportioned based on population, the Constitution generally provides that "other direct" taxes must likewise be apportioned. U.S. Const., art. I, § 9, cl.4. A "Tax[]" is direct if it falls outside the unapportioned "Duties, Imposts and Excises" authorized by the Tax Clause, *id.* art. I, § 8, cl. 1, because "the words 'duties, imposts and excises' are put in antithesis to direct taxes." *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 622 (1895); *see also Thomas v. United States*, 192 U.S. 363, 370 (1904) (recognizing "these two classes" as "apparently embrac[ing] all forms of taxation contemplated by the Constitution").

Non-direct taxes "comprehensively ... cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."

Thomas, 192 U.S. at 370. "Excise," specifically, encompasses taxes "upon a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property." *Fernandez v. Wiener*, 326 U.S. 340, 352 (1945).

Conversely, taxes on the "general ownership" of real or personal property—rather than any particular property or use thereof—are direct. *See Bromley v. McCaughn*, 280 U.S. 124, 136 (1929). *Pollock* further held that taxes on income from real or personal property are direct, as *de facto* taxes on the owner's *retention* of that property. *See* 158 U.S. at 627-29, 637.[2]

2. Any so-called "tax" on failing to purchase insurance would be a direct tax. It would not fall on a "particular use or enjoyment of property" or any "shifting" of a property right. *See Fernandez*, 326 U.S. at 352. Nor would it be triggered by any importation, consumption, manufacture, sale, business transaction, or exercise of a privilege, vocation, or occupation. *See Thomas*, 192 U.S. at 370. Rather, it would be levied on the *absence* of any transaction, shift in property rights, or particular use of property—*i.e.*, as a "tax" on the *retention* of one's "general ownership of property," for not having used some of it to purchase insurance. *See Bromley*, 280 U.S. at 136; *Pollock*, 158 U.S. at 627-29.

---

[2] *Pollock* remains governing precedent on the scope of direct taxes, despite the mooting of its specific holding when the Sixteenth Amendment exempted income taxes from the apportionment requirement.

The Government does not expressly address this direct-tax objection. If it is suggesting that a tax on the failure of individuals to purchase insurance would be analogous to taxes on the failure of businesses, heath plans, and participants in tax-deferred retirement plans to take specified operational steps, *see* Govt. Mandate Br. 56 n.10, that is incorrect. Such non-direct taxes are excises on the privilege of performing business in certain ways or conditions on income-tax benefits, rather than direct taxes on retention of an individual's property. Moreover, if it is suggesting that the mandate is itself an "income tax," *see id.* 56, that too is incorrect. That the penalty's *amount* is calculated partly with reference to income, 26 U.S.C.A. § 5000A(c),(e), does not change the fact that the penalty is laid on the "fail[ure]" to purchase insurance, *id.* § 5000A(b)(1). A law "that imposed fines upon all appellate judges who took too long in issuing decisions ... would not suddenly become an 'income tax'" if the fines were measured in "terms of a small percentage of the judge's federal income tax liability." *See Jefferson Cnty. v. Acker*, 527 U.S. 423, 449 (1999) (Breyer, J., dissenting).

CONCLUSION

This Court should hold that the individual mandate is unconstitutional and affirm in relevant part the judgment below.

Respectfully submitted,

KAREN R. HARNED
NFIB SMALL BUSINESS
LEGAL CENTER
1201 F St. NW, Suite 200
Washington, DC 20004

PROF. RANDY E. BARNETT
GEORGETOWN UNIV.
LAW CENTER
600 New Jersey Ave. NW
Washington, DC 20001

MICHAEL A. CARVIN
Counsel of Record
GREGORY G. KATSAS
C. KEVIN MARSHALL
HASHIM M. MOOPPAN
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Private Respondents

Dated: February 6, 2012

REPLY BRIEF

No. 11-398

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS
(Anti-Injunction Act)

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

A. Where it applies, the Anti-Injunction Act imposes a jurisdictional limitation on the courts' adjudicatory capacity 3

B. If the Court concludes that the AIA otherwise applies, respondents cannot circumvent it by recharacterizing their challenge as directed to a "requirement" to maintain minimum essential coverage 10

C. The state respondents are subject to the limitations of the AIA on the same terms as other persons 16

TABLE OF AUTHORITIES

Cases:

Alaska Airlines, Inc. v. *Brock*, 480 U.S. 678 (1987) .. 17, 18

Alexander v. *"Americans United" Inc.*, 416 U.S. 752 (1974) 14

American Needle, Inc. v. *National Football League*, 130 S. Ct. 2201 (2010) 8

Arbaugh v. *Y&H Corp.*, 546 U.S. 500 (2006) 8

Arizona Christian Sch. Tuition Org. v. *Winn*, 131 S. Ct. 1436 (2011) 16, 17

Block v. *North Dakota*, 461 U.S. 273 (1983) 20

Bob Jones Univ. v. *Simon*, 416 U.S. 725 (1974) 8, 10, 14, 15

Bond v. *United States*, 131 S. Ct. 2355 (2011) 18

Bowles v. *Russell*, 551 U.S. 205 (2007) 5

Davis v. *Federal Election Comm'n*, 554 U.S. 724 (2008) 17

Cases—Continued: Page

Enochs v. *Williams Packing & Navigation Co.*, 370 U.S. 1 (1962) 7, 8
Gonzalez v. *Thaler*, 132 S. Ct. 641 (2012) 5
Graham v. *du Pont*, 262 U.S. 234 (1923) 15
Helvering v. *Davis*, 301 U.S. 619 (1937) 9
Helvering v. *Mitchell*, 303 U.S. 391 (1938) 15
Henderson v. *Shinseki*, 131 S. Ct. 1197 (2011) 4
INS v. *Chadha*, 462 U.S. 919 (1983) 18
Jefferson County v. *Acker*, 527 U.S. 423 (1999) 6, 10
Kontrick v. *Ryan*, 540 U.S. 443 (2004) 4
License Tax Cases, 72 U.S. (5 Wall.) 462 (1867) 2, 11
Massachusetts v. *Mellon*, 262 U.S. 447 (1923) 18
Miller v. *Standard Nut Margarine Co.*, 284 U.S. 498 (1932) 7, 9
Miller-El v. *Cockrell*, 537 U.S. 322 (2003) 5
New York v. *United States*, 505 U.S. 144 (1992) 2, 11
Ohio v. *Helvering*, 292 U.S. 360 (1934) 19
Parker v. *Flook*, 437 U.S. 584 (1978) 8
Raygor v. *Regents of Univ. of Minn.*, 534 U.S. 533 (2002) 20
Seven-Sky v. *Holder*, 661 F.3d 1 (D.C. Cir. 2011), petition for cert. pending, No. 11-679 (filed Nov. 30, 2011) 9, 15
Sims v. *United States*, 359 U.S. 108 (1959) 19
South Carolina v. *Regan*, 465 U.S. 367 (1984) 8, 9, 21
Thunder Basin Coal Co. v. *Reich*, 510 U.S. 200 (1994) ... 14
United States v. *Brockamp*, 519 U.S. 347 (1997) 6
United States v. *Dalm*, 494 U.S. 596 (1990) 5

Cases—Continued: Page

United States v. *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996) 14
United States v. *Sanchez*, 340 U.S. 42 (1950) 15
Vermont Agency of Natural Res. v. *United States*, 529 U.S. 765 (2000) 20

Constitution, statutes and regulation:

U.S. Const.:
Art. I 18
§ 8, Cl. 1 (Tax Clause) 2
Amend. X 18, 21
Act of June 5, 1794, ch. 48, § 2, 1 Stat. 377 11
Act of June 30, 1864, ch. 173, 13 Stat. 223:
§ 71, 13 Stat. 248 11
§ 79, 13 Stat. 251 11
Anti-Injunction Act, 26 U.S.C. 7421(a) 2, 4, 8
Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*:
28 U.S.C. 1604 9
28 U.S.C. 1605(a)(1) 9
Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 1
Internal Revenue Code, 26 U.S.C. 1 *et seq.*:
Subtit. D, 26 U.S.C. 4001 *et seq.*:
Ch. 43, 26 U.S.C. 4971 *et seq.*:
§ 4980H (Supp. IV 2010) 17
Ch. 48, 26 U.S.C. 5000A (Supp. IV 2010) 3, 11, 12, 13, 14, 15

Statutes and regulation—Continued: Page

26 U.S.C. 5000A(a) (Supp. IV 2010) 12, 13
26 U.S.C. 5000A(b) (Supp. IV 2010) 12
26 U.S.C. 5000A(b)(1) (Supp. IV 2010) 15
26 U.S.C. 5000A(c)(1)(B) (Supp. IV 2010) ... 15
26 U.S.C. 5000A(c)(2) (Supp. IV 2010) 15
26 U.S.C. 5000A(d) (Supp. IV 2010) 12
26 U.S.C. 5000A(e) (Supp. IV 2010) 12, 13
26 U.S.C. 5000A(e)(1) (Supp. IV 2010) 13
26 U.S.C. 5000A(e)(5) (Supp. IV 2010) ... 13, 15
26 U.S.C. 5000A(g) (Supp. IV 2010) 3
26 U.S.C. 5000A(g)(1) (Supp. IV 2010) 15
26 U.S.C. 5000A(g)(2)(A) (Supp. IV 2010) ... 15
26 U.S.C. 5000A(g)(2)(B) (Supp. IV 2010) ... 15
Subtit. F, 26 U.S.C. 6001 *et seq.* 6
Ch. 61, 26 U.S.C. 6001 *et seq.*:
26 U.S.C. 6012 (2006 & Supp. IV 2010) 11
Ch. 68, 26 U.S.C. 6651 *et seq.* 3
Subch. A, 26 U.S.C. 6651 *et seq.*:
26 U.S.C. 6651(a) (2006 & Supp. IV 2010) ... 11
Subch. B, 26 U.S.C. 6671 *et seq.* 3
26 U.S.C. 6671(a) 3, 15
26 U.S.C. 6720A 12
Ch. 76, 26 U.S.C. 7401 *et seq.*:
26 U.S.C. 7402 6
26 U.S.C. 7421(a) 2, 4, 8
26 U.S.C. 7422(a) 5
26 U.S.C. 7482(a)(1) 6

Statutes and regulation—Continued: Page

Ch. 80, 26 U.S.C. 7801 *et seq.*:

26 U.S.C. 7851(a)(6)(A) 6

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 1

Tax Injunction Act, 28 U.S.C. 1341 ..... 6, 7

28 U.S.C. 2101(c) 5

28 U.S.C. 2253(c)(1) 4, 5

42 U.S.C. 7545(d)(1) 12

42 U.S.C.A. 18022(e)(2)(B) (Supp. 2011) 13

42 U.S.C.A. 18031(d)(4)(H) (Supp. 2011) 13

42 U.S.C.A. 18081(a)(4) (Supp. 2011) 13

42 U.S.C.A. 18081(b)(5) (Supp. 2011) 13

42 U.S.C.A. 18081(e)(2)(B) (Supp. 2011) 13

40 C.F.R. 80.610 12

In the Supreme Court of the United States

No. 11-398

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS
(Anti-Injunction Act)

The minimum coverage provision of the Patient Protection and Affordable Care Act (Affordable Care Act or Act)[1]—which is contained in the Internal Revenue Code and imposes only tax consequences for failure to maintain minimum coverage—represents a constitutional exercise of Congress's taxing power as well as its power to regulate commerce. Gov't Minimum Coverage Br. 52-62. In this instance, as in myriad others, Congress has implemented its constitutional powers through the highly reticulated provisions of the Internal Revenue Code that provide for monetary exactions and various

[1] Pub. L. No. 111-148, 124 Stat. 119, amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

credits, deductions, and exemptions, as well as detailed conditions or requirements for their application. For purposes of assessing the minimum coverage provision's constitutionality under the Tax Clause, it is immaterial whether Congress has chosen to identify a particular component in the calculation of liability under the Code as a tax, addition to tax, credit, deduction, exemption—or, here, a "penalty," calibrated to income and reported on a taxpayer's income tax return. Because the provision is embedded in the Code's tax system, and will raise substantial revenues, it is—and should be interpreted as—a constitutional exercise of Congress's powers under the Tax Clause irrespective of the label Congress has chosen. See *New York* v. *United States*, 505 U.S. 144, 170-171 (1992); *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471-472 (1867).

But the fact that the minimum coverage provision is a constitutional exercise of Congress's taxing power does not compel the conclusion that the Anti-Injunction Act (AIA), 26 U.S.C. 7421(a),[2] bars this suit. To resolve questions of statutory interpretation under the Internal Revenue Code itself, such as the applicability of the AIA, it is necessary to adhere closely to the specific text and structure of the provisions within the Code. Here, the text and structure of the Code, and of the minimum coverage provision in particular, establish that the AIA does not apply to respondents' claims.

The AIA bars suits "for the purpose of restraining the assessment or collection of any *tax*." 26 U.S.C. 7421(a) (emphasis added). The payment for failure to maintain minimum essential coverage is characterized

---

[2] Unless otherwise indicated, all citations to the United States Code refer to the 2006 edition and Supplement IV (2010).

in the Act as a "penalty," rather than a "tax." For statutory purposes under the Internal Revenue Code, of which the AIA is a part, a "penalty" is not the same thing as a "tax." To be sure, Congress specified in 26 U.S.C. 5000A(g) that the minimum coverage penalty is to be assessed and collected in the same manner as assessable penalties under Subchapter B of Chapter 68—which are, in turn, assessed and collected in the same manner as taxes, 26 U.S.C. 6671(a). But Congress did not provide, as it did in Section 6671(a) and other provisions of the Code, that the penalty is itself to be deemed a "tax" for AIA purposes. The procedural instruction to the Secretary of the Treasury to assess and collect the minimum coverage penalty in the same manner as a tax is not a directive to *courts* dictating that the AIA bars adjudication of suits like respondents' challenge to Section 5000A. See Gov't AIA Br. 20-38.

Respondents agree that, under this statutory analysis advanced by the government, the AIA does not bar their challenge to the minimum coverage provision. The Court should so hold, and there is no need for it to proceed further. Respondents nonetheless make a series of additional, broader arguments against application of the AIA. These arguments lack merit.

A. Where It Applies, The Anti-Injunction Act Imposes A Jurisdictional Limitation On The Courts' Adjudicatory Capacity

Respondents contend (NFIB Br. 41-58; States Br. 13-25)[3] that this Court need not even consider whether the AIA applies in this case because the parties agree that it does not. The AIA is, however, a jurisdictional

[3] All references to NFIB Br. and States Br. are to the briefs of those parties on the Anti-Injunction Act.

limit on the courts' authority to hear pre-enforcement challenges to federal taxes. The Court therefore has an "independent obligation to ensure" that the AIA does not bar the exercise of jurisdiction in this case. *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011).

1. The AIA provides that, with certain exceptions not relevant here, "no suit" to restrain the assessment or collection of taxes "shall be maintained in any court by any person." 26 U.S.C. 7421(a). This language, barring the very "maint[enance]" of pre-enforcement tax challenges, is a mandatory "prescription[] delineating the classes of cases (subject-matter jurisdiction) * * * falling within a court's adjudicatory capacity." *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004). It makes perfect sense that Congress would have intended to impose a firm jurisdictional bar: the AIA's purpose is to foreclose impediments to the prompt and efficient assessment and collection of taxes on which the government's operations depend. See Gov't AIA Br. 8-20.

Respondents contend that the AIA is not jurisdictional because the statute does not include the word "jurisdiction," and because its text is not "addressed to courts, but is instead addressed to litigants," referring to the maintenance of a suit "*in* any court *by* any person," rather than "*by* any court." States Br. 14-15; see NFIB Br. 43-44. That contention is incorrect.

This Court has repeatedly held that a statute may be jurisdictional even when it neither includes the term "jurisdiction" nor explicitly speaks of the power of the courts to hear the case. Section 2253(c)(1) of Title 28, for example, provides: "Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals." Although that statute, like the AIA, might appear to be addressed to litigants

rather than the courts, this Court has concluded that Section 2253(c)(1) speaks in "'clear' jurisdictional language," establishing by its "plain terms" that "'until a [certificate of appealability] has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners.'" *Gonzalez* v. *Thaler*, 132 S. Ct. 641, 649 (2012) (quoting *Miller-El* v. *Cockrell*, 537 U.S. 322, 336 (2003)). This Court has similarly held that 28 U.S.C. 2101(c), which provides that an appeal or writ of certiorari to this Court in a civil action "shall be taken or applied for within ninety days" after the lower court's judgment, imposes a limitation on this Court's jurisdiction. See, *e.g.*, *Bowles* v. *Russell*, 551 U.S. 205, 211-212 (2007).

Respondents' contention that the AIA is a claims-processing rule, rather than a jurisdictional limit, rests on an erroneous assumption that a statute that "direct[s] certain litigants to statutorily provided refund actions" cannot be jurisdictional. States Br. 15; see NFIB Br. 45-46. This Court has held that the statute restricting tax refund actions, which is worded almost identically to the AIA, is jurisdictional. See 26 U.S.C. 7422(a) ("No suit or proceeding shall be maintained in any court for the recovery of [any tax, penalty, or sum] * * * until a claim for refund or credit has been duly filed with the Secretary."); *United States* v. *Dalm*, 494 U.S. 596, 608-610 (1990) (holding that Section 7422(a) is jurisdictional). Section 7422(a) and the AIA share a common origin and are designed to work together to preclude disruption of the efficient collection of tax revenues. See Gov't AIA Br. 12-13. There is no reason to believe that Congress would have ranked Section 7422(a) as jurisdictional, while relegating the materially identical AIA to the status of a claims-processing rule.

The structure of the Code's tax-refund provisions similarly refute respondents' arguments that the AIA cannot be jurisdictional because it is located in Title 26 rather than Title 28 of the United States Code, or because it contains a number of statutory exceptions. States Br. 15-16; NFIB Br. 43-45 & n.6. Both the AIA and the tax refund restriction were enacted long before the organization of the present-day United States Code. See Gov't AIA Br. 10 & n.6. That the AIA was placed in Title 26 rather than Title 28 is unsurprising, given that the AIA applies to suits concerning taxes imposed under the Internal Revenue Code but not to suits concerning exactions imposed under other statutes. See 26 U.S.C. 7851(a)(6)(A) (providing that "[t]he provisions of subtitle F," 26 U.S.C. 6001 *et seq.*, in which the AIA appears, "shall be applicable with respect to any tax imposed by this title.").[4] Congress's amendments of the AIA to create specific statutory exceptions reinforce the conclusion that the AIA's bar is a jurisdictional limitation because those exceptions are typically framed in jurisdictional terms. See Gov't AIA Br. 14-15 & n.8; cf. *United States* v. *Brockamp*, 519 U.S. 347, 352 (1997).

2. For essentially the same reasons, respondents' efforts (NFIB Br. 46-47; States Br. 16) to distinguish the AIA from the concededly jurisdictional Tax Injunction Act (TIA), 28 U.S.C. 1341, are unavailing. Given that Congress "modeled the Tax Injunction Act" on the AIA, *Jefferson County* v. *Acker*, 527 U.S. 423, 434 (1999), there is no basis for concluding that Congress ranked the latter statute as jurisdictional but not the

---

[4] Title 26, moreover, contains other jurisdictional provisions. See, *e.g.*, 26 U.S.C. 7402 (governing district court jurisdiction in civil actions by United States), 7482(a)(1) (granting courts of appeals exclusive jurisdiction to review Tax Court decisions).

former. Although respondents contend that the TIA's location in Title 28 and its reference to "district courts" manifest such an intent, see States Br. 16, the only meaningful difference between the two statutes points in the opposite direction: While the TIA does not apply if "a plain, speedy and efficient remedy" cannot be had in state court, 28 U.S.C. 1341, the AIA contains no such exception, see *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1, 6 (1962). It is thus the AIA, not the TIA, that imposes the "more stringent" limitation on federal-court authority. NFIB Br. 47.

3. Respondents err in contending (NFIB Br. 48-57; States Br. 18-25) that this Court has treated the AIA as non-jurisdictional by fashioning "equitable exceptions" to it.

As the government has previously explained (Gov't AIA Br. 18-19), the Court did at one time view the AIA as simply "declaratory of the principle" in equity that the tax collector could be enjoined if there were "special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence." *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932). But the Court arrived at that approach as a matter of statutory construction, not as a direct exercise of equitable authority. *Id.* at 509-510.

The Court later reconsidered that approach and narrowed the "special and extraordinary circumstances" under which injunctive relief could issue to situations in which it is "clear that under no circumstances could the Government prevail" on its tax claim. *Williams Packing*, 370 U.S. at 7. And as in *Standard Nut*, the Court in *Williams Packing* rooted that rule in the text and purpose of the AIA, rather than in the exercise of equitable authority to fashion judicial exceptions. See *ibid.*; Gov't

AIA Br. 15-16. Indeed, the Court was quite clear that the AIA "withdraw[s] jurisdiction" from the courts, and that where it applies, the district court "is without jurisdiction, and the complaint must be dismissed." *Williams Packing*, 370 U.S. at 5, 7.

As respondents note (NFIB Br. 54-55), the Court has since described the *Williams Packing* rule as prescribing a route by which the "literal terms of § 7421(a) [can] be avoided." *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 737 (1974). But that simply means that as a matter of statutory construction, the literal terms of the jurisdictional provision do not bar suit when the government's position is wholly insubstantial. Compare *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006), and *Bob Jones Univ.*, 416 U.S. at 742.[5] And this Court not infrequently interprets statutes in a manner that departs from their "literal" meaning, in light of their text, purpose, and relevant context. See, *e.g.*, *American Needle, Inc.* v. *National Football League*, 130 S. Ct. 2201, 2208 (2010); *Parker* v. *Flook*, 437 U.S. 584, 589 (1978).

The same is true of the result in *South Carolina* v. *Regan*, 465 U.S. 367 (1984), which permitted an aggrieved party—a State whose own constitutional rights

---

[5] The Court in *Bob Jones* rejected the petitioner's contention that *Williams Packing* "does not constitute an all-encompassing reading of the Act," and that Section 7421(a) "is subject to judicially created exceptions other than the 'under no circumstances' test announced in *Williams Packing*." 416 U.S. at 742. Private respondents argue that, if the Court had believed *Williams Packing* was not a "judicially created exception[]," but "instead a permissible construction of the AIA's text in light of its purpose, then surely it would have said so." NFIB Br. 54 (citation omitted). But the Court effectively said just that when it rejected the petitioner's argument on the ground that *Williams Packing* represented "the capstone to judicial construction of the Act." *Bob Jones Univ.*, 416 U.S. at 742.

allegedly were violated by a tax provision—to challenge the provision because the State lacked an alternative remedy. *Id.* at 373. The Court rested its decision not on a supposed equitable discretion to create judicial exceptions to the AIA's bar, but instead on its review of the "Act's purpose and the circumstances of its enactment." *Id.* at 378. The jurisdictional status of a statutory bar does not "disable the courts from interpreting the statute and Congress's intent by means of the usual tools of statutory construction." *Seven-Sky* v. *Holder*, 661 F.3d 1, 29 n.8 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), petition for cert. pending, No. 11-679 (filed Nov. 30, 2011).

4. Finally, respondents err in relying (NFIB Br. 49; States Br. 22) on *Helvering* v. *Davis*, 301 U.S. 619 (1937). As previously noted, *Davis* was the product of a short-lived era when the Court saw the AIA as merely "declaratory" of pre-existing equitable principles, *Standard Nut*, 284 U.S. at 509, a view the Court has long since repudiated. See p. 7, *supra*; Gov't AIA Br. 17-20. Although Congress certainly has the power to enact a jurisdictional statute that allows an affirmative and explicit waiver by the government, cf. 28 U.S.C. 1604, 1605(a)(1) (Foreign Sovereign Immunities Act provision permitting district courts to exercise jurisdiction if foreign sovereign waives immunity), the Court's decisions in *Williams Packing* and subsequent cases cast considerable doubt on the result in *Davis*. In any event, any inferences that might be drawn from the result in *Davis* do not detract from the AIA's text, purpose, and history, all of which demonstrate that the AIA's statutory bar to pre-enforcement tax challenges is jurisdictional.

B. If The Court Concludes That The AIA Otherwise Applies, Respondents Cannot Circumvent It By Recharacterizing Their Challenge As Directed To A "Requirement" To Maintain Minimum Essential Coverage

Respondents argue (NFIB Br. 10-25; States Br. 43-48) that the AIA does not apply because they are challenging only the "requirement" that non-exempted individuals maintain minimum essential coverage, and not the penalty that results from a failure to do so. Respondents cannot avoid the AIA on that rationale if the Court concludes that the AIA otherwise applies.

1. To make this argument, respondents mischaracterize their own complaint, which—as the government previously noted (Gov't AIA Br. 38-39)—explicitly asked the district court to enjoin operation of the minimum coverage provision, necessarily including the tax penalty.

Private respondents urge (NFIB Br. 16) the Court to disregard their prayer for relief because the district court granted only a declaratory judgment. But jurisdiction is determined at the outset of litigation, and respondents' complaint plainly evinces a "purpose" to enjoin collection of the tax penalty. Moreover, the district court granted a declaratory judgment on the understanding that it was "the functional equivalent of an injunction." Pet. App. 364a (citation omitted). This Court has noted that "there is 'little practical difference between an injunction and anticipatory relief in the form of a declaratory judgment'" against a taxing statute. *Jefferson County*, 527 U.S. at 433 (citation omitted). For this reason, Congress added the tax exception to the Declaratory Judgment Act shortly after it was enacted, "thus reaffirming the restrictions set out in the [AIA]." *Bob Jones Univ.*, 416 U.S. at 732 n.7.

2. Respondents' argument also rests on the misconception that there is a material difference between a suit "for the purpose of" restraining the shared responsibility payment under Section 5000A and a suit "for the purpose of" restraining the "requirement" to maintain minimum essential coverage. There is in fact no material difference between the two.

It is not uncommon for statutes enacted pursuant to Congress's taxing power to describe actions that a taxpayer "shall" perform in one section, and to describe the tax consequences of nonperformance in another section. See, *e.g.*, 26 U.S.C. 6012 (certain individuals "shall" make income tax returns); 26 U.S.C. 6651(a) (additions to tax for failure to file return). This Court has long resisted efforts to isolate the predicates for liability from their tax consequences, and instead has construed such statutes as a whole. See, *e.g.*, *New York*, 505 U.S. at 170-171.

The *License Tax Cases*, *supra*, for example, involved a statute providing that "no person * * * shall be engaged in, prosecute, or carry on any trade, business, or profession [involving, *inter alia*, selling lottery tickets and liquor] until he * * * shall have obtained a license thereof" from the federal government. Act of June 30, 1864, ch. 173, § 71, 13 Stat. 248. An entirely different section required payment of specified sums to obtain the required license. See *id.* § 79, 13 Stat. 251. The Court concluded that, when read in context, "[t]he granting of a license" by Section 71 of the Act "must be regarded as nothing more than a mere form of imposing a tax" under Section 79. *License Tax Cases*, 72 U.S. (5 Wall.) at 471. The Court noted that Congress had long structured revenue statutes in this way. See *id.* at 472 (describing Act of June 5, 1794, ch. 48, § 2, 1 Stat. 377, which required

"retail dealer[s] in wines, or foreign distilled spirituous liquors," to obtain licenses, "merely as a convenient mode of imposing taxes").

Similarly, Section 5000A(a)'s "requirement" to maintain minimum coverage cannot be viewed in isolation from the remainder of the provision. There is no consequence for the failure to maintain minimum coverage other than the shared responsibility payment in Section 5000A(b). See Gov't Minimum Coverage Br. 60-61; Gov't AIA Br. 39-40. Any challenge to enforcement of the minimum coverage provision is thus necessarily a challenge to that penalty. If the payment were a "tax" for statutory purposes including the AIA (but see Gov't AIA Br. 20-38), respondents' challenge would be barred.[6]

3. Respondents note that Section 5000A includes exemptions to the definition of an "applicable individual" who is subject to Section 5000A(a), see 26 U.S.C. 5000A(d), and textually separate exemptions to the shared responsibility payment established by Section 5000A(b), see 26 U.S.C. 5000A(e). See States Br. 44. They thus posit that an individual's "exemption from the penalty does not obviate the need to comply with the mandate." *Ibid.* But far from establishing the existence of a freestanding "mandate" independent of the tax penalty, the structure of Section 5000A establishes that it is to be read as a whole.

---

[6] Private respondents thus fail in their attempt (NFIB Br. 13-14) to analogize the minimum coverage provision to the penalty for failure to comply with certain EPA diesel-fuel regulations. A person who violates those regulations is subject not only to the $10,000 assessable penalty under 26 U.S.C. 6720A, but also to civil enforcement by EPA, including fines of up to $25,000 per day. See 42 U.S.C. 7545(d)(1); 40 C.F.R. 80.610. That regulatory requirement is thus freestanding in a way that Section 5000A(a) is not.

In Section 5000A(e), for example, Congress provided exemptions from the penalty for individuals who "cannot afford coverage," 26 U.S.C. 5000A(e)(1), or who have been "determined by the Secretary of [HHS] * * * to have suffered a hardship with respect to the capability to obtain coverage," 26 U.S.C. 5000A(e)(5). In their assertion that Section 5000A(a) has independent legal force, respondents attribute to Congress an intention to brand those who qualify for the Section 5000A(e) exemptions as scofflaws, even as it recognized their inability to afford coverage or their hardship in obtaining it. The Court should not read an exercise of Congress's taxing power to produce such a consequence.

Other provisions of the Act confirm that Section 5000A should be read as an integrated whole. For example, the Act provides that an individual with a "certification * * * that the individual is exempt from the requirement under Section 5000A * * * by reason of * * * section 5000A(e)(1) of such Code (relating to individuals without affordable coverage); or * * * section 5000A(e)(5) of such Code (relating to individuals with hardships)," is eligible to enroll in a special catastrophic insurance plan. 42 U.S.C.A. 18022(e)(2)(B) (Supp. 2011). In this provision, Congress expressly characterized penalty exemptions in Section 5000A(e) as exemptions from "the requirement under Section 5000A," *ibid.*, demonstrating that exemptions from the penalty and from the definition of "applicable individual" generally have the same legal effect. Likewise, Congress provided for issuance of a single, all-purpose "certification of exemption" "from the individual requirement or from the penalty imposed" by Section 5000A. 42 U.S.C.A. 18031(d)(4)(H), 18081(a)(4), (b)(5) and (e)(2)(B) (Supp. 2011).

Therefore, if this Court were to determine that the minimum coverage penalty otherwise qualifies as a "tax" within the meaning of the AIA, respondents' challenge must necessarily await a refund suit. Nothing in Section 5000A would prevent individuals who wished to challenge that provision from declining to obtain insurance, paying the penalty, and seeking a refund. Cf. NFIB Br. 22; States Br. 45-46. That is true regardless of whether the individual respondents in this case plan to obtain minimum coverage; "[a] taxpayer cannot render an available review procedure an inadequate remedy at law by voluntarily foregoing it." *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752, 762 n.13 (1974). Respondents make a great deal out of the choice the individual respondents will face if they cannot adjudicate their claims now. But the reality is that they will face no legal or practical consequences (apart from the risk of remaining without health coverage) should they choose to forgo coverage in 2014, pay a tax penalty instead, and then seek a refund. And in any event, it is not uncommon, and is fully consistent with due process, to allow for a challenge to a law only in the context of the assessment of a sanction or other consequence for a failure to comply. See, *e.g.*, *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207-212 (1994); *Bob Jones Univ.*, 416 U.S. at 746-748.

4. Because Section 5000A does not make the failure to maintain health coverage independently unlawful, respondents' observation that a "punishment for an unlawful act" is not a "tax" for constitutional purposes is beside the point. NFIB Br. 27 (quoting *United States* v. *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996)); see *id.* at 26-28; States Br. 44.

Nor can the minimum coverage penalty plausibly be described as punitive—*i.e.*, as an "illegal penalt[y] in the nature of punishment for a criminal offense" for which pre-enforcement review might otherwise be justified under the AIA. *Graham* v. *du Pont*, 262 U.S. 234, 257 (1923); *Bob Jones Univ.*, 416 U.S. at 743; see *Seven-Sky*, 661 F.3d at 43 n.31, 48 n.37 (Kavanaugh, J., dissenting). Section 5000A forbids criminal prosecution for failure to pay the penalty. 26 U.S.C. 5000A(g)(2)(A). Instead, the Secretary gives notice and demand to the taxpayer, 26 U.S.C. 5000A(g)(1), and payment is to be "assessed and collected" in the same manner as taxes, 26 U.S.C. 5000A(g)(1), 6671(a), subject to limitations on notices of lien or levies on taxpayer property, 26 U.S.C. 5000A(g)(2)(B). "That Congress provided a distinctly civil procedure for the collection of [the § 5000A penalty] indicates clearly that it intended a civil, not a criminal, sanction." *Helvering* v. *Mitchell*, 303 U.S. 391, 402 (1938).

Above a floor, the penalty is proportional to income, and it cannot exceed the cost of qualifying insurance. 26 U.S.C. 5000A(c)(1)(B). Further, the penalty is pro-rated to apply only to those months in which the taxpayer lacks qualifying insurance. 26 U.S.C. 5000A(b)(1) and (c)(2). And unlike a punitive sanction, it has a hardship exemption. 26 U.S.C. 5000A(e)(5). These limits show that Congress intended to provide an incentive to obtain health coverage, not to impose a disproportionate sanction that could plausibly be regarded as punishment. As there is a "rational foundation" for the amount of the penalty, it has a "civil character." *United States* v. *Sanchez*, 340 U.S. 42, 45 (1950).

C. The State Respondents Are Subject To The Limitations Of The AIA On The Same Terms As Other Persons

Should this Court conclude that the minimum coverage penalty is a "tax" within the meaning of the AIA, state respondents cannot circumvent that statutory bar by seeking special treatment.

1. As an initial matter, the Court need not reach state respondents' AIA arguments because they lack standing to challenge the minimum coverage provision.

The States contend that they have standing because the provision will "forc[e] currently eligible but unenrolled individuals to enroll" in Medicaid, thereby purportedly increasing the States' Medicaid expenditures. States Br. 27. But the minimum coverage provision does not "forc[e]" anyone to maintain minimum coverage, much less does it "forc[e]" low-income individuals—who would be exempt from the penalty—to enroll in Medicaid. See Gov't Medicaid Br. 49-50. To the extent state respondents complain that the Affordable Care Act will *encourage* eligible individuals to enroll, they fail to explain how that encouragement invades any right or legally cognizable interest of the States. See Gov't AIA Br. 43-44. The orderly administration of the Internal Revenue Code would break down if an indirect economic impact alone were a sufficient basis for allowing a person to challenge a tax or exemption applicable *to someone else*. See *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1443 (2011).[7]

---

[7] Contrary to state respondents' allegations of financial injury, studies have shown that overall state spending will be approximately $100 billion *lower* through 2019 than it would have been in the absence of the Act. See Gov't Medicaid Br. 10-11.

State respondents next contend (Br. 30) that because they have standing to challenge other provisions of the Affordable Care Act to which States are directly subjected, such as the employer responsibility provision, 26 U.S.C. 4980H, they must also have standing to challenge the minimum coverage provision and then to seek invalidation of the entire Act as inseverable. Putting the AIA's bar to challenging the employer responsibility provision to one side (see Gov't Severability Br. 14 n.8), state respondents' bootstrapping theory of standing will not work. As this Court has repeatedly affirmed, "'[s]tanding is not dispensed in gross.' Rather, 'a plaintiff must demonstrate standing for each claim he seeks to press' and '"for each form of relief"' that is sought." *Davis* v. *Federal Election Comm'n*, 554 U.S. 724, 734 (2008) (citations omitted).

Alaska Airlines, Inc. v. *Brock*, 480 U.S. 678 (1987), on which state respondents rely, lends no support to their argument. The district court in *Alaska Airlines* had held the legislative-veto provision of the statute at issue unconstitutional, and further held the portion of the statute establishing certain protections for airline employees were inseverable from the offending provision. See *id.* at 683. The government appealed only on severability; the court of appeals reversed, holding the entire statute severable; and this Court affirmed without addressing the plaintiffs' standing. See *ibid.* State respondents' efforts to extract meaning from the Court's silence are unavailing. This Court has made clear that, "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Arizona Christian Sch. Tuition Org.*, 131 S. Ct. at 1448. Moreover, unlike the minimum coverage provision, the

legislative-veto provision in *Alaska Airlines* applied to regulations that governed the plaintiffs' own conduct. 480 U.S. at 682-683. In any event, particularly because the minimum coverage provision is severable from those provisions of the Act that do apply to the States, see Gov't Severability Br. 26-44, state respondents cannot rely on those unrelated provisions to establish their standing to challenge the minimum coverage provision. Compare *INS* v. *Chadha*, 462 U.S. 919, 931-936 & n.7 (1983) (concluding that respondent had standing to challenge legislative-veto provision only after concluding that it was severable from remainder of statute, such that respondent would receive relief if his challenge were successful).

Finally, state respondents claim (Br. 30-31) that they have standing to challenge any statute they assert to be beyond Congress's enumerated powers. But as they acknowledge, that sweeping theory of standing is foreclosed by *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923), in which this Court concluded that a State does not have *parens patriae* standing to represent its citizens vis-a-vis the United States, and that "the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of a statute" does not suffice to establish a State's standing to challenge the law. *Id.* at 483-486. *Bond* v. *United States*, 131 S. Ct. 2355 (2011), casts no doubt on those principles. In holding that an individual subject to criminal prosecution had standing to challenge the statute under which she was charged as violative of the Tenth Amendment, *id.* at 2363-2364, the Court did not suggest that a State has standing to challenge any statute it regards as beyond Congress's Article I powers—especially where, as here, the statute applies to individuals and not to the

States themselves. That theory of standing is breathtaking in its reach and would invite officials in any State to rove through the United States Code in search of provisions with which they disagree.

2. Should the Court nevertheless address the States' treatment under the AIA, it should reject state respondents' argument that they are not "person[s]" to whom the AIA applies.

For the first century of its existence, the AIA did not refer to "person[s]" at all. See Gov't AIA Br. 47-48. The phrase "by any person, whether or not such person is the person against whom such tax was assessed," was added in 1966, not to grant States permission to sue, but instead to remove any doubt that the AIA bars actions by non-taxpayers. See *ibid.* By that time, the Court had decided multiple cases interpreting the term "person" in other provisions of the Internal Revenue Code to include States. See *Sims* v. *United States*, 359 U.S. 108 (1959); *Ohio* v. *Helvering*, 292 U.S. 360 (1934). It would stand Congress's intent on its head to treat the 1966 amendment as narrowing the AIA by creating a special exemption for States that are not even subject to the challenged tax provision and that have no rights of their own that allegedly are infringed by it.[8]

---

[8] State respondents contend (Br. 38-41) that *Ohio* v. *Helvering* is distinguishable because the tax statute there applied to States in their non-sovereign capacity as sellers of liquor. Although the Court rejected the State's constitutional challenge on that basis, 292 U.S. at 368-370, it did not rely on that rationale in rejecting the State's separate argument that "a state is not embraced within the word 'person,' as used" in the statute, *id.* at 370.

State respondents attempt to distinguish *Sims* (Br. 40-41) on the ground that the Court referred not to the word "person" alone, but also to "the legislative environment" in which the term appeared. 359 U.S.

State respondents' invocation of the "longstanding interpretive presumption that 'person' does not include the sovereign," States Br. 37 (quoting *Vermont Agency of Natural Res.* v. *United States*, 529 U.S. 765, 780 (2000)), is out of place here. Whereas "comity and respect for our federal system demand that something more than mere use of the word 'person' demonstrate the federal intent to authorize unconsented private suit *against*" States, *Vermont Agency*, 529 U.S. at 780-781 n.9 (emphasis added), no similar principles counsel in favor of reading the AIA's reference to "person" to permit the States—and the States alone—to sue the federal government, without regard to the terms on which the United States has consented to suit. See *Block* v. *North Dakota*, 461 U.S. 273, 287-289 (1983). The States do not "retain substantial sovereign powers" to sue the federal government on whatever terms they wish. States Br. 37 (quoting *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 544 (2002)). To the contrary, under the Constitution, the United States is immune from suit unless Congress consents, and Congress controls the terms on which the federal government will be sued. It therefore undermines no principle of federalism and works no interference with state sovereignty for Congress to require a State to proceed against the federal government on the same terms as any other plaintiff.[9]

---

at 112. But here, too, the "legislative environment" of the AIA, including its subject matter and context, demonstrates that the AIA does not exempt States from its compass. See *ibid.*

[9] State respondents offer no support for their contention that it would be "inappropriate" to apply the AIA in a manner that would require a State to pay any federal taxes owed before filing suit to challenge its tax liability, as other taxpayers must do. States Br. 42. To the contrary, this Court's decision in *Regan* proceeded on the premise

3. Finally, state respondents contend that they are "aggrieved parties for whom [Congress] has not provided an alternative remedy." States Br. 35 (quoting *Regan*, 465 U.S. at 378). They are incorrect. The State in *Regan* was "aggrieved" by the tax provision because it assertedly interfered with the State's exercise of its sovereign power to raise money. See 465 U.S. at 379-380. Under those circumstances, the State was not required to depend on the possibility that an individual taxpayer would assert its Tenth Amendment claim on its behalf, particularly because "instances in which a third party may raise the constitutional rights of another are the exception rather than the rule." *Id.* at 380. This case is the converse of *Regan*. The minimum coverage provision does not apply to or regulate any sovereign function of the States. It applies to individual taxpayers only and directly. It is thus the States that are attempting to assert the "constitutional rights of another." *Ibid.* Neither the text of the AIA nor the result in *Regan* supports the notion that anyone may circumvent the AIA in this manner. Accordingly, if the Court concludes that the AIA bars individual taxpayers who are directly affected by the minimum coverage provision from bringing a pre-enforcement challenge, *a fortiori* there is no basis to permit state respondents to do so.

---

that the State's suit would have been barred by the AIA if the State had an alternative remedy. See 465 U.S. at 373-381.

* * * * *

For the foregoing reasons and those stated in the government's opening brief on the Anti-Injunction Act, the Court should hold that the suit brought by respondents to challenge the minimum coverage provision is not barred by the Anti-Injunction Act.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

FEBRUARY 2012

REPLY BRIEF

No. 11-398

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS
(Minimum Coverage Provision)

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

I. The minimum coverage provision is a valid exercise of Congress's commerce power 2
   A. The minimum coverage provision regulates economic activity that substantially affects interstate commerce 2
   B. The minimum coverage provision is necessary and proper to carry out the Act's insurance reforms 13
   C. Respondents' contentions regarding novelty and hypothetical mandates are misplaced 15
II. The minimum coverage provision is independently authorized by Congress's taxing power 21

TABLE OF AUTHORITIES

Cases:

Adkins v. *Children's Hosp.*, 261 U.S. 525 (1923), overruled by *West Coast Hotel Co.* v. *Parrish* 11

Bailey v. *Drexel Furniture Co.*, 259 U.S. 20 (1922) .. 22, 23

Bromley v. *McCaughn*, 280 U.S. 124 (1929) 25

Champion v. *Ames*, 188 U.S. 321 (1903) 18

Cruzan v. *Director, Missouri Dep't of Health*, 497 U.S. 261 (1990) 20

FERC v. *Mississippi*, 456 U.S. 742 (1982) 14

German Alliance Ins. Co. v. *Kansas*, 233 U.S. 389 (1914) 19

Gonzales v. *Raich*, 545 U.S. 1 (2005) 5, 7, 11, 14, 15, 17

Harmelin v. *Michigan*, 501 U.S. 957 (1991) 18

Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964) 16

Cases—Continued: Page

Hodel v. *Indiana*, 452 U.S. 314 (1981) 14
Hoke & Economides v. *United States*, 227 U.S. 308 (1913) 17
Hylton v. *United States*, 3 U.S. (3 Dall.) 171 (1796) 25
Katzenbach v. *McClung*, 379 U.S. 294 (1964) 17
Knowlton v. *Moore*, 178 U.S. 41 (1900) 25
Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871) ... 4, 7, 9
License Tax Cases, 72 U.S. (5 Wall.) 462 (1867) 21
McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) ..... *passim*
Murphy v. *IRS*, 493 F.3d 170 (D.C. Cir. 2007), cert. denied, 553 U.S. 1004 (2008) 25
NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) 3, 5, 14, 17
New York v. *United States*, 326 U.S. 572 (1946) 18
New York v. *United States*, 505 U.S. 144 (1992) 9, 22
North American Co. v. *SEC*, 327 U.S. 686 (1946) 16
Perez v. *United States*, 402 U.S. 146 (1971) 17
Pierce County v. *Guillen*, 537 U.S. 129 (2003) 21
Polish Nat'l Alliance v. *NLRB*, 322 U.S. 643 (1944) 17
Printz v. *United States*, 521 U.S. 898 (1997) 9, 18
Seven-Sky v. *Holder*, 661 F.3d 1 (D.C. Cir. 2011), petition for cert. pending, No. 11-679 (filed Nov. 30, 2011) 3, 16, 24
Skinner v. *Mid-America Pipeline*, 490 U.S. 212 (1989) 24

Cases—Continued: Page

Steward Mach. Co. v. *Davis*, 301 U.S. 548 (1937) 23

Texas Office of Pub. Util. Counsel v. *FCC*, 183 F.3d 393 (5th Cir. 1999) 11

Thomas More Law Ctr. v. *Obama*, 651 F.3d 529 (6th Cir. 2011), petition for cert. pending, No. 11-117 (filed July 26, 2011) ..... *passim*

U.S. Term Limits, Inc. v. *Thornton*, 514 U.S. 779 (1995) 9

United States v. *Comstock*, 130 S. Ct. 1949 (2010) 4, 7, 12, 21

United States v. *Darby*, 312 U.S. 100 (1941) .. 10, 12, 14, 17

United States v. *Lopez*, 514 U.S. 549 (1995) 3, 14, 15, 17

United States v. *Morrison*, 529 U.S. 598 (2000) 6

United States v. *Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939) 11, 18

United States v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) 18

United States v. *Wrightwood Dairy* Co., 315 U.S. 110 (1942) 11, 13, 14

Veazie Bank v. *Fenno*, 75 U.S. (8 Wall.) 533 (1869) 25

Virginia Office for Protection & Advocacy v. *Stewart*, 131 S. Ct. 1632 (2011) 16

West Coast Hotel Co. v. *Parrish*, 300 U.S. 379 (1937) 11

Wickard v. *Filburn*, 317 U.S. 111 (1942) 7, 11, 15, 17

Constitution and statutes:

U.S. Const.:

Art. I 1, 2, 13, 18, 24

§ 4, Cl. 1 5

Constitution and statutes—Continued: Page

§ 8:
Cl. 3 (Commerce Clause) 5
Cl. 18 (Necessary and Proper Clause) 7
Amend. XIV (Due Process Clause) 19
Emergency Medical Treatment and Labor Act, 42 U.S.C. 1395dd 20
Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 1
Internal Revenue Code, 26 U.S.C. 1 *et seq.*:
Subtit. D, 26 U.S.C. 4001 *et seq.*:
Ch. 48, 26 U.S.C. 5000A (Supp. IV 2010) 21, 22
26 U.S.C. 5000A(a) (Supp. IV 2010) 21
26 U.S.C. 5000A(b) (Supp. IV 2010) 21
26 U.S.C. 5000A(b)(1) (Supp. IV 2010) 23
26 U.S.C. 5000A(b)(2) (Supp. IV 2010) 24
26 U.S.C. 5000A(b)(3)(A) (Supp. IV 2010) 24
26 U.S.C. 5000A(c)(1)(A) (Supp. IV 2010) 24
26 U.S.C. 5000A(c)(2)(B) (Supp. IV 2010) 24
26 U.S.C. 5000A(c)(4)(B) (Supp. IV 2010) 24
26 U.S.C. 5000A(c)(4)(C) (Supp. IV 2010) 24
Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 1
42 U.S.C.A. 18052 12
42 U.S.C.A. 18091(a)(2)(F) 3
42 U.S.C.A. 18091(a)(2)(I) 14

Miscellaneous: Page

J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. Ill. L. Rev. 581 7

Matthew Buettgens & Caitlin Carroll, *Eliminating the Individual Mandate: Effects on Premiums, Coverage, and Uncompensated Care* (2012), http://www.urban.org/UploadedPDF/412480-Eliminating-the-Individual-Mandate.pdf 8

Stuart M. Butler, Heritage Found., *The Heritage Lectures 218: Assuring Affordable Health Care for All Americans* (Oct. 2, 1989), http://thf_media.s3.amazonaws.com/1989/pdf/hl218.pdf 20

Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank, in 8 The Papers of Alexander Hamilton (Harold C. Syrett ed., 1965) 3

Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327 (2002) 8

Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L. J. 267 (1993) 7

Corey Rayburn Yung, *The Incredible Ordinariness of Federal Penalties for Inactivity* (Jan. 30, 2012) http://papers.ssrn.com/sol3/papers.ctm?abstract_id=1995586 16

In the Supreme Court of the United States

No. 11-398

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

As the government demonstrated in its opening brief, the minimum coverage provision of the Patient Protection and Affordable Care Act,[1] and the comprehensive market reforms to which it is essential, are core exercises of Congress's Article I powers. They address longstanding economic distortions that have resulted in massive cost-shifting (in a national market that constitutes 17% of the Nation's gross domestic product) and have denied millions of Americans access to affordable health care.

In attacking the minimum coverage provision, and with it the entire Act, respondents seek to elevate a policy dispute over the means Congress chose to accom-

[1] Pub. L. No. 111-148, 124 Stat. 119, amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

plish its concededly valid objectives—a means advocated for decades in national policy debates as a responsible free-market approach to meeting those objectives—into an issue of constitutional dimension. But respondents have identified no principle of constitutional law nor any precedent that would justify the grave step of overturning the judgments of the democratically accountable Branches of government about what means would best address the Nation's health-care crisis. Instead, respondents invite this Court to impose novel limits on Congress's Article I authority based on an intrusive and largely standardless approach to reviewing economic legislation that would mark a sharp departure from the approach this Court has historically followed. The Court should decline that invitation and uphold the Act.

I. THE MINIMUM COVERAGE PROVISION IS A VALID EXERCISE OF CONGRESS'S COMMERCE POWER

A. The Minimum Coverage Provision Regulates Economic Activity That Substantially Affects Interstate Commerce

Respondents' argument that the minimum coverage provision exceeds Congress's commerce power rests on the erroneous premise that it should be treated as an effort to create commerce out of thin air by compelling the purchase of a particular product (health insurance). States Br. 15; NFIB Br. 7. That characterization is not faithful to what Congress actually did in the Affordable Care Act. The minimum coverage provision addresses economic effects that already exist in the health-care market because the uninsured as a class routinely consume health care they cannot afford. That is the activity Congress is regulating. It is ongoing economic activity that, in the aggregate, results in at least $43 billion worth of uncompensated health care annually—the cost

of which is now distributed through an unfair patchwork of hidden cost-shifting that adds approximately $1000 annually to the price of a family health insurance policy. 42 U.S.C.A. 18091(a)(2)(F). Because the provision regulates the timing and method of financing health-care services that members of the regulated class consume—and does so to address existing substantial economic effects in an area of pervasive federal involvement (Gov't Br. 3-7)—it is well within the recognized boundaries of the commerce power. *United States* v. *Lopez*, 514 U.S. 549, 560 (1995) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").[2] And the provi-

---

[2] For this reason, respondents' discussion of the meaning of "regulate" is beside the point. In all events, respondents do not refute the D.C. Circuit's analysis based on founding-era dictionaries, *Seven-Sky* v. *Holder*, 661 F.3d 1, 16 (2011), petition for cert. pending, No. 11-679 (filed Nov. 30, 2011), and they ignore this Court's decisions making clear that Congress has the power to enact legislation to "promote [commerce's] growth," "foster" it, and achieve its "advancement." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937) (internal citations omitted). Respondents' emphasis on the meaning of "regulate" also fails for the reasons Judge Sutton identified in rejecting their previously asserted "inactivity" theory. *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 560-564 (6th Cir. 2011), petition for cert. pending, No. 11-117 (filed July 26, 2011).

Respondents' argument likewise is impossible to square with *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), which rejected the contention that Congress could not create a bank because "[t]he power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress." *Id.* at 409. Respondents' amici (Former DOJ Officials Br. 9) similarly err in invoking Secretary of State Jefferson's argument against the constitutionality of the Bank of the United States. President Washington rejected that argument and instead agreed with Treasury Secretary Hamilton. *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank*, in 8 The Papers of Alexander Hamilton 126-127 (Harold C. Syrett ed.,

sion's necessary role in making effective the Act's guaranteed-issue and community-rating regulations further establishes its constitutionality. See pp. 13-15, *infra*; Gov't Br. 24-32.

1. Respondents concede that Congress has the constitutional authority to regulate the interstate health-care and health-insurance markets. They acknowledge Congress's power to prescribe guaranteed issue and community rating. And they do not question Congress's power to regulate how individuals pay for health care, or dispute that participation in the health-care market is virtually universal and that the risk of participation is unavoidable. They do not even challenge Congress's power to impose monetary penalties or other consequences (such as denial of health care) on those who lack health insurance, or to require that insurance be used to purchase health care. They dispute only the point in time at which Congress may employ the concededly valid means of a minimum coverage provision. *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 563 (6th Cir. 2011) (Sutton, J.), petition for cert. pending, No. 11-117 (filed July 26, 2011).

Respondents' attempt, based on a mere matter of timing, to invalidate Congress's choice of means to accomplish its concededly valid goals ignores two centuries of constitutional history. Although the national government is one of enumerated powers, "'a government, entrusted with such' powers 'must also be entrusted with ample means for their execution.'" *United States* v. *Comstock*, 130 S. Ct. 1949, 1956 (2010) (quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 408

1965). Chief Justice Marshall "substantially followed" Hamilton's opinion in *McCulloch*, see *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 642 (1871) (Field, J., dissenting).

(1819); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937). Thus, review of Congress's choice of means is particularly deferential. *Gonzales* v. *Raich*, 545 U.S. 1, 22 (2005). There is no principled constitutional basis for concluding that Congress may enact the kinds of provisions respondents concede are valid, but not the minimum coverage provision Congress did enact. As Judge Sutton recognized: "Requiring insurance today and requiring it at a future point of sale amount to policy differences in degree, not kind." *Thomas More*, 651 U.S. at 563. Just as the Constitution regards a prescription of the "Times, Places and Manner of holding Elections" as a "Regulation[]" of elections, Art. I, § 4, Cl. 1, the minimum coverage provision, governing the time, place, and manner of financing health care, is a proper means to "regulate Commerce," Art. I, § 8, Cl. 3.

Nor is there merit to respondents' argument that the Act does not actually regulate how individuals finance health care because it imposes a tax penalty on those without insurance, rather than requiring "individuals to actually *pay* for health-care services with * * * insurance." States Br. 25. Congress could reasonably conclude that applying the minimum coverage provision before actual consumption of health care would be more effective in extending coverage, removing barriers to care, and reducing cost-shifting than respondents' alternative. Congress also could reasonably assume that individuals with health insurance would act rationally and use it to pay their health-care bills. And even if some insured persons inexplicably did choose to pay out of pocket, the Act would still achieve Congress's objectives because their care would be paid for without any cost-shifting.

A correct understanding of the minimum coverage provision also answers respondents' hyperbolic claims that upholding it would vastly expand congressional power. *E.g.*, States Br. 24. A requirement that consumers purchase a commodity like broccoli or a car could not be justified on the same grounds that justify the minimum coverage provision. In markets for those goods, there is no pre-existing economic activity analogous to the uncompensated consumption of health care, and thus no substantial economic effect like the massive risk-shifting and cost-shifting that occurs in the health-care and health-insurance markets. See pp. 18-20, *infra*. "No one is inactive when deciding how to pay for health care, as self-insurance and private insurance are two forms of action for addressing the same risk," *Thomas More*, 651 F.3d at 561 (Sutton, J.), and those who "self-insure" often find themselves unable to pay unexpected medical bills, see Gov't Br. 44 (discussing respondent Mary Brown). Thus, recognizing Congress's power to regulate in this way to address the substantial economic effects of uncompensated care would not justify congressional action to simply create commerce. This is a regulation of existing commerce.

The minimum coverage provision is, of course, consistent with the commerce power limits this Court articulated in *Lopez* and *United States* v. *Morrison*, 529 U.S. 598 (2000). The provision regulates economic activity in a commercial sphere (health-care financing) that has long been subject to pervasive federal involvement under ERISA, the Internal Revenue Code, Medicare, Medicaid, and other laws. Gov't Br. 3-7; Health Care Policy History Scholars Amicus Br. 7-21. Contrary to state respondents' passing suggestion (Br. 38), it does not invade any sector (such as family law, education, or

general criminal law) traditionally reserved to the States.

2. Respondents devote the bulk of their briefs to arguing that the minimum coverage provision is neither necessary nor proper, reflecting their view that when Congress regulates activity that substantially affects interstate commerce, it is acting only pursuant to its necessary-and-proper power. But cf. *Raich*, 545 U.S. at 16-17. However framed, respondents' arguments are misconceived.

The Necessary and Proper Clause—"an additional power, not a restriction on those already granted"—grants Congress "ample means for the[] execution" of its other enumerated powers. *McCulloch*, 17 U.S. (4 Wheat.) at 408, 420. The Clause was not written "to clog and embarrass" Congress's "execution" of its enumerated powers "by withholding the most appropriate means." *Id.* at 408; see *Comstock*, 130 S. Ct. at 1956; *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 535-542 (1871). "[T]hose who contend that * * * one particular mode of effecting [Congress's] object is excepted * * * take upon themselves the burden of establishing that exception." *McCulloch*, 17 U.S. (4 Wheat.) at 410. Respondents cannot carry that burden.[3]

---

[3] In contending that the Necessary and Proper Clause should be reinterpreted to impose stringent new limits on Congress, private respondents rely heavily on a law review article, Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L. J. 267 (1993) (Lawson). *E.g.*, NFIB Br. 42, 44, 58, 60. That revisionist account is hotly contested, see, *e.g.*, J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. Ill. L. Rev. 581, and, more importantly, is irreconcilable with this Court's precedents, see Lawson 331-332 (contending *Wickard* v. *Filburn*, 317 U.S. 111 (1942), was wrongly decided, and stating *McCulloch* presents "a hard case" that

A minimum coverage provision that applies in advance rather than at the point of medical need is both necessary and proper. A law is "necessary" if it is "convenient, or useful, or essential" to the execution of an enumerated power. *McCulloch*, 17 U.S. (4 Wheat.) at 413. Once that standard is satisfied, further inquiry "into the degree of its necessity * * * would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." *Id.* at 423. Private respondents nonetheless spend nearly half their brief demanding the very type of judicial second-guessing the Court has eschewed since *McCulloch*. NFIB Br. 28-56. They cite no decision from this Court invalidating a law on the ground that Congress erred in finding the legislation "necessary" to achieve its legitimate ends. Under the long-settled standard of review, *McCulloch*, 17 U.S. (4 Wheat.) at 413, the minimum coverage provision is plainly constitutional. Gov't Br. 27-37.[4]

---

was likely incorrect); Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 350 n.92 (2002) ("We never claimed that our interpretation of the Sweeping Clause was consistent with precedent.").

[4] Private respondents contend that the minimum coverage provision is not "necessary" because (despite Congress's contrary judgment) it will not significantly reduce uncompensated care. NFIB Br. 5, 55-56; NFIB Severability Br. 16-17. They rely on the court of appeals' empirical analysis, *ibid.*, which relied exclusively on an amicus brief by economists supporting respondents, Pet. App. 127a-128a. Those economists have now acknowledged that their analysis suffered from serious methodological errors. Economists Amicus Br. 15 n.10, 23a n.1; see Gov't Severability Br. 53-54; Economic Scholars Amicus Br. 28-33. Independent economic modeling shows that repealing the minimum coverage provision "would mean $20 billion more in uncompensated care provided to the uninsured." Matthew Buettgens & Caitlin Carroll, *Eliminating the Individual Mandate: Effects on Premiums, Coverage, and Uncompensated Care* 5 (2012).

3. a. For similar reasons, respondents fail to demonstrate that the minimum coverage provision is not "proper." Respondents invoke *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997), but their reliance on those decisions underscores the misconceived nature of their argument. In both cases, this Court emphasized that Congress may not commandeer States or their officers (and thereby infringe state sovereignty), but that the Constitution provides Congress "ample power" to exercise authority "*directly upon the citizens*." *New York*, 505 U.S. at 162 (citation omitted); see *Printz*, 521 U.S. at 919-921; *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). In the Affordable Care Act, Congress used its "substantial powers to govern the Nation directly," *New York*, 505 U.S. at 162, by "acting directly on the people," *McCulloch*, 17 U.S. (4 Wheat.) at 404, in conformity with the constitutional structure. It is therefore baffling that respondents contend that the Act compromises the constitutional value of accountability recognized in *New York* and *Printz*. There is no doubt that "it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." *New York*, 505 U.S. at 168.

b. More generally, *Printz* and *New York* do not support interpreting the word "proper" as a roving judicial commission to nullify economic legislation as contrary to amorphous notions of "*individual* autonomy." NFIB Br. 60-62. Such a standardless power would be irreconcilable with the proper role of the Judiciary under our Constitution. Having abandoned their substantive due process claim, Pet. App. 112a n.93, respondents cannot now smuggle it back into the case as an even more elastic not-"proper" claim. *Legal Tender Cases*, 79 U.S. at

547, 549-551 (rejecting claim that legal tender acts violated the "spirit of the Constitution because they indirectly impair[ed] the obligation of contracts," and were thus not necessary and proper).

This would be an especially poor setting in which to invoke such generalized liberty-based notions, given that respondents assert a freedom of contract, NFIB Br. 61-62; cf. *United States* v. *Darby*, 312 U.S. 100, 125 (1941), in a context in which the uninsured are already engaged in the economic activity for which the minimum coverage provision governs the manner of payment. And respondents' preferred alternative (penalizing the uninsured at the time of medical need) would hardly "preserve spheres in which citizens remain free from federal superintendence." NFIB Br. 53. It would instead be *more* "coercive" because "[a]n individual in need of acute medical care, but without the resources to pay for it, is not apt to refuse to buy future medical insurance in order to obtain present care," *Thomas More*, 651 F.3d at 563 (Sutton, J.).

To support their plea for exacting review of economic legislation, respondents insist that the minimum coverage provision is suspect because it compels "healthy individuals" to enter into "disadvantageous contracts" to subsidize others. NFIB Br. 7, 41. Wholly apart from the facts that only a fraction of the uninsured actually think health insurance is "disadvantageous" (Gov't Br. 44) and that the government will subsidize much of the cost (*id.* at 10-11), an insurance contract is not "disadvantageous" merely because a person may pay more in premiums than he receives in benefits in a particular year. It is a sad but ineluctable fact of human existence that health is not immutable, and "healthy individuals" are not a static class. Insurance exists because "more-

healthy people" become "less-healthy people" (NFIB Br. 41), often as a result of a bolt-from-the-blue event like a heart attack or cancer diagnosis. No one is "more than an instant from" needing health care. *Raich*, 545 U.S. at 40 (Scalia, J., concurring in the judgment). To the extent "more-healthy" individuals will pay more for insurance than they would without guaranteed issue or community rating, they will pay less when they are older and at greater risk of needing expensive care.

Respondents' effort to imbue their subsidy argument with constitutional significance ignores this Court's precedents and consistent legislative practice. By their logic, a minimum-wage law impermissibly forces employers into "disadvantageous contracts." See *Adkins* v. *Children's Hosp.*, 261 U.S. 525, 544-562 (1923) (invaliding minimum-wage law because "[t]o the extent that the [wage] exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person"), overruled by *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 397-398 (1937). As the Court held in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), "[t]he conflicts of economic interest between the regulated and those who advantage by [regulation] are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process." *Id.* at 129; see *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, 572 (1939).[5]

---

[5] The commerce power has routinely been invoked to enact measures that could be characterized as forced subsidies. *E.g.*, *Texas Office of Pub. Util. Counsel* v. *FCC*, 183 F.3d 393, 405-408 (5th Cir. 1999) (federal communications regulation historically "involve[d] the manipulation of rates for some customers to subsidize more affordable rates for others"); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 118-121

c. Nor is there force to respondents' contention that the minimum coverage provision fails to "invoke 'the ordinary means of execution.'" NFIB Br. 57 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 409, 421). Insurance is the "ordinary" means of paying for health care, and insurance requirements are an "ordinary" means of market regulation where individuals' lack of insurance shifts risks and costs to others. Gov't Br. 3-7, 35-37. Respondents ignore the principle that "[t]he authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce." *Darby*, 312 U.S. at 116 (citation omitted). Accordingly, to achieve its legitimate ends, Congress was free to adopt regulatory means similar to those Massachusetts successfully employed. Gov't Severability Br. 50-51.

d. The Act is not unconstitutional on the ground that it fails to "account[] for state interests," NFIB Br. 58 (quoting *Comstock*, 130 S. Ct. at 1962). There is no such requirement when Congress regulates individuals directly. Gov't Medicaid Br. 43. In any event, the Act provides States considerable flexibility. Maryland Amicus Br. 29-36. For example, beginning in 2017, States may opt out of the minimum coverage provision if they establish an alternative means of affordably providing comprehensive coverage to a comparable number of residents. 42 U.S.C.A. 18052.

(1942) (upholding milk price-support law, under which milk consumers subsidize milk producers).

B. The Minimum Coverage Provision Is Necessary And Proper To Carry Out The Act's Insurance Reforms

As the government demonstrated in its opening brief, the minimum coverage provision is also a valid exercise of Congress's Article I powers because it is necessary and proper "to make * * * effective" (*United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 118-120 (1942)) the Act's guaranteed-issue and community-rating insurance market reforms. Gov't Br. 24-32; Gov't Severability Br. 44-54.

Agreeing with the government (but not private respondents, see NFIB Br. 46-47), state respondents recognize that, without a minimum coverage provision, many people would exploit the guaranteed-issue and community-rating reforms by delaying insurance purchases until they needed care. States Br. 34; see 42 U.S.C.A. 18091(a)(2)(I); Economic Scholars Amicus Br. 23-26; America's Health Ins. Plans Severability Amicus Br. 18-26. State respondents nonetheless contend that the minimum coverage provision is invalid because, far from being "ineffective," the reforms "would work far too well" without the minimum coverage provision, due to this gamesmanship. States Br. 34. That contention rests on a crabbed view of what it means to make a regulation effective.

This is not a situation in which Congress is using its necessary and proper authority to solve a problem of its own creation. Congress adopted the Act's insurance reforms to address the existing economic effects of discriminatory industry practices, and expressly found that the minimum coverage provision is "essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can

be sold." 42 U.S.C.A. 18091(a)(2)(I). The experience in States that enacted such reforms without a minimum coverage provision (and suffered serious adverse selection as a result) confirms that judgment. Gov't Br. 29-30; Gov't Severability Br. 44-54; see *Jones & Laughlin Steel Corp.*, 301 U.S. at 42 ("[I]nterferences with [interstate] commerce must be appraised by a judgment that does not ignore actual experience."). A regulation cannot be "effective" (*Wrightwood Dairy*, 315 U.S. at 118-120) without another regulation if, when implemented alone, it would lead to severely negative economic consequences that would be the opposite of what Congress intended.

State respondents contend that Congress's power to enact measures to make its regulation effective can defeat "challenges only to 'individual applications of a concededly valid statutory scheme,'" not facial challenges to a statute as a whole. States Br. 40 (quoting *Raich*, 545 U.S. at 23). That is incorrect. See *FERC* v. *Mississippi*, 456 U.S. 742, 754, 757 n.22 (1982) (rejecting facial challenge because "challenged provisions [were] an integral part of the regulatory program and * * * the regulatory scheme when considered as a whole satisfies [the] test" of constitutionality) (citation omitted); *Hodel* v. *Indiana*, 452 U.S. 314, 329 n.17 (1981) (same); *Darby*, 312 U.S. at 125. *Lopez*, which involved a facial challenge, emphasized that the statute at issue was *not* "an essential part of a larger regulation of economic activity," 514 U.S. at 561, a distinction that would have been unnecessary if that principle were irrelevant to facial challenges.

Respondents wrongly assert that upholding the minimum coverage provision as necessary and proper for the Act's insurance reforms would confer a limitless power

on Congress. First, they disregard the tight connection between the concededly valid market reforms (guaranteed issue and community rating) and the regulation necessary to make them effective (minimum coverage). These provisions both confer economic benefits and impose economic obligations on the previously uninsured, who will now be able to obtain affordable coverage regardless of their medical condition or history. "In economic terms, [the guaranteed-issue and community-rating] provisions create the equivalent of a contractual option to buy health insurance at market rates from any insurer at any future time, regardless of one's health status." 104 Health Law Professors Amicus Br. 27. "That option has real economic value." *Ibid.* Moreover, this Court has made clear that Congress may act to address increased risks, attributable to the regulatory scheme itself, that the regulated class will engage in economic activity that undercuts the scheme—here, delaying the purchase of insurance until it is needed. *Raich*, 545 U.S. at 18-19; *id.* at 37 & n.2 (Scalia, J., concurring in the judgment) (citing *Wickard*, 317 U.S. at 127-129); *Lopez*, 514 U.S. at 555-556, 558. Upholding the Act on the basis of that settled principle would not authorize Congress to treat the mere failure to purchase a commodity as activity undermining a larger scheme.

C. Respondents' Contentions Regarding Novelty And Hypothetical Mandates Are Misplaced

1. Respondents contend (*e.g.*, States Br. 21-24) that the supposed novelty of the minimum coverage provision should count against it. But federal statutes compelling individuals to take affirmative steps are commonplace (despite arguments that they interfere with individual autonomy). See *Thomas More*, 651 F.3d at 561 (Sutton,

J.) (referencing federal child-support and sex-offender-registration statutes); *Seven-Sky* v. *Holder*, 661 F.3d 1, 20 (D.C. Cir. 2011), petition for cert. pending, No. 11-679 (filed Nov. 30, 2011) (observing that *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258-259 (1964), upheld regulation of "seemingly passive" conduct); see generally Corey Rayburn Yung, *The Incredible Ordinariness of Federal Penalties for Inactivity* (Jan. 30, 2012). Moreover, the "novelty" about which respondents complain results from Congress's choice of a regulatory means that is more protective of individual choice, market efficiency, and state prerogatives than traditional approaches like Medicare. See Gov't Br. 14-15. "Courts naturally should be very careful before interfering with the elected Branches' determination to update how the National Government provides [government] assistance." *Seven-Sky*, 661 F.3d at 53 (Kavanaugh, J., dissenting).

In reviewing statutes that interfere with the Constitution's structural protections, such as statutes that commandeer state officials or alter States' sovereign immunity, the Court has said that the "[l]ack of historical precedent can indicate a constitutional infirmity." *Virginia Office for Protection & Advocacy* v. *Stewart*, 131 S. Ct. 1632, 1641-1642 (2011); see *Printz*, 521 U.S. at 907-908. But the modern Court has never applied that principle in evaluating Congress's exercise of its commerce power to regulate individuals directly. Nor would it be sensible to do so. *North American Co.* v. *SEC*, 327 U.S. 686, 705 (1946) ("Commerce itself is an intensely practical matter. To deal with it effectively, Congress must be able to act in terms of economic and financial realities.") (citation omitted).

"With negligible exceptions, Congress did not exercise its power to regulate commerce prior to its enactment in 1887 of the Interstate Commerce Act." *Polish Nat'l Alliance* v. *NLRB*, 322 U.S. 643, 647 (1944). "Then, in response to rapid industrial development and an increasingly interdependent national economy, Congress 'ushered in a new era of federal regulation under the commerce power.'" *Raich*, 545 U.S. at 16 (quoting *Lopez*, 514 U.S. at 554). For that reason, nearly all exercises of the commerce power could have been condemned as impermissibly "novel" under respondents' argument. Indeed, "in almost every instance of the exercise of the [commerce] power" during the modern era, "differences [were] asserted from previous exercises of it and made a ground of attack." *Hoke & Economides* v. *United States*, 227 U.S. 308, 320 (1913).[6] But the Court has not invalidated laws simply because Congress chose to address a worsening national economic problem with new regulatory tools that Congress concluded were well adapted to addressing it.

2. Respondents imagine various "mandates" and contend that upholding the minimum coverage provision would validate such measures. But "[t]he process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive

---

[6] See, *e.g.*, Pet. Br. at 5, *Perez* v. *United States*, 402 U.S. 146 (1971) (No. 70-600) ("unprecedented exercise of power"); Supp. Appellees' Br. at 40, *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) (No. 64-543) ("novel assertion of federal power"); Appellee's Br. at 6, *Wickard*, *supra* (No. 41-59) ("complete departure"); Appellee's Br. at 67, *Darby*, *supra* (No. 40-82) ("unprecedented theory of Federal power"); *Jones & Laughlin Steel Corp.*, 301 U.S. at 99 (McReynolds, J., dissenting) ("unprecedented").

in detail to cover the remotest contingency." *New York* v. *United States*, 326 U.S. 572, 583 (1946) (opinion of Frankfurter, J.); see *Champion* v. *Ames*, 188 U.S. 321, 362-363 (1903). Such reasoning is especially weak when there is little "probability that the parade will in fact materialize." *Harmelin* v. *Michigan*, 501 U.S. 957, 986 n.11 (1991) (opinion of Scalia, J.). There is no reason to think that a democratically accountable Congress would ever exercise a power to compel the purchases respondents conjure up, much less that doing so would be "highly attractive," States Br. 23 (quoting *Printz*, 521 U.S. at 905). Quite the contrary. Respondents acknowledge that States *do* have the power to enact purchase mandates (*id.* at 17), but they identify no example of any State ever having compelled its citizens to buy cars, agricultural products, gym memberships, or any other consumer product. That is surely because the power is not an "attractive" one, and would be used only when a legislature believes it is necessary to address a problem of sufficient importance to warrant any political accountability consequences that may ensue—as States have done in imposing insurance requirements (Gov't Br. 36-37).

Equally to the point, the minimum coverage provision falls well within Congress's Article I authority for reasons that would not justify respondents' hypothetical mandates. The provision is classic market regulation, intended to correct existing market failures and reduce risk-shifting and cost-shifting, in a way that respondents' hypothetical statutes are not. Compare *Rock Royal Co-op.*, 307 U.S. at 572. This is thus a case in which the activity being regulated, not merely the regulatory scheme itself, substantially affects interstate commerce. Gov't Br. 7-8; pp. 2-3, *supra*.

The minimum coverage provision regulates only how participants in a market finance that participation, *i.e.*, through insurance rather than through attempted self-insurance and financing borne by other market participants.[7] Health insurance is not purchased for its own sake like a car or broccoli; it is a means of financing health-care consumption and covering universal risks. Gov't Br. 41. Because insurance is "essentially different from ordinary commercial transactions," this Court has recognized that constitutional rulings regarding insurance regulation may be "confine[d]" to that setting. *German Alliance Ins. Co.* v. *Kansas*, 233 U.S. 389, 413-415 (1914) (Due Process Clause); see *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 540 n.14 (1944). Upholding the minimum coverage provision thus would not authorize Congress to compel purchase of an end-product by a stranger to that end-product's market. American Hosp. Ass'n Amicus Br. 23-24; cf. States Br. 23 (wheat, cars).

The minimum coverage provision is also different than the other insurance schemes respondents posit. States Br. 23, 47. If an individual does not have flood insurance, he cannot compel contractors to repair his flood-damaged home for free. Nor does a funeral home have an obligation to bury the indigent. And the survivors of the bread-winner who dies without life insurance cannot obtain free food from grocery stores and rent-

---

[7] For nearly all the uninsured, the back-stop of uncompensated care is critical. The "median financial assets for an uninsured family [in a study based on 2006-2007 data] were $20," and "[e]ven the wealthiest segment of the uninsured population within that study * * * had median financial assets of only $4,100, completely inadequate to pay a $22,200 hospital bill," the average bill for an uninsured patient. 104 Health Law Professors Amicus Br. 7, 9 n.17; Gov't Br. 8.

free shelter from their landlord. The failure to maintain those types of insurance thus does not have the kind of tangible and direct market-distorting effects that are present here. Gov't Br. 39-40.[8]

In that regard, state respondents contend (Br. 49) that uninsured individuals' "failure to internalize costs originates" with the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. 1395dd, and that "Congress can hardly expand its constitutional authority by creating problems that it lacks the power to fix." The obligation to provide emergency care regardless of ability to pay did not "originate" with EMTALA. State respondents studiously avoid mention of their own statutes that parallel EMTALA. Gov't Br. 39 & n.9. Nor do they acknowledge the longstanding societal norms underlying all these laws. Stuart M. Butler, Heritage Found., *The Heritage Lectures 218: Assuring Affordable Health Care for All Americans* 6 (Oct. 2, 1989). Congress is surely entitled to take that societal consensus as a given when it regulates.

In any event, no constitutional principle prohibits Congress from regulating in light of circumstances produced by existing federal policy choices. For example, the Court in *Comstock* noted that "Congress could * * * have reasonably concluded * * * that a reasonable number of [sexually violent] individuals would likely *not* be detained by the States if released from federal custody, in part because the Federal Government itself severed their claim to 'legal residence in any State' by

---

[8] A requirement that individuals visit the dentist twice a year (States Br. 29) would likely violate the "principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment," *Cruzan* v. *Director, Missouri Dep't of Health*, 497 U.S. 261, 278 (1990).

incarcerating them in remote federal prisons." 130 S. Ct. at 1961. That the federal civil-commitment statute was necessary in part to mitigate the effects of housing prisoners far from home counted as a factor *in favor* of its constitutionality, *id.* at 1961-1962, not a strike against it. See also *Pierce County* v. *Guillen*, 537 U.S. 129, 147 (2003).

In sum, "[r]egulating how citizens pay for what they already receive (health care), never quite know when they will need, and in the case of severe illnesses or emergencies generally will not be able to afford, has few (if any) parallels in modern life." *Thomas More*, 651 F.3d at 565 (Sutton, J.).

II. THE MINIMUM COVERAGE PROVISION IS INDEPENDENTLY AUTHORIZED BY CONGRESS'S TAXING POWER

The minimum coverage provision is independently authorized by Congress's taxing power. Gov't Br. 52-62.

1. In respondents' view, however, the minimum coverage provision must be interpreted as imposing an independent regulatory "mandate" to maintain insurance, 26 U.S.C. 5000A(a), and a separate regulatory penalty to enforce that mandate, 26 U.S.C. 5000A(b), neither of which is supported by Congress's tax power. States Br. 51-57; NFIB Br. 63-64. As the government has explained in its Anti-Injunction Act reply (Br. 11-12), respondents' attempt to artificially subdivide the minimum coverage provision—rather than read this single statutory section as one integrated whole establishing conditions for tax liability—fails. Functionally, Section 5000A is identical to the statute suggested by Judge Kavanaugh that would "definitively" be within Congress's tax power. Gov't Br. 60 (internal citation omitted); see *Li-*

cense Tax Cases, 72 U.S. (5 Wall.) 462, 471-472 (1867) (discussed at Gov't Br. 57).

To the extent the constitutionality of Section 5000A depends on whether Subsection (a) creates an independent legal obligation, the Court should construe it not to do so. Gov't Br. 61-62; see, *e.g.*, *License Tax Cases*, 72 U.S. (5 Wall.) at 471. *New York* is directly on point. That case involved a provision that, read in isolation, appeared to establish a mandate ("[e]ach State *shall* be responsible for" disposing of radioactive waste), with separate provisions establishing "[p]enalties" for failure to comply with that "[r]equirement[]." Gov't Br. 61-62 (internal citations omitted; first two pairs of brackets in original). To avoid a conclusion that the statute violated the Tenth Amendment, the Court interpreted it as creating financial incentives rather than a freestanding command backed by sanctions. *Id.* at 62. Section 5000A is structurally and functionally identical. It is implausible to suggest that it would be "plainly contrary to the intent of Congress," *New York*, 505 U.S. at 170 (citation omitted), to interpret the provision as establishing tax incentives to purchase health insurance rather than a separate statutory command to maintain insurance—especially given that the *only* consequence of failing to maintain insurance is the shared responsibility payment and that construing the provision in this way would not defeat any statutory objective.

2. The shared responsibility payment under Section 5000A is not "punishment for an unlawful act," States Br. 55 (internal citation omitted). Gov't AIA Reply Br. 15. Nor does it have the "features of the act" imposing exactions for employment of child labor that, in combination, the Court viewed as an impermissibly penal exercise of the tax power in *Bailey* v. *Drexel Furniture*

Co., 259 U.S. 20, 37 (1922). The shared responsibility payment is tied to income and is due only for months in which coverage is not maintained, 26 U.S.C. 5000A(b)(1); cf. *Bailey*, 259 U.S. at 36 ("The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day."); there is no scienter requirement, cf. *id.* at 36-37 ("Scienter is associated with penalties not with taxes."); and enforcement is solely by the IRS; cf. *id.* at 37 (enforcement in part by Department of Labor). See SEIU Amicus Br. 22-26.

Nor is it significant that Congress conditioned the payment, as a component of the taxpayer's overall income tax liability, on the practice of attempted self-insuring and thus the "failure to transact" for insurance coverage. States Br. 61. Congress may specify "that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents." *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 591 (1937). Maintenance of health coverage protects the public fisc by lessening cost-shifting onto government programs (as well as onto other market participants).

3. Respondents insist that Congress must expressly invoke its tax power in order to exercise it, so that it cannot "use the courts to impose taxes that it lacks the political support to enact." States Br. 56. That remarkable suggestion is contrary to both the settled rule that "the fact that an exaction is not labeled a tax does not vitiate Congress's power under the Taxing Clause," and the equally settled principle that "[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to

exercise." *Seven-Sky*, 661 F.3d at 48 n.37 (Kavanaugh, J., dissenting) (citations omitted). Nothing in the Constitution justifies such judicial superintendence of the political dynamics of enacting legislation, whether in Congress's exercise of its Article I powers in general or its tax power in particular. Compare *Skinner* v. *Mid-America Pipeline*, 490 U.S. 212, 219-223 (1989) (no special non-delegation limitation on Congress's exercise of tax power).

The Affordable Care Act would also make a poor candidate for the first-ever application of such a rule. Congress's tax power was expressly invoked to defeat constitutional points of order in the Senate; opponents of the Act attacked it as a tax; and supporters defended it as a valid exercise of the taxing power. Gov't Br. 58; SEIU Amicus Br. 19-20. And it is farfetched to suggest an absence of accountability, even assuming that were a proper subject of judicial inquiry. Taxpayers will have an annual reminder of the provision's monetary exaction and tax foundation: Every April 15, non-exempted "taxpayer[s]" who lacked coverage (or whose non-exempted dependents lacked coverage) during the prior "taxable year" will have to include a payment to the IRS with their federal income tax return, 26 U.S.C. 5000A(b)(2), (3)(A) and (c)(1)(A), based in part on their adjusted gross income as defined by the Internal Revenue Code, 26 U.S.C. 5000A(c)(2)(B), (4)(B) and (C), and enforceable through offset of tax refunds, Gov't Br. 54.

4. Respondents mistakenly contend that, even if the minimum coverage provision is supported by Congress's taxing power, it is an unapportioned direct tax, and therefore unconstitutional. States Br. 62-63; NFIB Br. 65-67. The Court has identified only two types of taxes that must be apportioned: a tax "imposed upon property

solely by reason of its ownership," *Knowlton* v. *Moore*, 178 U.S. 41, 81 (1900), and a "capitation, or poll tax" imposed on a person "simply, without regard to property, profession, or *any other circumstance*," *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.) (original italicization omitted; emphasis added). See *Veazie Bank* v. *Fenno*, 75 U.S. (8 Wall.) 533, 544 (1869); *Murphy* v. *IRS*, 493 F.3d 170, 181 (D.C. Cir. 2007), cert. denied, 553 U.S. 1004 (2008).

The shared responsibility payment is not a tax on property, and its imposition is contingent upon numerous factors, including income and the way an individual finances health care, *i.e.*, "a particular *use* of property," *Bromley* v. *McCaughn*, 280 U.S. 124, 136 (1929) (emphasis added). It is accordingly not a direct tax.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals invalidating the minimum coverage provision should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MARCH 2012

REPLY BRIEF

No. 11-398

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR COURT-APPOINTED AMICUS CURIAE SUPPORTING VACATUR (ANTI-INJUNCTION ACT)

ROBERT A. LONG, JR.
Counsel of Record
EMIN TORO
MARK W. MOSIER
HENRY B. LIU
DANIELLE S. BARBOUR
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. NW
Washington, DC 20004
(202) 662-6000
rlong@cov.com

March 2012

TABLE OF CONTENTS

PAGE

I. THE ANTI-INJUNCTION ACT LIMITS THE COURTS' JURISDICTION. 1

II. THE ANTI-INJUNCTION ACT BARS THIS SUIT. 4

A. The Anti-Injunction Act Applies To Penalties That Are "Assessed And Collected In The Same Manner As Taxes." 4

B. The Section 5000A Penalty Is A "Tax" Within The Meaning Of The Anti-Injunction Act. 14

III. THE ANTI-INJUNCTION ACT CANNOT BE AVOIDED ON ALTERNATIVE GROUNDS. 19

A. Respondents Challenge Both The Minimum Coverage Requirement And The Penalty Provision. 19

B. The Anti-Injunction Act Applies To The State Respondents. 23

CONCLUSION 25

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Alexander v. "Americans United" Inc.,
416 U.S. 752 (1974) 20, 21
Allen v. Regents of Univ. System of Georgia,
304 U.S. 439 (1938) 25
Bond v. United States,
131 S. Ct. 2355 (2011) 23, 24
Bob Jones Univ. v. Simon,
416 U.S. 725 (1974) 4, 20, 21
Brushaber v. Union Pac. R.R. Co.,
240 U.S. 1 (1916) 4
Dean v. United States,
129 S. Ct. 1849 (2009) 6
DePierre v. United States,
131 S. Ct. 2225 (2011) 11
Enochs v. Williams Packing & Navigation Co.,
370 U.S. 1 (1962) 3
Gonzalez v. Thaler,
132 S. Ct. 641 (2012) 2
Haywood v. Drown,
129 S. Ct. 2108 (2009) 20
Helvering v. Davis,
301 U.S. 619 (1937) 3, 4
Henderson ex rel. *Henderson v. Shinseki*,
131 S. Ct. 1197 (2011) 2
Jefferson County v. Acker,
527 U.S. 423 (1999) 3, 20
Lamie v. U.S. Trustee,
540 U.S. 526 (2004) 16
Massachusetts v. Mellon,
262 U.S. 447 (1923) 23

Microsoft Corp. v. i4i Ltd. P'ship,
131 S. Ct. 2238 (2011) 16
Miller v. Standard Nut Margarine Co.,
284 U.S. 498 (1932)..... 4
Mobile Republican Assembly v. United States,
353 F.3d 1357 (11th Cir. 2003) 12, 13
Ohio v. Helvering,
292 U.S. 360 (1934)..... 24
Phillips v. Comm'r of Internal Revenue,
283 U.S. 589 (1931)..... 18
Pollock v. Farmers' Loan & Trust Co.,
157 U.S. 429 (1895)..... 4
Sims v. United States,
359 U.S. 108 (1959)..... 24
Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) .....*passim*
South Carolina v. Regan,
465 U.S. 367 (1984)..... 3, 23, 24, 25
Thomas More Law Ctr. v. Obama,
651 F.3d 529 (6th Cir. 2011) 7
United States v. Dalm,
494 U.S. 596 (1990)..... 3
United States v. Reorganized CF&I Fabricators of Utah,
518 U.S. 223 (1996)..... 18
United States v. Thompson/Ctr. Arms. Co.,
504 U.S. 505 (1992)..... 16

STATUTES AND REGULATIONS

Anti-Injunction Act, 26 U.S.C. § 7421(a).....*passim*
Patient Protection and Affordable Care Act,
Pub. L. No. 111-148, 124 Stat. 119 11
26 U.S.C. § 527(j)(1) 12

26 U.S.C. § 4375 12
26 U.S.C. § 4376 12
26 U.S.C. § 4377(c) 11
26 U.S.C. § 4980H(a) 10
26 U.S.C. § 4980H(b)(2) 10
26 U.S.C. § 4980H(c)(7) 10
26 U.S.C. § 4980H(d)(1) 10
26 U.S.C. § 5000A ..... *passim*
26 U.S.C. § 5000A(b)(2) 15
26 U.S.C. § 5000A(c) 15
26 U.S.C. § 5000A(e)(2) 15, 22
26 U.S.C. § 5000A(g)(1) 4
26 U.S.C. § 5000A(g)(2) 13, 14
26 U.S.C. § 5114(c) 13
26 U.S.C. § 5684 13
26 U.S.C. § 5761 13
26 U.S.C. § 6103 11
26 U.S.C. § 6201 11
26 U.S.C. § 6201(a) 17
26 U.S.C. § 6207(1) 7
26 U.S.C. § 6212(a) 8
26 U.S.C. § 6212(c) 8
26 U.S.C. § 6213(a) 5, 7, 8
26 U.S.C. § 6214 8
26 U.S.C. § 6225(a) 8
26 U.S.C. § 6225(b) 7
26 U.S.C. § 6226 8
26 U.S.C. § 6246(b) 7
26 U.S.C. § 6247 8
26 U.S.C. § 6301 ..... 11, 17
26 U.S.C. § 6305(a) 12
26 U.S.C. § 6305(b) 8, 12
26 U.S.C. § 6321 11
26 U.S.C. § 6330(e)(1) 7

26 U.S.C. § 6331 11
26 U.S.C. § 6331(i)(4)(B) 7
26 U.S.C. § 6334(e)(1)(B) 8
26 U.S.C. § 6502(a) 8
26 U.S.C. § 6532(a)(1) 5
26 U.S.C. § 6665(a) 9, 13, 16
26 U.S.C. § 6671(a) 4, 9, 15, 16
26 U.S.C. § 6720A(a) 21
26 U.S.C. § 7421(b)(1) 12
26 U.S.C. § 7422(a) 3, 5, 15, 16, 17
26 U.S.C. § 7602 11
26 U.S.C. § 7806(b) 7
28 U.S.C. § 1341 3
42 U.S.C. § 7545(d)(1) 22
42 U.S.C. § 18022(e)(2)(B) 22
26 C.F.R. § 51.9T(a) 12
40 C.F.R. § 80.615 22

OTHER AUTHORITIES

H.R. REP. NO. 83-1337 (1954) 10
IRS Notice 2011-35 (June 20, 2011), *available at* http://www.irs.gov/pub/irs-drop/n-11-35.pdf 12
Noah Webster, *An American Dictionary of the English Language* (rev. by Chauncy A. Goodrich) (1860) 14
S. REP. NO. 83-1635 (1954) 10
Office of Tax Policy, Dep't of the Treasury, *Report to The Congress on Penalty and Interest Provisions of the Internal Revenue Code* (1999) 15

REPLY BRIEF FOR COURT-APPOINTED AMICUS CURIAE

The Anti-Injunction Act's "pay first, litigate later" rule is central to the federal tax assessment and collection process. The Act applies to the Section 5000A penalty because Congress specified that the penalty "shall be assessed and collected in the same manner as taxes." Congress also provided that the term "taxes" includes penalties for assessment purposes. Even if that were not so, the Section 5000A penalty bears the indicia of a tax. Moreover, the federal government has not identified *any* other assessable penalty in the Internal Revenue Code that is not subject to the Anti-Injunction Act. There is no reason to believe that Congress made a singular exception for the Section 5000A penalty. Accordingly, this action is barred by the Anti-Injunction Act.

I. THE ANTI-INJUNCTION ACT LIMITS THE COURTS' JURISDICTION.

Respondents contend that the Court need not consider the Anti-Injunction Act because the Act does not limit the Court's subject-matter jurisdiction. *See* States Br. 13-25; NFIB Br. 41-57. Respondents' arguments are unpersuasive.

1. Respondents contend that recent decisions of this Court support the conclusion that the Anti-Injunction Act is merely a "claims-processing rule." States Br. 15; NFIB Br. 45-46. But this Court's recent decisions do not help Respondents. Those

decisions hold that, "[w]hen a long line of this Court's decisions left undisturbed by Congress has treated a . . . requirement as jurisdictional," the Court "will presume that Congress intended to follow that course." *Henderson* ex rel. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011) (citation and internal quotations omitted). That is the case here.

Numerous decisions of the Court have treated the Anti-Injunction Act as jurisdictional. *See* Br. for Court-Appointed Amicus ("Amicus Br.") 16 (collecting cases). Moreover, Congress has ratified the Court's interpretation by enacting exceptions to the Act that speak expressly to the courts' "jurisdiction." *See id.* at 18 & n.6. These amendments confirm that Congress views the Anti-Injunction Act as a jurisdictional limitation.

Respondents assert that the text of the Anti-Injunction Act "is not addressed to courts, but is instead addressed to litigants." States Br. 14; NFIB Br. 43. That is incorrect. The prohibition on "maintain[ing]" a suit in any court, 26 U.S.C. § 7421(a), speaks to courts as well as litigants. In any event, a statute may address the litigants, rather than the court, and retain its jurisdictional status. *See, e.g.*, *Gonzalez v. Thaler*, 132 S. Ct. 641, 649 (2012) (statute providing that "an appeal may not be taken to the court of appeals" contains "'clear' jurisdictional language").[1]

---

[1] Respondents' argument is also contrary to this Court's interpretation of two provisions that are similar to the Anti-

(continued...)

2. Respondents contend that the Anti-Injunction Act cannot be jurisdictional because the Court's decisions in *Enochs v. Williams Packing & Navigation Company*, 370 U.S. 1 (1962), and *South Carolina v. Regan*, 465 U.S. 367 (1984), created equitable exceptions to the Act. *See* NFIB Br. 52-57. This argument is refuted by the Court's explicit statement in *Williams Packing* that "[t]he object of § 7421(a) is to withdraw jurisdiction . . . ." 370 U.S. at 5. Moreover, neither *Williams Packing* nor *Regan* created an equitable exception to the Anti-Injunction Act. In both cases, the Court recognized exceptions based on the text and purpose of the statute. *See* Amicus Br. 20-21; *Seven-Sky v. Holder*, 661 F.3d 1, 29 n.8 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("[T]he status of a statute as jurisdictional does not disable the courts from interpreting the statute and Congress's intent by means of the usual tools of statutory construction.").

3. Respondents argue that the Anti-Injunction Act is non-jurisdictional because the government was allowed to waive its application in *Helvering v. Davis*, 301 U.S. 619 (1937). *See* NFIB Br. 49-52; States Br. 22-23. But *Davis* is "an anomaly predating more stringent jurisdictional limitations." *Seven-Sky*, 661 F.3d at 13. When the Court decided *Davis*, it viewed the Act as "merely 'declaratory of the principle' of cases prior to its passage that equity

---

Injunction Act, 26 U.S.C. § 7422(a) and 28 U.S.C. § 1341. The Court has held that both provisions are jurisdictional. *See Jefferson Cnty. v. Acker*, 527 U.S. 423, 434 (1999); *United States v. Dalm*, 494 U.S. 596, 608-10 (1990); *see also* U.S. Br. 12-14.

usually, but not always, disavows interference with tax collection." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 744 (1974) (quoting *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932)). The Court has since repudiated that view, *see Bob Jones*, 416 U.S. at 742, which calls into question *Davis*'s continuing viability, *see* U.S. Reply Br. 9.[2] Thus, *Davis* cannot overcome the Court's many decisions declaring that the Anti-Injunction Act imposes a jurisdictional limitation.

II. THE ANTI-INJUNCTION ACT BARS THIS SUIT.

A. The Anti-Injunction Act Applies To Penalties That Are "Assessed And Collected In The Same Manner As Taxes."

1. Congress directed that the Section 5000A penalty "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68" of the Internal Revenue Code ("Code"). 26 U.S.C. § 5000A(g)(1). Congress further directed that such penalties "shall be assessed and collected in the same manner as taxes." *Id.* § 6671(a). There is no dispute that *both* taxes and assessable penalties under subchapter B of chapter 68 are

---

[2] Moreover, *Davis* was a suit by a shareholder against a private corporation. Prior to *Davis*, the Court held that the Anti-Injunction Act did not bar such litigation. *See Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 10 (1916); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 554 (1895).

subject to the Anti-Injunction Act. The only question is whether the requirement that the Section 5000A penalty be "assessed and collected in the same manner as taxes" makes the penalty subject to the Anti-Injunction Act. The answer to that question is "yes."

The Anti-Injunction Act directly addresses assessment and collection by barring suits "for the purpose of restraining *the assessment or collection of any tax*." 26 U.S.C. § 7421(a) (emphasis added). As a practical matter, an exaction that is not subject to the Anti-Injunction Act is not "assessed and collected in the same manner as taxes." *See* Amicus Br. 26-29; *Seven-Sky*, 661 F.3d at 31-38 (Kavanaugh, J., dissenting). The Code establishes a "pay first, litigate later" regime, subject to limited and carefully defined exceptions, that applies even to illegal and unconstitutional taxes. *See* Amici Tax Law Professors Br. 9-10. After paying a tax, the taxpayer must seek a refund from the Secretary and wait at least six months before filing a refund action. *See* 26 U.S.C. §§ 6532(a)(1) & 7422(a). In the limited circumstances in which a taxpayer is permitted to litigate before paying a tax, litigation is prohibited until the Secretary sends the taxpayer a notice of deficiency addressing a specific tax and tax period. *See id.* § 6213(a).

If the Anti-Injunction Act does not apply to the Section 5000A penalty, taxpayers will be free to bring suit at any time, for any tax period, without waiting for the Secretary to issue a notice of deficiency and without exhausting administrative remedies. Taxpayers who obtain an injunction can

force the Secretary to assess and collect the penalty only after litigation ends, not before it begins. If a taxpayer's suit is successful, the Secretary will *never* be able to assess or collect the penalty. (That is the result Respondents are seeking in this case.) To say that a penalty that is never assessed or collected is assessed and collected in the same manner as a tax that is both assessed *and* collected, and later refunded with interest, is an abuse of language.

2. The parties do not dispute most of these points. Indeed, their lengthy briefs have relatively little to say about the requirement that the Section 5000A penalty be "assessed and collected in the same manner as taxes." *See* U.S. Br. 31-33; States Br. 51-54; NFIB Br. 37-41. The parties' primary argument is that the "in the same manner" requirement "is a procedural instruction to the *Secretary* governing administration of the Code," not "an instruction to *courts* governing adjudication of suits." U.S. Br. 32. But the statutory directive that the penalty "shall be assessed and collected in the same manner as taxes" is not limited to the Secretary. *See Dean v. United States*, 129 S. Ct. 1849, 1853 (2009) ("The passive voice focuses on an event that occurs without respect to a specific actor . . . .").

The federal government notes that neither Chapter 63 of the Code (concerning assessment) nor Chapter 64 (concerning collection) includes the Anti-Injunction Act. U.S. Br. 32. Based on this statutory structure, the federal government contends that the "manner" of assessment and collection "'refers to the mechanisms the Internal Revenue Service employs to enforce penalties, not to the bar against pre-

enforcement challenges to taxes." *Id.* (quoting *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 540 (6th Cir. 2011)). The government is mistaken. For one thing, "[n]o inference [or] implication" may be based on "the location or grouping of any particular section or provision" of the Code. 26 U.S.C. § 7806(b). Moreover, the *text* of the assessment and collection provisions strongly supports the conclusion that the Anti-Injunction Act applies to an exaction that is "assessed and collected in the same manner as taxes."

First, the assessment and collection provisions create multiple express exceptions to the Anti-Injunction Act.[3] There is thus a tight textual link between the Anti-Injunction Act and the Code's assessment and collection provisions.

Second, the assessment and collection provisions are not directed solely to the Secretary, but include detailed instructions governing the interaction between the Secretary and courts during the assessment and collection process. For taxes that are subject to deficiency proceedings, for example, the Secretary must send a notice of deficiency to the

---

[3] *See* 26 U.S.C. § 6213(a) (If the Secretary proceeds with an assessment or levy without waiting 90 days after the notice of deficiency, or while an action is pending in the Tax Court, "*[n]otwithstanding the provisions of section 7421(a),*" the Secretary "may be enjoined by a proceeding in the proper court") (emphasis added); *see also id.* §§ 6225(b), 6330(e)(1), 6246(b), & 6331(i)(4)(B). *See also id.* § 6207(1) (cross-referencing Anti-Injunction Act).

taxpayer, and generally must wait 90 days before assessing a deficiency or beginning collection proceedings. *See* 26 U.S.C. §§ 6212(a) & 6213(a). If the taxpayer files an action in the Tax Court during this 90-day period, the Secretary may not proceed with assessment or collection until the court's decision becomes final, *id.* § 6213(a), and generally may not determine any additional tax deficiency for the same period, *id.* § 6212(c). *See also id.* § 6225(a).[4]

Third, the Code's assessment and collection provisions address, in detail, the courts' jurisdiction to restrain the assessment and collection process. For example, so long as the taxpayer files a timely petition after receiving a notice of deficiency, the Tax Court has jurisdiction to restrain assessment or collection by the Secretary, but only with respect to the tax period covered by the Secretary's notice. 26 U.S.C. § 6214. Moreover, collection efforts may directly involve the courts. *See id.* § 6502(a). The assessment and collection provisions thus address courts as well as the Secretary.[5]

In sum, the assessment and collection provisions of the Code support the conclusion that the Anti-

---

[4] The Section 5000A penalty is not subject to deficiency proceedings. *See* Amicus Br. 29 n.12.

[5] For additional examples, see 26 U.S.C. §§ 6226, 6247, 6305(b), and 6334(e)(1)(B).

Injunction Act is integral to the manner in which federal taxes are assessed and collected.[6]

3. The federal government argues (U.S. Br. 23-24) that the second sentence of Section 6671(a), rather than the first sentence, makes the Anti-Injunction Act applicable to penalties in subchapter B of Chapter 68. This argument is flawed. The second sentence of Section 6671 provides taxpayers with "the full panoply of rights and obligations under the Tax Code." *Seven-Sky*, 661 F.3d at 36 (Kavanaugh, J., dissenting); *see also* Amicus Br. 30. But the Anti-Injunction Act addresses restraints on the assessment and collection of taxes, so it is triggered by the first sentence (as well as the second sentence) of Section 6671(a).[7]

The anti-surplusage canon does not help the government, because *no* reasonable interpretation of Sections 6671(a) and 6665(a) avoids surplusage. *See* Amicus Br. 31-32. The Court has recognized that Congress sometimes enacts provisions that are superfluous, and such redundancies are not

---

[6] The D.C. Circuit was persuaded that the "manner" of assessing and collecting taxes is unrelated to the *timing* of assessment and collection. *See Seven-Sky*, 661 F.3d at 11. The parties do not press this argument, which is refuted by the many detailed timing requirements in Chapters 63 and 64 of the Code. *See* Amicus Br. 26-27 & n.10.

[7] When Congress added the second sentence of Section 6671(a) in 1954, the legislative reports stated that the addition made "no material change from existing law." H.R. REP. NO. 83-1337, at A420 (1954); S. REP. NO. 83-1635, at 596 (1954).

uncommon in the Code. *Id.* The parties do not dispute these points.

4. The federal government notes that Congress used different language in other provisions of the Affordable Care Act, and argues that these differences support the conclusion that the Anti-Injunction Act does not apply to the Section 5000A penalty. *See* U.S. Br. 25-26. This argument is unconvincing. *First*, the different formulations demonstrate that Congress did not adopt a single approach to indicating that the Anti-Injunction Act applies. *Second*, the different formulations are not addressed solely to whether the Anti-Injunction Act applies, but instead cover a range of issues.

For example, Section 4980H imposes an "assessable payment" on large employers that fail to offer their employees minimum essential coverage. 26 U.S.C. § 4980H(a). Congress provided that this penalty, like the Section 5000A penalty, "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." *Id.* § 4980H(d)(1). The federal government contends that the Anti-Injunction Act applies to Section 4980H, and that Congress's use of the word "tax" in two places in Section 4980H distinguishes that provision from Section 5000A. *See* U.S. Br. 26 n.16 (citing 26 U.S.C. §§ 4980H(b)(2) & (c)(7)). But Congress's use of the terms "tax" and "assessable penalty" indicates that those terms are interchangeable for purposes of assessment and collection. *See* Amici Caplin & Cohen Br. 33-34. The passing references to "tax" in Section 4980H hardly indicate that Congress intended to exclude the

Section 5000A penalty from coverage under the Anti-Injunction Act. *See DePierre v. United States*, 131 S. Ct. 2225, 2234 (2011) ("Congress sometimes uses slightly different language to convey the same message" (citation and internal quotations omitted)).

Section 4377(c) of Title 26 provides that "[f]or purposes of subtitle F" of the Code (which includes the Anti-Injunction Act), "the fees imposed by this subchapter shall be treated as if they were taxes." Similarly, Sections 9008 and 9010 of the Affordable Care Act provide that certain fees imposed on pharmaceutical manufacturers and health insurance providers, "for purposes of subtitle F . . . , shall be treated as excise taxes." Pub. L. No. 111-148, §§ 9008 & 9010, 124 Stat. 119, 861, 867 (2010). Subtitle F of the Code covers a broad range of matters, including tax returns, time and place for paying tax, and confidentiality rules. Congress had good reason to make these fee provisions subject to all of Subtitle F, rather than only the provisions relating to assessment and collection. Unlike the Section 5000A penalty, the fee provisions are not tied to the annual tax returns of individual taxpayers, but instead are free-standing financial obligations. By applying all of Subtitle F, Congress provided a means to administer these fees.[8] Thus, Congress's

---

[8] The IRS has confirmed that, as a result of the cross-reference to subtitle F, "the fee imposed by section 9008 is assessed (section 6201), collected (sections 6301, 6321, and 6331), enforced (section 7602), subject to examination and summons (section 6103), and subject to confidentiality rules (section 6103), in the same manner as taxes imposed by the Code." 26 (continued...)

choice of language does not imply that the Section 5000A penalty, which is expressly included in taxpayers' annual tax returns, is not subject to the Anti-Injunction Act.[9]

Other provisions of the Code cast doubt on the federal government's current position. Section 527 imposes penalties on political organizations for failing to make certain disclosures. 26 U.S.C. § 527(j)(1). The federal government has successfully argued that "there is no principled basis for distinguishing" Section 527 from taxes for the purposes of the Anti-Injunction Act because the penalties "shall be assessed and collected in the same manner as taxes." U.S. Br. 31-32, *Mobile Republican Assembly v. United States*, 353 F.3d 1357 (11th Cir.

C.F.R. § 51.9T(a); *see also* IRS Notice 2011-35, at 11-12 (June 20, 2011), *available at* http://www.irs.gov/pub/irs-drop/n-11-35.pdf (same for fees imposed by Sections 4375 and 4376 of the Code).

[9] Contrary to the federal government's suggestion (U.S. Br. 33 n.20), Sections 6305 and 7421 of the Code do not support its position. Section 6305 provides that certain child support obligations shall be assessed and collected "in the same manner . . . as if such amount were a tax imposed by subtitle C the collection of which would be jeopardized by delay," and further provides that courts may not "restrain or review the assessment or collection of amounts by the Secretary." 26 U.S.C. §§ 6305(a) & (b). This complete bar on litigation against the Secretary sweeps more broadly than the Anti-Injunction Act, which has fourteen express exceptions and does not bar refund suits. Similarly, Section 7421(b)(1) of the Code, which applies to the derivative tax liability of a transferee of property of a taxpayer, omits the express exceptions to Section 7421(a).

2003) (No. 02-16283). The same is true of the Section 5000A penalty. [10]

5. The State Respondents argue (States Br. 53-54) that the Anti-Injunction Act does not apply to the Section 5000A penalty because Section 5000A(g)(2)(B) expressly provides that some of the methods ordinarily available to collect taxes are not available to collect the Section 5000A penalty. But as the amicus Tax Law Professors explain, the specific collection methods that are made unavailable, as well as the placement of Section 5000A outside the Code's deficiency procedures, show that Congress adhered to the "pay first, litigate later" principle. *See* Amici Tax Law Professors Br. 19-25. Moreover, the detailed and specific exceptions in Section 5000A (as well as those in the Anti-Injunction Act itself) demonstrate that Congress knew how to exempt the Section 5000A penalty from the Anti-Injunction Act if it wished to do so.

6. If the Anti-Injunction Act does not apply to this case, it will not apply to routine litigation seeking to restrain the assessment or collection of Section 5000A penalties. *See* Amici Caplin & Cohen Br. 36.

---

[10] Moreover, the federal government takes the position that the penalties imposed by Sections 5114(c), 5684, and 5761 of the Code are subject to the Anti-Injunction Act. *See* U.S. Br. 36 n.22. Those penalties "shall be assessed, collected, and paid in the same manner as taxes, as provided in section 6665(a)." 26 U.S.C. §§ 5114(c)(3), 5684(b), & 5761(d). There is no valid basis for distinguishing these penalties from the Section 5000A penalty. *See Seven-Sky*, 661 F.3d at 34, n.17 (Kavanaugh, J., dissenting).

There is no reason to think that Congress, having made the Anti-Injunction Act applicable to essentially every penalty imposed by the Code, intended to make a special exception for the Section 5000A penalty. If Congress had such an unusual intent, it would have made it known more directly, for example by adding an additional express exception to Section 5000A(g)(2) or the Anti-Injunction Act.

The federal government's only response is that other doctrines, such as "standard equitable principles," may block such suits. *See* U.S. Br. 36-37. But if Congress had thought such doctrines were adequate to protect the collection of federal revenues, it would not have enacted the Anti-Injunction Act in the first place. The existence of such back-up doctrines does not indicate that Congress intended to make a rare (and perhaps unique) exception to the Anti-Injunction Act.

B. The Section 5000A Penalty Is A "Tax" Within The Meaning Of The Anti-Injunction Act.

1. Neither the Anti-Injunction Act nor the Code defines "tax." No party disputes that, when the Anti-Injunction Act was enacted, the ordinary meaning of "tax" included "almost every species of imposition on persons or property for supplying the public treasury." Noah Webster, *An American Dictionary of the English Language* 1132 (rev. by Chauncy A. Goodrich) (1860).

The Section 5000A penalty satisfies this broad definition. The penalty is codified in the Code and

"included with a taxpayer's return." 26 U.S.C. § 5000A(b)(2). The obligation to pay the penalty, and the amount of the penalty, depend on the taxpayer's income and whether the taxpayer is obligated to file a return. *Id.* § 5000A(c) & (e)(2). The federal government relies on these factors to argue that the penalty is a tax for constitutional purposes. *See* U.S. Br. 21.[11]

The parties contend that interpreting "tax" according to its ordinary meaning fails to give effect to Congress's decision to label the Section 5000A exaction a "penalty." U.S. Br. 20-22; NFIB Br. 32-33. But there is no indication that Congress labeled the Section 5000A exaction a "penalty" to exclude it from the Anti-Injunction Act. Nor does interpreting "tax" to include the Section 5000A penalty make Congress's choice irrelevant. By calling the exaction a "penalty," Congress signaled to taxpayers "that noncompliance is not acceptable behavior." Office of Tax Policy, Dep't of the Treasury, *Report to The Congress on Penalty and Interest Provisions of the Internal Revenue Code* 36 (1999).

The parties also contend that "tax" cannot be given its ordinary meaning because other provisions of the Code, such as Sections 7422(a) and 6671(a), demonstrate that "a 'penalty' is not the same thing as a 'tax' for statutory purposes under the Code."

---

[11] The Private Respondents argue (NFIB Br. 26-27) that a "tax" is a sum of money assessed for the government's use, unless the government's purpose in making the exaction is to punish, but the dictionary definition of "tax" includes no such limitation.

U.S. Br. 21-23; NFIB Br. 29 (arguing that "penalty" and "tax" are not "synonymous"). But no one argues that the two terms are synonymous. The ordinary meaning of "tax" is broad enough to include exactions labeled as "penalties," but not all taxes are penalties. Therefore, the terms are not interchangeable.

Nor are the parties correct to rely on the canon against surplusage to argue that "tax" should be interpreted narrowly. *See* U.S. Br. 28. That canon provides no basis for limiting the meaning of "tax" because it is used to resolve statutory ambiguity, not to depart from a statute's ordinary meaning. *See, e.g.*, *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004). In addition, the canon "assists only where a competing interpretation gives effect to every clause and word of a statute." *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2248 (2011) (citation and internal quotations omitted). Interpreting "tax" narrowly will not give separate effect to all of the Code provisions. *See, e.g.*, 26 U.S.C. §§ 6665(a) & 6671(a). Moreover, because "tax" is undefined in the Code, provisions specifying that particular penalties shall be treated as taxes provide "insurance" that the term "tax" will be defined broadly in particular contexts. *See United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 520 (1992) (Scalia, J., concurring).[12]

---

[12] The section of the Code that restricts refund actions separately refers to both "tax" and "penalty," 26 U.S.C. § 7422(a), but that does not demonstrate that the Section 5000A penalty is not a type of tax. As the federal government (continued...)

2. The Court need not rely on the ordinary meaning of "tax," because Section 6201 of the Code requires the Secretary to make "assessments of all taxes (*including . . . assessable penalties*) imposed by this title . . . ." 26 U.S.C. § 6201(a) (emphasis added). By defining "taxes" to include "assessable penalties" (as well as "interest" and "additional amounts"), Congress confirmed that—at least for purposes of assessment—an assessable penalty is included in the definition of tax. *See also id.* § 6301 (directing the Secretary to collect "taxes," which are assessed under Section 6201).[13]

The federal government contends that "Section 6201(a) is simply a way of describing that the Secretary's assessment authority with respect to 'taxes' also extends to . . . assessable penalties' imposed by the Internal Revenue Code." U.S. Br. 34. But Congress did not simply authorize the Secretary to assess "taxes" *and* "assessable penalties." Instead,

---

concedes, the language of the refund statute is "materially identical" to the Anti-Injunction Act. U.S. Reply Br. 5. Moreover, interpreting "tax" to include "penalty" does not render superfluous any part of the refund statute, because the statute uses "tax" and "penalty" to govern different types of challenges. *See* 26 U.S.C. § 7422(a) (barring suits to recover a "tax" that is "alleged to have been erroneously or illegally assessed or collected," and suits to recover a "penalty" that is "claimed to have been collected without authority").

[13] The Section 5000A penalty is an assessable penalty. *See* Amicus Br. 40-41; *Seven-Sky*, 661 F.3d at 38-40 (Kavanaugh, J., dissenting)

it provided that the term "taxes" *includes* "assessable penalties" for purposes of assessment and collection.

In sum, the Anti-Injunction Act "postpones redress for the alleged invasion of property rights if the exaction is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue." *Phillips v. Comm'r of Internal Revenue*, 283 U.S. 589, 595-96 (1931). The federal government dismisses this statement on the ground that Congress labeled the exaction at issue in *Phillips* a "tax." U.S. Br. 29. But the Court's language accurately describes the broad scope of the Act, and nothing in its decision supports a narrow interpretation of the term "tax" in the Anti-Injunction Act.[14]

---

[14] Private Respondents attempt to distinguish between "penalties" and "taxes" by relying on cases discussing those terms in other contexts, such as bankruptcy. NFIB Br. 26-27. But as those cases recognize, whether an exaction is a "tax" for purposes of bankruptcy law does not determine whether it is a tax under the Internal Review Code. *See United States v. Reorganized CF&I Fabricators of Utah*, 518 U.S. 223, 224 (1996).

III. THE ANTI-INJUNCTION ACT CANNOT BE AVOIDED ON ALTERNATIVE GROUNDS.

A. Respondents Challenge Both The Minimum Coverage Requirement And The Penalty Provision.

Respondents contend that the Anti-Injunction Act does not apply because the "purpose" of their suit is to challenge the minimum coverage requirement, not the penalty provision. NFIB Br. 10-25; States Br. 43-48. This argument fails for two reasons.

First, Respondents' complaint challenges both the minimum coverage requirement *and* the penalty provision. The complaint states that Respondents are challenging the requirement that individuals "obtain and maintain a federally-approved level of [healthcare] coverage *or pay a penalty*." J.A. 122 (emphasis added); *see also* J.A. 104-05. The complaint also seeks to enjoin "enforcement" of the Act. *Id.* at 124, 126. Because "the 'enforcement' contemplated by the statute is the assessment and collection of the tax penalties by the IRS," *Seven-Sky*, 661 F.3d at 41 n.29 (Kavanaugh, J., dissenting), an action seeking to enjoin enforcement of the Act is a challenge to the penalty. *See also* NFIB Pet. i (presenting the question "whether the ACA must be invalidated in its entirety").

Private Respondents contend that their request to enjoin enforcement of Section 5000A is irrelevant because the district court did not grant an injunction. NFIB Br. 16. But the application of the Anti-Injunction Act does not depend on the relief

that the court grants. A court must determine whether it has subject-matter jurisdiction before it reaches the merits and decides to grant relief. *See Haywood v. Drown*, 129 S. Ct. 2108, 2126 (2009). Moreover, the court's decision to grant or withhold relief does not change the "purpose" for which the suit was brought. Thus, the Anti-Injunction Act applies regardless of the relief that the court may ultimately grant.[15]

Second, even if the complaint had not mentioned the penalty provision, the Anti-Injunction Act would apply because the minimum coverage requirement cannot be separated from the sole means of enforcing that requirement.

Respondents cite no case holding the Anti-Injunction Act inapplicable on the ground that the taxpayer was challenging only the regulatory aspect of a tax provision. This Court's decisions have reached the opposite result. *See Bob Jones*, 416 U.S. at 739-40 (Anti-Injunction Act applies even if IRS is "attempt[ing] to regulate the admissions policies of private universities"); *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 760-61 (1974) (Act applies even if "restraining the assessment or collection of

---

[15] Furthermore, "there is little practical difference between an injunction and anticipatory relief in the form of a declaratory judgment." *Jefferson Cnty.*, 527 U.S. at 433 (internal citation and quotations omitted). The district court observed that the declaratory judgment in this case is "the functional equivalent of an injunction." Pet. App. 364a.

taxes was at best a collateral effect of respondent's action" (citation and internal quotations omitted)).

Respondents attempt to distinguish *Americans United* and *Bob Jones* on the ground that, in those cases, the regulatory and tax provisions were inextricably linked. But this Court has "abandoned" any "distinctions between regulatory and revenue-raising taxes." *Bob Jones*, 416 U.S. at 741 n.12. The Anti-Injunction Act applies even when the plaintiff seeks to challenge only the regulatory aspect of a tax, because "a suit to enjoin the assessment or collection of *anyone's* taxes triggers the literal terms of § 7421(a)." *Americans United*, 416 U.S. at 760 (emphasis added). Even if Respondents had challenged only the minimum coverage requirement, a successful challenge would relieve taxpayers of the obligation to pay the Section 5000A penalty. Such a suit would be barred because it could restrain assessment and collection of other people's taxes. *See id.*

The minimum coverage requirement cannot be separated from the penalty provision because the penalty is the sole means of enforcing the minimum coverage requirement. The minimum coverage requirement uses mandatory language and is set forth in a separate subsection, but the penalty provision immediately follows and expressly cross-references the minimum coverage requirement.[16]

---

[16] Private Respondents seek to analogize their claims to a challenge to the penalty imposed for violations of EPA (continued...)

Indeed, the better reading of Section 5000A is that it imposes only a single legal obligation: non-exempt covered individuals are required to pay an income tax penalty. Congress exempted individuals who "cannot afford coverage" from the penalty, 26 U.S.C. § 5000A(e)(1), so it is unlikely to have intended "the exempted individuals to be regarded as violators of a freestanding statutory requirement that they lacked the resources to satisfy." U.S. Br. 41; *see also* 42 U.S.C. § 18022(e)(2)(B) (referring to individuals who are "exempt from *the* requirement under section 5000A . . . by reason of section 5000A(e)(1)") (emphasis added). But even if Section 5000A imposed separate obligations to obtain insurance and to pay a penalty, the Anti-Injunction Act would still bar actions seeking to restrain assessment or collection of the penalty. *See* U.S. Reply Br. 14.

In short, Respondents' assertion that they challenge only the minimum coverage requirement is belied by the allegations of their own complaint. And even if Respondents had pled the case differently, they still could not avoid the Anti-Injunction Act because a challenge to the minimum coverage requirement necessarily challenges the penalty provision as well.

---

regulations governing diesel fuels. *See* NFIB Br. 13-14 (citing 26 U.S.C. § 6720A(a)). This analogy fails because the EPA regulations, unlike the minimum coverage requirement, impose non-tax penalties for noncompliance. *See* 42 U.S.C. § 7545(d)(1); 40 C.F.R. 80.615. A plaintiff's ability to challenge the EPA regulations thus provides no guidance for interpreting the Anti-Injunction Act.

B. The Anti-Injunction Act Applies To The State Respondents.

The State Respondents cannot escape the Anti-Injunction Act for two reasons: (1) they are not "aggrieved parties" for purposes of the narrow exception recognized by *South Carolina v. Regan*, 465 U.S. at 378, and (2) they are "person[s]" subject to the Anti-Injunction Act.

1. The State Respondents contend that they are "aggrieved parties" because the individual mandate "forces" eligible individuals to enroll in Medicaid. States Reply Br. 9-10. But the minimum coverage provision does not *require* low-income individuals (who will be exempt from the penalty) to enroll in Medicaid. *See* U.S. Reply Br. 16. The State Respondents' theory of standing would permit *any* third party to challenge the tax liability of someone else based on incidental effects of the tax. *See* Amicus Br. 57. This Court has rejected attempts to establish standing through assumptions about the future choices of private citizens responding to federal law. *See* Amicus Br. 54-55; U.S. Br. 43-44.

In the courts below, the State Respondents argued that they had standing based on their sovereign interest in enacting and enforcing statutes that shield their citizens from the requirement to purchase health insurance. They no longer dispute that, under *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923), they are precluded from establishing standing on that basis. The State Respondents now contend that the Court's decision in *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011), permits them to challenge any federal statute on the ground that it

exceeds the federal government's enumerated powers. States Br. 30-32. But *Bond* does not adopt such a sweeping view of standing where, as here, the law in question regulates only individuals and imposes no obligations on the States.

The State Respondents do not fall within the narrow exception provided by *Regan*, 465 U.S. 367. In *Regan*, South Carolina asserted a direct injury to its sovereign power to borrow money resulting from Congress's decision to terminate a federal tax exemption for bearer bonds. The Court concluded that South Carolina was not relegated to the "mere possibility" that an individual taxpayer would assert a claim on its behalf because "instances in which a third party may raise the constitutional rights of another are the exception rather than the rule." *Id.* at 380, 381. Here, by contrast, the State Respondents seek to protect the constitutional rights of individual taxpayers, not those of the States.

2. Congress has not exempted the States from the Anti-Injunction Act's ban on suits by "any person." In the context of the Code, the Court has construed the word "person" to include States. *See* Amicus Br. 49-51 (citing *Sims v. United States*, 359 U.S. 108 (1959); *Ohio v. Helvering*, 292 U.S. 360 (1934)). These decisions refute the State Respondents' assertion that they are *never* "persons" for purposes of tax provisions absent a clear statement by Congress. *See* U.S. Reply Br. at 19 n.8.

It is particularly appropriate to treat States as "persons" under the Anti-Injunction Act because that term did not appear in the Act until a century after it

was enacted, and was added by an amendment intended to *broaden* the scope of the Act. *See* Amicus Br. 51-52. Moreover, both *Regan* and *Allen v. Regents of University System of Georgia*, 304 U.S. 439 (1938), were decided based on the understanding that States generally are subject to the Anti-Injunction Act. If the rule were otherwise, States would be free to pursue litigation seeking to restrain the collection of a host of federal taxes.

CONCLUSION

The decision of the court of appeals should be vacated and remanded for dismissal of Respondents' challenge to Section 5000A for lack of jurisdiction.

Respectfully submitted,

ROBERT A. LONG, JR.
EMIN TORO
MARK W. MOSIER
HENRY B. LIU
DANIELLE S. BARBOUR
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. NW
Washington, DC 20004
(202) 662-6000
rlong@cov.com

March 2012

REPLY BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
FEB 27 2012
OFFICE OF THE CLERK

No. 11-398

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

v.

FLORIDA, ET AL.,

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF FOR PRIVATE RESPONDENTS ON THE ANTI-INJUNCTION ACT

KAREN R. HARNED
NFIB SMALL BUSINESS
LEGAL CENTER
1201 F St. NW, Suite 200
Washington, DC 20004

PROF. RANDY E. BARNETT
GEORGETOWN UNIV.
LAW CENTER
600 New Jersey Ave. NW
Washington, DC 20001

MICHAEL A. CARVIN
Counsel of Record
GREGORY G. KATSAS
C. KEVIN MARSHALL
HASHIM M. MOOPPAN
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Private Respondents

Library of Congress

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PRIVATE RESPONDENTS ON THE ANTI-INJUNCTION ACT 1

ARGUMENT 3

I. THE AIA IS NOT JURISDICTIONAL, AND THIS COURT CAN ACCEPT THE SOLICITOR GENERAL'S EXPRESS DISAVOWAL OF THE AIA REGARDLESS 3

II. THE AIA DOES NOT APPLY BECAUSE THIS SUIT'S "PURPOSE" IS TO INVALIDATE THE MANDATE'S "REQUIREMENT" TO OBTAIN INSURANCE, NOT TO RESTRAIN THE MANDATE'S ALLEGED "TAX" "PENALTY" FOR NON-COMPLIANCE 10

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Alexander v. 'Americans United' Inc.,
416 U.S. 752 (1974) 13

Arbaugh v. Y & H Corp.,
546 U.S. 500 (2006) 9

Bob Jones Univ. v. Simon,
416 U.S. 725 (1974) 13

Dep't of Revenue v. Kurth Ranch,
511 U.S. 767 (1994) 22

Dolan v. United States,
130 S. Ct. 2533 (2010) 6

Enochs v. Williams Packing & Navigation Co.,
370 U.S. 1 (1962) 8

Gonzalez v. Thaler,
132 S. Ct. 641 (2012) 4, 5

Helvering v. Davis,
301 U.S. 619 (1937) 8, 9, 10

Henderson ex rel. Henderson v. Shinseki,
131 S. Ct. 1197 (2011) 3, 5

John R. Sand & Gravel Co. v. United States,
552 U.S. 130 (2008) 7

Kucana v. Holder,
130 S. Ct. 827 (2010) 17

Miller v. Standard Nut Margarine Co. of Fla.,
284 U.S. 498 (1932) 8

New York v. United States,
505 U.S. 144 (1992) 18

Reed Elsevier, Inc. v. Muchnick,
130 S. Ct. 1237 (2010) 3, 4, 5

United States v. Dalm,
494 U.S. 596 (1990) 7

Va. Office for Protection & Advocacy v. Stewart,
131 S. Ct. 1632 (2011) 7

Whitman v. Am. Trucking Ass'ns, Inc.,
531 U.S. 457 (2001) 16

Zipes v. Trans World Airlines, Inc.,
455 U.S. 385 (1982) 4

STATUTES

17 U.S.C. § 411(a) 4

26 U.S.C. § 6671(a) 12

26 U.S.C. § 6720A(a) 12, 21, 22

26 U.S.C. § 7421(a) 1, 4, 12, 13

28 U.S.C. § 1341 6

26 U.S.C.A. § 5000A(a) 2, 16, 17, 21

26 U.S.C.A. § 5000A(b) 2, 17

26 U.S.C.A. § 5000A(d) 18

26 U.S.C.A. § 5000A(e) 15, 17, 18, 20

26 U.S.C.A. § 5000A(g) 19

42 U.S.C.A. § 18081(a) 17

42 U.S.C.A. § 18091(a) 12, 19

OTHER AUTHORITIES

Philip Klein, *OMB Director Undercuts Legal Case for Obamacare*, WASH. EXAMINER, Feb. 15, 2009, http://campaign2012.washingtonexaminer.com/blogs/beltway-confidential/omb-director-undercuts-legal-case-obamacare/376561 20

REPLY BRIEF FOR PRIVATE RESPONDENTS ON THE ANTI-INJUNCTION ACT

As explained in Private Respondents' opening AIA brief, there are multiple reasons why this suit against the ACA's individual insurance mandate is not barred by the AIA's ban on "suit[s] for the purpose of restraining the assessment or collection of any tax," 26 U.S.C. § 7421(a). The Government has correctly identified one such reason—*i.e.*, for AIA purposes, the mandate's monetary sanction is neither labeled a "tax" nor otherwise rendered a "tax" through any cross-reference in the Tax Code. *See* Govt. AIA Br. 20-38; *accord* Private Resps. AIA Br. 26-41. But the Government has incorrectly rejected two simpler and more fundamental reasons why the AIA is no barrier here.

First, the AIA is not jurisdictional, which means that the Solicitor General's express agreement with the challengers that the AIA is inapplicable obviates any need for this Court to consider whether the statute nevertheless applies. *See* Private Resps. AIA Br. 41-58. The Government fails in its various efforts to demonstrate—as this Court now requires—a clear indication that the AIA is jurisdictional. Instead, every relevant indicia of jurisdictional status is clearly absent. Moreover, the Solicitor General's express concession that the AIA is inapplicable authorizes this Court to adjudicate this suit *regardless* of whether the AIA is "jurisdictional," given that this Court in the past has accepted indistinguishable AIA waivers by the Solicitor General even when loosely labeling the AIA as "jurisdictional."

Second, the AIA does not apply because Private Respondents' purpose is to invalidate the mandate's freestanding legal "requirement" that they must purchase costly insurance, 26 U.S.C.A. § 5000A(a), not to avoid the alleged tax "penalty" that would be imposed if they were to fail to comply with that requirement, *id.* § 5000A(b), which they have no intention of doing. *See* Private Resps. AIA Br. 10-25. Faced with this critical distinction between the mandate's "requirement" and its "penalty," the Government has two primary responses, both of which are meritless.

The Government's initial position is that the distinction is irrelevant under the AIA: it contends that it is sufficient that invalidation of the mandate's requirement would "necessarily preclude" collection of the alleged tax penalty. That contention, however, is refuted by the AIA's text and context. It would require judicially rewriting the AIA's "purpose" element as a "necessary effect" element, and it would perversely force challengers of substantive legal requirements enforced through the Tax Code to violate the law before they could sue. Unsurprisingly, therefore, the Government quickly retreats to the position that the mandate's requirement is meaningless under the ACA apart from the penalty: it contends that, notwithstanding the statute's express imposition of a mandatory "requirement," it merely offers taxpayers a lawful economic choice between the price of insurance or the "penalty." That contention, however, is refuted by the ACA's text and context. Every relevant tool of statutory interpretation unambiguously establishes that Congress made it unlawful for individuals

covered by the mandate to be uninsured, whether or not they are willing to pay the penalty.

In sum, this Court could hold that the mandate's penalty should not be treated like an AIA tax, but it is more straightforward to hold either that the Government has abandoned any available AIA defense or that the AIA does not bar this challenge to the mandate's requirement to obtain insurance.

ARGUMENT

I. THE AIA IS NOT JURISDICTIONAL, AND THIS COURT CAN ACCEPT THE SOLICITOR GENERAL'S EXPRESS DISAVOWAL OF THE AIA REGARDLESS

In our opening brief, we demonstrated that the AIA lacks "a[] 'clear' indication" of jurisdictional status, *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011), given its text, location, character, and judicially created exceptions. *See* Private Resps. AIA Br. 41-58. The Government fails to refute that showing.

A. The Government first contends that the AIA speaks in jurisdictional terms, simply because it "bar[s] the very 'maint[enance]' of pre-enforcement tax challenges." *See* Govt. AIA Br. 10-11 (quoting 26 U.S.C. § 7421(a)). "Jurisdiction," however, refers to the "adjudicatory authority" of federal courts over the "subject-matter" of a case. *See Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243 (2010). And the AIA does not even purport to deprive federal courts of the *power to decide* challenges to federal taxes, let alone does it use the term "jurisdictional." Rather, it merely imposes a "threshold requirement[] that claimants must complete, or exhaust, before filing a lawsuit"—namely, payment of the protested

tax—which is "a type of precondition to suit" that this Court typically treats as a non-jurisdictional "claim-processing" rule. *See id.* at 1246-47; *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (holding non-jurisdictional the requirement in Title VII that discrimination plaintiffs must file a timely EEOC charge before filing a judicial action).

The AIA's fundamentally non-jurisdictional character is in no way altered by the fact that it bars pre-enforcement challenges from being "maintained." *See* 26 U.S.C. § 7421(a). The object of that claim-processing restriction is still the plaintiff's "suit," *id.*, not the "court" or its "jurisdiction." And, with respect to a court's *adjudicatory authority*, there is obviously no material distinction between a bar on "instituting" a claim and a bar on "maintaining" a claim. For example, in *Reed Elsevier*, it clearly would have made no difference if the Copyright Act had stated that "no civil action for infringement ... shall be ~~instituted~~[*maintained*] until preregistration or registration of the copyright claim has been made," *compare* 17 U.S.C. § 411(a)—either way, the statute would "say[] nothing about whether a federal court has subject-matter jurisdiction to adjudicate claims for infringement of unregistered works." *See* 130 S. Ct. at 1245.

Nor does *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012), support the Government's argument that the AIA's text speaks in jurisdictional terms, because that case turned on the habeas statute's historical context, not its text. It is true that *Gonzalez* stated (in *dicta*) that the federal habeas statute speaks with "'clear' jurisdictional language" in providing that "an appeal may not be taken to the court of appeals"

"[u]nless a circuit justice or judge issues a certificate of appealability." *Id.* at 649 (quoting 28 U.S.C. § 2253(c)(1)). But this Court plainly did not base that jurisdictional characterization on the *text* of the habeas statute's COA requirement. After all, that text, like the AIA, is semantically indistinguishable from countless statutory restrictions that impose mandatory claim-processing rules, such as the Copyright Act's registration requirement. *See Reed Elsevier*, 130 S. Ct. at 1245 ("no civil action ... shall be instituted until ..."). Instead, this Court relied on the historical "context" of the habeas statute—namely, that "the requirement of a COA ... dates back to 1908" and always "was jurisdictional." *See Gonzalez*, 132 S. Ct. at 648 n.3; *see also Henderson*, 131 S. Ct. at 1203 (rules "concern[ing] an appeal from one court to another court" historically have been treated as jurisdictional). Here, by contrast, the context provided by this Court's past precedent confirms that the AIA's text is not properly treated as jurisdictional. *See* Private Resps. AIA Br. 48-57; *infra* at 8-9.

B. The Government next contends that the AIA's purpose demonstrates its jurisdictional nature, simply because Congress viewed the mere maintenance of a pre-enforcement tax challenge as an impediment to effective revenue collection. *See* Govt. AIA Br. 10-11. But that observation just explains why Congress enacted the AIA in the first place; it says nothing about whether Congress' "purpose" was to make the AIA an inflexible jurisdictional bar foreclosing *any* exceptions.

In particular, the fact that the AIA *generally* serves Congress' purpose in protecting revenue

collection does not suggest that Congress intended to foreclose pre-enforcement suits in the rare scenario where, as here, the Government contends that the maintenance of such a suit should be allowed and would better serve Congress' revenue-protection purpose. To the contrary, the Government itself has long said, and this Court has long agreed, that in certain circumstances "the litigation of an injunction suit is more important for the protection of the revenues than insistence upon adherence to the ordinary procedure of payment followed by a suit for refund." *See id.* 17. Indeed, the Government concedes that this case presents just such a circumstance, because resolving the mandate's legal status will provide clarity to the Nation regarding the ACA, while the collection of the mandate's penalty is delayed until April of 2015 regardless. *See id.* 29-31. Given the existence of such situations, the AIA's revenue-protection purpose is better served by declining to treat its bar on pre-enforcement challenges as an unyielding jurisdictional constraint. *Cf. Dolan v. United States*, 130 S. Ct. 2533, 2539-40 (2010) (sentencing courts are not jurisdictionally foreclosed from awarding restitution after missing a mandatory statutory deadline because the deadline's primary purpose is to benefit victims, not protect defendants).

C. The Government also tries to draw a contextual inference from the jurisdictional status of "provisions closely related to the AIA." *See* Govt. AIA Br. 12-14. As for the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, we have already demonstrated why its stark contrasts with the AIA instead confirm the AIA's non-jurisdictional status. *See* Private Resps. AIA Br. 46-47. As for the statutory restrictions on

tax-refund actions, *see, e.g.*, *United States v. Dalm*, 494 U.S. 596, 608-10 (1990) (citing 26 U.S.C. §§ 6511(a), 7422(a)), that attempted analogy is doubly inapposite: tax-refund cases implicate sovereign-immunity concerns that are not present here and that this Court's modern precedents no longer treat as a valid basis for applying the "jurisdictional" label.

As noted, the statutory restrictions on tax-*refund* actions "limit[] the scope of a governmental waiver of sovereign immunity." *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (thus describing the restriction in *Dalm*). That "broader system-related" reason for treating those restrictions as "jurisdictional," *see id.*, simply is not implicated by the AIA's bar on *pre-enforcement* tax challenges, which raise no sovereign-immunity concerns because they fall squarely within the *Ex Parte Young* exception, *see Va. Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011). Furthermore, this Court has repudiated its reflexive attribution of jurisdictional status to limitations on sovereign-immunity waivers, leaving *stare decisis* as the sole ground supporting the types of decisions cited by the Government. *See John R. Sand & Gravel*, 552 U.S. at 136-39; *see also id.* at 144-46 (Ginsburg, J., dissenting) (advocating that such earlier cases be overruled in light of this Court's "recent efforts to apply the term 'jurisdictional' with greater precision"). In sum, the Government is essentially seeking to extend moribund "jurisdictional" holdings to the AIA, even though the AIA does not implicate the sovereign-immunity concerns that motivated the discredited doctrine in the first place.

D. Finally, the Government denies that this Court has created judicial exceptions to the AIA. *See* Govt. AIA Br. 15-20. As for this Court's decision establishing an indefensible-tax exception in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 6-7 (1962), the Government reprises its cert-stage argument recasting that decision as a textual interpretation of the word "tax," and we have already refuted that argument. *See* Private Resps. AIA Br. 52-57. As for this Court's acceptance of the Solicitor General's express waiver in *Helvering v. Davis*, 301 U.S. 619, 638-40 (1937), the Government does make some additional arguments beyond the cert-stage arguments to which we have already responded, *see* Private Resps. AIA Br. 49-52, but those new arguments are equally flawed.

The Government principally argues that *Davis* is no longer good law. It speculates that *Davis* was implicitly premised on the suggestion in *Miller v. Standard Nut Margarine Co. of Fla.*, 284 U.S. 498, 509-10 (1932), that the AIA does "nothing more" than codify equitable principles, *see* Govt. AIA Br. 18-19, which was an overly flexible construction that has since been *partly* repudiated, *see* Private Resps. AIA Br. 52-53 (describing how *Williams Packing* cabined the equitable exceptions authorized by *Standard Nut*). But *Davis* did not even cite *Standard Nut*, let alone intimate any reliance on the particularly expansive equitable reasoning in *Standard Nut* that was later rejected. *See Davis*, 301 U.S. at 639-40. Rather, this Court plainly relied on the more modest proposition advanced by the Solicitor General—namely, that the Government should be allowed to expressly waive the protections of a statute designed to protect the Government. *See id.*; Govt. AIA Br. 17

(quoting *Davis* brief). That narrow exception to the AIA—like the narrow indefensible-tax exception—is still the law and is in no way undermined by this Court's subsequent rejection of *Standard Nut's* theory of *unbounded* judicial authority to recognize equitable AIA exceptions.

The Government alternatively argues that it is "theoretically possible to read the AIA as both depriving the courts of jurisdiction *and* subject to affirmative and explicit waiver by the government." *See* Govt. AIA Br. 19. To the contrary, however, the most defining characteristic of "jurisdictional" rules is that they "can never be forfeited or waived." *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). The Government thus cannot cite a single example of a hybrid statute that allows the Government to effectuate an express waiver but that is otherwise fully subject-matter jurisdictional.

Moreover, even assuming that *Davis* stood for the proposition that the AIA is a "jurisdictional" statute that nevertheless can be expressly waived by the Solicitor General, that holding would equally allow this Court to accept the Solicitor General's express concession that the AIA should not bar this suit. After all, this is *not* a case where there has been a "mere failure by the government to raise [the AIA] as a defense." *See* Govt. AIA Br. 19 n.11. Rather, just as in *Davis*, the Solicitor General has expressly contended that the AIA should not bar this suit, despite full knowledge of all AIA arguments potentially available to him. Moreover, just as in *Davis*, the Solicitor General has correctly concluded that it will further federal interests to resolve this suit on the merits. *Compare id.* 17, 19 ("resolution of

the dispute [in *Davis*] further[ed] tax collection by eliminating constitutional doubts"), *with id.* 29-31 (resolution of this case "would facilitate the orderly implementation of the insurance market reforms and at the same time not unduly undermine the policies of the AIA in this particular context"). Thus, because there is no material distinction between the Solicitor General's position here and in *Davis*, this Court should accept the Solicitor General's express concession that the AIA should not bar this suit, regardless of whether the AIA is jurisdictional.

II. THE AIA DOES NOT APPLY BECAUSE THIS SUIT'S "PURPOSE" IS TO INVALIDATE THE MANDATE'S "REQUIREMENT" TO OBTAIN INSURANCE, NOT TO RESTRAIN THE MANDATE'S ALLEGED "TAX" "PENALTY" FOR NON-COMPLIANCE

In our opening brief, we demonstrated that, under the AIA, it is *irrelevant* whether the penalty for non-compliance with the mandate should be treated like a "tax," because the "purpose" of this suit is to invalidate the mandate's antecedent legal requirement to buy insurance. *See* Private Resps. AIA Br. 10-25. In particular, we explained that: (1) Private Respondents' "purpose" as law-abiding citizens is to eliminate their legal duty to buy costly insurance, rather than to avoid a non-compliance penalty that they have no intention of incurring, *see id.* 10-15, 19-22; (2) it is immaterial that success in this suit will have the inevitable *effect* of invalidating the alleged tax penalty for other individuals who would have failed to comply, *see id.* 16-19; and (3) requiring the use of post-enforcement refund actions for challenges to substantive legal

duties enforced through the Tax Code would force plaintiffs to become law-breakers, *see id.* 22-25. The Government has two principal responses why the status of the mandate's "penalty" under the AIA is relevant in this challenge to the mandate's "requirement." They are both meritless.[1]

A. The Government initially contends that, "if the relief [plaintiffs] seek 'would necessarily preclude the collection' of 'taxes' within the meaning of the AIA," then "'a suit seeking such relief falls squarely within the literal scope of the [AIA].'" *See* Govt. AIA Br. 39 (quoting *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 (1974), and citing *Alexander v. 'Americans United' Inc.*, 416 U.S. 752, 760 (1974)). But the Government fails to support that contention in any real way, to the point of virtually conceding its error.

Most obviously, the Government never even tries to explain how the statute's "literal" text covers any suit seeking relief that would "necessarily preclude" the collection of taxes. *See id.* To the contrary, after all, the AIA prohibits *only* suits brought "for the purpose of restraining the assessment or collection of any tax," not suits brought "for the purpose of ~~restraining the assessment or collection of~~[*invalidating*] any ~~tax~~[*legal requirement, if that relief would necessarily preclude the collection of any tax*]." *See* 26 U.S.C. § 7421(a). The Government's position would therefore require rewriting the AIA to

---

[1] The Government also suggests in passing that the complaint belies our contention that this suit's "purpose" is to invalidate the mandate's requirement rather than its alleged tax penalty. *See* Govt. AIA Br. 38-39. We have already demonstrated why such reliance on the complaint is misplaced and mistaken. *See* Private Resps. AIA Br. 16.

replace its "purpose" element with a "necessary effect" element. *See* Private Resps. AIA Br. 18-19.

Moreover, the Government ignores the absurd and perverse results of its "necessary effect" interpretation. As for absurdity, the AIA would bar an APA challenge to EPA's diesel-fuel regulations that are enforced through a "penalty" that is deemed a "tax" for all Tax Code purposes, *see* 26 U.S.C. §§ 6671(a), 6720A(a), because invalidation of those regulations would "necessarily preclude" the IRS' collection of the penalty-deemed-tax. *See* Private Resps. AIA Br. 13-14, 19. As for perversity, the AIA would force plaintiffs challenging substantive legal requirements enforced through the Tax Code to become law-breakers, because the only way of incurring the alleged tax penalty that would be the prerequisite for a refund action would be to engage in the very conduct that had been proscribed. *See id.* 22-24. For example, challengers of the diesel-fuel regulations would be compelled to sell fuel that failed to satisfy EPA's environmental standards, and individuals challenging the ACA's mandate would be compelled to remain uninsured, contrary to Congress' intent to achieve near-universal coverage, *see* Private Resps. Mandate Br. 1-5; 42 U.S.C.A. § 18091(a)(2)(C),(I). The Congress that enacted the AIA would not have wanted to compel Americans to violate the laws of the United States in order to bring a lawsuit to vindicate the Constitution of the United States, even if the Government here is willing to endorse that lawless result.

Nor can the Government claim that such atextual and bizarre results are compelled by *Bob Jones* and *'Americans United'*. Instead, as we have

previously explained, those suits challenging the loss of organizations' tax-exempt status were not barred on the sole ground that they would have had the *incidental effect* of "necessarily precluding" the collection of third-party taxes from the organizations' donors; rather, the suits were barred because their *obvious and indisputable "purpose"* was to restrain the collection of those very taxes, which were causing the organizations' financial injuries by decreasing the amount of charitable contributions the donors were willing to make. *See* Private Resps. AIA Br. 16-18. In other words, *Bob Jones* and *'Americans United'* do not support the proposition that the AIA applies if a suit will have the "inevitable effect" of precluding the collection of taxes, *even where* the suit's "purpose" is unrelated to *anyone's* taxes. Rather, those cases stand only for the correct proposition that where a plaintiff's clear "purpose" is to "restrain[] the ... collection of a[] tax," 26 U.S.C. § 7421(a), it is irrelevant that the "tax" is imposed on a third party and that the plaintiff's injury flows from that third-party taxation.

Indeed, the Government itself virtually concedes that its portrayal of *Bob Jones* and *'Americans United'* is untenably overbroad. The Government never disputes that those cases involved suits lacking *any* non-"tax"-related "purpose." Nor does the Government expressly contend that those cases should be *extended* to suits that, while brought for a non-"tax"-related "purpose," would nevertheless have a "necessary effect" on "taxes." Rather, the Government's *sole* rejoinder is that this is not the latter type of suit, because Private Respondents' "purpose" supposedly is "inextricably linked" to the alleged tax penalty. *See* Govt. AIA Br. 39-40. In

particular, the Government claims that the mandate does not actually impose a "discrete regulatory requirement" to buy insurance, but merely affords individuals a lawful economic choice whether to do so or pay the penalty, such that the only reason for challenging the mandate would be to avoid paying the penalty. *See id.* 39-41. Notably, however, the Government does not argue that the AIA bars this suit *if*, instead, the mandate *does* impose a freestanding duty to purchase insurance.

Ultimately, therefore, the Government is not really advancing the general argument that the AIA bars any suit that will "necessarily preclude" the collection of taxes. Instead, its position that this Court must focus on the status of the mandate's "penalty" rests *exclusively* on its specific argument that the ACA does not contain a separate "requirement" to buy insurance, an argument to which we now turn.

B. The Government is demonstrably wrong in claiming that the ACA affords individuals a *lawful choice* to remain uninsured so long as they are willing to pay the "penalty." As we have previously explained in detail, every relevant aspect of the ACA's text, structure, and context confirms that the mandate's "requirement" to buy insurance has legal force and effect wholly independent from the mandate's "penalty" for non-compliance. *See* Private Resps. AIA Br. 1-5, 19-22, 32-33.

To briefly summarize: (1) Congress imposed an unconditional "requirement" to buy insurance that is enforced through a "penalty" for unlawful non-compliance, rather than imposing a "tax" on individuals who make the lawful choice to remain

uninsured, *see id.* 1-3, 20; (2) Congress specifically exempted different sets of people from the mandate and the penalty, which is rational only if all individuals subject to the mandate must comply, regardless of whether they are exempt from the penalty, *see id.* 2-3, 21; (3) Congress structured earlier versions of the ACA's individual "responsibility" provision, as well as the final version of the ACA's employer "responsibility" provision, to allow a choice between buying insurance and paying a monetary exaction, but it ultimately decided not to use that structure in § 5000A, *see id.* 3-4, 21; (4) Congress knew that structuring the mandate as a legal requirement would cause many law-abiding citizens to purchase insurance even though they would have been willing to pay a tax to remain uninsured, and it also knew that this structure would permit the President to keep his campaign pledge of not raising taxes on the middle-class, *see id.* 4-5, 20-21; and (5) Congress consistently refrained from treating the mandate's penalty as a tax in the ACA, *see id.* 5, 33.

In the face of this overwhelming and unambiguous evidence of Congressional intent, the Government's various efforts to conflate the mandate's "requirement" with its "penalty" all fail.

1. The Government emphasizes that the provision containing the exemptions from the penalty refers to the "penalty [as] imposed under *subsection (a)*" (where the "requirement" is located), rather than "under subsection (b)" (where the "penalty" is located). *See* Govt. AIA Br. 41 (quoting 26 U.S.C.A. § 5000A(e)). But that fleeting cross-reference does not remotely support the

Government's suggested inference that Congress treated payment of the mandate's "penalty" as equivalent to compliance with the mandate's "requirement."

Most importantly, no cross-reference can change the fact that the mandate imposes an unconditional "requirement" that virtually all Americans "shall" obtain insurance. 26 U.S.C.A. § 5000A(a). That freestanding provision plainly establishes a binding legal duty to buy insurance that exists independently of the non-compliance penalty, regardless of the particular subsection of § 5000A "under" which that penalty is imposed. Nor does this cross-reference in any way undermine Congress' unequivocal and deliberate choice to make the mandate's requirement legally distinct from its penalty, as expressed through the critical decisions to exempt different people from each one and to eschew a structure that would have conflated the two. *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

Indeed, that Congress viewed the requirement and penalty as legally separate is vividly illustrated by a provision in the ACA authorizing "certification[s] ...attesting that, for purposes of the individual responsibility requirement under [26 U.S.C.A. § 5000A], an individual is entitled to an exemption from *either* the individual responsibility requirement *or* the penalty imposed by such section." 42 U.S.C.A. § 18081(a)(4) (emphases added). There is no conceivable reason why Congress would have

drafted the provision in the disjunctive if the requirement and the penalty are one and the same.

Furthermore, there are far better explanations for why § 5000A(e) says that penalties are imposed "under" § 5000A(a). For example, this Court has recognized that "[t]he word 'under' is [a] chameleon," because it can mean "specified in," but it also can mean "pursuant to," such that the proper meaning must be "draw[n] ... from its context." *See Kucana v. Holder*, 130 S. Ct. 827, 835 (2010). Here, given the "context" described above, Congress in § 5000A(e) could have referred to the "penalty" as being imposed "under" § 5000A(a), even though it is "specified in" § 5000A(b), because it is nevertheless imposed "pursuant to" an individual's failure to satisfy the "requirement" in § 5000A(a). Or, more simply, the cross-reference could just reflect a minor lack of precision attributable to the frenzied process by which the ACA was enacted. *See* Private Petrs. Severability Br. 7-10.

In sum, the ambiguous cross-reference upon which the Government relies fails to refute what is unambiguous from the ACA's text, structure, and context: Congress intended to impose a legal "requirement" to buy insurance that is enforced through a "penalty," rather than affording individuals a lawful economic choice whether to buy insurance or pay that monetary exaction.[2]

2. The Government further argues that Congress' decision to exempt certain low-income

---

[2] For the same reason, the Government's invocation of *New York v. United States*, 505 U.S. 144 (1992), *see* Govt. AIA Br. 41, is equally unavailing, *see* Private Resps. AIA Br. 21-22.

individuals from the penalty proves that Congress did not view the mandate's requirement as a free-standing legal duty, because Congress would not have wanted to force such individuals to buy costly insurance. *See* Govt. AIA Br. 41. This argument is flawed at every level.

It falters at the threshold on the fact that Congress exempted *other* individuals from the requirement itself, but exempted low-income individuals *only* from the penalty. *Compare* 26 U.S.C.A. § 5000A(d) (exempting from the requirement illegal aliens, incarcerated individuals, and certain religious objectors), *with id.* § 5000A(e) (exempting certain low-income individuals, and others, from the penalty but not the requirement). That critical structural distinction proves that Congress viewed the mandate's requirement as having legal significance distinct from its penalty; otherwise, Congress would not have exempted some individuals from the requirement and some from the penalty. Thus, regardless of the reason why Congress exempted certain low-income individuals from the penalty rather than the requirement, its rationale could not support the Government's inference that the requirement has no independent significance whatsoever.

To the contrary, the fact that Congress created an exemption from the mandate's requirement for illegal aliens, incarcerated individuals, and certain religious objectors, but declined to include low-income individuals within that exemption, starkly confirms that Congress intended for such individuals to comply with the requirement. Otherwise, it surely would have exempted them from the requirement

itself, just as it did for the other groups whom it did not intend to subject to that duty.

Moreover, Congress was not acting inconsistently when it decided to subject certain low-income individuals to the mandate's requirement but not its penalty. Instead, it was simply balancing competing interests. On the one hand, Congress wanted even those individuals to obtain insurance, in furtherance of its goal of achieving near-universal coverage. *See* Private Resps. Mandate Br. 1-5; 42 U.S.C.A. § 18091(a)(2)(C),(I). It knew that, despite the financial sacrifice, many law-abiding citizens with limited incomes would try to "comply with a mandate, even in the absence of penalties, because they believe in abiding by the nation's laws." *See* Private Resps. AIA Br. 4 (quoting CBO report). Plus, the burden would be minimal for those penalty-exempt individuals who are eligible for (the ACA-expanded) Medicaid. *See* Govt. Medicaid Br. 49-50. On the other hand, though, Congress did not want to pay the political price for *penalizing* people of limited means who failed to comply with the mandate. In fact, this imperative to avoid the appearance of draconian federal enforcement similarly explains why the IRS was stripped of its most effective, yet most onerous, enforcement tools. *See* 26 U.S.C.A. § 5000A(g)(2) (barring criminal prosecutions, liens, and levies). More generally, Congress also did not want to convert the mandate from a "requirement" enforced by a "penalty" into a "tax" on a voluntary choice, because that would have violated the President's campaign pledge not to raise "taxes" on families making less than $250,000 annually. *See* Private Resps. AIA Br. 4-5.

The Government can hardly deny that such a delicate balance between policy and politics was motivating Congress. After all, the Executive Branch itself has continued that balancing act throughout the pendency of this litigation. To give the most recent example, on February 15, 2012—slightly more than a week after the Solicitor General filed his latest brief in this Court opining that the mandate's penalty is a constitutional "tax," *see* Govt. AIA Br. 21—the Acting Director of the Office of Management and Budget testified under oath before Congress that the mandate's penalty is *not* a "tax."[3] If the Executive Branch is comfortable taking such seemingly irreconcilable positions, it cannot possibly suggest that the Legislative Branch was acting inconsistently when it subjected certain low-income individuals to the mandate's requirement but then exempted them from its penalty.

In all events, there are other people who are exempt only from the mandate's penalty, yet who are indisputably capable of complying with the mandate's requirement—namely, members of defined Indian Tribes and individuals who are uninsured during coverage gaps of less than three months. *See* 26 U.S.C.A. § 5000A(e)(3),(4). Congress' decision to exempt *those* people *only* from the penalty—likely due to enforcement and administrative concerns—is indisputable evidence that Congress expected them to comply with the requirement: that decision cannot possibly be

---

[3] *See* Philip Klein, *OMB Director Undercuts Legal Case for Obamacare*, WASH. EXAMINER, Feb. 15, 2009, http://campaign2012.washingtonexaminer.com/blogs/beltway-confidential/omb-director-undercuts-legal-case-obamacare/376561.

equated with an atextual intention to exempt them from the requirement itself.

3. The Government also observes that, under the ACA, "the only consequence of noncompliance with Section 5000A(a) is the penalty prescribed by Section 5000A(b)." *See* Govt. AIA Br. 40. That is entirely true and entirely irrelevant. To tweak an earlier example, even if the *only* consequence of violating the EPA's diesel-fuel regulations was the penalty-deemed-tax in 26 U.S.C. § 6720A(a), that would not in any way change the fact that those regulations "establish[] [an] independently [binding] legal obligation." *See* Govt. AIA Br. 40. A freestanding legal duty does not lose its mandatory character simply because its sole means of enforcement is placed in the Tax Code.

Put differently, when determining whether a federal law compels conduct or merely attaches adverse "tax" consequences to the failure to engage in that conduct, the relevant legal question is not the *consequence* of refraining from the conduct, but whether the *freedom* to refrain exists. Indeed, the Government can hardly contend that a direct mandate to act enforced through a monetary penalty may be equated with an indirect monetary incentive to act, because its primary defense of the ACA's Medicaid expansion is that acceptance of federal funding with regulatory conditions is "voluntary" in theory, no matter how "coercive" in fact. *See* Govt. Medicaid Br. 31-48.

More generally, it is startling and disheartening that the Department charged with enforcing the Nation's laws would argue to this Court that there is no real difference between violating a duty enshrined

in federal law and making a purely economic decision based on its "tax" consequences. There is instead a palpable difference—directly affecting the behavior of law-abiding citizens—between a statute that imposes a $5-per-pack "tax" on the lawful act of buying cigarettes and a statute that enforces through a $5-per-pack "penalty" a legal ban on the purchase of cigarettes. *See* Private Resps. AIA Br. 20-21. Thus, when Congress imposed a legal "requirement" to buy health insurance with the goal of forcing virtually every American into the Nation's health-insurance risk pools, Congress surely did not share the Government's view that Americans could lawfully frustrate that goal by remaining uninsured and (at most) paying some money into the federal treasury instead.

4. Similarly, the Government gains nothing by observing that the mandate's penalty will generate revenue. *See* Govt. AIA Br. 40. So will the Tax Code's diesel-fuel penalties, 26 U.S.C. § 6720A(a), as will all "[c]riminal fines, civil penalties, [and] civil forfeitures," *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 778 (1994). The fact that the "penalty" for non-compliance with a regulatory "requirement" will generate revenue does not somehow render the "requirement" voluntary. Individuals are paying the "penalty" because they have *violated* the law, not because they are *complying* with it.

The Government thus gets matters precisely backwards by invoking this Court's abandonment of the distinction between "regulatory and revenue-raising taxes." *See* Govt. AIA Br. 40. Just as this Court refuses to inquire whether Congress had a

hidden "regulatory" motive in enacting a "tax" not formally imposed as punishment for unlawful conduct, *see* Private Resps. AIA Br. 26-27, 30-32, so too should this Court refuse to inquire whether Congress had a hidden "tax" motive in enacting a "penalty" that is formally imposed as punishment for unlawful conduct.

5. Finally, it warrants emphasis that, elsewhere in its brief, the Government implicitly concedes that the mandate imposes a freestanding legal "requirement," distinct from its "penalty." Certain *amici* have argued that allowing this suit to proceed will also authorize future pre-enforcement challenges to the penalty's application in individual circumstances (if the mandate is facially upheld here). *See* Caplin/Cohen AIA Br. 7-8, 36. In response, the Government asserts that, unlike this suit, such a future pre-enforcement "challenge to the calculation or imposition of a particular penalty under Section 5000A" "would be barred on any of a host of grounds," including the existence of "adequate [post-enforcement] remed[ies]," the "failure to exhaust administrative remedies," the existence of "a special statutory administrative and judicial review procedure for raising such issues," and "the absence of 'final agency action.'" *See* Govt. AIA Br. 36-37.

The Government's response, however, is necessarily premised on the legal distinction between the mandate's requirement and its penalty, because that is the only material difference between this suit and future challenges to individual penalties. After all, if, as the Government claims, even our "general challenge" to § 5000A is "'inextricably linked' with the penalty provision" because there is no "discrete

regulatory requirement," *see id.* 39-40, then the "host of grounds" that bar specific challenges to a penalty would apply with equal force to this general challenge. Under the Government's own reasoning, therefore, it is precisely because this suit challenges the mandate's requirement to buy insurance, rather than its penalty for non-compliance, that there is no bar on review here. Thus, just as the Government virtually admits that its "necessary effect" interpretation of the AIA is wrong, *supra* at 13-14, it virtually admits that its conflation of the mandate's "requirement" and "penalty" is also wrong.

CONCLUSION

Preferably for the foregoing reasons, but at least for the reason given by the Government, this Court should hold that the AIA does not bar this suit and then review the judgment below on the merits.

Respectfully submitted,

KAREN R. HARNED
NFIB SMALL BUSINESS
LEGAL CENTER
1201 F St. NW, Suite 200
Washington, DC 20004

PROF. RANDY E. BARNETT
GEORGETOWN UNIV.
LAW CENTER
600 New Jersey Ave. NW
Washington, DC 20001

MICHAEL A. CARVIN
Counsel of Record
GREGORY G. KATSAS
C. KEVIN MARSHALL
HASHIM M. MOOPPAN
YAAKOV M. ROTH
JONES DAY
51 Louisiana Ave. NW
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Counsel for Private Respondents

Dated: February 27, 2012

REPLY BRIEF

No. 11-398

In the
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR STATE RESPONDENTS ON THE ANTI-INJUNCTION ACT

PAMELA JO BONDI
Attorney General of Florida
SCOTT D. MAKAR
Solicitor General
LOUIS F. HUBENER
TIMOTHY D. OSTERHAUS
BLAINE H. WINSHIP
Office of the Attorney General of Florida
The Capitol, Suite PL-01
Tallahassee, FL 32399
(850) 414-3300

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
CONOR B. DUGAN
ERIN M. HAWLEY
Bancroft PLLC
1919 M Street, NW
Suite 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

February 27, 2012 *(Additional Counsel Listed on Inside Cover)*

ROBERT M. MCKENNA
Attorney General
of Washington
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504

LAWRENCE G. WASDEN
Attorney General of Idaho
P.O. Box 83720
Boise, ID 83720

THOMAS W. CORBETT, JR.
Governor
LINDA L. KELLY
Attorney General
Commonwealth of
Pennsylvania
16th Floor
Strawberry Square
Harrisburg, PA 17120

JOSEPH SCIARROTTA, JR.
General Counsel
Office of Arizona Governor
JANICE K. BREWER
TOM HORNE
Attorney General
of Arizona
1700 West Washington Street
9th Floor
Phoenix, AZ 85007

MARTY J. JACKLEY
Attorney General
of South Dakota
1302 East Highway 14
Pierre, SD 57501

WAYNE STENEJHEM
Attorney General
of North Dakota
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

GREGORY F. ZOELLER
Attorney General
of Indiana
302 West Washington Street
Indianapolis, IN 46204

BRIAN SANDOVAL
Governor of Nevada
State Capitol Building
101 North Carson Street
Carson City, NV 89701

SAMUEL S. OLENS
Attorney General
of Georgia
40 Capitol Square, SW
Atlanta, GA 30334

MICHAEL C. GERAGHTY
Attorney General
of Alaska
P.O. Box 110300
Juneau, AK 99811

GREG ABBOTT
Attorney General
of Texas
BILL COBB
Deputy Attorney General
for Civil Litigation
Office of the Attorney
General of Texas
P.O. Box 12548
Capitol Station
Austin, TX 78711
(512) 475-0131

JON BRUNING
Attorney General
of Nebraska
KATHERINE J. SPOHN
Special Counsel to the
Attorney General
Office of the Attorney
General of Nebraska
2115 State Capitol Building
Lincoln, NE 68508
(402) 471-2834

ALAN WILSON
Attorney General
of South Carolina
P.O. Box 11549
Columbia, SC 29211

MARK L. SHURTLEFF
Attorney General of Utah
Capitol Suite #230
P.O. Box 142320
Salt Lake City, UT 84114

LUTHER STRANGE
Attorney General
of Alabama
501 Washington Avenue
Montgomery, AL 36130

JAMES D. "BUDDY" CALDWELL
Attorney General
of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804

BILL SCHUETTE
Attorney General
of Michigan
P.O. Box 30212
Lansing, MI 48909

JOHN W. SUTHERS
Attorney General
of Colorado
1525 Sherman Street
Denver, CO 80203

MICHAEL DEWINE
Attorney General of Ohio
DAVID B. RIVKIN
LEE A. CASEY
Baker & Hostetler LLP
Special Counsel
30 East Broad Street
17th Floor
Columbus, OH 43215

MATTHEW MEAD
Governor of Wyoming
State Capitol
200 West 24th Street
Cheyenne, WY 82002

J.B. VAN HOLLEN
Attorney General of Wisconsin
114 East State Capitol
Madison, WI 53702

TERRY BRANSTAD
Governor of Iowa
107 East Grand Avenue
Des Moines, IA 50319

MICHAEL B. WALLACE
Counsel for the State of Mississippi by and through Governor
PHIL BRYANT
Wise Carter Child & Caraway, P.A.
P.O. Box 651
Jackson, MS 39205

DEREK SCHMIDT
Attorney General of Kansas
Memorial Hall
120 SW 10th Street
Topeka, KS 66612

WILLIAM J. SCHNEIDER
Attorney General of Maine
Six State House Station
Augusta, ME 04333

QUESTION PRESENTED

The question presented is whether the suit brought by Respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a).

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REPLY BRIEF 1

ARGUMENT 3

I. The AIA Is Not Jurisdictional. 3

A. The Language, Purpose, and Context of the AIA Confirm that It Is Not Jurisdictional. 3

B. This Court's Treatment of the AIA Confirms that It Is Non-Jurisdictional. 6

II. The AIA Is No Obstacle To The States. 9

A. The States Fall Squarely Within the *Regan* Exception. 9

B. States Are Not Persons Within the Meaning of the AIA. 14

III. In All Events, The AIA Does Not Apply To Challenges To The Individual Mandate 17

A. The States Are Challenging the Mandate, Not the Penalty. 17

B. The ACA's Penalty Is Not a Tax 21

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Alexander v. "Americans United" Inc.,
416 U.S. 752 (1974) 19, 20

Allen v. Regents of Univ. Sys. of Ga.,
304 U.S. 439 (1938) 17

Arbaugh v. Y & H Corp.,
546 U.S. 500 (2006) 6, 8

Bailey v. Drexel Furniture Co.,
259 U.S. 20 (1922) 22

Bob Jones Univ. v. Simon,
416 U.S. 725 (1974) 7, 16, 19, 20

Bond v. United States,
131 S. Ct. 2355 (2011) 11

Bowles v. Russell,
551 U.S. 205 (2007) 8, 9

Collector v. Day,
78 U.S. 113 (1870) 16

Comm'r of Internal Revenue v. Lundy,
516 U.S. 235 (1996) 5

Dolan v. United States,
130 S. Ct. 2533 (2010) 8

Duke Power Co. v. Carolina Envt'l Study Grp.,
438 U.S. 59 (1978) 11

Enochs v. Williams Packing & Nav. Co.,
370 U.S. 1 (1962) 4, 6, 7

Fed. Maritime Comm'n v. S.C. Ports Auth.,
535 U.S. 743 (2002) 15

Gregory v. Ashcroft,
501 U.S. 452 (1991) 15

Helvering v. Davis,
301 U.S. 619 (1937) 6, 8

Henderson ex rel. Henderson v. Shinseki,
131 S. Ct. 1197 (2011) 3, 4, 5, 6

Kontrick v. Ryan,
540 U.S. 443 (2004) 6, 8

Massachusetts v. Mellon,
262 U.S. 447 (1923) 11

Ohio v. Helvering,
292 U.S. 360 (1934) 14

Raygor v. Regents of Univ. of Minn.,
534 U.S. 533 (2002) 16

Reed Elsevier, Inc. v. Muchnick,
130 S. Ct. 1237 (2010) 3, 5, 6

Sims v. United States,
359 U.S. 108 (1959) 14

South Carolina v. Regan,
465 U.S. 367 (1984) ..... *passim*

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 7

Sunshine Anthracite Coal Co. v. Adkins,
310 U.S. 381 (1940) 8

United States v. Brockamp,
519 U.S. 347 (1997) 5

United States v. Cooper Corp.,
312 U.S. 600 (1941) 15

United States v. Dalm,
494 U.S. 596 (1990) 5

United States v. United Mine Workers of Am.,
330 U.S. 258 (1947) 15

United States v. Reorganized CF & I Fabricators of Utah, Inc.,
518 U.S. 213 (1996) 22

Vt. Agency of Natural Res. v. United States ex. rel. Stevens,
529 U.S. 765 (2000) 14

Wilson v. Omaha Indian Tribe,
442 U.S. 653 (1979) 15

Statutes

26 U.S.C. § 6511(a) 5

26 U.S.C. § 7422 15

26 U.S.C. § 7422(a) 5

28 U.S.C. § 1341 7

42 U.S.C. § 1396a(a)8 10

26 U.S.C.A. § 5000A 20, 21

26 U.S.C.A. § 5000A(a) 21

26 U.S.C.A. § 5000A(b) 21, 22

26 U.S.C.A. § 5000A(d) 21

26 U.S.C.A. § 5000A(e) 21

Anti-Injunction Act, 26 U.S.C. § 7421(a) ..... *passim*

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education and Reconciliation Act of 2010, Pub. L. No. 111-152 (ACA) 21, 22

ACA § 1501(a)(2)(D) 22

Other Authorities

Philip Klein, *OMB Director Undercuts Legal Case for Obamacare,* Wash. Examiner (Feb. 15, 2012) 22

Revenue Act of Mar. 2, 1867 § 10, 14 Stat. 471 16

REPLY BRIEF

The federal government correctly concedes that the Anti-Injunction Act (AIA) does not bar the Court from considering the merits of Respondents' challenge to the individual mandate. But it erroneously resists multiple more straightforward avenues to that conclusion.

First, contrary to the federal government's assertions, the AIA is not an obstacle to reaching the merits for the simple reason that the AIA is not jurisdictional and is no longer pressed by any party. The federal government identifies nothing in the text of the statute that provides any clear indication that it is jurisdictional. And while it notes that the Court has sometimes labeled the AIA "jurisdictional," it fails to reconcile those passing references with the Court's repeated treatment of the AIA as a claims-processing rule subject to equitable exceptions and waiver. This Court has been more rigorous in its use of the jurisdictional label of late, and under rigorous analysis it is clear that the label fits neither the AIA nor the substance of this Court's AIA jurisprudence.

Second, even if the AIA were jurisdictional, it would pose no bar to the States' challenge. There is no merit to the federal government's assertion that the injury the mandate will cause the States is not legally cognizable, or its related contention that the States are not aggrieved by the mandate. Because the States here, like the State in *South Carolina v. Regan*, 465 U.S. 367 (1984), are injured, but not as taxpayers able to bring a refund action, they have no alternative avenue of relief. The AIA therefore does not apply and leave them without any remedy.

Moreover, the AIA and its generic reference to "any person" do not apply to States in the first place.

In all events, the AIA is inapplicable because Respondents challenge the mandate, not the penalty applicable to a subset of those who do not comply. The federal government's attempt to blur the distinction between the two is irreconcilable with the text, structure, and purpose of the statute, not to mention the federal government's long-term interest in having people obey federal law even in the absence of an enforceable penalty.

More fundamentally, the federal government's concession that the penalty is not a tax for purposes of the AIA only underscores the implausibility of its continued insistence that the penalty is nonetheless a tax for constitutional purposes. Congress deliberately rejected the label and structure of a tax; the President assured the public that it was not a tax; the forced payments to insurance companies are not reflected on any federal government statement of revenues or expenditures; and the federal government itself insists the penalty is not a tax for all purposes. In the end, the mandate is not subject to the AIA, not because of some detail of labeling, but for the straightforward reason that it is not a tax for any purpose. It is something far different and far more problematic. It is an unprecedented mandate to purchase an unwanted product so that the federal government can pay for its new regulatory impositions on the seller without the accountability that comes with new taxes. Nothing in the AIA remotely prevents this Court from invalidating this unprecedented law.

ARGUMENT

I. The AIA Is Not Jurisdictional.

The federal government concedes that Respondents' challenge to the individual mandate "is not barred by the [AIA]" and urges the Court to address the merits of their claims. Govt.'s Br. 5. But although no party invokes the AIA as a bar to reaching the merits, the federal government maintains this Court must address it anyway because it is jurisdictional. *Id.* The federal government is mistaken. The AIA has none of the "clear indications" that this Court requires to find a statute truly jurisdictional. Accordingly, it is no obstacle to reaching the merits of this important case. *See Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011).

A. The Language, Purpose, and Context of the AIA Confirm that It Is Not Jurisdictional.

The plain text of the AIA—"no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person," 26 U.S.C. § 7421(a)—does not mention jurisdiction, much less speak in "clear" jurisdictional terms. The federal government attempts to demonstrate otherwise by focusing on the term "maintain," but it overlooks the fact that that term is clearly directed to *litigants*: It addresses the kind of suits that may be brought "*in* any court *by* any person," not the kind of suits that may be heard *by* any court. *See Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1245 (2010) (phrase "no civil action shall be instituted" non-jurisdictional because addressed

to litigants). Further, the AIA does not ultimately forbid any judicial challenge to collection of a tax; it merely delays such a suit pending payment or diverts it to administrative review. As this Court has explained, claims-processing procedures like the AIA, which seek to "promote the orderly process of litigation," are non-jurisdictional. *See Henderson*, 131 S. Ct. at 1203.

The purpose of the AIA also underscores its non-jurisdictional nature. The AIA was intended to protect tax revenues by "requir[ing] that the legal right to the disputed sums be determined in a suit for refund." *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962). The AIA does not, therefore, protect the courts by cordoning off an entire subject-matter area as unfit for judicial review, but rather governs the way such litigation proceeds. As this Court put it, the AIA "was merely intended to require taxpayers to litigate their claims in a designated proceeding." *Regan*, 465 U.S. at 374. And to the extent that the statute intends to protect the public fisc, as opposed to the courts, there is no reason the federal taxing authorities cannot waive it.

Given the lack of any clear indicia in the AIA that the statute is jurisdictional, the federal government resorts to arguing that the Court should "presume" Congress has ratified a jurisdictional reading of the AIA because "a long line of this Court's decisions left undisturbed by Congress" has treated *other* related statutes as "jurisdictional." Govt.'s Br. 14 (internal quotation marks omitted). This transferred-acquiescence theory of statutory construction is not only legally dubious, but rests on a faulty premise. No such "long line" of cases exists.

The federal government relies on cases describing the similarly worded 26 U.S.C. § 7422(a) as "jurisdictional," Govt.'s Br. 12–13, but it fails to mention that section 7422(a) was not the deciding factor in *any* of those cases. In each case, the taxpayer had satisfied section 7422(a)'s requirement to file a refund claim; the only question was whether that claim was timely under a statutory limitations period set forth in a *different* statute, 26 U.S.C. § 6511(a). *See United States v. Dalm*, 494 U.S. 596, 600 (1990); *United States v. Brockamp*, 519 U.S. 347, 349 (1997); *Comm'r of Internal Revenue v. Lundy*, 516 U.S. 235, 243 (1996). Whether the Court was correct in those cases to refer to section 6511(a)'s time-bar as jurisdictional, or whether that is just another instance of loose use of the term, is ultimately beside the point. This Court's references to the status of section 6511(a)'s filing deadline shed absolutely no light on the AIA.

Whatever the status of section 6511(a), the filing requirement contained in section 7422(a), like the AIA, operates as a quintessential claims-processing rule: It "seek[s] to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson*, 131 S. Ct. at 1203. Notwithstanding loose language in the cases the federal government cites, section 7422(a)'s exhaustion mandate is precisely the sort of "threshold requirement[]" this Court has routinely treated as non-jurisdictional. *See Reed Elsevier*, 130 S. Ct. at 1246–47 & n.6.

B. This Court's Treatment of the AIA Confirms that It Is Non-Jurisdictional.

Once focus properly returns to cases interpreting the AIA itself, it is clear, as *Amicus* concedes, that there is no "long line" of cases treating the *AIA* as jurisdictional. *See Amicus* Br. 19 (construction of AIA has been "cyclical," infused with "periods" in which Court rejected jurisdictional interpretation).

This Court's recent decisions confirm that it is the substance of prior opinions, not the use of the label "jurisdictional," that governs. And Congress, for its part, certainly could not have ratified a "jurisdictional" reading of the AIA when this Court consistently has treated the AIA as non-jurisdictional. *See Williams Packing*, 370 U.S. at 5–6 (equitable exception); *Regan*, 465 U.S. at 381 (remedial exception); *Helvering v. Davis*, 301 U.S. 619 (1937) (accepting waiver). Further, in a host of contexts this Court has reflected a "marked desire" to correct "less than meticulous" use of the term "jurisdictional"—rather than defer to loose references or "drive-by jurisdictional rulings" even where Congress has not objected. *See, e.g.*, *Henderson*, 131 S. Ct. at 1202–07; *Reed Elsevier*, 130 S. Ct. at 1249; *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); *Kontrick v. Ryan*, 540 U.S. 443, 452–56 (2004).

The federal government attempts to dismiss as mere "statutory construction" this Court's holding in *Williams Packing* that the AIA does not apply when the taxpayer has a strong case on the merits. Govt.'s Br. 16–17. That is to rewrite history. This Court

has been candid that *Williams Packing* represents a "judicially created" exception to, not an interpretation of, the AIA. *See, e.g.*, *Regan* 465 U.S. at 372 (referencing "judicially-created" *Williams Packing* exception); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 742 (1974) (examining whether AIA is "subject to judicially created exceptions other than the ... test announced in *Williams Packing*"). And the federal government does not explain what words in the seemingly categorical AIA ("no suit") give rise to an exception for suits where the tax collector's arguments are particularly weak.

More fundamentally, the federal government's interpretation of *Williams Packing* is irreconcilable with the principle that *Congress* prescribes jurisdiction. If the AIA were truly jurisdictional, then Congress would have the last word and this Court would not be discussing whether to recognize or expand "judicially created exceptions." To be sure, Congress could have clearly indicated that the AIA was "jurisdictional," *see, e.g.*, 28 U.S.C. § 1341, and also that jurisdiction nevertheless would exist where it was clear that the federal government would not "ultimately prevail," *Williams Packing*, 370 U.S. at 7. But it did neither. The judicially created "extraordinary and exceptional circumstances" test thus confirms that the AIA is not truly jurisdictional in the sense of limiting "the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).

Regan also underscores that conclusion by emphasizing that it is who sues and when—not the subject matter of the suit—that matters. *Regan* held that the AIA only "prohibited injunctions in the

context of a statutory scheme that provided an alternative remedy," and "was merely intended to require taxpayers to litigate their claims in a designated proceeding." *Regan*, 465 U.S. at 374. It thus confirms that the AIA is directed to litigants, not to the adjudicatory authority of courts, *i.e.*, jurisdiction. Indeed, a truly jurisdictional limit would admit of no equitable exception, even if a litigant was left wholly without remedy. *See Dolan v. United States*, 130 S. Ct. 2533, 2538 (2010); *Bowles v. Russell*, 551 U.S. 205, 214 (2007); *Arbaugh*, 546 U.S. at 514; *Kontrick*, 540 U.S. at 452.

Moreover, the federal government effectively concedes that *Davis* and *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940), are irreconcilable with a jurisdictional reading of the AIA. The federal government acknowledges that this Court has "never expressly disavowed the result in *Davis* that enabled it to reach the merits," Govt.'s Br. 20, but counsels ignoring it nonetheless.

Davis and *Sunshine Anthracite* are not so easily dismissed. They are consistent with this Court's interpretation of the AIA as a claims-processing rule that permits equitable exceptions. What is more, they are precedential decisions that not even the federal government seriously proposes overruling. These and other cases squarely hold that the AIA is subject to forfeiture, waiver, and equitable exceptions. It is one thing to ignore loose language and dictum, but quite another to ignore the substantive results in cases like *Davis* and *Sunshine Anthracite*—decisions on the merits—that are irreconcilable with a jurisdictional reading of the AIA. *See Bowles*, 551

U.S. at 216 ("[I]f a limit is taken to be jurisdictional, waiver becomes impossible.").

In the end, there is nothing to recommend reading the AIA as jurisdictional. The plain text of the statute speaks to litigants, not courts; its purpose is to process claims, not to limit the authority of courts; and the Court's treatment of the statute as subject to waiver and judicially created exceptions is inconsistent with jurisdictional status. Because the AIA has no "clear indications" that it is truly jurisdictional, and is no longer pressed by any party, this Court may reach the merits.

II. The AIA Is No Obstacle To The States.

Even were the AIA jurisdictional, it would still not bar the States' suit. First, there is no merit to the federal government's assertion that the States lack standing to challenge or are not aggrieved by the individual mandate. The States are injured by the mandate but have no alternative means to challenge it. They thus fall squarely within the *Regan* exception. Moreover, the federal government does not come close to overcoming the strong presumption that the AIA's generic reference to "any person" does not include the sovereign States.

A. The States Fall Squarely Within the *Regan* Exception.

1. The federal government cannot and does not dispute that the individual mandate will force millions of individuals to enroll in Medicaid even though they would not do so absent the mandate. *See* States' Br. 25–26. Indeed, that is the whole point of the mandate's application to Medicaid-eligible

individuals, who are largely exempt from the penalty. Nor does it dispute that enrolling such individuals will cost States hundreds of millions of dollars. *See* JA (Medicaid) 76 ¶¶ 17–18. It instead simply asserts that the States' injury is not legally cognizable. *See* Govt.'s Br. 43. That assertion is baseless.

The federal government contends that the States cannot complain about costs generated by enrolling eligible individuals because the States elected to participate in Medicaid. But even assuming continued participation in Medicaid were voluntary, *but see* States' Medicaid Br. 32–59, the federal government acknowledges that the States agreed only to "ensure that 'all individuals *wishing* to'" enroll in Medicaid "'have opportunity to do so.'" Govt.'s Br. 44 (quoting 42 U.S.C. § 1396a(a)(8); emphasis added). In other words, the States agreed to provide Medicaid to all eligible individuals *who want it*, not to provide Medicaid to all eligible individuals. Just like a company that agreed to provide a subsidized product to all who voluntarily want it, the States clearly have standing to challenge a law that makes that purchase/participation mandatory. Indeed, the mandate alters the States' participation in, and costs of, Medicaid just as directly as if Congress had simply amended Medicaid to require States to enroll more individuals. Because the States unquestionably would have standing to challenge that kind of condition, they unquestionably have standing to challenge the mandate as well.

The federal government also argues that the States cannot challenge the mandate "as *parens patriae* ... on behalf of individuals to whom the provision applies." Govt.'s Br. 45. But that argument

misconstrues the nature of the injury the States assert as an alternative basis for standing. They do not indirectly assert their citizens' interests; they directly assert their own sovereign interests. As this Court recently reiterated, "action that exceeds the National Government's enumerated powers undermines the sovereign interests of States," *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011), and thus injures *the States* distinctly from any injury to their residents. To the extent that *Massachusetts v. Mellon*, 262 U.S. 447 (1923), deprives States of standing to seek redress for that injury, it should be overruled. *See* States' Br. 31–32. That said, the Court need not consider that question here given the States' clear standing to challenge the mandate's pecuniary impact on their participation in Medicaid.

2. The federal government also gains nothing from its invocation of prudential third-party standing principles because the States are seeking to redress their *own* legally cognizable injury—financial or alternatively sovereign—not the injury that the mandate causes individuals. "Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying the standing doctrine are generally satisfied ...." *Duke Power Co. v. Carolina Envt'l Study Grp., Inc.*, 438 U.S. 59, 80–81 (1978).

Nor is there any heighted "standard[] for prudential standing under the Internal Revenue Code." Govt.'s Br. 44. Setting aside the fact that the States are challenging the mandate, not the penalty, *see infra*, Part III.A, which renders any concerns

about "orderly administration and enforcement of the [Tax] Code" beside the point, this Court has already recognized situations in which "a third party [is] permitted to challenge a tax or tax penalty or benefit applicable *to someone else* based on asserted indirect effects on the third party." Govt.'s Br. 44. Indeed, the Court went out of its way in *Regan* to devise an exception to the AIA for just such situations and rejected the same arguments the federal government raises here in the process. *See Regan*, 465 U.S. at 380–81 (rejecting Secretary's argument that State must rely on taxpayer to bring challenge).

Moreover, third-party standing concerns are particularly misplaced here because the individuals from whom the States' injury flows have neither the incentive nor the ability to challenge the mandate. That injury is primarily a product of the mandate's effect on Medicaid-eligible individuals, most of whom are not even subject to the penalty provision. The federal government is entirely silent as to how these individuals could challenge the mandate, let alone the penalty to which they are *not* subject, as the federal government goes to great lengths to pretend the mandate and penalty are one and the same. These individuals certainly do not have the option of defying the mandate, paying a penalty, and seeking a refund. Yet the whole theory of the AIA is that a refund action is the preferred mechanism for challenging a tax; and the whole theory of *Regan* is that aggrieved parties without a refund remedy are not barred by the AIA. Accordingly, the risk is even more acute here than in *Regan* that requiring the States to rely on "the mere possibility of persuading a third party to assert [their] claims" "would entirely deprive the

State[s] of any opportunity to obtain review." *Id.* at 381. Nothing in prudential standing principles supports that inequitable result.

3. There is no question that the States "will be unable to utilize any statutory procedure to contest the constitutionality of" the mandate, as neither the mandate nor the penalty applies to them. *Id.* at 379. Accordingly, even assuming the AIA might bar some challenges to the mandate, it would not bar the States' challenge. To the extent that the federal government suggests the States must demonstrate something more than standing to fall within the *Regan* exception, it is mistaken.

Regan did not devise some fact-based exception applicable only when a State "challenge[s] a statute that allegedly infringe[s] its power to borrow funds in violation of its Tenth Amendment rights." Govt.'s Br. 50–51. It established a very clear rule that the AIA does not apply unless "Congress has provided an alternative avenue for an aggrieved party to litigate its claims on its own behalf." *Regan*, 465 U.S. at 381. As *Regan* explained, that rule is consistent with the basic purpose of the AIA, a statute enacted in conjunction with a refund provision that Congress assumed would provide an alternative forum for individuals to pay a tax under protest and challenge it later. Accordingly, the only thing necessary to bring a party within the ambit of *Regan* is a legally cognizable injury resulting from a tax that the party lacks an alternative forum to challenge.

B. States Are Not Persons Within the Meaning of the AIA.

The federal government offers no persuasive reason why the AIA's generic reference to "any person" should be read to encompass the States. It is well settled that courts "must apply [the] longstanding interpretive presumption that 'person' does not include the sovereign," which "may be disregarded *only* upon some affirmative showing of statutory intent to the contrary." *Vt. Agency of Natural Res. v. United States ex. rel. Stevens*, 529 U.S. 765, 780–81 (2000) (emphasis added). Like *Amicus*, the federal government makes no such showing.

First, neither *Ohio v. Helvering*, 292 U.S. 360 (1934), nor *Sims v. United States*, 359 U.S. 108 (1959), resolves the question whether the AIA applies to States. Govt.'s Br. 48. As the States have explained, *see* States' Br. 38–41, nothing in either case even remotely supports the broad contention that *all* "internal revenue laws apply to States as 'persons.'" Govt.'s Br. 48. They merely establish that such a law *can* be read to apply to States, but only if its "legislative environment" reveals Congress' intent to reach States. *Sims*, 359 U.S. at 112; *see also Ohio*, 292 U.S. at 370 ("[w]hether the word 'person' ... includes a state ... depends upon the connection in which the word is found"); *cf. Vt. Agency*, 529 U.S. at 784 (interpreting one use of "person" in statute to include States but another use to exclude them).

Nor may the presumption against reading "person" to include States be dismissed by reasoning that "applying the AIA to the States does not upset the federal-state balance." Govt.'s Br. 48. First, the

presumption is by no means limited to statutes that abrogate States' sovereign immunity. *But see* Govt.'s Br. 49. The Court has applied the presumption in a host of contexts—including contexts involving the United States rather than the States—"where the statute [would] impose[] a burden or limitation" on the sovereign. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979) (applying presumption to determine whether States covered by statute establishing burden of proof for land disputes with Indians); *see also United States v. United Mine Workers of Am.*, 330 U.S. 258, 275 (1947) (applying presumption to determine whether statute included United States); *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941) (same).

Moreover, applying the AIA to States certainly would upset the federal-state balance. If the AIA applies to States, a State not only must pay a federal tax it believes to be unconstitutional but also must go through an administrative refund proceeding before it can challenge the tax in an Article III court. *See* 26 U.S.C. § 7422. It is one thing to include States within the ambit of a tax statute; it is quite another to relegate them to an administrative proceeding before they can vindicate their rights in an Article III court. The latter is a far greater affront to the dignity interest of States and surely implicates principles of federalism sufficiently to render it "incumbent upon the federal courts to be certain of Congress' intent before finding that" the AIA burdens States in that manner. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *cf. Fed. Maritime Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 760 n.11 (2002).

That the term "any person" was not added to the AIA until 1966 also in no way undermines the conclusion that Congress did not intend to reach States. As already explained, *see* States' Br. 37–38, the relevant presumption does not arise because "person" is a unique term of art that presumptively *excludes* States. It arises because *no* generic legislative term should lightly be interpreted to *include* States. *See Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 544 (2002) ("States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." (internal quotation marks omitted)).

There is certainly nothing in the AIA's original text to overcome the presumption—the statute simply stated that "no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." Revenue Act of Mar. 2, 1867 § 10, 14 Stat. 471, 475. The addition of "by any person" underscores that it was directed at litigants all along, but is otherwise no more or less State-specific in its terms. Nor can the federal government identify any legislative history to support its argument since the AIA "apparently has no recorded legislative history." *Bob Jones*, 416 U.S. at 736. And there is no reason to assume Congress would have been concerned with the procedures for States to challenge federal taxes given that it was not even clear to what extent Congress *could* tax the States when it enacted the AIA in 1867. *See, e.g.*, *Collector v. Day*, 78 U.S. 113 (1870) (recognizing broad State immunity from federal taxes).

Indeed, the federal government offers no case in which the Court even considered applying the AIA to

a State (or, more aptly, an instrumentality of a State) until 70 years into the statute's existence. *See Allen v. Regents of Univ. Sys. of Ga.*, 304 U.S. 439 (1938). And even then (much like it did when the question next arose nearly 50 years later in *Regan*), the Court avoided the question by holding that "extraordinary circumstances" made application of the AIA inequitable. *Id.* at 448. The circumstances the Court identified underscore why the AIA does not apply to States at all—the Court concluded that requiring a State "to incur the expense and burden of ... prosecution of claim for refund of a tax" that might be unconstitutional is not an "adequate[]" remedy when a State is arguing that a tax impermissibly "burden[s] a state activity." *Id.* at 448–49. There is no reason for the Court to read the AIA as requiring that result given the total absence of any evidence that Congress so intended.

III. In All Events, The AIA Does Not Apply To Challenges To The Individual Mandate.

A. The States Are Challenging the Mandate, Not the Penalty.

As the States have explained, *see* States' Br. 43–48, whether the AIA applies to challenges to the penalty for violating the individual mandate is irrelevant because the States have brought suit for the purpose of invalidating the mandate, not "for the purpose of restraining the assessment or collection of" the penalty, 26 U.S.C. § 7421(a). The federal government's arguments to the contrary are unavailing.

First, nothing in Respondents' complaint suggests the purpose of their suit is to restrain the

penalty, rather than to invalidate the mandate. The complaint is replete with references to whether Congress has authority to impose a mandate "requiring and coercing citizens and residents of the Plaintiff States *to have healthcare coverage.*" JA 124 (emphasis added); *see also, e.g.*, JA 112 ("Congress lacks the constitutional authority to enact the individual mandate."); *id.* ("None of Congress's enumerated powers includes the authority to force every American to buy a good or service on the private market."); JA 123 ("The Act is directed to a lack of, or failure to engage in, activity that is driven by the choices of individual Americans."). And the primary relief sought is a "[d]eclar[ation] that the *individual mandate* exceeds Congress's authority under Article I of the Constitution." JA 124 (emphasis added); *see also* JA 125.[1]

That Respondents are not seeking to restrain the penalty is further confirmed by the fact that neither the States nor Private Respondents will be subject to the penalty. Despite the federal government's effort to equate the mandate with the penalty, the penalty's validity is ultimately irrelevant to the States, as their injury stems from the mandate's effect on individuals who will *comply* with the mandate by enrolling in Medicaid and are largely exempt from the penalty. *See supra*, Part II.A. The same is true as to Private Respondents—they are unaffected by the penalty because they fully intend to comply with the mandate

---

[1] Although the complaint includes an "alternative" claim alleging that if the penalty is a tax, it is not a constitutional one, JA 126, that *alternative* claim simply anticipated the federal government's effort to conflate the mandate and penalty and its attempt to justify them under the tax power.

so long as it is the law. If their choice is to pay a premium and get insurance or pay a penalty and get nothing (not even the federal government's acknowledgement that they have complied with the mandate), they will choose the former. Respondents manifestly did not bring suit "for the purpose of restraining" a penalty that will not affect them, 26 U.S.C. § 7421(a).

Rather than attempt to demonstrate otherwise, the federal government maintains it is sufficient that invalidating the mandate "necessarily would restrain the assessment and collection of the" penalty, as the penalty would have no effect without the mandate. Govt.'s Br. 39. But that argument simply reads the "for the purpose of" language out of the AIA, by rendering the statute applicable to any suit that would have *the effect* of invalidating a tax.

Neither *Bob Jones* nor *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974), supports rewriting the AIA in that manner. In both cases, the Court held the AIA applicable because it found that the purpose of the suits *was* to restrain taxes. *See Bob Jones*, 416 U.S. at 738 ("[Petitioner's] allegations leave little doubt that a primary purpose of this lawsuit is to prevent the Service from assessing and collecting income taxes from petitioner."); *Americans United*, 416 U.S. at 761 ("[R]espondent would not be interested in obtaining the declaratory and injunctive relief requested if that relief did not effectively restrain the taxation of its contributors."). That is because the tax-exempt status the parties were seeking to vindicate and the tax deductions that flowed from that status were two sides of the same coin. That is decidedly not the case here.

Respondents have a very powerful interest in invalidating the mandate wholly apart from the penalty because both the States and Private Respondents are injured by the mandate, not the penalty.

Moreover, the very different situations in *Bob Jones* and *Americans United* underscore why applying the AIA here would be contrary to its basic purpose. In those cases, applying the AIA made perfect sense because the challengers had alternative means through which they could pay under protest the taxes they sought to avoid and challenge the denial of tax-exempt status later. *See Bob Jones*, 416 U.S. at 746; *Americans United*, 416 U.S. at 761. Here, by contrast, applying the AIA would require Private Respondents to violate the mandate in order to challenge it because there is no avenue through which individuals may purchase the required insurance under protest. And applying the AIA to bar the States' claim would deprive the States of *any* avenue for challenging it. As this Court has already concluded, that is not how Congress intended the AIA to operate. *See Regan*, 465 U.S. at 373 ("[T]he Act was not intended to bar an action where ... Congress has not provided the plaintiff with an alternative *legal* way to challenge the validity of a tax." (emphasis added)).

The federal government alternatively persists in its implausible contention that section 5000A "cannot meaningfully be divided into a discrete regulatory requirement and a companion penalty." Govt.'s Br. 39 (internal quotation marks omitted). As the States have demonstrated elsewhere, *see* States' Br. 43–48; States' Minimum Coverage Br. 52–56, the federal

government's repeated attempts to read the individual mandate as no different from, and just a predicate for, the penalty provision are wholly irreconcilable with the text, structure, and purpose of the Act, not to mention the federal government's long-term interest in having law-abiding citizens. Congress itself meaningfully divided section 5000A into a discrete regulatory requirement and a companion penalty—section 5000A(a) imposes a free-standing mandate that nearly every individual "shall" maintain insurance, and section 5000A(b) imposes a "penalty" upon a subset of those who "fail[] to meet that requirement." 26 U.S.C.A. § 5000A(a), (b). That the two are distinct is confirmed by the fact that the former applies more broadly than the latter, and payment of the latter does not eliminate the obligation imposed by the former. *Compare id.* § 5000A(d), *with id.* § 5000A(e). The federal government cannot rewrite the ACA by refusing to defend the statute that Congress actually enacted.

B. The ACA's Penalty Is Not a Tax.

The States agree with the federal government that, as a matter of statutory construction, the penalty is not a tax "for purposes of the AIA." *See* Govt.'s Br. 20–35. But the penalty is also not subject to the AIA for the more basic reason that it is not a tax at all, for any purpose. That is as clear from its enacting history and its practical operation as it is from its text.

As the States have explained, *see* States' Br. 5–7, Congress considered numerous proposals to structure the statute as a tax but rejected them in favor of imposing a mandate to maintain insurance

accompanied by a "penalty" applicable to a subset of its violators. Congress' findings accompanying the mandate confirm that it imposes a regulatory command to "achieve[] near-universal" insurance coverage, not a tax to raise revenue. *See* ACA § 1501(a)(2)(D). Moreover, Congress employed the label penalty, not tax, because the penalty operates as a penalty. "[I]f the concept of penalty means anything, it means punishment for an unlawful act or omission." *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996). The federal government previously recognized this fundamental distinction. *See Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 21–22 (1922) (Argument of Solicitor General) ("where the statute prohibits the doing of an act and as a sanction imposes a pecuniary punishment for violating the act, then it is a penalty, and not a tax at all"). That is precisely what section 5000A(b) imposes—a punishment for a subset of those who violate the individual mandate. *See* States' Minimum Coverage Br. 57–62.[2]

More fundamentally, the federal government gets things exactly backward by insisting that Congress' labels and intentions are "highly relevant" for purposes of the AIA, but "irrelevant" for purposes of the Constitution. Govt.'s Br. 21. There is no great accountability interest served by ensuring that the penalty is not an assessable penalty under Chapter

---

[2] Indeed, just recently, the federal government once again confirmed that the penalty is not a tax. *See* Philip Klein, *OMB Director Undercuts Legal Case for Obamacare*, Wash. Examiner (Feb. 15, 2012), http://campaign2012.washingtonexaminer.com/blogs/beltway-confidential/omb-director-undercuts-legal-case-obamacare/376561.

68 or is exempt from the AIA. By contrast, there is a very powerful accountability interest in ensuring that the political branches cannot refuse to label or structure a provision as a tax, expressly disavow the notion that it is a tax, explicitly ground the provision in Congress' commerce power, but then turn around and defend that provision as an exercise of Congress' tax power. To make matters worse, the mandated premiums paid to insurance companies are entirely "off-budget" and not captured by any accounting of federal government revenues or expenditures. That cloaking effect is particularly troubling as the Nation struggles to address seemingly structural budget deficits. The accountability constraint on Congress' tax power is precisely why Congress chose to impose a penalty rather than a tax. The Court should not relieve Congress of the consequences of that politically convenient decision in construing the AIA or in resolving the ultimate constitutional questions in this case.

CONCLUSION

The Court should hold that the AIA does not bar the States' challenge to the individual mandate.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
CONOR B. DUGAN
ERIN M. HAWLEY
Bancroft PLLC
1919 M Street, NW
Suite 470
Washington, DC 20036
pclement@bancroftpllc.com
(202) 234-0090

PAMELA JO BONDI
Attorney General of Florida
SCOTT D. MAKAR
Solicitor General
LOUIS F. HUBENER
TIMOTHY D. OSTERHAUS
BLAINE H. WINSHIP
Office of the Attorney General of Florida
The Capitol, Suite PL-01
Tallahassee, FL 32399
(850) 414-3300

KATHERINE J. SPOHN
Special Counsel to the Attorney General
Office of the Attorney General of Nebraska
2115 State Capitol Building
Lincoln, NE 68508
(402) 471-2834

BILL COBB
Deputy Attorney General for Civil Litigation
Office of the Attorney General of Texas
P.O. Box 12548
Capitol Station
Austin, TX 78711
(512) 475-0131

February 27, 2012

Counsel for State Respondents

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 11-398

FILED
JAN 11 2012
Office of the Clerk

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, THE ARC OF THE UNITED STATES, BREAST CANCER ACTION, FAMILIES USA, FRIENDS OF CANCER RESEARCH, MARCH OF DIMES FOUNDATION, NATIONAL BREAST CANCER COALITION, NATIONAL COALITION FOR CANCER SURVIVORSHIP, NATIONAL HEALTH LAW PROGRAM, NATIONAL ORGANIZATION FOR RARE DISEASES, NATIONAL SENIOR CITIZENS LAW CENTER, NATIONAL WOMEN'S HEALTH NETWORK, THE OVARIAN CANCER NATIONAL ALLIANCE AND VOICES FOR AMERICA'S CHILDREN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

(MINIMUM COVERAGE PROVISION)

Rochelle Bobroff
Counsel of Record
Simon Lazarus
Federal Rights Project, National Senior Citizens Law Center
1441 I Street, NW, Suite 1100, Washington, DC 20005
(202) 289-6976, rbobroff@nsclc.org

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTERESTS OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE EXPERIENCE OF THE STATES DEMONSTRATES THAT ENSURING COVERAGE FOR PERSONS WITH PRE-EXISTING MEDICAL CONDITIONS HAS WORKED ONLY WITH A COMPLEMENTARY REQUIREMENT THAT PERSONS WHO CAN AFFORD IT CARRY HEALTH INSURANCE 6

A. State Bans On Excluding From Coverage People With Pre-Existing Conditions That Were Not Accompanied By A Minimum Coverage Provision Have Been Unsuccessful 8

B. Massachusetts Successfully Banned Excluding From Insurance Plans Patients With Pre-existing Conditions By Requiring Minimum Coverage 14

C. The Eleventh Circuit's Claim that the ACA's Minimum Coverage Provision is Ineffective, and, hence, not Essential is Refuted by the Experience with a Similar Provision in Massachusetts and by Independent Analysis 18

II. THE MINIMUM COVERAGE PROVISION, TOGETHER WITH THE PROHIBITION ON EXCLUSIONS FOR PRE-EXISTING CONDITIONS, CAN BE EXPECTED TO REDUCE HEALTH CARE COSTS, PREVENT MEDICAL BANKRUPTCIES, ENCOURAGE FLUIDITY IN THE JOB MARKET, AND REDUCE HUMAN AND ECONOMIC COSTS FROM UNNECESSARY DEATHS 26

A. The Pre-existing Conditions Provision Will Reduce Health Care Costs For Millions of Americans 27

B. The Pre-existing Conditions Provision Will Reduce Medical Bankruptcies 29

C. The Pre-existing Conditions Provision Will Reduce "Job Lock" 30

D. The Pre-existing Conditions Provision Will Reduce Preventable Deaths 32

III. INDIVIDUALS WHO CHOOSE TO FOREGO INSURANCE SHIFT BILLIONS OF DOLLARS OF COSTS TO OTHER PARTICIPANTS IN THE HEALTH INSURANCE AND SERVICES MARKET, AN ECONOMIC ACTIVITY THAT SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE 33

CONCLUSION 38

TABLE OF AUTHORITIES

Federal Cases

Fed. Ins. Co. v. Raytheon Co.,
426 F.3d 491 (1st Cir. 2005) 7
Florida ex rel. Atty. Gen. v. U.S. Dept. of Health & Human Services,
648 F.3d 1235 (11th Cir. 2011), *cert. granted*, 132 S. Ct. 603 (2011) ..... 13, passim
Gonzales v. Raich,
545 U.S. 1 (2005) ..... 3, passim
Group Life & Health Ins. Co. v. Royal Drug Co.,
440 U.S. 205 (1979) 30
Heart of Atlanta Motel, Inc. v. U. S.,
379 U.S. 241 (1964) 19
Liberty University, Inc. v.Geithner,
2011 WL 3962915 (4th Cir., 2011) 19
M'Culloch v. Maryland,
17 U.S. 316 (1819) 20, 37
Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) ..... 17, passim
Thomas More Law Ctr. v. Obama,
651 F.3d 529 (6th Cir. 2011) ..... 15, passim
Turner Broad. Sys., Inc. v. F.C.C.,
520 U.S. 180 (1997) 19, 20
United States v. Lopez,
514 U.S. 549 (1995) ..... 3, passim
United States v. S.-E. Underwriters Ass'n,
322 U.S. 533 (1944) 26

Federal Statutes

26 U.S.C. § 5000A 22, 23
29 U.S.C. § 1181 30
29 U.S.C. § 1182 30
42 U.S.C. § 1395dd 34
42 U.S.C. § 18091 15
42 U.S.C. § 300gg-1 ..... 6, 7
I. R. C. § 6321 23
I. R. C. § 6323 23
I. R. C. § 7402 24
Patient Protection and Affordable Care Act, Pub L. No. 111-148, 124 Stat. 119 (2010) .....2, passim

State Statutes and Regulations

830 Code of Massachusetts Regulations (CMR) 111M.2.1 (2011) 22
1998 Kentucky Laws Ch. 496 (H.B. 315) 9
Ky. Rev. Stat. Ann. § 304.17A-060(2)(A) (West) 9
Mass. Gen. Laws ch. 111M, ... 14, 22
Mass. Gen. Laws ch. 176M, § 3(a) 14
Me. Rev. Stat. Ann. Tit. 24-A. § 2736-C(3) (Maine)...9
New Hampshire Act of May 19, 1997, ch. 188, sec. 11, § 420-G:7, I(a) (2003) 11
N.H. Rev. Stat. Ann. § 420-G:6 (1994) (New Hampshire) 9
N.J. Stat. Ann. § 17B:27A-22 (West) (New Jersey) .. 9
NY CLS Ins § 3231, 3232 (New York) 9
VT. Stat. Ann. tit. 8, § 4080B (Vermont) 9
Wash. Rev. Code § 48.43.012 (Washington)..... 9

Other Authorities

156 Cong. Rec. H1903 (daily ed. Mar. 21, 2010) 21

A.C. Aizenman, *Major Health Insurers to Stop Offering New Child-Only Policies*, Washington Post (Sept. 20, 2010) 13

Blumberg, Linda J. & John Holahan, *Do Individual Mandates Matter?*, Urban Institute, Jan. 2008..... 7

Buettgens, Matthew, et al. The Urban Institute, *Why the Individual Mandate Matters* 1 (Dec. 2010) .. 25

Centers for Disease Control and Prevention, Short-Term Effects of Health Care Coverage Legislation – Massachusetts 2008, Morbidity and Mortality Weekly Report, 2010, 59(9), 262-67 16

Chandra, Amitabh, Jonathan Gruber, and Robin McKnight, *The Importance of the Individual Mandate—Evidence from Massachusetts*, The New England Journal of Medicine, January 27, 2011 ....14, 15

Committee on the Consequences of Uninsurance, Institute of Medicine, Health Insurance is a Family Matter 106 (2002) 33

Committee on Understanding Premature Birth & Assuring Healthy Outcomes, Institute of Medicine, Preterm Birth: Causes, Consequences, and Prevention 398 (2007) 28, 29

Congressional Budget Office, "Effects of Eliminating the Individual Mandate to Obtain Health Insurance" 2 (June 16, 2010) 24

Cong. Budget Office, Key Issues in Analyzing Major Health Proposals (2008) 4, 34

Crawford, E.D. et al., *A Retrospective Analysis Illustrating the Substantial Clinical & Economic Burden of Prostate Cancer*, 13 Prostate Cancer & Prostatic Diseases 162 (2010) 35

Furnas, Ben & Peter Harbage, *The Cost-shift from the Uninsured*, Center for Am. Progress, March 24, 2009 35

Frakt, Austin, *Dispatch from Massachusetts: The Individual Mandate is Working*, Kaiser Health News, July 22, 2010 21

Grady, Denise, *After Caesareans, Some See Higher Insurance Cost*, N.Y. Times, June 1, 2008 28

Gruber, Jonathan, *Getting the Facts Straight on Health Care Reform*, 361 New Eng. J. of Med. 2497 (2009) 8

Gruber, Jonathan, Massachusetts Institute of Technology, The Senate Bill Lowers Non-Group Premiums: Updated for New CBO Estimates (2009) 14

Gruber, Jonathan, "Health Care Reform is a 'Three-Legged Stool,'" (2010) 25

H. Comm. on Energy and Commerce Memorandum, 111th Cong., *Coverage Denials for Pre-Existing Conditions in the Individual Health Insurance Market* 1 (Oct. 12, 2010) 27

Hall, Mark A., *An Evaluation of New York's Reform Law*, 25 J. Health Politics, Pol'y & L., 71, 76-77 (2000) 11

Hall, Mark A., *An Evaluation of Vermont's Reform Law*, 25 J. Health Politics, Pol'y & L. 101, 115 (2000) 12

Himmelstein, David U., et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 Am. J. of Med. 741, 742 (2007) 30

Kaiser Family Foundation, *How Private Health Coverage Works: A Primer, 2008 Update* (April 2008)..... 2, 3

Kirk, Adele M., *Riding the Bull: Experience with Individual Market Reform in Washington, Kentucky and Massachusetts*, 25 J. Heath Politics, Pol'y & L. 133, 152 (2000) 9, 12

Madrian, Brigitte C., *Health Insurance and Job Mobility: Is There Evidence of Job-Lock?*, 109 Q. J. of Econ. 27, 43 (1994) 31

Maine Bureau of Insurance, *White Paper: Maine's Individual Health Insurance Market*, January 22, 2001.....10, 12

Massachusetts Division of Health Care Finance and Policy, *Health Care in Massachusetts: Key Indicators*, May 2011 Edition..... 16

Meropol, Neal J. & Kevin A. Schulman, Kevin, A., *Cost of Cancer Care: Issues and Implications*, 25 J. Clinical Oncology 180 (2007) 35

Monheit, Alan C. et al., *Community Rating and Sustainable Individual Health Insurance Markets in New Jersey*, 23.4 Health Affairs 167, 169–70 (2004) 11

National Taxpayer Advocate, *2009 Report to Congress*, I.R.S. Pub. No. 2104 (2009) 23

National Women's Law Center, Nowhere to Turn: How the Individual Health Insurance Market Fails Women 8 (2008) 28

Ostrom, Carol M., *Washington 'a Step Ahead' of Health Law*, Seattle Times, Apr. 1, 2010 12

Pettit, Carol A. & Edward C. Liu, Congressional Research Service, *The PPACA Penalty Provision and the Internal Revenue Service* 6 (April 30, 2011) 24

Pollitz, Karen, et al., *How Accessible is Individual Health Insurance for Consumers in Less-Than-Perfect Health?*, Kaiser Fam. Found., June 2001 .....27, 28, 30

President Barack Obama, Address to a Joint Session of Congress (Sep. 9, 2009) 31

RAND Corporation, *Analysis of the Patient Protection and Affordable Care Act (H.R. 3590)* 8–9 (Feb. 2010) 25

Roundtable Discussion on Expanding Health Care Coverage: Hearing Before the Senate Finance Committee, 111th Cong. 3 (2009) 8

Salganicoff, Alina, et al., *Women and Health Care: A National Profile*, Kaiser Fam. Found., Jul. 2005 28

Sebastian, Christine, et al., *Health Reform: Help for Americans with Pre-Existing Conditions*, Families USA, May 2010 .....26, 27, 29, 34

Seifert, Robert W. and Andrew P. Cohen, *Re-Forming Reform: What the Patient Protection and Affordable Care Act Means for Massachusetts*, University of Massachusetts Medical School Center for Health Law and Economics 22

Stroupe, Kevin T., et al., *Chronic Illness and Health Insurance Related-Job Lock*, 20 J. Pol'y Analysis & Mgmt. 525, 525 (2001) 31

Terminations of Individual Health Policies by Insurance Companies: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. On Oversight and Investigations, 111th Cong. (2009) 31

Tu, Ha T. & Peter J. Cunningham, *Public Coverage Provides Vital Safety Net for Children with Special Health Care Needs*, Center for Studying Health Sys. Change, Sept. 2005 28

U.S. Census Bureau, 2010 Statistical Abstract: Income, Expenditures, Poverty & Wealth (2009) ..... .36

U.S. Census Bureau, Statistical Abstract of the United States: 2012, Table 156. Persons With and Without Health Insurance Coverage by State: 2009 16

Wilper, Andrew P., et al., *Health Insurance and Mortality in US Adults*, 99 Am. J. Pub. Health 2289, 2295 (2009).....32

INTERESTS OF AMICUS CURIAE[1]

Amici are leading organizations dedicated to helping those individuals facing insurance denials and rejections due to pre-existing conditions, including organizations dedicated to reducing the incidence of and the impact of major diseases, disorders, and disabilities, and engaged in advocacy on behalf of individuals affected with such conditions. *Amici* have amassed extensive knowledge of the impact of these conditions and of the history of remedies and policies aimed at lessening these impacts. *Amici* represent the interests of individuals who are at risk of serious financial and medical consequences if they cannot obtain insurance to cover the costs of their medical care. Such individuals are thus tangibly and profoundly harmed by health insurers' practice of denying coverage to persons with pre-existing medical conditions and other abuses that are prohibited by the insurance reforms in the ACA, to which the minimum coverage

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici*, its members or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of *amicus* briefs and have filed letters reflecting their blanket consent with the Clerk.

provision is integral and essential.[2] Moreover, the barriers to affordable coverage eliminated by the ACA increase financial costs and compound medical threats for the entire population, since lack of access to affordable health insurance impedes timely diagnosis and treatment, postponing remedial action until remedies are both more expensive and less effective. Hence, *amici* have both a strong interest in preserving the insurance reforms in the ACA and the capacity to offer information that illuminates the soundness of Congress' conclusion that the minimum coverage provision is critical to the success of these vital reforms.

SUMMARY OF ARGUMENT

Empirical evidence and analysis demonstrate that Congress correctly concluded that a minimum coverage provision "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold."[3] Patient Protection and Affordable Care Act

---

[2] "Minimum coverage provision" is the phrase employed in this brief for the statutory requirement to carry minimum levels of insurance or pay a penalty – what is sometimes referred to as the "individual mandate."

[3] "Guaranteed issue" refers to requirements that insurers accept specified applicants for coverage, e.g., small businesses applying for coverage. "Exclusion of coverage of pre-existing conditions" refers to the practice of denying coverage to persons who have or have had illnesses or conditions that could require treatment during the policy period. Kaiser Family Foundation,

("ACA"), Pub L. No. 111-148, 124 Stat. 119 § 1501(a)(2)(G) (2010). The evidence presented here – of which Congress was aware – shows that each of the seven states that enacted insurance reforms requiring insurers to cover individuals with pre-existing conditions and related reforms without also enacting a minimum coverage provision experienced disastrous results: steep, often unaffordable premium spikes and insurers exiting the market for individual insurance coverage altogether. By contrast, Massachusetts, the one state which enacted such reforms in conjunction with a minimum coverage provision, successfully achieved near-universal health insurance coverage while lowering health insurance premiums. Because the experience of these eight states demonstrates that the minimum coverage provision is "an essential part of a larger regulation of economic activity," it falls squarely within Congress' authority to regulate interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 24 (2005) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995); U.S. Const. art. I, § 8).

The Eleventh Circuit majority, the only circuit to invalidate the provision, did so on the factually and legally indefensible argument that the minimum coverage provision is not tightly drafted enough to accomplish its admittedly valid objectives. This decision intrudes upon an area that is constitutionally reserved to the legislative branch,

---

How Private Health Coverage Works: A Primer, 2008 Update (April 2008) ("How Private Health Coverage Works"), *available at* http://www.kff.org/insurance/upload/7766.pdf.

and it is thoroughly disproven by expert opinion and empirical evidence. Most notably, Massachusetts enacted a minimum coverage provision with similar exemptions and weaker penalties than the one contained in the ACA, and it succeeded in achieving near-universal insurance coverage while reducing premiums.

Working in conjunction with other critical components of the ACA, in particular its guaranteed issue provision and its ban on the exclusion of coverage due to pre-existing conditions, the minimum coverage provision will ensure that affordable health insurance and health care are available to people when they need it, reduce health care costs, prevent medical bankruptcies, encourage fluidity in the job market, and reduce the human and economic costs of preventable deaths.

In addition to its function as an essential means to ensuring universal insurance coverage without regard to pre-existing medical conditions or health status generally, Congress appropriately considered the minimum coverage provision necessary and essential to address the shifting of costs by uninsured individuals seeking medical care to other participants in the system – providers, the government (taxpayers), and insured individuals and families (through higher premiums). Individuals who do not carry insurance are nonetheless participants in the health care market and, collectively, shift billions of dollars of costs onto third parties. Cong. Budget Office, Key Issues in Analyzing Major Health Proposals 114 (2008),

available at http://www.cbo.gov/ftpdocs/99xx/doc9924/12-18-KeyIssues.pdf. These adverse impacts are especially acute because Federal and state laws, as well as widespread practices and customs, require hospitals to provide treatment to uninsured individuals whether they can pay their bills or not. Correcting these widespread and severe market failures unique to the national health insurance and services sector provides ample justification for the minimum coverage provision.

In short, the overwhelming evidence from the experience of state health reform efforts and analyses of the health care market establishes far more than a rational basis for Congress's decision that the minimum coverage provision is essential to ensuring that the ACA ameliorates significant negative effects on the national economy.

ARGUMENT

"Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 514 U.S. at 560. Additionally, when a provision of law is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut" if the provision of law were struck down, *Raich*, 545 U.S. at 24 (quoting *Lopez*, 514 U.S. at 561), that provision falls within Congress' authority under the Commerce and Necessary and Proper Clauses. These two doctrines provide two independent reasons why the minimum coverage provision should be upheld. The minimum coverage provision regulates economic

activity within the health care and health insurance markets, and it is absolutely essential to the ACA's larger regulation of the insurance market. As this brief explains, this essential link between the minimum coverage provision and the ACA's insurance reforms is not only supported by congressional findings and expert research; it is also conclusively demonstrated by the experience of eight states that enacted insurance regulations similar to the ones contained in the ACA.

I. THE EXPERIENCE OF THE STATES DEMONSTRATES THAT ENSURING COVERAGE FOR PERSONS WITH PRE-EXISTING MEDICAL CONDITIONS HAS WORKED ONLY WITH A COMPLEMENTARY REQUIREMENT THAT PERSONS WHO CAN AFFORD IT CARRY HEALTH INSURANCE

The ACA's insurance regulations include what is commonly referred to as a "guaranteed issue" provision, which requires insurers to "accept every employer and individual . . . that applies for such coverage." 42 U.S.C. § 300gg-1(a). Additionally, a provision of the ACA known as its "modified community rating" provision places strict limits on an insurer's ability to charge higher premiums to higher risk consumers. § 300gg. A minimum coverage provision is an essential element of any law containing these reforms because of the problem of adverse selection.[4]

---

[4] Hereinafter, these provisions are referred to collectively as the ACA's "pre-existing conditions" provisions.

Congress' judgment that the minimum coverage provision is integral to barring exclusions for pre-existing medical conditions and other insurance reforms was based on considerable evidence demonstrating that, without such a requirement, "many individuals will not choose to obtain coverage ... [and] adverse selection will occur . . . ." Linda J. Blumberg & John Holahan, *Do Individual Mandates Matter?*, Urban Institute, Jan. 2008, *available at* http://www.urban.org/uploadedpdf/411603_individual_mandates.pdf. Adverse selection occurs when persons with a higher than average health risk disproportionately enroll in a given insurance plan. Currently healthy consumers will tend to delay the purchase of health insurance until they become ill or injured – forcing the insurer to pay them substantially more in benefits than they have previously paid in premiums, and increasing premiums for those who are insured. *See Fed. Ins. Co. v. Raytheon Co., 426* F.3d 491, 499 (1st Cir. 2005). Thus, this adverse selection is an economic activity that substantially affects interstate commerce because it leads to significantly higher premiums and other distortions of the health insurance market.

In hearings before Congress, a representative of the National Association of Insurance Commissioners testified that due to the "severe adverse selection" resulting from the "elimination of preexisting condition exclusions for individuals, State regulators can support these reforms to the extent they are coupled with an effective and

enforceable individual purchase mandate and appropriate income-sensitive subsidies to make coverage affordable." *Roundtable Discussion on Expanding Health Care Coverage: Hearing Before the Senate Finance Committee*, 111th Cong. 3 (2009) (statement of Sandy Praeger, Chair of the Health Insurance and Managed Care Committee, Nat'l Ass'n of Insurance Comm'rs). Indeed, "[w]ithout the individual mandate, fundamental insurance-market reform is impossible[.]" Jonathan Gruber, *Getting the Facts Straight on Health Care Reform*, 361 New Eng. J. of Med. 2497, 2498 (2009), *available at* http://healthcarereform.nejm.org/?p=2473.

Moreover, Congress' judgment that a minimum coverage provision is essential to the ACA's insurance reforms is not merely supported by research and analysis. The need to couple insurance reform with a minimum coverage provision had been demonstrated by the actual experience of states which have tried to do otherwise and – without exception – failed.

A. State Bans On Excluding From Coverage People With Pre-Existing Conditions That Were Not Accompanied By A Minimum Coverage Provision Have Been Unsuccessful

Kentucky, Maine, New Hampshire, New Jersey, New York, Vermont, and Washington enacted legislation that required insurers to guarantee issue to all consumers in the individual

market,[5] but did not have a minimum coverage provision. *See* Ky. Rev. Stat. Ann. § 304.17A-060(2)(A) (West)(Kentucky, repealed); Me. Rev. Stat. Ann. Tit. 24-A. § 2736-C(3) (Maine); N.H. Rev. Stat. Ann. § 420-G:6 (1994)(New Hampshire); N.J. Stat. Ann. § 17B:27A-22 (West)(New Jersey); NY CLS Ins § 3231, 3232 (New York); Vt. Stat. Ann. tit. 8, § 4080B(d)(1)(Vermont); Wash. Rev. Code § 48.43.012(1)(Washington). All of these laws have had detrimental effects on the insurance markets in those states. All seven states suffered from sky-rocketing insurance premium costs, reductions in individuals with coverage, and reductions in insurance products and providers.

"The departure of nearly all insurers from Kentucky's individual market is probably the most widely known aspect of its reforms." Adele M. Kirk, *Riding the Bull: Experience with Individual Market Reform in Washington, Kentucky and Massachusetts*, 25 J. Heath Politics, Pol'y & L. 133, 152 (2000) ("Riding the Bull"). By late 1996, only two providers were still selling new policies in Kentucky's individual market, and the most commonly cited reason given by the departing companies to explain their departure was Kentucky's pre-existing condition provisions. *Id.* at 152–53. Kentucky's reforms were eventually repealed in 1998. *See* 1998 Kentucky Laws Ch. 496 (H.B. 315).

---

[5] "Individual market" refers to the market for health insurance policies for individuals not covered by employer-sponsored or other group health plans.

Maine experienced a similar loss of insurance providers from its individual market after its pre-existing condition provision was enacted in 1993. A 2001 report found that 13 of 18 major carriers ceased issuing new policies to individuals during the eight years after the provision became law. Maine Bureau of Insurance, *White Paper: Maine's Individual Health Insurance Market*, January 22, 2001, at 8 ("White Paper"). The report had equally grim news about costs. Many insurance providers doubled their premiums in just three years or less, and all but one of the state's HMOs experienced "at least one rate increase of 25% or more in 1998 or 1999." *Id.* at 6, 7 & 10.

The same Maine report cited New Hampshire as a cautionary tale of a state whose individual indemnity market completely collapsed. According to the report,

> New Hampshire was nearly left with no carriers in the market when Blue Cross Blue Shield of New Hampshire announced it was withdrawing from the individual market. The New Hampshire Insurance Department took emergency measures to preserve the market. Under the system adopted through emergency rulemaking, and later by statute, all group health insurance and excess loss carriers in New Hampshire are assessed an amount (36 cents monthly in 2000) per covered person. Funds are distributed to individual

> carriers according to a formula designed to compensate those with large losses.

Id. at 5. In 2003, New Hampshire amended its law to permit pre-existing conditions to be excluded for 9 months. Act of May 19, 1997, ch. 188, sec. 11, § 420-G:7, I(a) (2003).

After New Jersey's pre-existing conditions provision took effect in 1993, individual insurance market premiums skyrocketed. Between 1996 and 2001, the cost of the most generous individual insurance plans rose by more than 350 percent. Alan C. Monheit, et al., *Community Rating and Sustainable Individual Health Insurance Markets in New Jersey*, 23.4 Health Affairs 167, 169–70 (2004). Even HMO plans, which tend to resist premium increases, nearly doubled in price during this same timeframe. *Id.*

New York enacted pre-existing condition provisions for the individual market in 1993. Consequently, the portion of non-elderly New Yorkers without insurance worsened from 16.5 percent in 1992 to 20 percent in 1997; while during the same period of time the national average of Americans without coverage worsened from 17.8 percent to 18.4 percent. Mark A. Hall, *An Evaluation of New York's Reform Law*, 25 J. Health Politics, Pol'y & L., 71, 76-77 (2000). A study of the New York individual market concludes that "[f]ollowing reform, the overall percentage of the population with insurance has worsened, and enrollment in the individual market has steadily diminished. Prices

have increased substantially more than in other portions of the market, due to adverse selection." *Id.* at 97.

Like New York, Vermont saw substantial increases in premiums after its similar insurance reform measures took effect in 1993. Mark A. Hall, *An Evaluation of Vermont's Reform Law*, 25 J. Health Politics, Pol'y & L. 101, 115 (2000).

Severe consequences resulted from Washington's law. Within just a few years, non-managed care options disappeared entirely from the individual market. Riding the Bull at 140; White Paper at 5. Among HMOs in the individual market, "[t]he trend since 1994 has been toward higher deductible and/or more managed products as insurers have progressively closed lower deductible, less tightly managed products." Riding the Bull at 140. The state's only insurer in the individual policy market stopped selling new individual policies. *Id.* By 2000, some Washington counties had no private individual coverage available at all. White Paper at 5. In 1999, the Washington state legislature modified its law to permit insurers to deny coverage to certain high-risk consumers.[6]

Recent experience with the early implementation of ACA indicates similar results in the national market when a pre-existing conditions

---

[6] Some other aspects of Washington state's health reform have been successful. Carol M. Ostrom, *Washington 'a Step Ahead' of Health Law*, Seattle Times, Apr. 1, 2010, *available at* http://seattletimes.nwsource.com/html/localnews/2011504803_statehealthreform02m.html.

provision is not accompanied by a minimum coverage provision. In September 2010, several of the ACA's provisions protecting individuals with pre-existing conditions went into effect for children. Pub L. No. 111-148 § 10103(e). Immediately thereafter, several large insurance companies stopped offering new child-only insurance policies. A.C. Aizenman, *Major Health Insurers to Stop Offering New Child-Only Policies*, Washington Post (Sept. 20, 2010). A health insurance industry spokesperson explained that "[w]ith no ... mandate currently in place. ... the result over the next several years [until 2014, when the minimum coverage provisions takes effect] could be that the pool of children insured by child-only plans would rapidly skew toward those with expensive medical bills, either bankrupting the plans or forcing insurers to make up their losses by substantially increasing premiums for all customers." *Id.*

An unbroken pattern shows that pre-existing conditions provisions, absent a minimum coverage provision, are a failed experiment. At best, they result in premium increases. At worst, they cause the total collapse of a state's individual insurance market. Judge Marcus of the Eleventh Circuit summed up the evidence succinctly: "As the states that tried to effectuate guaranteed issue and community rating reforms without some form of individual mandate attest, trying to do the former without the latter simply does not work." *Florida v. Dep't of Health and Human Servs.*, 648 F.3d 1235, 1349 (11th Cir. 2011), (Marcus, J., dissenting), *cert. granted*, 132 S. Ct. 603 (2011).

B. Massachusetts Successfully Banned Excluding From Insurance Plans Patients With Pre-existing Conditions By Requiring Minimum Coverage

In mid-2006, Massachusetts Governor Mitt Romney signed a health reform bill which included a minimum coverage provision. Mass. Gen. Laws ch. 111M, §§ 1-5. Massachusetts law already had a pre-existing conditions provision. Mass. Gen. Laws ch. 176M, § 3(a). The results were both striking and immediate. Although nationwide individual premiums increased an average of 14 percent over the next few years, "the average individual premium in [Massachusetts] fell from $8537 at the end of 2006 to $5143 in mid-2009, a *40% reduction while the rest of the nation was seeing a 14% increase.*" Jonathan Gruber, Massachusetts Institute of Technology, The Senate Bill Lowers Non-Group Premiums: Updated for New CBO Estimates 1 (2009) (emphasis in original).

Indeed, by adding a minimum coverage provision to Massachusetts' existing insurance regulations, the 2006 law reversed a cycle of adverse selection that had already begun during the period when the state had a pre-existing conditions provision but no minimum coverage provision. Individuals who enrolled before the enactment of the minimum coverage provision were almost four years older, almost 50% more likely to be chronically ill and had health care costs about 45% higher than those who enrolled after the minimum coverage provision was fully effective. Amitabh Chandra,

Jonathan Gruber, and Robin McKnight, *The Importance of the Individual Mandate—Evidence from Massachusetts*, The New England Journal of Medicine, January 27, 2011, p. 294, *available at* http://www.nejm.org/doi/pdf/10.1056/NEJMp101306. Thus, while a pre-existing conditions provision in Massachusetts increased enrollment of individuals with high health care costs and chronic illness, the enactment of the minimum coverage provision resulted in relatively healthy individuals also obtaining health insurance.

Congress was well aware of Massachusetts' experience when it crafted the ACA. In congressional findings explaining the need for the ACA's minimum coverage provision, Congress explicitly referenced Massachusetts' successful experience with a minimum coverage provision. 42 U.S.C. § 18091(a)(D); *see also Thomas More Law Center v. Obama*, 651 F.3d 529, 547 (6th Cir. 2011) (explaining that Congress decided to emulate Massachusetts' successful minimum coverage provision because it was informed by the experience of the eight states described above). Congress noted that the ACA's minimum requirement builds upon and strengthens the private employer-based health insurance market and observed that a "similar requirement" in Massachusetts had increased the number of individuals offered employer sponsored coverage, despite an economic downturn. *Id.* Thus, Massachusetts's successful minimum coverage provision was a model for the ACA.

Moreover, empirical data demonstrates that Congress was wise to base the ACA on Massachusetts' experience in order to achieve its overarching goal of near-universal health coverage. Although estimates vary slightly on the percentage of uninsured individuals in Massachusetts, the state is widely acknowledged as having the lowest rate of uninsured individuals in the country. Based on 2009 Census data, Massachusetts had an uninsured rate of 4.4%, the lowest for any state in the country, and significantly lower than the national rate of 16.7%. U.S. Census Bureau, Statistical Abstract of the United States: 2012, Table 156. Persons With and Without Health Insurance Coverage by State: 2009, *available at* http://www.census.gov/compendia/statab/2012/tables/12s0156.pdf.

Other estimates reinforce the success of the Massachusetts model. Massachusetts' minimum coverage provision increased health insurance coverage from 89% of the state's residents in 2006 to 97% in 2008 according to the Centers for Disease Control, Centers for Disease Control and Prevention. Short-Term Effects of Health Care Coverage Legislation – Massachusetts 2008, Morbidity and Mortality Weekly Report, 2010, 59(9), 262-67, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5909a3.htm. The state's own data indicates that its uninsurance rate dropped as low as 1.9% by 2010. Massachusetts Division of Health Care Finance and Policy, *Health Care in Massachusetts: Key Indicators*, May 2011 Edition.

As the foregoing evidence demonstrates, the minimum coverage provision is both an essential part of a larger regulation of economic activity and consistent with well-established law. *Raich*, 545 U.S. at 24; *Lopez*, 514 U.S. at 560. Nevertheless, the Eleventh Circuit held it unconstitutional because it believed upholding it would "obliterate[e] the boundaries inherent in the system of enumerated congressional powers." *Florida*, 648 F.3d at 1328. This concern is unfounded.

The minimum coverage provision is at the core of Congress' authority under the Commerce and Necessary and Proper Clauses, not its periphery. It does not touch, let alone cross, any of the outer boundary lines defined in the Constitution and prior Supreme Court cases. As Judge Silberman recognized, nothing in his opinion upholding the minimum coverage provision disturbs the distinctions "between intrastate and interstate commerce, and between traditional, non-economic areas of state concern and those involving commerce" that are both apparent in the text of the Commerce Clause and explicit in this Court's decisions. *Seven-Sky v. Holder*, 661 F.3d 1, 18-19 (D.C. Cir. 2011). Nor, as Judge Sutton explained, "does this approach remove all limits on the commerce power." *Thomas More*, 651 F.3d. at 558 (Sutton, J., concurring in part and delivering the opinion of the Court in part). Unlike the many non-economic regulations which remain entirely unconstitutional under Judges Silberman and Sutton's opinions, "health care and the means of

paying for it are 'quintessentially economic,'" and fit comfortably within Congress' core authority. *Id.*

C. The Eleventh Circuit's Claim that the ACA's Minimum Coverage Provision is Ineffective, and, hence, not Essential is Refuted by the Experience with a Similar Provision in Massachusetts and by Independent Analysis

The Eleventh Circuit concluded that the minimum coverage provision is not "essential" to the ACA, because healthy people can simply pay a penalty for non-compliance or claim one of several exemptions, such as the religious conscience exemption. *Florida*, 648 F.3d at 1311. The court made a further factual determination that the ACA penalties are "toothless," because the law does not contain criminal penalties and prohibits the IRS from filing notice of liens and levying property to collect the penalty. *Id.* In making this determination, however, the Eleventh Circuit both exceeded its legitimate authority as an arm of the judiciary and reached a factually inaccurate conclusion.

This Court's earliest and most recent precedents conclusively establish that it is not the role of the judiciary to engage in a granular critique of a federal law's efficacy. In assessing the effectiveness of the minimum coverage provision, the proper inquiry is not whether it possesses sufficient "teeth." Rather, the Court must sustain the law as long as "Congress had a rational basis for believing that failure to regulate . . . would leave a gaping

hole" in an economic regulatory scheme. *Raich*, 545 U.S. at 22; *see also Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 196 (1997) ("deference must be accorded to [Congress'] findings as to the harm to be avoided and to the remedial measures adopted for that end, lest [the judiciary] infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy"). Rather than apply the proper legal standard, the Eleventh Circuit "subject[ed] Congress' findings to an analysis that looks startlingly like strict scrutiny review. *Florida*, 648 F.3d at 1343 (Marcus, J., dissenting); *see Liberty University, Inc. v. Geithner*, __ F.3d __, 2011 WL 3962915 at *39 (4th Cir. 2011) (Davis, J., dissenting) (explaining that the impact of the uninsured on interstate commerce "relies on a great number of factual determinations. These are to be made not by the courts but by Congress, an institution with far greater ability to gather and critically evaluate the relevant information."); *see also Seven-Sky v. Holder*, 661 F.3d at 20 (observing that it is "imperative that Congress be free to forge national solutions to national problems" (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258–59 (1964))).

Indeed, the Eleventh Circuit breached limitations on the judiciary's role established since the earliest days of the Republic by substituting its own judgment for that of Congress with respect to whether Congress chose an effective means of regulation. As Chief Justice Marshall held in 1819, the Necessary and Proper Clause

> *cannot* be construed to restrain the powers of congress, *or to impair the right of the legislature to exercise its best judgment in the selection of measures* to carry into execution the constitutional powers of the government. . . . [T]he sound construction of the constitution *must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution*, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. . . . [W]here the law is not prohibited, and is really *calculated to effect any of the objects intrusted to the government, to undertake . . . to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.*"

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420-21, 423 (1819) (emphasis added).

Such judicial modesty is grounded in this Court's wise judgment that Congress "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broadcasting*, 520 U.S. at 195 (internal quotations omitted). This is especially true in a case such as this one, where the statute at issue was enacted after an unusually lengthy and comprehensive congressional inquiry. Indeed, one member of Congress estimates that the House of Representatives alone held 79 hearings on health

reform, debated 238 amendments and heard testimony from 181 witnesses as part of its consideration of the Affordable Care Act. 156 Cong. Rec. H1903 (daily ed. Mar. 21, 2010) (statement of Rep. Holt). Federal courts—especially appellate courts—lack the capacity to conduct such a sweeping policy inquiry.

Moreover, even if it were appropriate for the judiciary to engage in the fundamentally legislative inquiry of determining whether or not the minimum coverage provision's enforcement mechanism is sufficiently stern, the Eleventh Circuit still erred by ignoring considerable evidence indicating that this provision has more than sufficient "teeth" to accomplish its purpose.

As explained above, Massachusetts' minimum coverage provision succeeded in accomplishing the ACA's minimum coverage requirement's goal of permitting comprehensive insurance reforms without triggering a downward spiral of adverse selection. Yet the Massachusetts law's enforcement mechanism is in many ways weaker than the ACA's. In most cases, the penalties for non-compliance with Massachusetts' minimum coverage provision are less steep than the penalties for non-compliance with the ACA's minimum coverage requirement. The average penalty per person in 2016 is estimated to be $537 under the Massachusetts law, compared with the higher average penalty of $674 per person under the ACA. Austin Frakt, *Dispatch from Massachusetts: The Individual Mandate is Working*, Kaiser Health News, July 22, 2010, available at

http://www.kaiserhealthnews.org/Columns/2010/July/072210Frakt.aspx. In addition, the ACA includes a penalty for uninsured children, assessing half the adult penalty, while Massachusetts does not impose any penalty for uninsured children. Robert W. Seifert and Andrew P. Cohen, *Re-Forming Reform: What the Patient Protection and Affordable Care Act Means for Massachusetts*, University of Massachusetts Medical School Center for Health Law and Economics, pp. 12, available at http://masshealthpolicyforum.brandeis.edu/forums/Documents/IssueBrief_ReportFINAL.pdf.

Moreover, Massachusetts' law contains many of the exact same exemptions criticized by the Eleventh Circuit as rendering the ACA minimum coverage provision fatally "porous." 648 F.3d at 1326. The Massachusetts scheme relies on a financial penalty for non-compliance, Mass. Gen. Laws ch. 111M, § 2, proving there is no need for criminal penalties to achieve compliance. The Massachusetts law also has a religious exemption, demonstrating that a religious exemption does not gut the effectiveness of a minimum coverage provision. *Compare* 26 U.S.C. § 5000A(d)(2) *with* Mass. Gen. Laws ch. 111M, § 3. Likewise, both the Massachusetts system and the ACA include exemptions for people likely to experience financial hardship if they comply with the law and for low income individuals. *Compare* 26 U.S.C. § 5000A(e)(5) *with* 830 Code of Massachusetts Regulations (CMR) 111M.2.1(6)(c) (2011).

Furthermore, the Eleventh Circuit's assumption that the Internal Revenue Service ("IRS") cannot collect a penalty under the ACA without filing notice of liens or imposing criminal penalties, 648 F.3d at 1311, is rebutted by the reality of tax code enforcement. The IRS reported to Congress in 2009 that the majority of delinquent taxes recouped from taxpayers are collected through "refund offsets," whereby "the taxpayer filed a return in a subsequent tax year showing a refund due and the IRS withheld the refund to satisfy the past-due tax debt." National Taxpayer Advocate, *2009 Report to Congress*, I.R.S. Pub. No. 2104, at 18 (2009). This mechanism remains available to collect penalties due under the ACA's minimum coverage provision.

Additionally, the Internal Revenue Code automatically places a lien "upon all property and rights to property, whether real or personal, belonging to" a taxpayer who refuses to comply with a request for payment from the IRS. *See* I.R.C. § 6321. Although the ACA prohibits the IRS from filing a notice of a lien,[7] 26 U.S.C. § 5000A(g)(2), nothing in the ACA vitiates the lien automatically placed upon the taxpayer's property if they refuse to comply with a request to pay any penalties owed under the minimum coverage provision. Should the taxpayer sell any property subject to the IRS' lien, IRS could "collect on its claim prior to distribution of the proceeds to anyone other than those with

[7] The notice gives the IRS a superior claim to the taxpayer's property over that of "any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor." I.RC. § 6323.

superior claims." Carol A. Pettit & Edward C. Liu, Congressional Research Service, *The PPACA Penalty Provision and the Internal Revenue Service* 6 (April 30, 2011).

Finally, nothing in the ACA vitiates IRS's authority to seek enforcement of the tax code through civil lawsuits filed in a U.S. District Court. *See* I.R.C. § 7402. Accordingly, although the ACA removes a handful of the extraordinary remedies normally available to IRS, tax collectors retain a wide range of tools enabling them to ensure payment of penalties under the minimum coverage provision.

The Eleventh Circuit's dismissal of the minimum coverage provision's enforcement mechanism also runs counter to the predictions of numerous experts with considerable experience evaluating the economic impact of regulation. Contrary to the Eleventh Circuit's suggestion that the minimum coverage provision provides a negligible incentive for individuals to carry insurance, the Congressional Budget Office determined that 16 million people will purchase insurance because of the minimum coverage provision—including 4 to 5 million who will enroll in employer-based coverage. Congressional Budget Office, "Effects of Eliminating the Individual Mandate to Obtain Health Insurance" 2 (June 16, 2010) ("Effects of Eliminating Mandate"). Without the minimum coverage provision, CBO estimates the number of newly insured individuals will be cut in half. *Id.* Similarly, an Urban Institute study found that compliance with the minimum coverage

provision is the single greatest factor driving new insurance enrollments under the ACA. *See* Matthew Buettgens, et al. The Urban Institute, *Why the Individual Mandate Matters* 1 (Dec. 2010) ("[T]he number of uninsured would be cut by more than half with the mandate but by only about 20 percent without the mandate.) And the RAND Corporation concluded that "[e]stimates from scenarios that include each major coverage provision separately . . . indicate that the individual mandate by itself would have the largest impact on coverage, reducing the number of uninsured in 2019 to 31 million." RAND Corporation, *Analysis of the Patient Protection and Affordable Care Act (H.R. 3590)* 8–9 (Feb. 2010).

Expert analysis also demonstrates that excising the minimum coverage provision would dramatically impact premiums. One study predicts that premiums in 2019 are likely to rise 27% without the minimum coverage provision. Jonathan Gruber, "Health Care Reform is a 'Three-Legged Stool,'" (2010), *available at* http://www.americanprogress.org/issues/2010/08/pdf/repealing_ reform.pdf.

In sum, both expert opinion and the success of Massachusetts' health reforms belie the Eleventh Circuit's dismissal of Congress' judgment concerning the effectiveness of the minimum coverage requirement.

II. THE MINIMUM COVERAGE PROVISION, TOGETHER WITH THE PROHIBITION ON EXCLUSIONS FOR PRE-EXISTING CONDITIONS, CAN BE EXPECTED TO REDUCE HEALTH CARE COSTS, PREVENT MEDICAL BANKRUPTCIES, ENCOURAGE FLUIDITY IN THE JOB MARKET, AND REDUCE HUMAN AND ECONOMIC COSTS FROM UNNECESSARY DEATHS

Because the minimum coverage provision is an essential element of the ACA's pre-existing conditions reforms, this Court must uphold it so long as those reforms regulate an activity that substantially affects interstate commerce. *Id.* This point is easily proven. Insurance is an activity subject to regulation under the Commerce Clause, *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944), and the ACA's insurance reforms place strict limits on the insurance industry's activities of denying coverage to persons with pre-existing conditions and charging higher premiums to higher risk patients.

The harm from the exclusions for pre-existing conditions cuts across the entire U.S. population. An estimated 57.2 million Americans under the age of 65 have a pre-existing condition. Christine Sebastian et al., *Health Reform: Help for Americans with Pre-Existing Conditions*, Families USA, May 2010, at 2, *available at* http://www.familiesusa.org/assets/pdfs/health-

reform/pre-existing-conditions.pdf ("Help for Americans"). A congressional investigation conducted after passage of the ACA found that the four largest U.S. for-profit health insurers denied policies to one out of every seven applicants based on their prior medical history. H. Comm. on Energy and Commerce Memorandum, 111th Cong., *Coverage Denials for Pre-Existing Conditions in the Individual Health Insurance Market* 1 (Oct. 12, 2010). Congress also found that pregnant women, fathers-to-be and those attempting to adopt children are generally unable to buy policies on the individual insurance market. *Id.*

A. The Pre-existing Conditions Provision Will Reduce Health Care Costs For Millions of Americans

Many of the 57.2 million Americans with pre-existing conditions currently can be denied coverage outright, forcing them to pay even catastrophic medical costs out-of-pocket. *See* Karen Pollitz et al., *How Accessible is Individual Health Insurance for Consumers in Less-Than-Perfect Health?*, Kaiser Fam. Found., June 2001, at 31, *available at* http://www.kff.org/insurance/20010620a-index.cfm ("How Accessible") (finding that insurers in the individual market consider certain conditions to be "uninsurable"). Yet even very minor conditions can lead to denials of coverage—one study found that individual insurers will deny coverage to a young, otherwise-healthy woman 8 percent of the time simply because she has hay fever. *Id.* at 7. Likewise, temporary conditions such as pregnancy can be

grounds for complete denial of insurance, *id.* at 19 n.27, potentially imposing enormous unanticipated costs on uninsured women, *see* Committee on Understanding Premature Birth & Assuring Healthy Outcomes, Institute of Medicine, Preterm Birth: Causes, Consequences, and Prevention 398 (2007) ("Preterm Birth") (estimating the total costs of medical treatment for preterm births alone to be $16.9 billion in 2005).

The weight of pre-existing condition exclusions falls particularly hard on women. Women are more likely than men to have chronic conditions. *See* Alina Salganicoff et al., *Women and Health Care: A National Profile*, Kaiser Fam. Found., Jul. 2005, at 8. *available at* http://www.kff.org/womenshealth/7336.cfm. Insurance companies have denied coverage to women based solely on their history of having had a Cesarean section or required them to show proof of sterilization. Denise Grady, *After Caesareans, Some See Higher Insurance Cost*, N.Y. Times, June 1, 2008, at A26, *available at* http://www.nytimes.com/2008/06/01/health/01insure.html. Survivors of domestic violence may also face pre-existing condition coverage denials, National Women's Law Center, Nowhere to Turn: How the Individual Health Insurance Market Fails Women 8 (2008), *available at* http://nwlc.org/reformmatters/NWLCReport-NowhereToTurn-WEB.pdf.

About 13.5 million children have special health needs, Ha T. Tu & Peter J. Cunningham, *Public Coverage Provides Vital Safety Net for Children with Special Health Care Needs*, Center for Studying Health Sys. Change, Sept. 2005, at 1,

available at http://www.hschange.com/CONTENT/778/778.PDF. But pre-existing conditions are most common among older Americans. Nearly half of all adults between the ages of 55 and 64 have a pre-existing condition, and thus could be denied insurance coverage absent the ACA's pre-existing conditions provision. Help for Americans at 3.

Other individuals with pre-existing conditions will be issued insurance only if they agree to pay increased premiums, accept a higher co-payment or deductible, exclude their pre-existing condition from coverage, accept an annual or lifetime cap on coverage, or all four. How Accessible at i–iii & 24. Insurers typically substantially limit the benefits available to children with long-term health conditions. Treatment such as rehabilitation services, for example, is "usually limited to 3 months after an acute event that usually requires hospitalization." Preterm Birth at 459.

For Americans denied meaningful access to health insurance, every illness is a potential brush with economic ruin. The pre-existing conditions provision will remove this risk, also removing a substantial burden to interstate commerce in the process.

B. The Pre-existing Conditions Provision Will Reduce Medical Bankruptcies

At its core, health insurance exists to "distribute[] risk" away from an individual unfortunate enough to be struck with an expensive

illness or injury and spread these costs among a large pool of individuals. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 239, 99 S. Ct. 1067, 1087 (1979). Without access to insurance, persons with pre-existing conditions are constantly at risk of being struck by an unaffordable hospital bill, forcing them to declare bankruptcy. Likewise, Americans who can afford insurance but choose not to purchase it impose significant burdens on interstate commerce when they subsequently declare bankruptcy to escape from medical bills they cannot afford to pay.

Congress found that "[h]alf of all personal bankruptcies are caused in part by medical expenses," Pub L. No. 111-148 § 1501(a)(2)(E). One study estimates that "62.1% of all bankruptcies have a medical cause," and the share of bankruptcies attributable to such causes increased by 50 percent between 2001 and 2007. David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 Am. J. of Med. 741, 742 (2007). The pre-existing conditions provision will increase access to insurance, reducing the number of patients hit by catastrophic bills and decreasing the substantial burden medical bankruptcies impose on interstate commerce.

C. The Pre-existing Conditions Provision Will Reduce "Job Lock"

Because employer-provided health plan participants typically enjoy legal protections against exclusion, *see* 29 U.S.C. §§ 1181, 1182, the only way

for many people with pre-existing conditions to secure coverage is to receive insurance through an employer. *See* How Accessible at 19 n.27 (finding that insurers in the individual market consider certain conditions to be "uninsurable"). Thus, absent the pre-existing conditions provision, thousands of American workers will forego a job opportunity because of fear that they will be uninsured if they leave their current job. This "job lock" phenomenon "accounts for a 25–30 percent reduction in [job] mobility." Brigitte C. Madrian, *Health Insurance and Job Mobility: Is There Evidence of Job-Lock?*, 109 Q. J. of Econ. 27, 43 (1994); *see also* Kevin T. Stroupe et al., *Chronic Illness and Health Insurance Related-Job Lock*, 20 J. Pol'y Analysis & Mgmt. 525, 525 (2001) (finding that workers with chronic illnesses or a family member with chronic illness are 40 percent less likely to voluntarily leave a job which provides health benefits than a similarly-situated healthy worker with a healthy family). Moreover, Congress was well aware of job lock when it debated the ACA. *See Terminations of Individual Health Policies by Insurance Companies: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. On Oversight and Investigations*, 111th Cong. (2009) (statement of Jennifer Wittney Horton) ("I have had to take jobs that I do not want, and put my 22 career goals on hold to ensure that I can find health insurance."); President Barack Obama, Address to a Joint Session of Congress (Sep. 9, 2009) ("More and more Americans worry that if you . . . change your job, you'll lose your health insurance too.").

Excluding individuals with pre-existing conditions from coverage stifles entrepreneurship; it leads workers to choose large employers over promising young companies; it forces workers to limit their career path to jobs which offer health benefits; and it discourages workers from going where their talents lead them. By eliminating such exclusions in the individual market, the ACA will significantly reduce—if not eliminate altogether—these substantial burdens to interstate commerce.

D. The Pre-existing Conditions Provision Will Reduce Preventable Deaths

Finally, and most tragically, nearly 45,000 deaths every year are associated with a lack of health insurance. Andrew P. Wilper et al., *Health Insurance and Mortality in US Adults*, 99 Am. J. Pub. Health 2289, 2295 (2009). Beyond the terrible human tragedies of these deaths, this figure represents tens of thousands of workers whose productive lives are cut short, often leaving their families without a source of income. By increasing access to lifesaving health insurance, the ACA's insurance reforms will prevent many of these tragic deaths, removing a substantial burden on interstate commerce.

III. INDIVIDUALS WHO CHOOSE TO FOREGO INSURANCE SHIFT BILLIONS OF DOLLARS OF COSTS TO OTHER PARTICIPANTS IN THE HEALTH INSURANCE AND SERVICES MARKET, AN ECONOMIC ACTIVITY THAT SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE

Finally, the minimum coverage provision regulates the financing of health care, specifically, individuals' decisions to self-insure or purchase insurance, an economic activity that is in and substantially affects interstate commerce. As Judge Sutton stated, "[S]elf-insurance and private insurance are two forms of action for addressing the same risk. . . . both affect commerce." *Thomas More*, 651 F.3d at 561 (Sutton, J., concurring in part and delivering the opinion of the Court in part). As Congress found, with ample basis, "cost shifting" from the uninsured to people with insurance substantially affects interstate commerce, and thus can be regulated by Congress.

Uninsured individuals fall into three categories: individuals who cannot afford insurance coverage, those who are denied coverage because of pre-existing conditions, and those who choose to forego purchasing insurance in the hope that they will never require expensive medical treatment or that if they do, it will be available in any event. Uninsured individuals seeking care for pre-existing conditions or who have unexpected health care costs due to illness or injury can lead to increased costs for

other, insured Americans. This is because "[t]hose who are uninsured are less likely to get the care that they need when they need it and are more likely to delay seeking care—often until a condition becomes so serious that treatment can no longer be put off." Help for Americans at 9; *see also* Committee on the Consequences of Uninsurance, Institute of Medicine, Health Insurance is a Family Matter 106 (2002) ("Uninsured children often receive care late in the development of a health problem or do not receive any care. As a result, they are at higher risk for hospitalization for conditions amenable to timely outpatient care and for missed diagnoses of serious and even life-threatening conditions.").

Under the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd, however, a patient who allows his condition to deteriorate until it requires expensive treatment to stabilize must still receive treatment from most emergencies rooms even if he is unable to pay. Cong. Budget Office, Key Issues in Analyzing Major Health Proposals 13 (2008). These high costs of stabilizing a dangerous condition are then distributed to other consumers.

Even the Eleventh Circuit could not ignore the substantial evidence demonstrating that the uninsured shift costs to the insured, thereby impacting commerce. The Eleventh Circuit acknowledged a recent study which demonstrates that a "hidden tax" on health insurance accounts for roughly 8 percent of the average health insurance premium. 648 F.3d at 1245, n.9, citing Ben Furnas & Peter Harbage, *The Cost-shift from the Uninsured*,

Center for Am. Progress, March 24, 2009, *available at* http://www.americanprogressaction.org/issues/2009/03/pdf/cost_shift.pdf. This cost-shift added, on average, $1,100 to each family premium in 2009 and about $410 to an individual premium. *Id.* In a high-cost state such as Florida, the cost-shift is even greater, increasing annual average family premiums by $1,400 and individual premiums by $510 per year. *Id.* at 2.

For those who can afford health insurance coverage, and choose not to purchase care, the decision to remain uninsured is clearly an economic calculation with adverse consequences for other market participants. Those who opt to self-insure can virtually never guarantee that, when faced with a life-threatening illness or traumatic injury, that they will bear all their health care costs or forego necessary treatment. According to a recent study, the cost of active treatment for prostate cancer had an average 2-year cost of $59,286. E.D.Crawford et al., *A Retrospective Analysis Illustrating the Substantial Clinical & Economic Burden of Prostate Cancer*, 13 Prostate Cancer & Prostatic Diseases 162 (2010). For colorectal cancer patients, the cost of treatment can exceed hundreds of thousands of dollars. The cost of drugs alone can range from $150,000 to $200,000 for a course of treatment. Neal J. Meropol & Kevin A. Schulman, Kevin, A., *Cost of Cancer Care: Issues and Implications*, 25 J. Clinical Oncology 180 (2007), *available at* http://dceg.cancer.gov/files/genomicscourse/meropol-011007.pdf. In comparison, U.S. Census Bureau data shows, median household income for 2007 was

$50,740, and median household net worth in 2007 was $120,300. U.S. Census Bureau, 2010 Statistical Abstract: Income, Expenditures, Poverty & Wealth (2009), *available at* http://www.census.gov/compendia/statab/cats/income_expenditures_poverty_wealth.html.

By enhancing access to insurance, the pre-existing conditions provision increases the likelihood that patients will seek treatment early, and thus will not pass on elevated costs to other consumers. Judge Sutton of the Sixth Circuit emphasized that Congress's enactment of the minimum coverage provision was eminently reasonable, stating: "Faced with $43 billion in uncompensated care, Congress reasonably could require *all* covered individuals to pay for health care now so that money would be available later to pay for *all* care as the need arises." *Thomas More*, 651 F.3d at 557 (Sutton, J., concurring in part and delivering the opinion of the Court in part).

Judge Sutton's conclusion – that Congress' choice of the minimum coverage provision was reasonable and hence beyond the judiciary's authority to overturn – is compelled by two centuries of precedent. The Eleventh Circuit majority's contrary assertion – that the provision is unconstitutionally "overinclusive" – flouts those precedents. In essence, the majority accuses Congress of overestimating the extent to which, in fact, the minimum coverage provision will reduce cost-shifting from uninsured persons to providers, consumers, and governments. *Florida*, 648 F.3d at

1294, 1299-1300. But this approach oversteps long-established boundaries on the authority of courts to second-guess factual judgments underlying statutes implementing the Commerce and Necessary and Proper clauses. As Chief Justice Marshall explained nearly two centuries ago:

> [Where a law] is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

McCulloch v. Maryland, 17 U.S. at 423.

In the instant case, Judge Marcus, in dissent from the Eleventh Circuit's decision, restated the legal standards first articulated by Chief Justice Marshall, and observed further how the Eleventh Circuit majority's analysis is misplaced as a matter of law. He noted that "There is simply no requirement under the Commerce Clause that Congress choose the least restrictive means at its disposal to accomplish its legitimate objectives." 648 F.3d at 1341. In the same vein, Judge Silberman, in his D.C. Circuit decision upholding the minimum coverage provision, noted that ACA opponents' parsing of Congress' policy choices "seems . . . redolent of Due Process Clause arguments . . . [b]ut has no foundation in the Commerce Clause." *Seven-*

Sky, 661 F.3d at 19.[8] In short, Congress had far more than a reasonable basis for concluding that the minimum coverage provision will substantially ameliorate an endemic dysfunction in one of the nation's largest national markets, and no basis exists in law or fact for setting aside that judgment.

CONCLUSION

Amici respectfully submit that the Court should reverse the decision of the Eleventh Circuit with respect to the minimum coverage provision.

---

[8] Apart from its impropriety as a matter of law, the Eleventh Circuit majority's critique of Congress' cost-shifting analysis is flawed by numerous factual and conceptual errors. *See* Br. of *Amici Curiae* Economic Scholars In Support of Defendants-Appellees Supporting Affirmance, at 24-28, *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011). To note just one particularly revelatory example of the Eleventh Circuit majority's faulty analysis, the decision asserts that all persons currently lacking insurance because of pre-existing conditions must be subtracted from the $43 billion aggregate of costs shifted by the uninsured, because insurers will be required to cover them under the ACA's insurance reform provisions. *Florida*, 648 F.3d at 1299. Here the majority ignores Congress' well-founded judgment that, without the minimum coverage provision, the insurance reform protections will not work, and affordable coverage will remain beyond the reach of many uninsured persons and families.

Respectfully submitted,

Rochelle Bobroff
Counsel of Record
Simon Lazarus
Federal Rights Project
National Senior Citizens
Law Center
1441 I Street, NW,
Suite 1100
Washington, DC 20005
(202) 289-6976
rbobroff@nsclc.org

Attorneys for *Amici Curiae*

AMICUS CURIAE BRIEF

No. 11-398

IN THE

Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*
Petitioners,

v.

FLORIDA, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* THE AMERICAN CANCER SOCIETY, AMERICAN CANCER SOCIETY CANCER ACTION NETWORK, AMERICAN DIABETES ASSOCIATION, AND AMERICAN HEART ASSOCIATION, SUPPORTING PETITIONERS URGING REVERSAL ON THE MINIMUM COVERAGE PROVISION ISSUE

F. SHEFFIELD HALE
Chief Counsel
AMERICAN CANCER SOCIETY
250 Williams Street
Atlanta, GA 30303
(404) 327-6423

MARY P. ROUVELAS
Counsel of Record
Senior Counsel
AMERICAN CANCER SOCIETY
CANCER ACTION NETWORK
555 11th Street NW
Suite 300
Washington, DC 20004
(202) 661-5707
Mary.rouvelas@cancer.org

Counsel for Amici Curiae

January 12, 2012

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE "ACTIVITY-INACTIVITY" DISTINCTION IS NOT A PRACTICAL WAY TO THINK ABOUT HEALTH INSURANCE AND HEALTH CARE MARKETS	5
A. Health Care Is Different From Other Consumer Goods And Services	7
B. As A Result Of The Unique Characteristics Of Health Care, The Market For Health Care Involves Significant Cost-Shifting That Has Substantial Economic Effects, Regardless Of Whether Decisions About Financing Health Care Are Characterized As An Activity Or Inactivity	10
II. THE MINIMUM COVERAGE PROVISION IS NECESSARY AND PROPER TO IMPLEMENT THE AFFORDABLE CARE ACT'S BROADER REGULATORY SCHEME	12
A. The Affordable Care Act Addresses Failures Of The Interstate Health Insurance Market That Hurt Patients And Contribute To The High Cost Of Health Insurance And Health Care	13

TABLE OF CONTENTS—Continued

Page

1. The Act addresses the problem of cancer, diabetes, heart disease, and stroke patients and survivors who want and need health insurance but often cannot obtain it..... 13

2. Without Adequate Health Insurance, people have poorer health outcomes and require more costly health care..... 17

B. The Minimum Coverage Provision Is Essential To The Implementation Of Two Key Provisions Of The Act That Correct The Failures Of The Interstate Health Insurance Market And Improve The Availability, Affordability, And Quality Of Health Insurance..... 21

CONCLUSION 23

TABLE OF AUTHORITIES

CASES Page

Florida v. U.S. Dep't of Health and Human Servs., 648 F.3d 1235 (11th Cir. 2011)..... 6, 12

Gonzalez v. Raich, 545 U.S. 1 (2005)..... 5

Seven-Sky v. Holder, No. 11-5047, slip op. (D.C. Cir. Nov. 8, 2011)..... 6, 11

United States v. Comstock, 130 S. Ct. 1949 (2010)..... 12

United States v. South-Eastern Underwriters Assn., 322 U.S. 533 (1944)..... 6

CONSTITUTION

U.S. Const. art. 1, § 8 .....5, 6, 12

U.S. Const. art. 1, § 8, cl 18..... 12

STATUTES

Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd 10

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010),

§ 1501(a), 42 U.S.C. § 18091(a) 10

§ 10106(a), 42 U.S.C. § 18091(a) 11, 22

OTHER AUTHORITIES

AMERICAN CANCER SOCIETY CANCER ACTION NETWORK, *A National Poll: Facing Cancer in the Health Care System* (2010)..... 15, 18

TABLE OF AUTHORITIES—Continued

Page

AMERICAN CANCER SOCIETY, CANCER STATISTICS 2010 SLIDE PRESENTATION (2010) 7

Amy Y. Chen et al., *The Impact of Health Insurance Status on Stage at Diagnosis of Oropharyngeal Cancer*, 110 CANCER 395 (2007) 19

Are Mini-Med Policies Really Health Insurance: Hearing Before the S. Comm on Commerce, Sci. and Transp., 111th Cong. 2d Sess. S. Hrg. 111-1087 (Dec. 1, 2010) 17

Brief for Appellants, *Florida v. HHS*, Nos. 11-11021 & 11-11067 (filed April 4, 2011) 2

CENTER FOR DISEASE CONTROL AND PREVENTION, NATIONAL DIABETES FACT SHEET 2011 (2011) 7

David J. Skorton, et al., *Task Force 5: adults with congenital heart disease: access to care*, 37 J. AM. C. CARDIOLOGY 1193 (2001) 15

David U. Himmelstein, et al., *MarketWatch: Illness and Injury as Contributors to Bankruptcy, Health Affairs*, Feb. 2, 2005 17

David U. Himmelstein, et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. MED. 741 (2009) 14

TABLE OF AUTHORITIES—Continued

Page

Elizabeth Ward, et al., *Association of Insurance with Cancer Care Utilization and Outcomes*, 58 CANCER J. FOR CLINICIANS 9 (2008) 18

J. Michael McWilliams, et al., *Health insurance coverage and mortality among the near-elderly*, 23 HEALTH AFFAIRS 223 (2004) 20

James P Boyle, et al., *Projection of the year 2050 burden of diabetes in the US adult population: dynamic modeling of incidence, mortality, and prediabetes prevalence*, POPULATION HEALTH METRICS, Oct. 22, 2010 8

Jay J. Shen & Elmer L. Washington, *Disparities in outcomes among patients with stroke associated with insurance status*, 38 STROKE 1010 (2007) 20

JB Fox, et al., *Vital Signs: Health Insurance Coverage and Health Care Utilization—United States, 2006-2009 and January-March 2010*, 59 MORBIDITY AND MORTALITY WKLY. REP. 1448 (2010). 19

Jessica S. Banthin & Didem M. Bernard, *Changes In Financial Burdens for Healthcare: National Estimates for the Population Younger Than 65 years*, 296 J. AM. MED. ASS'N. 2712 (2006) 16, 17

TABLE OF AUTHORITIES—Continued

Page

K. M. Venkat Narayan, et al., *Lifetime Risk for Diabetes Mellitus in the United States*, 290 J. AM. MED. ASS'N. 1884 (2003) 8

Karen Pollitz et al., *Falling Through the Cracks: Stories of How Health Insurance Can Fail People with Diabetes* (Georgetown University Health Policy Institute and the American Diabetes Association) (2005) 16

Karyn Schwartz, et al., *Patients Under Pressure: Profiles of How Families Affected by Cancer Are Faring in the Recession* (Kaiser Family Foundation and the American Cancer Society) (2009) 16

Karyn Schwartz et al., *Spending to Survive: Cancer Patients Confront Holes in Health Insurance System* (Kaiser Family Foundation and the American Cancer Society) (2009) 14, 15

Kim G. Smolderen, et al., *Health Care Insurance, Financial Concerns in Accessing Care, and Delays to Hospital Presentation in Acute Myocardial Infarction*, 303 J. AM. MED. ASS'N. 1392 (2010) 18

Michael T. Halpern, et al., *Insurance Status and Stage of Cancer at Diagnosis Among Women with Breast Cancer*, 110 CANCER 403 (2007) 20

TABLE OF AUTHORITIES—Continued

Page

Nina E. Flavin, et al., *Health Insurance and the Development of Diabetic Complications*, 102 SO. MED. J. 805 (2009) 20

O. Kenrik Duru, et al., *Health insurance status and hypertension monitoring and control in the United States*, 20 AM J. HYPERTENSION 348 (2007) 20

Raymond J. Gibbon, et al., *The American Heart Association's 2008 Statement of Principles for Healthcare Reform*, 118 J. AM. HEART. ASS'N. 2209 (2008) 15

Synovate, *Advocacy Survey Among CVD & Stroke Patients* (American Heart Association) (2010) 18

Veronique L. Roger, et al., *Heart Disease and Stroke Statistics 2011 Update: A Report From the American Heart Association* 187 (2010) 8

Xuanping Zhang, et al., *The Missed Patient with Diabetes: How Access to Health Care Affects the Detection of Diabetes*, 31 DIABETES CARE 1748 (2008) 19

BRIEF OF *AMICI CURIAE* THE AMERICAN CANCER SOCIETY, AMERICAN CANCER SOCIETY CANCER ACTION NETWORK, AMERICAN DIABETES ASSOCIATION, AND AMERICAN HEART ASSOCIATION, SUPPORTING PETITIONERS URGING REVERSAL ON THE MINIMUM COVERAGE PROVISION ISSUE[1]

INTEREST OF *AMICI*[2]

The American Cancer Society ("ACS"), and American Cancer Society Cancer Action Network ("ACS CAN"), the American Diabetes Association ("ADA"), and the American Heart Association ("AHA") (collectively, "*Amici*") are the largest and most prominent organizations representing the interests of patients, survivors, and families affected by the widespread chronic conditions of, respectively, cancer, diabetes, and heart disease and stroke. These conditions result in a significant portion of the nation's health care spending.

The fight against cancer, diabetes, heart disease, and stroke requires access to affordable, quality health care and to health insurance. *Amici* therefore

---

[1] *Amici* certify that this brief was authored in whole by counsel for *Amici* and no part of the brief was authored by any attorney for a party. No other person or entity made any monetary contribution to the preparation or submission of this brief.

[2] Blanket consents to the filing of filing of amicus curiae briefs in support of either party or of neither party were received from counsel for the petitioners, the Solicitor General, filed on November 15, 2011 and from counsel for Florida, et al. filed on November 22, 2011.

strongly supported patient access to care provisions of the Patient Protection and Affordable Care Act ("Affordable Care Act" or "Act") during its consideration by Congress, and desire to assist the Court in understanding why those provisions of the Act are so important to millions of cancer, diabetes, heart disease, and stroke patients and survivors, as well as their families. Because these diseases are chronic, those living with them are particularly susceptible to discrimination in the rates and terms of health insurance, or to being denied coverage altogether, due to pre-existing medical condition exclusions and adverse rating actions based on their health status. The Affordable Care Act addresses these problems, but as the United States acknowledged to the Eleventh Circuit below that "the minimum coverage provision is integral to the Act's guaranteed-issue and community-rating provisions." Brief for Appellants, *Florida v. HHS*, Nos. 11-11021 & 11-11067, at 59 (filed April 4, 2011). *Amici* therefore are gravely concerned that if the minimum coverage provision is invalidated, these important provisions may be jeopardized as well.

The ACS is the nationwide, community-based voluntary health organization dedicated to eliminating cancer as a major health problem. The ACS has three million volunteers nationwide. The ACS seeks to reduce cancer mortality by 50 percent and cancer incidence by 25 percent by 2015. The ACS's extensive scientific findings have established that health insurance status is strongly linked to medical outcomes. Cancer patients with adequate insurance coverage are more likely to be diagnosed at an earlier stage of disease resulting in lower medical costs, more thorough treatment, better outcomes, and lower rates of death. Accordingly, the ACS identified the

lack of adequate insurance coverage as a major impediment to advancing the fight against cancer. Along with its nonpartisan advocacy affiliate, ACS CAN, the ACS strongly advocates guaranteeing all Americans adequate, available, affordable health care that is administratively simple. ACS CAN has nearly a million patient and survivor advocates nationwide, including thousands that participated in efforts supporting enactment of strong patient protections in the Affordable Care Act. During consideration of the Affordable Care Act, ACS CAN was the leading voice for cancer patients and their families seeking the inclusion of patient protections in the law.

The ADA is a nationwide, nonprofit, voluntary health organization founded in 1940, and has over 485,000 general members, 15,000 health professional members, and 1,000,000 volunteers. Its mission is to prevent and cure diabetes and to improve the lives of all people affected by diabetes. The ADA is the most authoritative source for clinical practice recommendations, guidelines, and standards for the treatment of diabetes. As part of its mission, the ADA works to improve access to high quality medical care and treatment for all people with and at risk for diabetes. In seeking to prevent diabetes, protect the rights of patients, and improve access to affordable and adequate insurance for people with diabetes, and based on clear evidence that lack of health insurance leads to increased risk of diabetes complications, the ADA supported provisions in the Affordable Care Act that specifically impact people with diabetes. These include provisions to end discrimination, exclusion, and other adverse actions based on pre-existing conditions such as diabetes, to ban rescissions and caps on annual and lifetime benefits, and to develop an essential benefits package.

The AHA is the nation's oldest and largest voluntary health organization dedicated to fighting heart disease and stroke—the first and fourth leading causes of death in the United States. Since 1924, the AHA and its more than 22 million volunteers and supporters have focused on reducing disability and death from cardiovascular disease and stroke through research, education, community-based programs, and advocacy. The AHA and its American Stroke Association division ("ASA") have set goals to improve the cardiovascular health of all Americans by 20 percent and to reduce cardiovascular disease and stroke mortality by 20 percent by 2020. Based on well-documented research that uninsured and under-insured Americans with heart disease and stroke experience higher mortality rates, poorer blood pressure control, greater neurological impairments and longer hospital stays after a stroke, the AHA /ASA worked to represent the needs and interests of heart disease and stroke patients during the congressional debates on healthcare reform, and supported patient-centered provisions of the Affordable Care Act.

SUMMARY OF ARGUMENT

All Americans use or will use health care services, and the lifetime risks for every American of acquiring one of the diseases or conditions towards which *amici* direct their efforts are very high. Moreover, the costs of treating such serious conditions can often also be very high, and are generally beyond the financial means of individuals or families. The question is thus not whether individual Americans will incur health care expenses, but how they will be financed. How these purchases are financed, in turn, has substantial economic effects on interstate commerce

because of the distinguishing characteristics of health care and the unique cost-shifting that occurs in the health care market as a result. Access to health insurance also greatly improves access to health care, and the consequent outcomes for patients with chronic diseases and conditions.

Two central provisions of the Affordable Care Act's regulatory scheme—the ban on pre-existing condition exclusions and the prohibition of discrimination based on health status in the determination of insurance premium rates—are absolutely critical to assuring that patients with chronic diseases and conditions have access to insurance, and hence to quality care. These key provisions were made a part of the Act in response to failures in the health insurance market that left individuals, especially those affected by serious and chronic conditions such as cancer, diabetes, heart disease, and stroke, without insurance and facing burdensome costs and poorer health outcomes. Congress corrected these failures to achieve its broader regulatory goals of protecting patients and reducing costs by improving the availability, affordability, and quality of health insurance. These provisions cannot be effective and successful, however, without the minimum coverage provision.

ARGUMENT

I. THE "ACTIVITY-INACTIVITY" DISTINCTION IS NOT A PRACTICAL WAY TO THINK ABOUT HEALTH INSURANCE AND HEALTH CARE MARKETS

Under the Commerce Clause, Congress may regulate, among other things, "activities that substantially affect interstate commerce." *Gonzalez v. Raich*, 545 U.S. 1, 16-17 (2005) (citations omitted). The

primary argument that the minimum coverage provision falls outside Congress' broad Commerce Clause powers – which indisputably include the power to regulate insurance, *see United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944) – is that this Court's references to "activities" that affect interstate commerce are intended to mean that "inactivity" cannot be regulated. See *Florida v. U.S. Dep't of Health and Human Servs.*, 648 F.3d 1235, 1351 n. 14 (11th Cir. 2011) (Marcus, J., dissenting) (noting "the central foundation – the dichotomy between activity and inactivity – on which the plaintiffs and the district court rely for their position that upholding the individual mandate would convert the Commerce Clause into an unlimited general police power.").

The "activity-inactivity" paradigm has no precedent in the decisions of this Court. *See Seven-Sky v. Holder*, No. 11-5047, slip op. at 29 -30 (D.C. Cir. Nov. 8, 2011) ("No Supreme Court case has ever held or implied that Congress's Commerce Clause authority is limited to individuals who are presently engaging in an *activity* involving, or substantially affecting, interstate commerce. . . . To be sure, a number of the Supreme Court's Commerce Clause cases have used the word "activity" to describe behavior that was either regarded as within or without Congress's authority. But those cases did not purport to limit Congress to reach only *existing* activities."). It also overlooks the unique characteristics of the health care market and the substantial effect of uninsured individuals on the interstate health care and health insurance markets. How individuals finance health care purchases substantially affects interstate commerce, regardless of whether they purchase health insurance, pay out-of-pocket, or rely on government

or private funding. The circuit court's decision also neglects to account for the significant differences between health care and other goods.

A. Health Care Is Different From Other Consumer Goods And Services

Health care is unlike any other consumer good or service because we often can literally not live without it. For example, bus rides, carpools and walking can substitute for cars, and a workout DVD for a gym club membership, but there is often no substitute for health care procedures performed by professionals, especially when they are needed most. Additionally, decisions about whether, when, and how to pay for transportation, gym club memberships, and other consumer goods or services do not shift direct costs to third parties. Moreover, consumers cannot opt out of the health care market or decide not to purchase health care because the need for health care is not only difficult to predict, but also practically inevitable at some point in life. Looking just at the diseases that are the focus of this *amicus curiae* brief, alone:

— One out of two men and one out of three women will develop some form of cancer in his or her lifetime, even if certain skin cancers and early-stage tumors are excluded. AMERICAN CANCER SOCIETY, CANCER STATISTICS 2010 SLIDE PRESENTATION 19-20 (2010), http://www.cancer.org/Research/CancerFacts Figures/.

— Currently, an estimated 25.8 million Americans have diabetes, CENTER FOR DISEASE CONTROL AND PREVENTION, NATIONAL DIABETES FACT SHEET 2011 2 (2011), http://www.cdc.gov/diabetes/pubs/pdf/ndfs_2011.pdf., and if present trends continue, one in three Americans and nearly one in two African

Americans and Hispanics born in 2000 will develop diabetes in their lifetime. K. M. Venkat Narayan, et al., *Lifetime Risk for Diabetes Mellitus in the United States*, 290 J. AM. MED. ASS'N. 1884, 1888 (2003).

— By 2050, as many as one in three adult Americans are expected to have diabetes. James P. Boyle, et al., *Projection of the year 2050 burden of diabetes in the US adult population: dynamic modeling of incidence, mortality, and prediabetes prevalence*, POPULATION HEALTH METRICS, Oct. 22, 2010 at 4.

— An estimated 82.6 million American adults (more than one in three) have one or more types of cardiovascular disease. Veronique L. Roger, et al., *Heart Disease and Stroke Statistics 2011 Update: A Report From the American Heart Association* 187 (2010), *available at* http://circ.ahajournals.org/cgi/reprint/CIR.0b013e3182009701v1/.

— The lifetime risk for developing cardiovascular disease among those starting free of known disease is two in three for men and greater than one in two for women. *Id.* at 31.

These statistics in combination demonstrate the strong likelihood that, even focusing only on this group of chronic diseases, most people will at some point need health care and participate in the health care market. Without a better and more equitably organized health insurance market, the current barriers to care are unlikely to be overcome, and individuals and their families will continue to bear the burden of substantial costs and worse health outcomes.

Aside from the lack of a substitute for health care and the inevitable need for it, health care is also different from other consumer goods and services because we as a people place it in a different category. Unlike most other goods and services, a person's health, well-being, and chance for positive health outcomes when sick are generally not considered to be best left wholly dependent on that person's ability to pay for health care. For example, we abhor reports of patients diagnosed with cancer who are unable to afford potentially life-saving chemotherapy treatment and are left helpless as their condition worsens. We find it tragic when people with diabetes delay treatment or fail to take needed medications for so long because of the high costs that they are forced to amputate a limb. We are frustrated by the all too common occurrence of people with cardiovascular disease cutting pills and forgoing treatment because they cannot afford to refill their prescriptions or visit a doctor.

These natural, indeed nearly universal, human responses are why the *amici* have drawn hundreds of thousands of members and millions of volunteers and donors to help increase access to quality care for those with debilitating or life-threatening diseases. A person who wants a car he or she cannot afford is unlikely to spark a similar reaction. As organizations dedicated to addressing the devastating impact of these diseases, we know that life-saving treatments are fundamentally different than the desire to own an automobile or other consumer goods.

B. As A Result Of The Unique Characteristics Of Health Care, The Market For Health Care Involves Significant Cost-Shifting That Has Substantial Economic Effects, Regardless Of Whether Decisions About Financing Health Care Are Characterized As An Activity Or Inactivity

Because of the unique characteristics of health care, Congress has required health care providers in certain instances to provide health care regardless of a patient's ability to pay. *See* Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd. The requirement to provide health care in certain instances, regardless of a patient's ability to pay, coupled with the high cost of health care, often results in the costs to provide care for uninsured and underinsured individuals being shifted to insured patients or government health programs. To provide uncompensated care for uninsured and underinsured patients, health care providers pass the costs onto other participants in the health insurance market, driving up insurance premiums, *see* Patient Protection and Affordable Care Act § 1501(a), and, thus, exacerbating problems of higher costs and worse health outcomes caused by the lack of affordable, quality health insurance. This cost-shifting is unique to the market for health care because, unlike an individual's decision not to buy a car or other consumer goods, third parties often bear the costs of an individual's decision to not buy health insurance. Costs to provide care for the uninsured and underinsured are also shifted to third parties even when individuals are not uninsured or underinsured by choice. For example, prior to the Affordable Care Act's ban on pre-existing condition exclusions and the prohibition of discrimination based on health status in deter-

mining insurance premium rates, cancer, diabetes, heart disease, and stroke patients and survivors who wanted and needed health insurance were often unable to obtain health insurance because they were denied coverage or could not find affordable and adequate health insurance to cover the care they needed to manage their chronic diseases.

Congress found that the cost of providing uncompensated care to the uninsured was $43 billion in 2008. *See id.* § 10106(a). Based on the unique characteristics of the health care market, this cost must be shifted to other market participants. Congress also found that cost-shifting from providing uncompensated care resulted in increases to insurance premiums for families by over $1,000 a year on average. *Id.* Moreover, this cost-shifting is neither transparent nor equitable. Regardless of whether an individual's decision about how to finance health care can be characterized as an "activity" or "inactivity," this unique cost-shifting that occurs in the market for health care has substantial economic effects that impact interstate commerce. *See Seven Sky v. Holder*, slip op at 33 ("It suffices for this case to recognize, as noted earlier, that the health insurance market is a rather unique one, both because virtually everyone will enter or affect it, and because the uninsured inflict a disproportionate harm on the rest of the market as a result of their later consumption of health care services.")

II. THE MINIMUM COVERAGE PROVISION IS NECESSARY AND PROPER TO IMPLEMENT THE AFFORDABLE CARE ACT'S BROADER REGULATORY SCHEME.

As noted above, Congress indisputably has the authority under the Commerce Clause to regulate interstate insurance markets. Congress also has the authority under the Necessary and Proper Clause, U.S. Const. art. I, §8, cl. 18, to use a "means that is rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock,* 130 S. Ct. 1949, 1956 (2010).

No party or court has contended that the two features of the Affordable Care Act of particular importance to *amici*—the ban on pre-existing condition exclusions and the prohibition of discrimination based on health status in determining insurance premium rates—were not properly enacted pursuant to Congress's Commerce Clause authority to regulate the interstate health insurance market. Indeed, the Eleventh Circuit expressly declined to invalidate these provisions. *See Florida v. HHS*, 648 F.2d at 1328 ("The individual mandate, however, can be severed from the remainder of the Act's myriad reforms . . . The Act's other provisions remain legally operative after the mandate's excision.") These two features are critically important to the Affordable Care Act's regulatory scheme intended to provide protections to patients and reduce costs by improving the availability, affordability, and quality of health insurance.

The government has acknowledged, however, that these two provisions cannot be implemented workably without the minimum coverage provision. *See* p. 6, *supra*. For that reason, the minimum coverage

provision is not only rationally related to Congress's exercise of its authority to regulate the interstate health insurance market, it is essential to the success of Congress's broader regulatory scheme.

A. The Affordable Care Act Addresses Failures Of The Interstate Health Insurance Market That Hurt Patients And Contribute To The High Cost Of Health Insurance And Health Care

The debate over health care reform and Congress's enactment of the Affordable Care Act were spurred by the failures and high costs of the interstate health insurance and health care markets. These failures hurt not only the nation's economic well-being, but also the health and well-being of individual Americans. One of the failures of the health insurance market that led to the nation's healthcare crisis involved the insurance industry's severe medical underwriting practices that often left those most in need of care without adequate health insurance. Reforming the health insurance industry to protect patients against such discriminatory practices was a primary focus of the *amici* and of Congress.

1. The Act addresses the problem of cancer, diabetes, heart disease, and stroke patients and survivors who want and need health insurance but often cannot obtain it

The cost of services to treat cancer, diabetes, heart disease, and stroke can be beyond the reach of all but the wealthiest individuals absent some form of insurance. These chronic conditions have significant financial implications for cancer, diabetes, heart disease, and stroke patients and survivors as well as

their families. The costs for necessary health care can be so high that even insured patients can face very significant expenses. For example, 5 percent of even privately insured breast cancer patients had total out-of-pocket costs that exceeded $31,264. Karyn Schwartz et al., *Spending to Survive: Cancer Patients Confront Holes in Health Insurance System* (Kaiser Family Foundation and the American Cancer Society) (2009) *available at* http://www.kff.org/insurance/upload/7851.pdf. The high cost of treating cardiovascular disease is also a leading cause of medical bankruptcy. David U. Himmelstein, et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. MED. 741 (2009). Among families with high levels of medical debt resulting in bankruptcy, those with stroke had average out-of-pocket medical costs of $23,380 and those with heart disease had average medical costs of $21,955. *Id.* at 745.

To be better able to handle the high costs associated with cancer, diabetes, heart disease, and stroke, patients and survivors, on their own initiative, want and need health insurance. However, cancer, diabetes, heart disease, and stroke patients and survivors have often been unable to obtain health insurance or find an adequate, affordable health insurance plan to cover their medical needs. Without the Affordable Care Act's provisions banning pre-existing condition exclusions and prohibiting discrimination based on health status in the determination of health insurance rates, cancer, diabetes, heart disease, and stroke patients and survivors often reported being denied health insurance or offered health insurance only with significantly higher insurance premiums, despite their efforts to obtain health insurance. For example, a prostate

cancer survivor who has been cancer-free for over ten years voiced his frustration to the ACS over insurers refusing him health insurance, saying "after cancer you may as well kiss your way of life and your family's way of life goodbye, because no one wants to talk to you about getting comprehensive, affordable coverage." Karyn Schwartz et al., *Spending to Survive: Cancer Patients Confront Holes in Health Insurance System* 17 (Kaiser Family Foundation and the American Cancer Society) (2009) *available at* http://www.kff.org/insurance/upload/7851.pdf.

The problem is not merely anecdotal. One of every three people diagnosed with cancer under age 65 are uninsured or have been uninsured at some point since diagnosis. AMERICAN CANCER SOCIETY CANCER ACTION NETWORK, *A National Poll: Facing Cancer in the Health Care System* (2010) *available at* http://www.ascan.org/healthcare/cancerpoll. Of the cancer patients who reported being uninsured, 75 percent attributed their lack of health insurance to affordability or pre-existing condition exclusions. *Id.*

Similarly, approximately 6.5 million (or 15 percent) of adults who report having cardiovascular disease are uninsured, and more than half of the uninsured with cardiovascular disease cite cost as the reason they lack coverage. Raymond J. Gibbon, et al., *The American Heart Association's 2008 Statement of Principles for Healthcare Reform*, 118 J. AM. HEART ASS'N. 2209 (2008). Additionally, between 10 percent and 22 percent of adults with congenital heart disease are uninsured, and 67 percent have reported difficulty in obtaining health insurance or changing jobs to guarantee coverage. David J. Skorton, et al., *Task Force 5: adults with congenital heart disease: access to care,* 37 J. AM. C. CARDIOLOGY 1193, 1195 (2001). Many

individuals with diabetes also report being unable to obtain any individual health insurance because of their diabetes, or being offered policies which are significantly more expensive than those for people without diabetes. Karen Pollitz et al., *Falling Through the Cracks: Stories of How Health Insurance Can Fail People with Diabetes* 9-12 (Georgetown University Health Policy Institute and the American Diabetes Association) (2005) *available at* http://www.healthinsuranceinfo.net/diabetes_and_health_insurance.pdf. The recent recession has only magnified problems for cancer, diabetes, heart disease, and stroke patients and survivors because employer-sponsored insurance covers more than half of all people under age 65, and the rise of unemployment put many individuals' health insurance at risk. *See* Karyn Schwartz, et al., *Patients Under Pressure: Profiles of How Families Affected by Cancer Are Faring in the Recession* 1 (Kaiser Family Foundation and the American Cancer Society) (2009) *available at* http://www/kff.org/insurance/7934.pdf.

There is also a tremendous problem with individuals being underinsured. Nearly one in three (or 28.8 percent) of cancer patients who are insured have an out-of-pocket health care burden that exceeds 10 percent of their family income. Jessica S. Banthin & Didem M. Bernard, *Changes In Financial Burdens for Healthcare: National Estimates for the Population Younger Than 65 Years,* 296 J. AM. MED. ASS'N. 2712, 2717 (2006). More than one in nine cancer patients with insurance have out-of-pocket health care burdens exceeding 20 percent of their family income in health care expenditures. *Id.* More than a third (39.1 percent) of households that include an individual with diabetes have health care costs totaling 10 percent or more of household income, while 18

percent of such households have costs totaling 20 percent or more of household income. *Id.* This high cost to the underinsured has led to numerous bankruptcies due to medical expenses. *See* David U. Himmelstein, et al., *MarketWatch: Illness and Injury as Contributors to Bankruptcy*, Health Affairs, Feb. 2, 2005 at 69.

To address the problem of underinsurance, the Affordable Care Act includes several provisions that, in combination with the ban on pre-existing condition exclusions and the prohibition of discrimination based on health status, improve the availability, affordability, and quality of health insurance and health care. These include a framework for an essential benefits package and the elimination of lifetime and annual limits. *Are Mini-Med Policies Really Health Insurance*: *Hearing Before the S. Comm. on Commerce, Sci. and Transp.*, 111th Cong. 2d Sess. S. Hrg. 111-1087, 5-6 (Dec. 1, 2010) (statement of Stephen Finan, American Cancer Society Cancer Action Network). Additionally, the Act offers subsidies to assist individuals and families below 400 percent of the federal poverty level and requires limits on out-of-pocket expenses in all insurance plans, except those that are grandfathered. *Id.*

2. Without adequate health insurance, people have poorer health outcomes and require more costly health care

The lack of adequate and affordable health insurance has serious consequences for cancer, diabetes, heart disease, and stroke patients and survivors. Individuals without health insurance are less likely to receive preventative treatment or early detection screenings and are more likely to delay treatment.

For example, in a 2010 ACS poll of individuals under age 65 who have cancer or a history of cancer, 34 percent reported delaying care because of cost in the past 12 months. AMERICAN CANCER SOCIETY CANCER ACTION NETWORK, *A National Poll: Facing Cancer in the Health Care System* (2010). More specifically, 29 percent delayed needed health care, 19 percent delayed getting a recommended cancer test or treatment, and 22 percent delayed a routine cancer check-up. *Id.* At every level of education, individuals with health insurance are about twice as likely as those without it to have access to key cancer early detection procedures, such as mammography or colorectal screenings. Elizabeth Ward, et al., *Association of Insurance with Cancer Care Utilization and Outcomes*, 58 CANCER J. FOR CLINICIANS 9 (2008).

With respect to heart disease, an AHA survey found that more than half of the cardiovascular patients responding reported difficulty paying for medical care. Of those reporting difficulty paying for medical care, 46 percent said they had delayed getting needed medical care, 43 percent had not filled a prescription, and 31 percent had delayed a screening test. Synovate, *Advocacy Survey Among CVD & Stroke Patients* 23 (American Heart Association) (2010) *available at* http://americanheart.org/presenter.jhtml?identifier=3072496. Even during a heart attack, studies show that uninsured patients are more likely to delay seeking medical care. Kim G. Smolderen, et al., *Health Care Insurance, Financial Concerns in Accessing Care, and Delays to Hospital Presentation in Acute Myocardial Infarction*, 303 J. AM. MED. ASS'N. 1392, 1395-99 (2010).

The same patterns occur among uninsured individuals with diabetes. For example, among persons aged 18 to 64 with diabetes mellitus, those who had no health insurance during the preceding year were six times as likely to forgo needed medical care as those who were continuously insured. JB Fox, et al., *Vital Signs: Health Insurance Coverage and Health Care Utilization—United States, 2006-2009 and January-March 2010,* 59 MORBIDITY AND MORTALITY WKLY. REP. 1448, (2010). Lack of health insurance also leads to cases of diabetes going undiagnosed, delaying the start of needed treatment and increasing the risks of complications. Among those with diabetes, 42.2 percent of those without health insurance were undiagnosed, compared with 25.9 percent for those with insurance. Xuanping Zhang, et al., *The Missed Patient with Diabetes: How Access to Health Care Affects the Detection of Diabetes*, 31 DIABETES CARE 1748, 1749 (2008).

As a result of lack of preventative care and delayed treatment, uninsured patients have poorer outcomes and require more costly long-term and invasive treatment than individuals with insurance. For example, in a multivariate analysis including sex, age, type of treatment facility, location of residence, median household income in zip code of residence, and education level, health insurance status was the strongest predictor of oropharyngeal cancer and tumor size at diagnosis, with uninsured patients having the greatest likelihood of advanced disease stage at diagnosis. Amy Y. Chen et al., *The Impact of Health Insurance Status on Stage at Diagnosis of Oropharyngeal Cancer,* 110 CANCER 395, 400-01 (2007). Similarly, patients who are uninsured have substantially elevated risks of being diagnosed with advanced stage breast cancer compared with

privately insured patients. Michael T. Halpern, et al., *Insurance Status and Stage of Cancer at Diagnosis Among Women with Breast Cancer*, 110 CANCER 403, 409 (2007). Cancer patients diagnosed at an advanced stage experience lower survival, more debilitating, invasive treatment, and greater long-term treatment-related morbidity. *Id.* at 408.

Likewise, uninsured patients with cardiovascular disease experience higher mortality rates and poorer blood pressure control than their insured counterparts. Jay J. Shen & Elmer L. Washington, *Disparities in outcomes among patients with stroke associated with insurance status*, 38 STROKE 1010, 1013 (2007); J. Michael McWilliams, et al., *Health insurance coverage and mortality among the near-elderly*, 23 HEALTH AFFAIRS 223, 229 (2004); O. Kenrik Duru, et al., *Health insurance status and hypertension monitoring and control in the United States*, 20 AM. J. HYPERTENSION 348 (2007). Those who suffer a stroke who are uninsured experience greater neurological impairments, longer hospital stays and up to a 56 percent higher risk of death than the insured. Shen, *supra*, at 1013. Patients with no health insurance were also twice as likely to have a diabetic complication as patients who had insurance. Nina E. Flavin, et al., *Health Insurance and the Development of Diabetic Complications,* 102 SO. MED. J. 805 (2009).

In sum, there can be no doubt that Congress acted to address serious shortcomings in the health insurance market.

B. The Minimum Coverage Provision Is Essential To The Implementation Of Two Key Provisions Of The Act That Correct The Failures Of The Interstate Health Insurance Market And Improve The Availability, Affordability, And Quality Of Health Insurance

To address the failures of the health insurance market and the tragic consequences they have for individuals, especially cancer, diabetes, heart disease, and stroke patients and survivors, Congress enacted the ban on pre-existing condition exclusions and the prohibition of discrimination based on health status. The ban on pre-existing condition exclusions ensures that all individuals are able to participate in the health insurance market and protects individuals from being forced out of the market based on risk. The prohibition of discrimination based on health status similarly protects patients from being priced out of the health insurance market based on risk.

By ensuring that health insurance is available to all individuals regardless of prior history, the Affordable Care Act protects patients with chronic conditions from the negative health and financial outcomes that accompany being uninsured or underinsured. However, the effective implementation of these provisions is critical; otherwise cancer, diabetes, heart disease, and stroke patients and survivors will continue to be plagued by the serious financial and health consequences associated with the lack of adequate health insurance.

Congress recognized that the ban on pre-existing condition exclusions and the prohibition of discrimination based on health status must be coupled with the minimum coverage provision to be effective in achieving the patient protections, cost reductions, elimination of inequitable cost shifting, and improvements to health insurance Congress intended. Affordable Care Act, § 10106(a). Congress explained that "if there were no [minimum coverage provision], many individuals would wait to purchase health insurance until they needed care" because the ban on pre-existing condition exclusions and the prohibition of discrimination based on health status guarantee that individuals will be issued health insurance regardless of their health history or status. *Id.*

The adverse selection that would result from the decoupling of the ban on pre-existing condition exclusions and the prohibition of discrimination based on health status from the minimum coverage provision could ultimately collapse the health insurance industry. Insurance pools would be populated by individuals who are ill and thus drive the cost of coverage to unsustainable levels creating a death spiral in the industry as fewer and fewer healthy people choose (or are able) to buy very expensive coverage before they actually become ill. The Affordable Care Act's two central provisions thus must be combined with the minimum coverage provision to mitigate the problematic cost-shifting that occurs in the health care market and ensure that everyone shares in the financing of health care. Only through the minimum coverage provision will adverse selection be minimized, and costs spread more broadly across current and potential participants in the health care market to reduce the cost of health insurance overall, thus

enabling achievement of the goals of Congress's broader regulatory scheme.

The minimum coverage provision is also essential to the effective implementation of the pre-existing condition exclusion ban and the elimination of discrimination based on health status because it allows the health insurance market to be restructured around competition based on price, quality, and value, instead of the risk segmentation that prevailed prior to the enactment of the Affordable Care Act. For these reasons, the minimum coverage provision is not just "necessary and proper" for the execution of the Affordable Care Act's ban on pre-existing condition exclusions and the prohibition of discrimination based on health status, but is absolutely essential to their successful implementation.

CONCLUSION

Amici respectfully submit that the court of appeals' decision invalidating the individual responsibility provision of the Act should be reversed.

Respectfully submitted,

F. SHEFFIELD HALE
Chief Counsel
AMERICAN CANCER SOCIETY
250 Williams Street
Atlanta, GA 30303
(404) 327-6423

MARY P. ROUVELAS
Counsel of Record
Senior Counsel
AMERICAN CANCER SOCIETY
CANCER ACTION NETWORK
555 11th Street NW
Suite 300
Washington, DC 20004
(202) 661-5707
Mary.rouvelas@cancer.org

Counsel for Amici Curiae

January 12, 2012

AMICUS CURIAE BRIEF

RECORD AND BRIEFS
58

No. 11-398

FILED
FEB 1 3 2012
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DEPARTMENT OF HEALTH
AND HUMAN SERVICES, et al.,

Petitioners,

v.

STATE OF FLORIDA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE AMERICAN CATHOLIC LAWYERS ASSOCIATION, INC., IN SUPPORT OF RESPONDENTS (Minimum Coverage Provision)

BERTRAM P. GOLTZ, JR., ESQ.
AMERICAN CATHOLIC
LAWYERS ASSOCIATION, INC.
420 Route 46 East, Suite 7
P.O. Box 10092
Fairfield, New Jersey 07004-6092
(973) 244-9895
skipgoltz@optonline.net
Counsel for Amicus

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congress

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

CONGRESS HAS DISREGARDED THE FEDERALIST STRUCTURAL PRINCIPLE THAT, ABSENT A SPECIFIED CONSTITUTIONAL POWER GRANTED CONGRESS, ALL OTHER POWERS AND RIGHTS RESIDE IN THE STATES AND, ULTIMATELY, IN THE PEOPLE. CONGRESS HAS NO POWER WHATEVER TO FORCE A PERSON INTO A MARKET INTO WHICH HE OR SHE REFUSES TO ENTER. BY DIRECTING AND CONTROLLING INDIVIDUAL DECISIONS IN EXCESS OF DELEGATED AUTHORITY, THE INDIVIDUAL MANDATE VIOLATES THE FEDERALIST PRINCIPLE AND OUR NATION'S DEEPLY-EMBEDDED TRADITION OF AUTONOMY AND SELF-DETERMINATION. THIS COURT SHOULD DECLARE IT UNCONSTITUTIONAL 5

CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES

Alden v. Maine, 527 U.S. 706 (1999) 11

Bond v. United States, ___ U.S. ___, 131 S.Ct. 2355 (2011) 3, 11, 12, 13

Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969) 18

California Democratic Party v. Jones, 530 U.S. 567 (2000) 21

Charles v. Brown, 495 F.Supp. 862 (N.D. Ala. (1980) 16, 17

Coleman v. Thompson, 501 U.S. 722 (1991) 12

Davis v. Firment, 269 F.Supp. 524 (E.D. La. 1967), *aff'd*, 408 F.2d 1085 (5th Cir. 1969) 19

Department of Health and Human Services v. Florida, 132 S.Ct. 604 (2011), *cert. granted in part*, *Florida v. Department of Health and Human Services*, 132 S.Ct. 604 (2011) 3

Froehlich v. Wisconsin Dep't of Corr., 196 F.3d 800 (7th Cir. 1999) 16

Gibbons v. Ogden, 22 U.S. 1 (1824) 9

Gonzales v. Raich, 545 U.S. 1 (2005) 11

Goudy-Bachman v. U.S. Dep't of Health and Human Servs., ___ F.Supp.2d ___, 2011 WL 4072875 (M.D. Pa. 2011), Slip Opinion 6, 30, 31

Gregory v. Ashcroft, 501 U.S. 451 (1991) 9

Griffin v. Tatum, 300 F.Supp. 60 (M.D. Ala. 1969) 19, 32

TABLE OF AUTHORITIES – Continued

Page

Griswold v. Connecticut, 381 U.S. 479 (1965).....*passim*

Hamilton v. Ky. Distill. & Warehouse Co., 251 U.S. 146 (1919).....28

Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981).....10

In re Murphy's Case, 63 Mass. App. Ct. 774, 829 N.E.2d 1156 (App. Ct. 2005).....29

Kesler v. Dept. of Pub. Safety, 369 U.S. 153 (1962).....28

Marbury v. Madison, 5 U.S. 137 (1803).....17

Miller v. Gillis, 315 F.Supp. 94 (N.D. Ill. 1969).....19

Nat'l Labor Rel. Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).....10

New York v. United States, 505 U.S. 144 (1992).....12, 14, 15

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).....21

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).....25

Reutzel v. State Dep't of Highways, 290 Minn. 88, 186 N.W.2d 521 (1971).....28

Richmond Newspapers v. Virginia, 448 U.S. 555 (1980).....16

Riggle v. State, 778 S.W.2d 127 (Tex. App. 1989).....28

Rynn v. Jaffe, 457 F.Supp. 22 (D.D.C. 2006).....16

TABLE OF AUTHORITIES – Continued

Page

State of Florida v. United States Dept. of Human Servs., 648 F.3d 1235 (11th Cir. 2011), *cert. granted sub nom.*, *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 603 (2011) ..... *passim*

State v. Turk, 197 Mont. 311, 643 P.2d 224 (1982) 28

Thomas More Law Center v. Obama, 651 F.3d 529 (6th Cir. 2011) 6, 7, 30

United States v. Comstock, ___ U.S. ___, 130 S. Ct. 1949 (2010) 27

United States v. Darby, 300 U.S. 100 (1941) 14

United States v. Edwards, 14 F.Supp. 384 (S.D. Cal. 1936) 28

United States v. Lopez, 514 U.S. 549 (1995) 9, 10, 11, 27

United States v. Morrison, 529 U.S. 598 (2000) 10, 27

Washington v. Glucksberg, 521 U.S. 702 (1997) 19, 20

Williamson v. Lee Optical of Okla., 348 U.S. 483 (1955) 29

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IX ..... *passim*

U.S. Const. amend. X ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

U.S. Const. art. I, § 8, cl. 18 27

U.S. Const. art. I, § 8, cl. 3 9

STATUTES

Mass. Gen. Laws ch. 152, § 1(4)(g) 29

OTHER AUTHORITIES

Abigail R. Moncrieff, *Safeguarding the Safeguards: The ACA Litigation and the Extension of Indirect Protection to Non-Fundamental Liberties*, 64 Fla. L. Rev. (forthcoming 2012).....21, 22

Catechism of the Catholic Church (2d Ed.), Art. 5, § 2271.....1

Catechism of the Catholic Church (2d Ed.), Art. 6, § 2370.....19

Individualism, Wilfred McClay: *Dictionary of American History*, Charles Scribner's Sons (Gale, Cengage Learning 2009).....22, 23, 24

Self-Reliance, Ralph Waldo Emerson, Essays: First Series (1841).....24

The Uninsured And Unconvinced (Weekend Edition Sunday, December 26, 2009), http://www.npr.org/templates/story/story.php?storyId=121946556&ps=rs.....26, 32

Voluntarily Uninsured: A "Calculated Risk" (Weekend Edition Sunday, October 4, 2009), http://www.npr.org/templates/story/story.php?storyid=113340361.....26, 32

INTEREST OF THE AMICUS CURIAE[1]

As stated in its Statement of Purpose, the amicus curiae American Catholic Lawyers Association is "a non-profit religious organization run by Catholics, to defend the rights of Catholics," which "engage[s] in pro bono, free legal services on behalf of Catholics needing legal defense in matters of faith and conscience." It is dedicated to establishing the Social Kingship of Christ and to "upholding the Divine prerogatives and moral law." http://www.americancatholic lawyers.org/about.htm. The Catholic Church condemns abortion:

> Since the first century the Church has affirmed the moral evil of every procured abortion. This teaching has not changed and remains unchangeable. Direct abortion, that is to say, abortion willed either as an end or a means, is gravely contrary to the moral law. . . .

[*Catechism of the Catholic Church* (2d Ed.), Art. 5, § 2271 http://www.christusrex.org/www1/CDHN/fifth.html#HUMAN.]

---

[1] Counsel for all parties have filed blanket consents for the filing of briefs by amici curiae. No counsel for a party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

Yet the Patient Protection and Affordable Care Act ("PPACA") and its minimum coverage provision, or individual mandate, force Catholics and others in some health plans to make separate personal payments that will fund abortion and thereby to violate this teaching. The amicus is profoundly troubled by this requirement because of its conflict with Catholic teaching and accordingly is filing this brief in support of the respondents.

SUMMARY OF ARGUMENT

The constitutional question before this Court implicates the very essence of our federalist system: the structural principle that, in the absence of a specified power granted by the Constitution to the Congress, all other powers and rights pertaining to governance and to individual decision-making reside not only in the States, but also and ultimately in the people.[2] The principle is expressed through the Ninth and Tenth Amendments, and it is indeed structural, for if it is disregarded the federalist system will collapse. In the individual mandate – the minimum coverage provision obligating virtually all persons to purchase health insurance – Congress has disregarded the

[2] As a Catholic organization the amicus American Catholic Lawyers Association affirms, however, that God is the source of all political authority. *Cf.* John 19:11 ("Thou shouldst not have any power against me, unless it were given thee from above." Douay Rheims trans.)

federalist principle, for as the Eleventh Circuit below held:

> [The individual mandate] regulates those who have not entered the health care market at all. It regulates those who have entered the health care market, but have not entered the insurance market (and have no intention of doing so).
>
> [*State of Florida v. United States Dept. of Human Servs.*, 648 F.3d 1235, 1295 (11th Cir. 2011), *cert. granted sub nom.*, *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 603 (2011), *Department of Health and Human Services v. Florida*, 132 S.Ct. 604 (2011), *cert. granted in part*, *Florida v. Department of Health and Human Services*, 132 S.Ct. 604 (2011).]

It "is forcing market entry by those outside the market." *Id.* at 1300. And forcing a person into a market – dragging that person, kicking and screaming, into a sphere of activity in which he or she has and wants no involvement whatever – contradicts utterly the deeply-embedded tradition of individual autonomy and self-determination which is a hallmark of our nation.

"Federalism . . . protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Bond v. United States*, ___ U.S. ___, 131 S.Ct. 2355, 2364 (2011). Directing and controlling individual decisions and actions in excess

of delegated governmental authority is precisely what is occurring here. This Court has spoken of "the teachings of history [and] . . . the basic values that underlie our society . . . [to] preserv[e] American freedoms . . . " *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring), and these teachings of history and underlying American social values include a long-standing and still-vibrant tradition of individualism and self-determination regarding one's life and personal affairs. It is a tradition which Congress seeks to radically undermine by demanding that individuals who choose to have no part of health insurance and who willingly accept the potential consequences of that choice nonetheless purchase such a product. The issue is not even one of a fundamental right that can constitutionally be regulated, but only on a compelling governmental interest and in narrowly-tailored fashion; instead, however the right be characterized, Congress has no power *whatever* to inject itself into a particular sphere of human activity – in this instance, health care and insurance for it – to exercise control over a person who has removed himself or herself entirely from that sphere of activity and refuses to enter the market in which the particular product or service is bought and sold.

This Court should declare the minimum coverage provision unconstitutional.

ARGUMENT

CONGRESS HAS DISREGARDED THE FEDERALIST STRUCTURAL PRINCIPLE THAT, ABSENT A SPECIFIED CONSTITUTIONAL POWER GRANTED CONGRESS, ALL OTHER POWERS AND RIGHTS RESIDE IN THE STATES AND, ULTIMATELY, IN THE PEOPLE. CONGRESS HAS NO POWER WHATEVER TO FORCE A PERSON INTO A MARKET INTO WHICH HE OR SHE REFUSES TO ENTER. BY DIRECTING AND CONTROLLING INDIVIDUAL DECISIONS IN EXCESS OF DELEGATED AUTHORITY, THE INDIVIDUAL MANDATE VIOLATES THE FEDERALIST PRINCIPLE AND OUR NATION'S DEEPLY-EMBEDDED TRADITION OF AUTONOMY AND SELF-DETERMINATION. THIS COURT SHOULD DECLARE IT UNCONSTITUTIONAL.

The Congressional mandate that virtually all persons enter the health insurance market to purchase health insurance is not supported by a power granted Congress by the United States Constitution. Not only is the mandate not so supported, but it violates the federalist premise of our system of governance as expressed by the Ninth and Tenth Amendments while infringing on rights of the individual. Preliminarily, it is well to recall the comment of one District Judge who has adjudicated the question:

> One of the benefits of the myriad challenges to the constitutionality of the [Act] . . . is the distillation of relevant issues.

[*Goudy-Bachman v. U.S. Dep't of Health and Human Servs.*, ___ F.Supp.2d ___, 2011 WL 4072875 (M.D. Pa. 2011), Slip Opinion at 1.]

As the various District Court and Court of Appeals judges have distilled the individual-mandate issue, even those who have deemed it constitutional – not to mention those holding to the contrary – have often revealed the profound constitutional defects of the provision. Judge Sutton, concurring in part and delivering the opinion of the court in part in *Thomas More Law Center v. Obama*, 651 F.3d 529 (6th Cir. 2011), stated the matter well in his summary of the plaintiffs' argument:

> The [Commerce Clause] permits the legislature to "regulate" commerce, not to create it. Put another way, it empowers Congress to regulate economic "activities" and "actions," not inaction – not in other words individuals who have never entered a given market and who prize that most American of freedoms: to be left alone.

[*Id.* at 558.]

"Of all the arguments auditioning to invalidate the individual mandate," Judge Sutton acknowledged, "this is the most compelling." *Ibid.* There is "the lingering intuition – shared by most Americans, I suspect – that Congress should not be able to compel

citizens to buy products they do not want." *Id.* at 564. Indeed.

The constitutional underpinning for this "lingering intuition" was identified both by the District Court in *Goudy-Bachman* and by the Eleventh Circuit below. The *Goudy-Bachman* court observed:

> To date, all exercises of Commerce Clause authority have proscribed or prescribed activity by individuals *already engaged* in commerce who are active in the relevant interstate market.

[Slip Opinion at 14.]

And the Eleventh Circuit said:

> [T]he individual mandate is breathtaking in its expansive scope. It regulates those who have not entered the health care market at all. It regulates those who have entered the health care market, but have not entered the insurance market (and have no intention of doing so). It is overinclusive in when it regulates: it conflates those who presently consume health care with those who will not consume health care for many years into the future. The government's position amounts to an argument that the mere fact of an individual's existence substantially affects interstate commerce, and therefore Congress may regulate them at every point of their life. This theory affords no limiting principles in

> which to confine Congress's enumerated power.

[*State of Florida v. United States Dept. of Human Servs.*, *supra*, 648 F.3d at 1295.]

The key phrase is this: "It regulates those who have not entered the health care market at all."

> The individual mandate forces healthy and voluntarily uninsured individuals to purchase insurance from private insurers and pay premiums now in order to subsidize the private insurers' costs in covering more unhealthy individuals under the Act's reforms. Congress sought to mitigate its reforms' regulatory costs on private insurers by compelling healthy Americans outside the insurance market to enter the private insurance market and buy the insurers' products.

[*Id.* at 1300 (footnote omitted).]

"This starkly evinces how the Act is forcing market entry by those outside the market." *Ibid.*

This attempt by Congress to force into a particular market individuals who want nothing to do with that market and what is sold there triggers a constitutional deficiency that centers on the absence of Commerce Clause authority and the interest in individual rights embodied in our federalist system and

expressed through the Ninth and Tenth Amendments. We must start with first principles:

> The Constitution creates a Federal Government of enumerated powers. *See* Art. I, § 8. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties."

[*United States v. Lopez*, 514 U.S. 549, 552 (1995), quoting *Gregory v. Ashcroft*, 501 U.S. 451, 458 (1991).]

One of those enumerated powers is Congressional authority over interstate commerce,[3] "commerce" being "the commercial intercourse between nations, and parts of nations, in all its branches. . . ." *Id.* at 553, quoting *Gibbons v. Ogden*, 22 U.S. 1, 189-90 (1824). As such, it "is regulated by prescribing rules for carrying on that intercourse." *Ibid.*; *Gibbons v. Ogden*, 22 U.S. at 190. Nevertheless, "limitations on the

---

[3] The Commerce Clause grants Congress power:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

[U.S. Const. art. I, § 8, cl. 3.]

commerce power are inherent in the very language of the Commerce Clause." *Id.* Enumeration, after all, "presupposes something not enumerated." *Id.* And so the Congressional power is subject to outer limits. *Lopez*, 514 U.S. at 556-57.

The limited scope of the interstate commerce power:

> . . . must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

[*Id.* at 557, quoting *Nat'l Labor Rel. Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).]

"[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring). And this Court has not hesitated to find overreaching. *See United States v. Lopez*, *supra* (Gun-Free School Zones Act exceeded Congress' Commerce Clause authority because gun possession in local school zone not economic activity substantially affecting interstate commerce); *United States v. Morrison*, 529 U.S. 598 (2000) (Congress lacked Commerce Clause

authority to enact civil remedy provision of Violence Against Women Act because not a regulation of activity substantially affecting interstate commerce); *cf. Gonzales v. Raich*, 545 U.S. 1, 25-26 (2005) (Commerce Clause granted Congress authority to apply Controlled Substances Act to users and growers of marijuana for medical purposes under California Compassionate Use Act because federal statute *was* one that directly regulated quintessentially economic commercial activity).

Again, it is "our dual system of government" which illuminates how far the authority granted Congress by the Commerce Clause truly extends. *United States v. Lopez, supra*, 514 U.S. at 557. Accordingly, whether Congress truly is drawing on the Commerce Clause as authority for the individual mandate has profound implications for the federalism which is the framework of our system of dual governance. The federal system "rests on what might at first seem a counterintuitive insight," that "freedom is enhanced by the creation of two governments, not one." *Bond v. United States*, ___ U.S. ___, 131 S.Ct. 2355, 2364 (2011), quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999). Federalism, furthermore, has more than one dynamic. To be sure, the federal structure grants and delimits the prerogatives and responsibilities of the States and the national government vis-a-vis one another, thereby preserving the integrity, dignity and residual sovereignty of the States and ensuring that States function as political entities in their own right. *Ibid.* This balance is, in part, an end in itself. *Ibid.*

But that is not its exclusive sphere of operation. Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. *Ibid.* "State sovereignty is not just an end in itself"; rather, "federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Ibid.*, quoting *New York v. United States*, 505 U.S. 144, 181 (1992); *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting). While some of these liberties are of a political character, *ibid.*, federalism also secures the freedom of the individual. *Ibid.*

> It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.

[*Ibid.*]

Therefore, "the individual liberty secured by federalism is not simply derivative of the rights of the States." *Ibid.*

> Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. [Citation omitted] By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary

> power. When government acts in excess of its lawful powers, that liberty is at stake.

[*Ibid.*]

States, therefore, are not the sole intended beneficiaries of federalism, *ibid.*, and the limitations that federalism entails are not therefore a matter of rights belonging only to the States. *Ibid.*

> An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.

[*Ibid.*]

This "direct interest" of the individual and fidelity to the governing principles therefore are inextricably linked. This linkage is extraordinarily important, for while the individual interest certainly is manifest in the final two sections of the Bill of Rights – the Ninth and Tenth Amendments – the wording of those two provisions is less important than the overarching constitutional structural principle that they embody: federalism. With respect to the Ninth Amendment,[4]

---

[4] The Ninth Amendment provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

that provision constitutionally recognizes and affirms the sovereignty of the individual by specifying that the enumeration of certain constitutional rights is not to deny or disparage "others retained by the people." With respect to the Tenth Amendment,[5] that provision, to be sure, "states but a truism that all is retained which has not been surrendered." *New York v. United States*, *supra*, 505 U.S. at 156, quoting *United States v. Darby*, 300 U.S. 100, 124 (1941). Nevertheless, Congress still exercises its conferred powers subject to the limitations contained in the Constitution. *Id.* at 156.

> Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment.

[*Ibid.*]

And so:

> [t]he Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the

---

[5] The Tenth Amendment provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

> Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power.

[*Id.* at 156-57.]

The Tenth Amendment, comparably to the Ninth Amendment, confirms individual sovereignty through the diffusion of governmental power and its reservation of power to the States "*or to the people*" (emphasis added). Judge Marcus below, dissenting from the Eleventh Circuit invalidation of the individual mandate, referred to the "or to the people" language as "the tail end" of the Tenth Amendment. *State of Florida v. United States Dept. of Human Servs.*, *supra*, 648 F.3d at 1364 (Marcus, J., concurring in part and dissenting in part). Such dismissive and borderline-pejorative characterization is quite inappropriate, as even he seemingly recognized. To be sure, "the [Supreme] Court has never used the 'people' prong of the Tenth Amendment to invalidate an act of Congress." *Id.* at 1364, n. 25. Yet:

> [i]t may be that in time the law will come to breathe practical life into the Tenth Amendment's reservation of power to the people, but that day has not yet arrived.

[*Id.* at 1365.]

That day, we submit, is at hand.

This amicus is not proposing, it should be emphasized, that either amendment is an independent source of constitutional rights, for that proposition has not been judicially sanctioned. Rather, the Ninth Amendment in particular reflects the framers'

> perceived need for some sort of constitutional "saving clause," which, among other things, would serve to foreclose application to the Bill of Rights of the maxim that the affirmation of particular rights implies a negation of those not expressly defined.

[*Richmond Newspapers v. Virginia*, 448 U.S. 555, 579 n. 15 (1980).]

Accord Charles v. Brown, 495 F.Supp. 862, 863-64 (N.D. Ala. (1980) ("[T]he Ninth Amendment was added to the Bill of Rights to ensure that the maxim *expressio unius est exclusio alterius* would not be used at a later time to deny fundamental rights merely because they were not specifically enumerated in the Constitution"). The Ninth Amendment is thus a rule of construction, *id.* at 864; *Froehlich v. Wisconsin Dep't of Corr.*, 196 F.3d 800, 801 (7th Cir. 1999); *Rynn v. Jaffe*, 457 F.Supp. 22, 26 (D.D.C. 2006), but a rule of construction which nonetheless does provide a framework for adjudicating matters of great significance. While in contrast to the first eight amendments the Ninth Amendment does not specify any rights of the people, it does serve the critical function of "keep[ing] from lowering, degrading or rejecting

any rights which are not specifically mentioned in the [Constitution] itself." *Charles v. Brown, supra*, 495 F.Supp. at 863. The Ninth Amendment does not raise those unmentioned rights to constitutional stature by its own force; it simply takes cognizance of their general existence. *Ibid.* Still:

> [t]his is not to say that no unenumerated rights are constitutional in nature, for some of them may be found in the penumbras of the first eight amendments or in the liberty concept of the Fourteenth Amendment and, thus, rise to constitutional magnitude.

[*Ibid.*]

The "penumbra" metaphor is, of course, an allusion to Justice Douglas' opinion for this Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Connecticut law forbidding use of contraceptives unconstitutionally intrudes upon the right of marital privacy), in which he cited various amendments, including the Ninth, and famously opined that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484. Justice Goldberg in his concurrence particularly emphasized the Ninth Amendment and what he saw as its adjudicative role, pointing out that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." *Id.* at 490-91, quoting *Marbury v. Madison*, 5 U.S. 137, 174 (1803). He agreed that the Ninth Amendment does not constitute an independent source of protected constitutional rights, *id.* at

492, but it does, he said, show a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included in those provisions not be deemed exhaustive. *Ibid.*

> [T]he Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights . . . protected from state, as well as federal, infringement.

[*Id.* at 493.][6]

---

[6] In addition to this Court's citation of the Ninth Amendment in *Griswold v. Connecticut*, a number of lower federal courts have cited it in the context of students' choice of hair styles contrary to public school dress codes. In *Breen v. Kahl*, 419 F.2d 1034, 1036 (7th Cir. 1969), for example, the Seventh Circuit characterized the right to wear one's hair at any length or in any desired manner as "an ingredient of personal freedom protected by the United States Constitution."

> Whether this right is designated as within the "penumbras" of the first amendment freedom of speech, [citing *Griswold*], or as encompassed within the ninth amendment as an "additional fundamental right(s) * * * which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments" [citing *Griswold* (Goldberg, J., concurring], it clearly exists and is applicable to the states through the due process clause of the fourteenth amendment.

[*Ibid.*]

(Continued on following page)

The amicus does not agree with the ultimate holding of *Griswold v. Connecticut*[7] nor necessarily with the holdings of the other cases mentioned. But we do agree that there exist unenumerated constitutional rights that should be respected, and we agree with the formulation, stated by Justice Harlan in his *Griswold* concurrence and by this Court elsewhere, *Washington v. Glucksberg*, 521 U.S. 702, 720-22 (1997), of how unenumerated constitutional rights are to be identified. Writing of how judicial self-restraint is "an indispensable ingredient of sound constitutional adjudication," Justice Harlan said that such will be achieved:

Accord, e.g., *Griffin v. Tatum*, 300 F.Supp. 60, 62 (M.D. Ala. 1969) (freedom protected is "the right to some breathing space for the individual into which the government may not intrude without carrying a substantial burden of justification."). *Cf. Miller v. Gillis*, 315 F.Supp. 94, 100 (N.D. Ill. 1969) (dress code violated Fourteenth Amendment equal protection, but Ninth Amendment inapplicable); *contra Davis v. Firment*, 269 F.Supp. 524, 529 (E.D. La. 1967), *aff'd*, 408 F.2d 1085 (5th Cir. 1969) (no constitutional right of any sort to wear hair long in violation of dress code).

[7] The amicus disagrees absolutely with *Griswold*, which made contraception broadly available. The Catholic Church teaches:

> [E]very action which, whether in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible is intrinsically evil. . . .

[*Catechism of the Catholic Church* (2d Ed.), Art. 6, § 2370 (internal quotation marks omitted) http://www.christusrex.org/www1/CDHN/sixth.html#CREATED.]

> only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.

[381 U.S. at 501 (Harlan, J., concurring).]

As will shortly be discussed *infra*, individualism and self-determination are among the foremost values underpinning American culture, and those values generate a right that must be respected. First, however, one must address the character of that right and the comment of Judge Marcus, concurring in part and dissenting in part below, *State of Florida v. United States Dept. of Human Servs.*, *supra*, 648 F.3d at 1362, that under current precedent only relatively few rights are deemed "fundamental" under substantive due process.[8] That is not the point. The amicus is not proposing that the right advanced here is even necessarily that sort of "fundamental" constitutional right. Saying that an individual right is "fundamental" presupposes that the right in question, however characterized, is generically subject to *some* Government regulation to at least some extent; finding the right "fundamental" simply means tight regulatory

---

[8] These are "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion. . . ." *Washington v. Glucksberg*, *supra*, 521 U.S. at 720.

restrictions: the Government may regulate the right, but only upon a compelling interest and in narrowly-tailored fashion. *E.g.*, *California Democratic Party v. Jones*, 530 U.S. 567, 581-82 (2000); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

Here, by contrast, we submit that Congress has *no* power, under the Commerce Clause or any other source of constitutional authority, to inject itself into a particular sphere of human activity – in this instance, health care and insurance for it – to exercise control over a person who has removed himself or herself entirely from that sphere of activity to force him or her to enter the market in which the particular product or service is bought and sold. And this is a right, however characterized, which is constitutionally protected. *See* Abigail R. Moncrieff, *Safeguarding the Safeguards: The ACA Litigation and the Extension of Indirect Protection to Non-Fundamental Liberties*, 64 Fla. L. Rev. (forthcoming 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1919272 (pre-publication version, provisionally paginated) at 6, challenging the notion that liberty interests should be "statically catalogued as either fundamental or not" and arguing that

> even for those liberties that ought to remain on the non-fundamental side of the divide, the case for using structural doctrines to protect those liberties should be stronger, not

> weaker, than the case for using structural doctrines to protect fundamental liberties.[9]

[*Ibid.*]

We submit that it is a right constitutionally protected precisely because of, in Justice Harlan's words, the respect to be accorded "the teachings of history [and] . . . the basic values that underlie our society . . . and preserv[e] American freedoms. . . ." *Griswold*, 381 U.S. at 501. Those teachings of history and underlying American social values include a long-standing and still-vibrant tradition of individualism and self-determination regarding one's life and personal affairs. It is a tradition which Congress seeks to radically undermine by demanding that individuals who choose to have no part of health insurance and who willingly accept the potential consequences of that choice nonetheless purchase such a product.

Individualism and self-determination are deeply-woven into the American moral fabric. One can go so far even to characterize this American tradition, shared to an extent by some other Western nations, as "an eccentricity among cultures. . . ." *Individualism*, Wilfred McClay: *Dictionary of American History*,

---

[9] While the amicus agrees with the author to the extent that she recognizes the importance of protecting non-fundamental as well as fundamental rights, we do not accept her notion of "semisubstantive review" and all of its quasi-political implications for the adjudicative process. *Id.* at 9-10. The judiciary – this Court – has a task which it is called upon to fulfill irrespective of other considerations.

Charles Scribner's Sons (Gale, Cengage Learning 2009).[10] It arose in part from the ideas and institutions arising out of biblical monotheism, forming "an individualistic ideal [which] plac[es] heavy emphasis upon the infinite value, personal agency, and moral accountability of the individual person." *Ibid.* To be sure, the student of American culture "is likely to find that 'individualism' is first highly praised and then roundly condemned in nearly the same breath," *ibid.*, but in the American context, especially with the social opening that came with the rise of Jacksonian democracy, the word has only rarely taken on pejorative connotations. *Ibid.* Instead:

> [i]t was more likely to refer to the sturdy values of the self-reliant frontiersman or the self-made entrepreneur – or to a broadly libertarian understanding of the relationship between the individual and society or the state, wherein the liberty and dignity of the former are shielded from the grasping hands of the latter.

[*Ibid.*]

As such:

> it pointed toward a view of all political and social groups as mere aggregations of

---

[10] Available as a digital download from Amazon.com: http://www.amazon.com/INDIVIDUALISM-Charles-scribnersDictionaryAmerican/dp/B001QYIOS/ref=sr_1_4?s=books&ie=UTF8&qid=1324496630&sr=1-4 (the amicus will be pleased to supply a print copy of this article at the request of the Court).

> otherwise naturally self-sufficient individuals, whose social bonds are largely governed by choice and consent.

[*Ibid.*][11]

Even more radically, "individualism" can take the meaning, increasingly pervasive in our own day, that to the maximum degree possible the individual should be regarded as an entirely morally-autonomous creature – accountable to no person and to no higher law, armed with a quiver of inviolable rights, protected by a zone of inviolable privacy, and left free to "grow" and "develop" as the promptings of the self dictate. *Ibid.* This amicus, it should be stressed, does not by

---

[11] By the middle of the nineteenth century,

> figures such as Ralph Waldo Emerson and Walt Whitman – romantic American nationalists and prophets of the unconstrained self – were already trumpeting the note that would have the most lasting resonance in the American imagination.

[*Ibid.*]

Quotations from Emerson are illustrative:

> Whoso would be a man must be a nonconformist. He who would gather immortal palms must not be hindered by the name of goodness, but must explore if it be goodness. Nothing is at last sacred but the integrity of your own mind. Absolve you to yourself, and you shall have the suffrage of the world.

[*Self-Reliance*, Ralph Waldo Emerson, Essays: First Series (1841) http://www.emersoncentral.com/selfreliance.htm.]

"Trust thyself: every heart vibrates to that iron string." *Ibid.*

any means endorse this notion of unconstrained moral autonomy. Still:

> there seems little reason to doubt that the dominant view in our own day tends to endorse the highest possible degree of individual liberty and self-development in political, religious, social, and economic affairs.[12]

[*Ibid.*]

Accordingly, when the plaintiffs in various of the cases litigating the Patient Protection and Affordable Care Act contest Congress' constitutional capacity to force them to buy health insurance they do not want, they are expressing "[one] of the basic values that underlie our society. . . ." *Griswold v. Connecticut*, *supra*, 381 U.S. at 501 (Harlan, J., concurring). And they are not alone in not wanting to be insured. Some of those litigating the Act do not want to buy health insurance because – and this is the interest of this amicus – they will thereby be giving involuntary and

---

[12] The amicus, needless to say, would not apply this "highest possible degree of individual liberty and self-development in political, religious, social, and economic affairs" to abortion.

> One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus.

[*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 952 (1992) (Rehnquist, C.J., concurring and dissenting).]

The autonomy of swinging one's fist stops at the other person's nose.

governmentally-coerced financial support for abortion. There are other people who do not want to buy health insurance for other reasons – or for no reason at all.[13] That is their right. It is their right because of

---

[13] Exemplifying such people is the woman profiled in the two National Public Radio features *Voluntarily Uninsured: A "Calculated Risk"* (Weekend Edition Sunday, October 4, 2009), http://www.npr.org/templates/story/story.php?storyid=113340361, and *The Uninsured And Unconvinced* (Weekend Edition Sunday, December 26, 2009), http://www.npr.org/templates/story/story.php?storyId=121946556&ps=rs (the amicus will be pleased to supply the transcripts of these broadcasts at the request of the Court). Lyn Robinson, an athletic fifty-two-year-old plant nursery owner who does not have health insurance, would

> rather use the $6,000 a year that I would be paying in health insurance premiums and put it toward actual care – pay the doctor directly.

Insurance companies, she believes, interfere in the patient/doctor relationship; she likes the power of deciding where and when to spend her medical dollars. She knows she is taking a calculated risk by not being insured:

> I'm sure that there's people out there that are going to say that's crazy and irresponsible. Maybe it is. Maybe it isn't. Maybe we're just brainwashed into believing that we are supposed to have insurance to be fiscally responsible.

Eight years ago a rollerblading fall cost her $14,000 out of pocket, yet:

> If I have one of those kinds of incidences once in 10 years, I can pay the bill because I haven't paid for worthless insurance premiums. I haven't paid out $6,000 a year for the false security that somebody's going to take care of me if something happens.

As do some of Ms. Robinson's friends, one may question the wisdom of her decision. But it is her right to make it.

the nature of our federalist system – one which grants certain powers to the federal government, but reserves all other powers and rights to the states and, ultimately, to the people. *See* discussion, *supra*.

If Congress, therefore, is to intrude on this right of self-autonomy, it must do so pursuant to "one or more of its powers enumerated in the Constitution." *United States v. Morrison*, *supra*, 529 U.S. at 607. With respect to the purported constitutional source of the individual mandate, this amicus agrees with the holding of the Eleventh Circuit below that Congress plainly intended it to be the Commerce Clause. *State of Florida v. United States Dept. of Human Servs.*, *supra*, 648 F.3d at 1316. The Commerce Clause, however, does not grant *carte blanche* authority, for the Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *United States v. Lopez*, *supra*, 514 U.S. at 566. Therefore, if Congress desires to exercise power that is at all analogous to the State police power, it must reach out for an implied power that is supported by the Necessary and Proper Clause.[14] *See generally United States v. Comstock*, ___

---

[14] The Necessary and Proper Clause grants Congress power

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

[U.S. Const. art. I, § 8, cl. 18.]

U.S. ___, 130 S. Ct. 1949 (2010). To be sure, under the Commerce Clause Congress does have an implied power "akin to the police power," *United States v. Edwards*, 14 F.Supp. 384, 389 (S.D. Cal. 1936); *see generally Hamilton v. Ky. Distill. & Warehouse Co.*, 251 U.S. 146, 157 (1919), but the regulation must be a true incident of police power. The quasi-police power of the Commerce Clause cannot reach out to an individual quietly minding his or her own business and drag that person, kicking and screaming, into a sphere of activity in which he or she has and wants no involvement whatever.

There are, to be sure, limited circumstances in which a State pursuant to its police power may demand that a person purchase a particular product to thereby protect the public safety and welfare. One such instance that readily springs to mind is the purchase of automobile liability insurance. *See Kesler v. Dept. of Pub. Safety*, 369 U.S. 153, 172 (1962). But in that situation, the nexus between the police power and what the individual is doing is obvious. The individual holds a State license to engage in a hazardous activity – driving – on property owned and controlled by the State – the public highways – where other people can easily be injured, and therefore "[p]rotection in securing redress for injured highway travelers, as well as protection from being injured, is a proper subject of a state's police powers." *Riggle v. State,* 778 S.W.2d 127, 129 (Tex. App. 1989). *Accord State v. Turk*, 197 Mont. 311, 314-15, 643 P.2d 224, 226 (1982); *Reutzel v. State Dep't of Highways*, 290

Minn. 88, 96-97, 186 N.W.2d 521, 524-25 (1971). Another such instance of State-mandated purchase, less well-known and rather rare, is the purchase of workers' compensation by persons hiring full-time domestic workers. Mass. Gen. Laws ch. 152, § 1(4)(g); *see In re Murphy's Case*, 63 Mass. App. Ct. 774, 776-78, 829 N.E.2d 1156, 1159-60 (App. Ct. 2005). There too, the police power is properly exercised because those subject to the mandate are engaged in a sphere of activity subject to governmental control – the hiring of employees to do potentially dangerous work – and within that sphere other persons – the domestic workers – can be injured.

But these instances of *bona fide* State police power regulation are a far cry from what Congress is attempting under the Commerce Clause here. As an apt analogy, one can only imagine how the courts would view a State mandate that *everyone* – including those not licensed to drive a car – buy automobile liability insurance. Or a State mandate that everyone purchase workers' compensation insurance, irrespective of whether he or she in fact employs domestic workers. Needless to say, such legislative mandates would not survive even the least demanding judicial review test, rational basis, *e.g.*, *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488 (1955), but that misses the more fundamental point stated earlier. Applying the rational-basis or any of the other judicial review tests presupposes that the individual is subject to some Government regulation to at least some extent, even despite the individual's having

absented himself or herself entirely from the sphere of activity in question. But that is not so. Rational-basis or whatever review standard aside, there simply is no nexus between the purported exercise of governmental power and the activity – actually *non*-activity – in question. And without that nexus, government lacks entirely the power of governmental control.

As discussed, the Eleventh Circuit has clearly identified Congress' violation of individual rights. The individual mandate "regulates those who have not entered the health care market at all." *State of Florida v. United States Dept. of Human Servs.*, *supra*, 648 F.3d at 1295. It "is forcing market entry by those outside the market." *Id.* at 1300. Forced market entry by those outside the market does indeed evoke what Judge Sutton in the Sixth Circuit called "the lingering intuition – shared by most Americans, I suspect – that Congress should not be able to compel citizens to buy products they do not want." *Thomas More Law Center v. Obama*, *supra*, 651 F.3d at 564. And this forced market entry is unconstitutional. Now it may be the case that a compelled insurance purchase once an individual has in fact entered the market – once he or she has gone to the emergency room and drawn down resources affecting interstate commerce – *is* constitutional. At that point he or she *has* entered the market, and at that point Congress may have the power to impose an insurance-purchase obligation. The plaintiffs in *Goudy-Bachman v. U.S. Dep't of Health and Human Servs.*, *supra*, for example, "[did] not contest that they can be regulated once they

receive services and fail to pay for those services. It is the pre-conduct requirement to pay in advance that is at issue." Slip Opinion at 15. As the Eleventh Circuit recognized, "[W]hen the uninsured actually enter the stream of commerce and consume health care, Congress may regulate their activity at the point of consumption." *State of Florida v. United States Dept. of Human Servs.*, *supra*, 648 F.3d at 1295.

But that is not this case. The constitutional defect here is that "the individual mandate does *not* regulate behavior at the point of consumption." *Ibid.* As said in *Goudy-Bachman*, "It is the pre-conduct requirement to pay in advance that is at issue." Slip Opinion at 15. The District Judge there pointed out the problem:

> Section 1501 of the Act . . . is a mandate in anticipation. It regulates many individuals who have not yet entered the market – whether one defines the market as the broader market for health care services or the market for health insurance – in anticipation of their entrance into the health care services market.

[*Id.* at 14.]

And

> [t]he outcome is the same regardless of whether one considers the relevant market to be the health care services market or health insurance market because the minimum coverage provision seeks to regulate

> conduct prior to an uninsured's entrance into either market. The Commerce Clause simply does not reach this pre-transaction stage.

[*Id.* at 14, n. 12.]

A "mandate in anticipation" therefore is in anticipation of what for any particular individual may never happen and whose governmentally-mandated remedy utterly contradicts and violates that individual's autonomy. Congress has no authority to impose it.

The individual's autonomy: his or her right and freedom to make decisions on matters that involve himself or herself alone. This is the self-reliance, the "iron string," of which Emerson wrote and by which Lyn Robinson, the determinedly-uninsured nursery owner featured in the National Public Radio episodes, n. 13, *supra*, and others live. Those who hold this value have the right to maintain it, and government may not coerce them to surrender it. What the court said in *Griffin v. Tatum*, *supra*, 300 F.Supp. at 62, rings true here as well.

> [T]he freedom here protected is the right to some breathing space for the individual into which the government may not intrude without carrying a substantial burden of justification.

Breathing space for the individual. Indeed. The only difference here – and it is a significant difference – is that, in *Griffin v. Tatum* and the other cases mentioned, *supra*, concerning a student availing him- or herself of the services furnished in and by a government-sponsored school, government had at

least *some* basis, subject to judicial review under the applicable review standard, to regulate the student's behavior. Here, by contrast, the plaintiffs litigating this statute and other like-minded people are simply taking no part whatever in the sphere of activity in question – they have not entered the market and have no intention of entering the market for health insurance – and therefore the government has *no* basis – literally no police power or quasi-police power at all – for intruding. Congress has reached far beyond its constitutional authority. The Eleventh Circuit correctly declared the individual mandate unconstitutional, and this Court should affirm.

CONCLUSION

It is respectfully submitted that for these reasons this Court should affirm the final decision of the United States Court of Appeals for the Eleventh Circuit declaring the minimum coverage provision – the individual mandate – unconstitutional.

Respectfully submitted,

BERTRAM P. GOLTZ, JR., ESQ.
AMERICAN CATHOLIC
LAWYERS ASSOCIATION, INC.
420 Route 46 East, Suite 7
P.O. Box 10092
Fairfield, New Jersey 07004-6092
(973) 244-9895
skipgoltz@optonline.net
Counsel for Amicus

Date: February 10, 2012

AMICUS CURIAE BRIEF

No. 11-398

In The
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

vs.

STATE OF FLORIDA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE IN SUPPORT OF RESPONDENTS REGARDING THE ANTI-INJUNCTION ACT ISSUE AND URGING AFFIRMANCE IN PART, REVERSAL IN PART

JAY ALAN SEKULOW
Counsel of Record
JORDAN SEKULOW
STUART J. ROTH
COLBY M. MAY
JAMES M. HENDERSON SR.
WALTER M. WEBER
EDWARD L. WHITE III
ERIK M. ZIMMERMAN
MILES L. TERRY
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue, NE
Washington, DC 20002
sekulow@aclj.org
202-546-8890
Counsel for Amicus Curiae

February 13, 2012

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

THE ANTI-INJUNCTION ACT DOES NOT BAR THIS COURT FROM REACHING THE MERITS OF RESPONDENTS' CLAIMS 4

A. Introduction 4

B. The Anti-Injunction Act applies to truly revenue-raising tax statutes. The Anti-Injunction Act does not apply here because the individual mandate and its penalty are not truly revenue-raising tax provisions 6

C. The Anti-Injunction Act's purpose is to protect the Federal Government's ability to assess and collect taxes expeditiously. The Anti-Injunction Act does not apply here because this lawsuit will be resolved years before the Federal Government can assess or collect any exaction; thus, this case does not thwart the Anti-Injunction Act's purpose 11

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Alexander v. "Americans United" Inc., 416 U.S. 752 (1974) 16

Bob Jones Univ. v. Simon, 416 U.S. 725 (1974) 6, 11, 15, 16

Cheatham v. United States, 92 U.S. 85 (1875) 15

Duncan v. Walker, 533 U.S. 167 (2001) 8

Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962) 13, 14

FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007) 1

Florida v. United States Dep't of Health & Human Servs., 716 F. Supp. 2d 1120 (N.D. Fla. 2010) 9, 12

Goudy-Bachman v. United States Dep't of Health & Human Servs., 764 F. Supp. 2d 684 (M.D. Pa. 2011) 9, 12

Hibbs v. Winn, 542 U.S. 88 (2004) 14

Liberty Univ. v. Geithner, 753 F. Supp. 2d 611 (W.D. Va. 2010), *vacated*, 2011 U.S. App. LEXIS 18618 (4th Cir. Sept. 8, 2011) 9, 12

McConnell v. FEC, 540 U.S. 93 (2003) 1

Mead v. Holder, 766 F. Supp. 2d 16 (D.D.C. 2011) 9

Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941) 8

TABLE OF AUTHORITIES – Continued

Page

Pleasant Grove City v. Summum, 555 U.S. 460 (2009) 1

Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011) 9, 12

Snyder v. Marks, 109 U.S. 189 (1883) 15

South Carolina v. Regan, 465 U.S. 367 (1984) 6

State R.R. Tax Cases, 92 U.S. 575 (1876) 14, 15

TMLC v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010) 9, 12

TMLC v. Obama, 651 F.3d 529 (6th Cir. 2011) 9

U.S. Citizens Ass'n v. Sebelius, 754 F. Supp. 2d 903 (N.D. Ohio 2010) 9

United States v. La Franca, 282 U.S. 568 (1931) 8

United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213 (1996) 7

Van Orden v. Perry, 545 U.S. 677 (2005) 1

Virginia v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010), *vacated*, 656 F.3d 253 (4th Cir. 2011) 9

STATUTES

26 U.S.C. § 501(c)(3) 15, 16

26 U.S.C. § 4191 7

26 U.S.C. § 4980I 7

26 U.S.C. § 5000A 1, 4, 7, 9

TABLE OF AUTHORITIES – Continued

Page

26 U.S.C. § 5000A(a) 5

26 U.S.C. § 5000A(b) 5

26 U.S.C. § 5000A(b)(1) 5

26 U.S.C. § 5000A(g)(2)(A) 10

26 U.S.C. § 5000A(g)(2)(B) 10

26 U.S.C. § 5000B 7

26 U.S.C. § 7421(a) 6, 11, 12, 13, 17

26 U.S.C. § 7806(b) 8

42 U.S.C. § 18091(1) 6

42 U.S.C. § 18091(2) 7

42 U.S.C. § 18091(2)(I) 7

Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010), Pub. L. No. 111-152, 124 Stat. 1029 (2010) ..... *passim*

Title IX – Revenue Provisions, Subtitle A – Revenue Offset Provisions of the Patient Protection and Affordable Care Act of 2010, *available at* http://www.healthcare.gov/law/resources/authorities/title/ix-revenue-provisions.pdf 10

INTEREST OF THE AMICUS CURIAE

Amicus curiae, the American Center for Law & Justice ("ACLJ"), is an organization dedicated to defending constitutional liberties secured by law.[1] ACLJ attorneys have argued before this Court and other federal and state courts in numerous cases involving constitutional issues. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003). ACLJ attorneys have also participated as amicus curiae in numerous cases involving constitutional issues before this Court and lower federal courts. *E.g.*, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Van Orden v. Perry*, 545 U.S. 677 (2005).

The ACLJ has been active in litigation concerning the Patient Protection and Affordable Care Act of 2010 ("ACA" or "Act"), Pub. L. No. 111-148, 124 Stat. 119 (2010), Pub. L. No. 111-152, 124 Stat. 1029 (2010), in particular, with regard to the minimum coverage provision, otherwise known as the "individual mandate," 26 U.S.C. § 5000A, which requires millions of Americans to purchase and maintain Federal Government-approved health insurance from a private company for the remainder of their lives or be penalized annually. The ACLJ has filed amicus curiae

---

[1] No counsel for a party authored this brief in whole or in part. No person or entity aside from amicus curiae, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed notices with this Court consenting to the filing of amicus curiae briefs.

briefs in support of the following challenges to the ACA: *Virginia v. Sebelius*, No. 3:10-CV-188-HEH (E.D. Va.), and Nos. 11-1057, 11-1058 (4th Cir.); *TMLC v. Obama*, No. 10-2388 (6th Cir.); and *Florida v. United States Dep't of Health & Human Servs.*, No. 3:10-CV-91-RV-EMT (N.D. Fla.), Nos. 11-11021-HH, 11-11067-HH (11th Cir.), and Nos. 11-393, 11-398, 11-400 (U.S.). In the brief filed in Case No. 11-398, the ACLJ urged this Court to affirm the United States Court of Appeals for the Eleventh Circuit's judgment that the individual mandate is unconstitutional. In the brief filed in Case Nos. 11-393 and 11-400, the ACLJ urged this Court to reverse the Eleventh Circuit's judgment that the unconstitutional individual mandate is severable from the rest of the ACA and rule the entire ACA invalid.

Additionally, the ACLJ represents the plaintiffs in a challenge to the individual mandate: *Mead v. Holder*, No. 1:10-CV-00950-GK (D.D.C.), *appeal sub. nom. Seven-Sky v. Holder*, No. 11-5047 (D.C. Cir.). The ACLJ has filed a petition for a writ of certiorari in *Seven-Sky v. Holder*, No. 11-679 (U.S. Nov. 30, 2011). Accordingly, the ACLJ has an interest that may be affected by the instant case.

The ACLJ is dedicated to the founding principles of a limited Federal Government and to the belief that the Constitution contains meaningful boundaries that Congress may not trespass – no matter how serious the nation's healthcare problems. The ACLJ believes that the Constitution does not empower Congress to require Americans to purchase and maintain

health insurance from a private company for the rest of their lives or pay an annual penalty. The ACLJ is deeply troubled by the fundamental alteration to the nature of our federalist system of government that would be required to recognize a novel Congressional power to mandate that citizens buy a product from a private company. The ACLJ urges this Court to rule the entire ACA invalid.

SUMMARY OF THE ARGUMENT

The Anti-Injunction Act ("AIA") applies to truly revenue-raising tax statutes. The individual mandate and its penalty are not truly revenue-raising tax provisions. The purchase of health insurance, as required by the individual mandate, does not provide revenue to the Federal Government, as the insurance is not purchased directly from the Federal Government. The penalty provision also is not a tax, but, instead, is a regulatory penalty designed to compel American citizens to purchase health insurance from private companies. Because the individual mandate and penalty are not taxes, the AIA does not bar this Court from reaching the merits of Respondents' claims.

Moreover, the purpose of the AIA is to protect the Federal Government's ability to assess and collect taxes expeditiously. Respondents did not file their lawsuit to restrain the Federal Government's assessment or collection of any tax. Rather, the purpose of

their lawsuit is to challenge the constitutionality of the individual mandate, which does not go into effect until January 1, 2014, and any penalty for non-compliance with the individual mandate is not due and owed until April 15, 2015. This lawsuit, then, cannot be for the purpose of restraining the assessment or collection of any tax; no assessment or collection of any exaction related to the individual mandate is possible for at least three years from now, and the Government's interest in the prompt collection of taxes is not implicated by this Court's review of the Eleventh Circuit's decision now. Therefore, the AIA does not apply.

Accordingly, this Court should proceed to resolve the merits of Respondents' claims. This Court should affirm the Eleventh Circuit's judgment that the individual mandate is unconstitutional, reverse the Eleventh Circuit's judgment that the unconstitutional individual mandate is severable from the rest of the ACA, and hold that the entire ACA is invalid.

ARGUMENT

THE ANTI-INJUNCTION ACT DOES NOT BAR THIS COURT FROM REACHING THE MERITS OF RESPONDENTS' CLAIMS

A. Introduction

Among Respondents' claims is their challenge to the constitutionality of the individual mandate provision, 26 U.S.C. § 5000A, which states in part that

"[a]n applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month." 26 U.S.C. § 5000A(a). The penalty provision of the individual mandate states:

> If a taxpayer who is an applicable individual, or an applicable individual, for whom the taxpayer is liable under paragraph (3), *fails to meet the requirement of subsection (a)* [*i.e.*, the individual mandate] for 1 or more months, then, except as provided in subsection (e) [which provides certain exemptions], there is hereby imposed on the taxpayer a *penalty with respect to such failures* in the amount determined under subsection (c).

26 U.S.C. § 5000A(b)(1) (emphasis added). The individual mandate goes into effect on January 1, 2014. *See* 26 U.S.C. § 5000A(a). For those applicable individuals who do not purchase the Federal Government-approved health insurance, their penalty is due and owed on April 15, 2015, the date on which their federal income tax returns must be filed. *See* 26 U.S.C. § 5000A(b). Respondents brought this action in March 2010, approximately five years before any exaction may be assessed and collected by the Federal Government, to challenge the constitutionality of the individual mandate.

B. The Anti-Injunction Act applies to truly revenue-raising tax statutes. The Anti-Injunction Act does not apply here because the individual mandate and its penalty are not truly revenue-raising tax provisions.

The AIA states in relevant part that "no suit for the purpose of restraining the assessment or collection of *any tax* shall be maintained in any court by any person, whether or not such person is the person against whom *such tax* was assessed." 26 U.S.C. § 7421(a) (emphasis added). As this Court has explained, the AIA is to be read literally and applies to "truly revenue-raising tax statutes." *Bob Jones Univ. v. Simon,* 416 U.S. 725, 736-43 (1974). There are at least four reasons why the individual mandate and its penalty are *not taxes*. Because they are not taxes, the AIA does not bar Respondents' action from proceeding to the merits.[2]

First, in Congress's findings supporting the individual mandate, Congress relied *exclusively* on its Commerce Clause authority. 42 U.S.C. § 18091(1) (Congressional finding that the mandate to purchase health insurance "is commercial and economic in

---

[2] In addition, the claims of the State Respondents, at minimum, would not be barred. Simply put, if the State Respondents were unable to advance their claims now, they would have no alternative remedy; the State Respondents cannot pay a "tax" to the Federal Government and then sue for its return. *See South Carolina v. Regan,* 465 U.S. 367, 378 (1984) (explaining that the AIA does not apply to lawsuits "brought by aggrieved parties for whom [Congress] has not provided an alternative remedy").

nature, and substantially affects interstate commerce"); 42 U.S.C. § 18091(2) (Congressional finding regarding "[e]ffects on the national economy and interstate commerce," which includes statements made to bolster Congress's assertion of Commerce Clause power and focuses solely on the goal of forcing people into the insurance market). Congress's findings do not mention its taxing power in support of the individual mandate and its penalty, which is unsurprising since Section 5000A's stated purpose is not to generate tax revenue but to create "effective health insurance markets" by forcing millions of Americans to purchase health insurance from private companies. *See* 42 U.S.C. § 18091(2)(I).

Second, Congress consciously chose not to refer to the penalty as a "tax" in the ACA. Underscoring that Congress knows the difference between a penalty and tax, Congress distinguished between "taxes" and "penalties" throughout the ACA. Although Section 5000A imposes a "penalty" while expressly relying upon the Commerce Clause, other sections of the ACA impose a "tax" on particular activities or entities. *E.g.*, 26 U.S.C. § 4191 (*tax* on medical devices); 26 U.S.C. § 4980I (*tax* on high cost employer-sponsored health coverage); 26 U.S.C. § 5000B (*tax* on indoor tanning services). Congress's decision to label the individual mandate penalty a "penalty" and not a "tax" is noteworthy. Unlike a penalty, which compels or punishes behavior, "a tax is a pecuniary burden laid upon individuals or property for the purpose of supporting the Government." *United States v.*

Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 224 (1996) (internal citations omitted). The terms "penalty" and "tax" are "not interchangeable . . . and if an exaction [is] clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *United States v. La Franca*, 282 U.S. 568, 572 (1931); *see also Duncan v. Walker*, 533 U.S. 167, 173 (2001) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citations and quotation marks omitted).[3]

Although the "practical operation" of a provision is more informative than "the precise form of descriptive words which may be applied to it," *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941), it is telling that both the practical operation of the individual mandate penalty *and* the words Congress used to describe it are tied to the congressional purpose of forcing many more Americans into the health insurance market, not any purpose of raising revenue for the Federal Government. If each applicable

---

[3] Congress's placement of the individual mandate inside the Internal Revenue Code and listing it among the "Miscellaneous Excise Taxes" is insignificant and gives rise to no inference that Congress intended it to be a tax, as the Internal Revenue Code itself points out. 26 U.S.C. § 7806(b) ("No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title. . . .").

individual purchases health insurance, fulfilling Congress's purpose, the penalty is not triggered and the Federal Government would not generate any revenue because health insurance is not purchased directly from the Federal Government. Moreover, if the individual mandate is held unconstitutional, the penalty is meaningless and unenforceable. There would be no behavior to compel and nothing to penalize; thus, no revenue is provided to the Federal Government.[4]

Third, Congress also indicated that the penalty is not a tax by prohibiting the use of traditional tax enforcement measures to collect the penalty. The Special Rules subsection of Section 5000A declares that a person "shall not be subject to any criminal

---

[4] It is telling that every federal court to consider the argument that Section 5000A's exaction is a tax, other than the United States Court of Appeals for the Fourth Circuit, has rejected it. *TMLC v. Obama*, 651 F.3d 529, 550 (6th Cir. 2011) (Sutton, J., concurring); *id.* at 566 (Graham, J., dissenting); *Goudy-Bachman v. United States Dep't of Health & Human Servs.*, 764 F. Supp. 2d 684, 695 (M.D. Pa. 2011); *Mead v. Holder*, 766 F. Supp. 2d 16, 40-41 (D.D.C. 2011); *Liberty Univ. v. Geithner*, 753 F. Supp. 2d 611, 627-29 (W.D. Va. 2010), *vacated*, 2011 U.S. App. LEXIS 18618 (4th Cir. Sept. 8, 2011); *Florida v. United States Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1130-44 (N.D. Fla. 2010); *U.S. Citizens Ass'n v. Sebelius*, 754 F. Supp. 2d 903, 909, 911-24 (N.D. Ohio 2010); *Virginia v. Sebelius*, 728 F. Supp. 2d 768, 782-88 (E.D. Va. 2010), *vacated*, 656 F.3d 253 (4th Cir. 2011); *TMLC v. Obama*, 720 F. Supp. 2d 882, 890-91 (E.D. Mich. 2010). *But see Liberty Univ., Inc. v. Geithner*, 2011 U.S. App. LEXIS 18618 (4th Cir. Sept. 8, 2011); *Seven-Sky v. Holder*, 661 F.3d 1, 23 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

prosecution or penalty" for failing to timely pay the penalty. 26 U.S.C. § 5000A(g)(2)(A). In addition, "[t]he Secretary shall not . . . file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section," or "levy on any such property with respect to such failure." 26 U.S.C. § 5000A(g)(2)(B). Had Congress intended the penalty to be a tax, it would have made the traditional tax enforcement measures applicable.

Finally, Congress specifically listed multiple revenue offset provisions within the ACA. Notably, the individual mandate penalty is not listed as a revenue producing provision, which underscores that Congress did not consider the penalty to be one of the many revenue generating provisions of the ACA, such as those noted previously and other taxes such as the tax on elective cosmetic medical procedures. Title IX – Revenue Provisions, Subtitle A – Revenue Offset Provisions of the ACA, *available at* http://www.healthcare.gov/law/resources/authorities/title/ix-revenue-provisions.pdf (last visited Jan. 31, 2012).

In sum, Congress did not make the individual mandate and its penalty truly revenue-raising tax provisions. As such, the AIA does not bar this pre-enforcement challenge to the constitutionality of the individual mandate from proceeding to the merits.

C. The Anti-Injunction Act's purpose is to protect the Federal Government's ability to assess and collect taxes expeditiously. The Anti-Injunction Act does not apply here because this lawsuit will be resolved years before the Federal Government can assess or collect any exaction; thus, this case does not thwart the Anti-Injunction Act's purpose.

As this Court has explained, the main purpose of the AIA is to protect "the [Federal] Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference 'and to require that the legal right to the disputed sums be determined in a suit for refund.'" *Bob Jones Univ.*, 416 U.S. at 736 (quoting *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962)). Respondents did not file their lawsuit, in contravention of the AIA, "for the purpose of restraining the assessment or collection of any tax. . . ." 26 U.S.C. § 7421(a). Rather, the purpose of their lawsuit, filed in March 2010, is to challenge the constitutionality of the individual mandate. The individual mandate does not go into effect until January 1, 2014, and any penalty for non-compliance with the individual mandate is not due and owed until April 15, 2015. A lawsuit, then, such as this one, cannot be "for the purpose of restraining the assessment or collection of any tax" if no current assessment or collection of any

tax related to the suit is possible. *See id.* Therefore, the AIA does not apply to this action.[5]

The inapplicability of the AIA to the case at hand is illustrated by the fact that, in the typical case in which the AIA bars a claim, one or more of the following three key events occurred *before* the plaintiff sued:

1) a tax-related law or policy relevant to the plaintiff's conduct *took effect*;

2) an activity or event allegedly triggering application of that law or policy to the plaintiff *occurred*; or

3) the government or an income-providing entity *began the process* of collecting, assessing, or withholding funds, investigating current or past tax liability, or otherwise establishing the plaintiff's tax liability.

---

[5] Of the many courts to consider the applicability of the AIA as it relates to challenges to the individual mandate, only the Fourth Circuit determined that the AIA applies. The Fourth Circuit determined that the AIA applies not only to taxes but also to penalties. *Compare Liberty Univ.*, 2011 U.S. App. LEXIS 18618 (holding that the AIA applies), *with Seven-Sky*, 661 F.3d 1 (holding the AIA inapplicable), *TMLC*, 651 F.3d 529 (same), *Goudy-Bachman*, 764 F. Supp. 2d 684 (same), *and Florida*, 716 F. Supp. 2d 1120 (same). Even if the Fourth Circuit were correct about the breadth of the AIA, the AIA still does not apply here. As discussed above, no tax or penalty is being collected or assessed by the Federal Government at this time, and the purpose of the AIA will not be frustrated by this lawsuit, which will be resolved before the individual mandate goes into effect and any exaction is due and owed.

In *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), this Court held that the AIA barred a lawsuit seeking to prevent the collection of allegedly *past due* social security and unemployment taxes. *Id.* at 2. In so holding, this Court observed that "[t]he manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes *alleged to be due* without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue." *Id.* at 7 (emphasis added). Moreover, "in general, the Act prohibits suits for injunctions barring the collection of federal taxes *when the collecting officers have made the assessment and claim that it is valid.*" *Id.* at 8 (emphasis added).[6]

A review of the purpose of the Tax Injunction Act ("TIA") of 1937, which the *Williams Packing* Court characterized as "comparable" to the AIA, is instructive. *See id.* at 6. The *Williams Packing* Court cited a Senate Report concerning the TIA which stated:

> The existing practice of the Federal courts in entertaining tax-injunction suits against State officers makes it possible for foreign

---

[6] Because this case does not fall within the terms of the AIA, there is no need to address the *Williams Packing* exception for cases *otherwise subject to the AIA* (such as those involving allegedly past due taxes) in which the plaintiff can demonstrate irreparable harm and that the government has no likelihood of success. *See* 370 U.S. at 7-8.

> corporations doing business in such States to withhold from them and their governmental subdivisions, taxes in such vast amounts and for such long periods of time as to seriously disrupt State and county finances. The pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy.

Id. at 7 n.6 (quoting S. Rep. No. 1035, 75th Cong., 1st Sess. 2). This Court made a similar observation about the TIA's purpose in *Hibbs v. Winn*, 542 U.S. 88 (2004), noting that Congress "trained its attention on taxpayers who sought to avoid paying their tax bill" and sought "to stop taxpayers, with the aid of a federal injunction, from withholding large sums, thereby disrupting state government finances." *Id.* at 104-105. Put differently, the TIA's drafters sought to ensure that taxpayers who contested their liability for *current or past due* taxes must first pay the amounts to the government to avoid the problem of the government being without substantial sums of money for extended periods of time.

Earlier cases from this Court confirm that the AIA's chief purpose is to deal with the problem of taxpayers withholding assessed or past due taxes. For example, in *State R.R. Tax Cases*, 92 U.S. 575 (1876), this Court observed that the AIA addressed the problem of courts enjoining *the collection of assessed taxes*

that "enable[d] the complainant to escape wholly the tax for the period of time complained of, though it be obvious that he ought to pay a tax if imposed in the proper manner," and also encouraged corporations to withhold the entirety of their currently due taxes to contest a small portion of their assessments. *Id.* at 615-17. In light of the problem of taxpayers withholding *past due* taxes to contest a small portion of them, this Court observed that the AIA "shows the sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence." *Id.* at 613-14.

Similarly, in *Snyder v. Marks*, 109 U.S. 189 (1883), this Court held that the AIA "applies to all *assessments of taxes*, made under color of their offices, by internal revenue officers" and declares that public officers "shall not be enjoined *from collecting a tax claimed to have been unjustly assessed*, when those officers, in the course of general jurisdiction over the subject matter in question, have made the assessment and claim that it is valid." *Id.* at 193, 194 (emphasis added); *see also Cheatam v. United States*, 92 U.S. 85, 89 (1876) (holding that a refund suit was barred because it was brought more than six months *after* the tax was assessed, and noting that "[i]t is essential to the honor and orderly conduct of the government that its taxes [alleged to be due] should be promptly paid. . . .").

Moreover, in *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974), the requirements of 26 U.S.C. § 501(c)(3)

for maintaining tax-exempt status had been applicable to Bob Jones University long before it brought suit, and revoking that status would have led to imminent tax liability. Before the University brought suit, "[t]he Commissioner of Internal Revenue [had already] instructed the District Director to commence administrative procedures leading to the revocation of petitioner's § 501(c)(3) ruling letter." *Id.* at 735. The University stated that "it would be subject to 'substantial' federal income tax liability if the Service were allowed to carry out its threatened action," estimating over one million dollars in tax liability over a two-year period. *Id.* at 738.

The AIA barred the University's suit because the Federal Government had already initiated the process of establishing the University's current tax liability, such that granting the University an injunction would halt the ongoing administrative process and "interrupt the assessment and collection of taxes." *Id.* at 739-40, n.10. In this context, this Court observed that "the principal purpose [of the AIA is] the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference." *Id.* at 736-37; *see also Alexander v. "Americans United" Inc.*, 416 U.S. 752, 762 n.13 (1974) (holding that the AIA barred a suit challenging denial of Section 501(c)(3) tax-exempt status because "the imposition of a federal tax . . . follows from the Service's withdrawal of § 501(c)(3) status").

In contrast, the present lawsuit *does not implicate* the Federal Government's need to promptly collect taxes that are currently due, or past due, because the individual mandate and penalty do not take effect until January 1, 2014. No person in the country can possibly engage in any activity that can trigger any collection, assessment, withholding, or investigation related to the individual mandate until that time. Thus, Respondents are not the subject of any investigatory or administrative proceedings relating to the collection or assessment of the individual mandate penalty, nor could they be for at least three years from now. In other words, this case is much different from the typical situation in which the tax code enforcement and collection process is already underway before a lawsuit is filed. Consequently, this lawsuit is not brought "for the purpose of restraining the assessment or collection of any tax," in contravention of the AIA. *See* 26 U.S.C. § 7421(a). This Court is not prevented from proceeding to the merits of Respondents' claims.

CONCLUSION

Amicus curiae respectfully requests that this Court conclude that the Anti-Injunction Act does not bar it from resolving the merits of Respondents' claims. Amicus curiae further requests that this Court affirm the Eleventh Circuit's judgment that the individual mandate is unconstitutional, reverse the Eleventh Circuit's judgment that the individual

mandate is severable from the rest of the ACA, and rule the entire ACA invalid.

Respectfully submitted,

JAY ALAN SEKULOW
Counsel of Record
JORDAN SEKULOW
STUART J. ROTH
COLBY M. MAY
JAMES M. HENDERSON SR.
WALTER M. WEBER
EDWARD L. WHITE III
ERIK M. ZIMMERMAN
MILES L. TERRY
AMERICAN CENTER FOR
LAW & JUSTICE
201 Maryland Avenue, NE
Washington, DC 20002
sekulow@aclj.org
202-546-8890
Counsel for Amicus Curiae

February 13, 2012

AMICUS CURIAE BRIEF

No. 11-398

In The
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

vs.

STATE OF FLORIDA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

AMICI CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE, 119 MEMBERS OF THE UNITED STATES CONGRESS, AND MORE THAN 144,000 SUPPORTERS OF THE ACLJ IN SUPPORT OF RESPONDENTS AND URGING AFFIRMANCE ON THE MINIMUM COVERAGE PROVISION, OTHERWISE KNOWN AS THE INDIVIDUAL MANDATE, ISSUE

JAY ALAN SEKULOW
Counsel of Record
JORDAN SEKULOW
STUART J. ROTH
COLBY M. MAY
JAMES M. HENDERSON SR.
WALTER M. WEBER
EDWARD L. WHITE III
ERIK M. ZIMMERMAN
MILES L. TERRY
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]
Counsel for Amici Curiae

February 8, 2012

[redacted]

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

THE INDIVIDUAL MANDATE EXCEEDS CONGRESS'S ENUMERATED POWERS 5

A. The individual mandate is not authorized by the Commerce Clause 6

1. *Lopez* and *Morrison* emphasized that Congress may regulate *voluntary economic activity*, but the individual mandate regulates a person's *inactivity* 7

a. *United States v. Lopez*, 514 U.S. 549 (1995) 8

b. *United States v. Morrison*, 529 U.S. 598 (2000) 11

c. The individual mandate exceeds the Commerce Clause power because it does not regulate existing commercial or economic activity 12

2. *Wickard* and *Raich* do not suggest that Congress's authority to regulate local economic activity, as an essential part of a national scheme to regulate that activity, gives rise to a newly-minted power to force unwilling individuals into a market 13

TABLE OF CONTENTS – Continued

Page

a. *Wickard v. Filburn*, 317 U.S. 111 (1942) 14

b. *Gonzales v. Raich*, 545 U.S. 1 (2005) ... 15

3. Cases affirming Congress's power to regulate an economic class of activities, in the aggregate, do not support the conclusion that Congress can regulate *all* uninsured individuals now because *some* will receive health care that they cannot pay for in the future 19

4. There is no support for the Federal Government's conclusion that Congress can regulate all Americans now, and indefinitely for their entire lives, based on their "inevitable" future participation in a market 23

5. As in *Lopez* and *Morrison*, the Federal Government's arguments lack a judicially-enforceable limiting principle and, if accepted, would give rise to a federal police power 24

B. The individual mandate is not authorized by the Necessary and Proper Clause 28

CONCLUSION 34

TABLE OF AUTHORITIES

Page

CASES

Bond v. United States, 131 S. Ct. 2355 (2011) 5

FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007) 1

Florida v. United States Dep't of Health & Human Servs., 716 F. Supp. 2d 1120 (N.D. Fla. 2010) 33

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) 7

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 6

Gonzales v. Raich, 545 U.S. 1 (2005) ..... *passim*

Gregory v. Ashcroft, 501 U.S. 452 (1991) 24

Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) 20, 22

Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 20

Katzenbach v. McClung, 379 U.S. 294 (1964) 20, 22

McConnell v. FEC, 540 U.S. 93 (2003) 1

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 28, 29, 33

New York v. United States, 505 U.S. 144 (1992) 5

Perez v. United States, 402 U.S. 146 (1971) 20

Pleasant Grove City v. Summum, 555 U.S. 460 (2009) 1

Printz v. United States, 521 U.S. 898 (1997) 6, 7, 28

TABLE OF AUTHORITIES – Continued

Page

TMLC v. Obama, 651 F.3d 529 (6th Cir. 2011).....18

United States v. Bruce, 405 F.3d 145 (3d Cir. 2005).....21

United States v. Comstock, 130 S. Ct. 1949 (2010).....29, 30, 31, 32, 33

United States v. Lopez, 514 U.S. 549 (1995).....*passim*

United States v. Morrison, 529 U.S. 598 (2000)...*passim*

United States v. Salerno, 481 U.S. 739 (1987).....18

United States v. Stevens, 130 S. Ct. 1577 (2010).....26

U.S. Citizens Ass'n v. Sebelius, 754 F. Supp. 2d 903 (N.D. Ohio 2010).....33

U.S. Term Limits v. Thornton, 514 U.S. 779 (1995).....5

Van Orden v. Perry, 545 U.S. 677 (2005).....1

Wickard v. Filburn, 317 U.S. 111 (1942).....13, 14, 15, 17, 21

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8.....5, 6, 28

STATUTES

26 U.S.C. § 5000A.....1, 6, 12, 18, 33

42 U.S.C. § 1395dd.....25

42 U.S.C. § 18091(2)(A).....12

42 U.S.C. § 18091(2)(D).....32

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 18091(2)(E) 26

42 U.S.C. § 18091(2)(F) 27

42 U.S.C. § 18091(2)(H) 33

42 U.S.C. § 18091(2)(I) 27, 33

42 U.S.C. § 18091(2)(J) 27

OTHER SOURCES

The Federalist No. 45 (James Madison), George Carey & James McClellan eds., 2001 25

INTEREST OF THE AMICI CURIAE

Amicus curiae, the American Center for Law & Justice ("ACLJ"), is an organization dedicated to defending constitutional liberties secured by law.[1] ACLJ attorneys have argued before this Court and other federal and state courts in numerous cases involving constitutional issues. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003). ACLJ attorneys have also participated as amicus curiae in numerous cases involving constitutional issues before this Court and lower federal courts. *E.g.*, *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Van Orden v. Perry*, 545 U.S. 677 (2005).

The ACLJ has been active in litigation concerning the Patient Protection and Affordable Care Act of 2010 ("ACA" or "Act"), Pub. L. No. 111-148, 124 Stat. 119 (2010), Pub. L. No. 111-152, 124 Stat. 1029 (2010), in particular, with regard to the minimum coverage provision, otherwise known as the "individual mandate," 26 U.S.C. § 5000A, which requires millions of Americans to purchase and maintain Federal Government-approved health insurance from a private company for the remainder of their lives or be

---

[1] No counsel for a party authored this brief in whole or in part. No person or entity aside from amici curiae, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed notices with this Court consenting to the filing of amicus curiae briefs.

penalized annually. The ACLJ has participated as an amicus curiae in briefs filed in support of the following challenges to the ACA: *Virginia v. Sebelius*, No. 3:10-CV-188-HEH (E.D. Va.), and Nos. 11-1057, 11-1058 (4th Cir.); *TMLC v. Obama*, No. 10-2388 (6th Cir.); and *Florida v. United States Dep't of Health & Human Servs.*, No. 3:10-CV-91-RV-EMT (N.D. Fla.), Nos. 11-11021-HH, 11-11067-HH (11th Cir.), and Nos. 11-393, 11-400 (U.S.).

Additionally, the ACLJ represents the plaintiffs in a challenge to the individual mandate: *Mead v. Holder*, No. 1:10-CV-00950-GK (D.D.C.), *appeal sub. nom. Seven-Sky v. Holder*, No. 11-5047 (D.C. Cir.). The ACLJ has recently filed a petition for a writ of certiorari in *Seven-Sky v. Holder*, No. 11-679 (U.S. Nov. 30, 2011). Accordingly, the ACLJ has an interest that may be affected by the instant case.

This brief is also filed on behalf of United States Representatives Paul Broun, Robert Aderholt, Todd Akin, Rodney Alexander, Mark Amodei, Steve Austria, Michele Bachmann, Spencer Bachus, Lou Barletta, Roscoe Bartlett, Joe Barton, Rob Bishop, Diane Black, Marsha Blackburn, Charles Boustany, Kevin Brady, Mo Brooks, Larry Bucshon, Michael Burgess, Dan Burton, Francisco "Quico" Canseco, Eric Cantor, Steve Chabot, Howard Coble, Mike Coffman, Tom Cole, Mike Conaway, Chip Cravaack, Geoff Davis, Scott DesJarlais, Jeff Duncan, Blake Farenthold, Stephen Fincher, Chuck Fleischmann, John Fleming, Bill Flores, Randy Forbes, Virginia Foxx, Trent Franks, Cory Gardner, Scott Garrett, Bob Gibbs, Phil

Gingrey, Louie Gohmert, Bob Goodlatte, Tom Graves, Tim Griffin, Michael Grimm, Ralph Hall, Gregg Harper, Andy Harris, Vicky Hartzler, Jeb Hensarling, Wally Herger, Tim Huelskamp, Bill Huizenga, Randy Hultgren, Lynn Jenkins, Bill Johnson, Walter Jones, Jim Jordan, Mike Kelly, Steve King, Adam Kinzinger, John Kline, Raul Labrador, Doug Lamborn, Jeff Landry, James Lankford, Robert Latta, Billy Long, Blaine Luetkemeyer, Cynthia Lummis, Dan Lungren, Connie Mack, Donald Manzullo, Kenny Marchant, Kevin McCarthy, Michael McCaul, Tom McClintock, Thaddeus McCotter, Cathy McMorris Rodgers, Gary Miller, Jeff Miller, Randy Neugebauer, Alan Nunnelee, Pete Olson, Ron Paul, Steve Pearce, Mike Pence, Joe Pitts, Ted Poe, Mike Pompeo, Bill Posey, Tom Price, Ben Quayle, Denny Rehberg, Reid Ribble, Scott Rigell, Phil Roe, Todd Rokita, Dennis Ross, Ed Royce, Steve Scalise, Jean Schmidt, David Schweikert, Adrian Smith, Lamar Smith, Marlin Stutzman, Lee Terry, Scott Tipton, Michael Turner, Tim Walberg, Joe Walsh, Daniel Webster, Lynn Westmoreland, Joe Wilson, Rob Woodall, and Don Young, who are 119 members of the United States House of Representatives in the One Hundred Twelfth Congress. In addition, this brief is filed on behalf of more than 144,000 supporters of the ACLJ who specifically requested that they be included in this brief as an expression of support for the ACLJ's efforts to overturn the ACA.

Amici curiae are dedicated to the founding principles of a limited Federal Government and the belief that the Constitution contains meaningful boundaries

that Congress may not trespass – no matter how serious the nation's healthcare problems. Amici curiae believe that the Constitution does not empower Congress to require Americans to purchase and maintain health insurance from a private company for the rest of their lives or pay an annual penalty. Amici curiae are deeply troubled by the fundamental alteration to the nature of our federalist system of government that would be required to recognize a novel Congressional power to mandate that citizens buy a product from a private company. Amici curiae urge this Court to rule the individual mandate unconstitutional and to declare the entire ACA invalid, since the unconstitutional individual mandate cannot be severed from the ACA.

SUMMARY OF THE ARGUMENT

This Court should affirm the United States Court of Appeals for the Eleventh Circuit's judgment that the individual mandate is unconstitutional. The individual mandate exceeds the outermost bounds of Congress's Article I authority and is inconsistent with the constitutional system of dual sovereignty that divides power between the federal and State governments. The individual mandate's unprecedented requirement to buy a product from a private company is inconsistent with our constitutional tradition. Although the ACA is the first federal law relying on the Commerce Clause to cross the line between *encouraging* increased market activity and *mandating*

individual purchases, it will certainly not be the last if the individual mandate is upheld.

ARGUMENT

THE INDIVIDUAL MANDATE EXCEEDS CONGRESS'S ENUMERATED POWERS.

"The Constitution creates a Federal Government of enumerated powers. *See* U.S. Const. art. I, § 8. As James Madison wrote, 'the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'" *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting *The Federalist No. 45*). This Court has emphasized the importance of dual sovereignty, observing that "the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992); *see also Bond v. United States*, 131 S. Ct. 2355, 2364-66 (2011) (discussing the importance of federalism); *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own discovery. . . . It was the genius of [the Founders] that our citizens would have two political capacities, one State and one federal, each protected from incursion by the other."). The

individual mandate, 26 U.S.C. § 5000A, is unconstitutional because it exceeds the few and defined powers of Congress, including those provided by the Commerce and Necessary and Proper Clauses. The Eleventh Circuit's decision should be affirmed on this point.

A. The individual mandate is not authorized by the Commerce Clause.

Congress has the power "[t]o regulate commerce . . . among the several States." U.S. Const. art. I, § 8. Although the scope of this power has been broadened from the original understanding of a power to "prescribe the rule by which commerce is to be governed," *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824), this Court has consistently held that Congress's exercise of this power is limited.

Federal statutes are presumed to be constitutional, *United States v. Morrison*, 529 U.S. 598, 607 (2000), but the unprecedented nature of the individual mandate is strong evidence that the Commerce Clause does not authorize Congress to require an individual to buy something from a private company. In *Printz v. United States,* 521 U.S. 898 (1997), this Court observed that "[t]he utter lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed absence of such power." *Id.* at 907-08; *see also id.* at 905 ("if . . . earlier Congresses avoided use of this highly attractive

power, we would have reason to believe that the power was thought not to exist."); *id.* at 918 (finding significant the "almost two centuries of apparent congressional avoidance of the practice"); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010) (agreeing that "[p]erhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity"). The individual mandate is the first instance in our Nation's history where Congress has compelled American citizens to buy a product or service from a private company based solely on their status of lawfully residing in this country.

1. *Lopez* and *Morrison* emphasized that Congress may regulate *voluntary economic activity*, but the individual mandate regulates a person's *inactivity*.

A purported exercise of the Commerce Clause power must be predicated upon the regulation of existing, voluntary commercial or economic activity to be valid – not the failure to purchase a product. Because the individual mandate applies to individuals regardless of whether they are presently engaged in any specific commercial or economic activity, it exceeds the Commerce Clause power.

a. *United States v. Lopez*, 514 U.S. 549 (1995)

In *Lopez*, this Court held that the Gun Free School Zones Act, which prohibited the possession of a firearm within 1,000 feet of a school, exceeded Congress's Commerce Clause authority because it was a law that "ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561. The *Lopez* Court reiterated that the Commerce Clause "'must be considered in the light of our dual system of government and may not be extended so as to . . . effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *Id.* at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

This Court identified three "categories of activity" that the Commerce Clause authorizes Congress to regulate, including "activities that substantially affect interstate commerce," the only category relevant here. *Id.* at 558-59. The Court summarized previous cases dealing with this category as holding that, "[w]here *economic activity* substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.* at 560 (emphasis added). This Court concluded that the Act exceeded Congress's authority because possessing a gun in a school zone was not economic activity, nor was the Act "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut

unless the intrastate activity were regulated." *Id.* at 561.

In *Lopez,* the Federal Government argued that Congress may regulate non-economic activity (possessing guns in a school zone) that, in the aggregate, substantially affects interstate commerce. Of note, the Federal Government cited *the cost-shifting impact on the insurance system*, arguing that gun possession may lead to violent crime, and "the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population." *Id.* at 563-64. In rejecting these arguments, this Court responded by stating:

> We pause to consider the implications of the Government's arguments. The Government admits . . . that Congress could regulate not only all violent crime, but all activities that might lead to violent crime. . . . [as well as] any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. . . . *Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power. . . . Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.*

Id. at 564 (emphasis added).

This Court noted that the Constitution "withhold[s] from Congress a plenary police power that

would authorize enactment of every type of legislation," *id.* at 566, and stated,

> [t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. . . . [That] would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, . . . and that there never will be a distinction between what is truly national and what is truly local. . . . This we are unwilling to do.

Id. at 567-68 (citations omitted); *see also id.* at 577-78 (Kennedy, J., concurring) (noting the importance of federalism principles in Commerce Clause interpretation).

The individual mandate does not withstand scrutiny under *Lopez*. Being lawfully present within the United States, like possessing a gun within 1,000 feet of a school, is not a *commercial or economic activity* that substantially affects interstate commerce. No support exists for the assertion that the power to "'prescribe the rule by which commerce is to be governed'" includes the power to force those who do not want to engage in a commercial or economic activity to do so. *See id.* at 553 (quoting *Gibbons*, 22 U.S. at 196). As in *Lopez*, "[t]o uphold the Government's contentions here [would require] . . . convert[ing] congressional authority under the Commerce Clause to a

general police power of the sort retained by the States." *Id.* at 567.

b. ***United States v. Morrison*, 529 U.S. 598 (2000)**

Morrison also demonstrates that the individual mandate exceeds Congress's power. There, this Court held that Section 13981 of the Violence Against Women Act, which provided a civil remedy for victims of gender-motivated violence, was unconstitutional because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity." 529 U.S. at 613. Congress determined that gender-motivated violence substantially affects interstate commerce, *id.* at 615, but this Court rejected the argument "that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 617. This Court observed that cases in which it had upheld an assertion of Commerce Clause authority due to the regulated activity's substantial effect on interstate commerce involved the regulation of "commerce," an "economic enterprise," "economic activity," or "some sort of economic endeavor." *Id.* at 610-11.

Like *Lopez*, *Morrison* further illustrates that the individual mandate exceeds Congress's Commerce Clause authority. Accepting the Federal Government's arguments would lead to a federal police power allowing Congress – for the first time in our history – to mandate a host of purchases by American citizens.

c. The individual mandate exceeds the Commerce Clause power because it does not regulate existing commercial or economic activity.

Through the individual mandate, Congress sought to obscure entirely the distinction between activity and inactivity, stating that Section 5000A "*regulates activity* that is commercial and economic in nature: economic and financial *decisions* about how and when health care is paid for, and when health insurance is purchased." 42 U.S.C. § 18091(2)(A) (emphasis added). Put differently, Congress asserted that being lawfully present in the United States without health insurance *is itself economic activity* that Congress can regulate.

American adults decide daily whether to spend money on an array of goods and services. A person may choose to buy X and not Y. Under the Federal Government's reasoning, so long as Congress has the authority to regulate the interstate market for Y (which is often the case), it can mandate that all individuals purchase Y. Congress would merely need to assert that the "mental activity" of deciding not to purchase Y is economic in nature, and that the failure to buy Y substantially affects interstate commerce. For example, Congress could cite its authority to regulate the stock market to justify a mandate that all individuals above a certain income level buy stocks or pay annual penalties.

Moreover, although at times a person's failure to buy a particular product is the result of a deliberate decision-making process, far more often, the individual has not contemplated buying the particular product at all. There is a vast and diverse array of services and products available for sale, many of which an individual will never make an active decision not to purchase. The progression from a Congressional power to regulate commerce among the several States to a power to regulate a person's failure to buy a good or service, *even one that the person has never thought about*, is staggering, and bears no connection to the Commerce Clause's text or the Constitution's system of dual sovereignty.

2. *Wickard* and *Raich* do not suggest that Congress's authority to regulate local economic activity, as an essential part of a national scheme to regulate that activity, gives rise to a newly-minted power to force unwilling individuals into a market.

Wickard v. Filburn, 317 U.S. 111 (1942), and *Gonzales v. Raich*, 545 U.S. 1 (2005), stand for the proposition that federal regulation of a particular type of existing economic activity, such as producing a marketable commodity, can reach that activity at a purely local level when doing so is necessary and proper to effectively regulating that activity nationally. Neither *Wickard* nor *Raich* suggests that Congress may compel people to join a market involuntarily as

an "essential" part of a scheme to regulate that market.

a. *Wickard v. Filburn*, 317 U.S. 111 (1942)

In *Wickard*, this Court upheld provisions of the Agricultural Adjustment Act that authorized a penalty to be imposed on farmers who grew more wheat than the quotas set for their farms as a means of limiting supply and stabilizing market prices. 317 U.S. at 115-16. Roscoe Filburn grew more than twice the quota for his farm; he typically sold a portion of his wheat in the marketplace, used a portion for feeding his livestock and for home consumption, and kept the rest for future use. *Id.* at 114-15. Filburn argued that the Act exceeded Congress's power because his activities were local and had only an indirect effect upon interstate commerce. *Id.* at 119.

This Court upheld the Act, stating that "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Id.* at 125. This Court observed that the statute effectively "restrict[ed] the amount [of wheat] which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs." *Id.* at 127.

Wickard does not suggest that Congress may regulate *inactivity* that has some impact upon interstate commerce; rather, the Court held that Congress

may regulate local *economic activity* (growing a marketable commodity) when that economic activity, taken in the aggregate with similar economic activity, substantially affects interstate commerce.

The law at issue in *Wickard* penalized overproduction of wheat, *a quintessential voluntary economic activity*, not the failure to make a purchase in the wheat market. *Wickard* did not hold that Congress could have dealt with the issue of low wheat prices by forcing all Americans to buy a specific amount of wheat or pay a penalty for failing to do so, even though virtually all Americans will inevitably eat wheat at some point, and Americans' failure to buy a specific amount of wheat, when viewed in the aggregate, would substantially affect overall demand for wheat and wheat prices. To do so, Congress would have violated the Commerce Clause as it has through the individual mandate.

In short, unlike the law at issue in *Wickard*, the individual mandate is not triggered by any voluntary economic activity, nor can an individual avoid its application by ceasing an ongoing economic activity. It is, therefore, unconstitutional.

b. *Gonzales v. Raich*, 545 U.S. 1 (2005)

Raich does not support the individual mandate either. In *Raich*, individuals who wanted to use marijuana for medicinal purposes brought an as-applied challenge (not a facial challenge as is the case here) to the Controlled Substances Act (CSA),

which created a "closed regulatory system" governing the manufacture, distribution, and possession of controlled substances to "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." 545 U.S. at 9, 12. Importantly, the *Raich* plaintiffs did not contend (as Plaintiffs do here with the ACA) "that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority." *Id.* at 15. As such, the narrow issue before the *Raich* Court was "whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally." *Id.* at 9.

This Court held that "[t]he CSA is a valid exercise of federal power, even as applied to the troubling facts of this case." *Id.* The Court stated, "[o]ur case law firmly establishes Congress' power to regulate purely local activities that are part of an *economic 'class of activities'* that have a substantial effect on interstate commerce." *Id.* at 17 (emphasis added) (citing *Perez v. United States*, 402 U.S. 146, 151 (1971)). Moreover, "[w]hen Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class." *Id.* (citing *Perez*, 402 U.S. at 154-55). As such, "when a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* (citation and quotation marks omitted).

This Court stated that *Wickard*'s key holding was that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Id.* at 18. Unlike the non-economic activities at issue in *Lopez* and *Morrison*, "the activities regulated by the CSA *are quintessentially economic*. . . . The CSA . . . regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Id.* at 25-26 (emphasis added). In addition,

> Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority. . . .

Id. at 22. This Court described the marijuana ban as "merely one of many 'essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" *Id.* at 24-25 (quoting *Lopez*, 514 U.S. at 561).

Significantly, unlike *Raich*, the instant case does not involve an as-applied challenge to a concededly valid regulatory scheme; rather, Plaintiffs contend that the individual mandate exceeds Congress's

authority on its face. *Raich* relied heavily on the key differences between cases, such as *Lopez* and *Morrison*, alleging that a federal law exceeds Congress's power (facial challenges) and cases, such as *Raich*, challenging a specific application of an admittedly valid law (as-applied challenges). *See Raich*, 545 U.S. at 23. *Raich* considered the distinction between facial and as-applied challenges to be "pivotal." *Id.* Thus, *Raich*'s emphasis on the reluctance of courts to prohibit individual applications of a valid statutory scheme to local economic conduct is not implicated here.[2]

Also, the statute in *Raich* discouraged an ongoing "quintessentially economic" activity: "the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Id.* at 25-26. This Court repeatedly emphasized Congress's authority to target an ongoing economic class of activities. *Id.* at 17. By contrast, the individual mandate does not regulate an ongoing economic class of activities "within the reach of federal power." *See id.* at 23. Lawful presence in the United States, without more, is not an economic activity akin to producing and distributing a

---

[2] The standard for facial challenges set forth in *United States v. Salerno*, 481 U.S. 739 (1987), does not apply here. Section 5000A is *ultra vires* and is unconstitutional in all applications. *TMLC v. Obama*, 651 F.3d 529, 566 (6th Cir. 2011) (Graham, J., dissenting) ("*Lopez* and *Morrison* struck down statutes as facially unconstitutional under the Commerce Clause and did so without reference to *Salerno*.").

marketable commodity. *Raich* does not suggest that the targeted economic class of activities may include the failure to buy something.

In addition, statements in *Raich* concerning Congress's ability to enact a comprehensive regulatory scheme targeting ongoing economic activity have no bearing on the individual mandate. *Raich* held only that federal regulation of economic activity – such as producing and consuming a marketable commodity – can, in some circumstances, reach that economic activity at a local level when doing so is necessary and proper to the effective national regulation of that economic activity. *Raich* and other Commerce Clause cases do not suggest that Congress can – for the first time in our Nation's history – use its Commerce Clause power to require individuals who are not engaging in a particular economic activity to do so solely because other statutory provisions are connected with that mandate.

3. Cases affirming Congress's power to regulate an economic class of activities, in the aggregate, do not support the conclusion that Congress can regulate *all* uninsured individuals now because *some* will receive health care that they cannot pay for in the future.

The aggregation principle allows Congress to regulate individuals who are voluntarily engaged in economic activity when their individual conduct, taken in the aggregate with the similar conduct of others,

substantially affects interstate commerce. *See, e.g., Lopez*, 514 U.S. at 561; *Hodel v. Va. Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 277 (1981) (stating that local activity "may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States. . . ."). Under this line of cases, the "class" that Congress can regulate consists of individuals who are *voluntarily* engaged in the relevant economic activity; Supreme Court jurisprudence does not suggest that Congress may reach individuals *who are not engaged in the relevant economic activity*. *See Raich*, 545 U.S. 1 (upholding regulation of individuals who grew marijuana); *Katzenbach v. McClung*, 379 U.S. 294, 300-02 (1964) (upholding regulation of individuals who operated restaurants); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964) (upholding regulation of individuals who operated motels).

In *Perez v. United States*, 402 U.S. 146 (1971), a loan shark argued that a federal law prohibiting extortionate credit transactions could not be applied to his local activities. This Court stated that, "[w]here the class of activities is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Id.* at 154 (citation omitted). This Court observed that, as a loan shark, "Petitioner is clearly *a member of the class which engages in 'extortionate credit transactions'* as defined by Congress. . . ." *Id.* at 153 (emphasis added). In other words, the relevant

"class" subject to regulation consists of those *who actually engage in the relevant economic conduct*. *See also United States v. Bruce*, 405 F.3d 145, 148 (3d Cir. 2005) ("The Supreme Court . . . reasoned that, as long as Perez was a 'member of the class which engages in 'extortionate credit transactions' as defined by Congress,' then the statute was properly applied.").

The Federal Government erroneously imputes the future conduct of a small subset of uninsured individuals to the entire group of uninsured individuals, holding that Congress may force all uninsured individuals to maintain health insurance indefinitely because some uninsured individuals will engage in a certain type of economic activity in the future. The Federal Government's broad expansion of the aggregation principle finds no support in this Court's cases. While Congress has broad authority "[*w*]*here the class of activities is regulated* and that class is within the reach of federal power," *Raich*, 545 U.S. at 23 (emphasis added), the individual mandate does not regulate a class of economic activities; its application is not tied to any specific commercial transaction or economic conduct. Under the Federal Government's analysis, Congress could have regulated all individuals present within Montgomery County, Ohio, because some of those individuals (such as Roscoe Filburn, a party in *Wickard*) would grow too much wheat in the future, and, inevitably, they would all eat American-grown wheat at some point in their lives. The Federal Government's approach ignores the fact that, while Filburn subjected himself to

Congressional authority by growing wheat, the application of the individual mandate is not triggered by any voluntary economic activity.

Moreover, in cases such as *Heart of Atlanta Motel* and *Katzenbach*, an individual's voluntary economic activity (operating a hotel, restaurant, etc.) is what brought him or her within the reach of Congress's regulatory power, and only for the duration of that economic activity. 379 U.S. 241; 379 U.S. 294. Congress could not have imposed regulatory mandates upon all Americans who have business degrees on the theory that Americans with business degrees, in the aggregate, operate (or may operate in the future) many businesses that substantially affect interstate commerce.

If, for the first time in our country's history, the Commerce Clause is interpreted to authorize Congress to regulate all Americans, for their entire lives, regardless of the lack of relevant current economic or commercial activity by those regulated, Congress would have "a plenary police power that would authorize enactment of every type of legislation," one "of the sort retained by the States." *Lopez*, 514 U.S. at 566-67.

4. There is no support for the Federal Government's conclusion that Congress can regulate all Americans now, and indefinitely for their entire lives, based on their "inevitable" future participation in a market.

The perceived inevitability of an individual's participation in a market at some point in his or her lifetime does not give Congress plenary authority to regulate that individual *for his or her entire lifetime*. The implications of this unprecedented line of reasoning are stunning. There are countless markets in which virtually all Americans will, at some point in their lives, take part, such as markets for food, water, clothing, transportation, housing, education, jobs, utilities, and recreation, to name a few. Congress has no authority to regulate the intricacies of all Americans' daily lives and mandate their purchases simply because they will, at some point, participate in the market for these items and services. Congress may regulate commercial or economic activities *when they occur*; Congress cannot impose onerous mandates on all Americans, owing to their mere existence, on the premise that all Americans will engage in interstate commerce at some point.

5. As in *Lopez* and *Morrison*, the Federal Government's arguments lack a judicially-enforceable limiting principle and, if accepted, would give rise to a federal police power.

As the Eleventh Circuit properly noted, this Court has emphasized the need to identify clear limiting principles when assessing a purported exercise of the Commerce Clause power to prevent the conversion of that power into "a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567; *see also id.* at 578 (Kennedy, J., concurring) (stating that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far"). The Constitution's creation of a system of dual sovereignty is based upon the premise that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *see also Morrison*, 529 U.S. at 616, n.7 (characterizing the principle of dual sovereignty as a "central principle of our constitutional system. . . . crafted . . . so that the people's rights would be secured by the division of power").

The Federal Government's novel theory of virtually unlimited Commerce Clause power is at odds with the Constitution's delegation of a few, limited

powers to the federal government. As James Madison noted in *Federalist No. 45*,

> [t]he powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 241 (James Madison) (George Carey & James McClellan eds., 2001). The Federal Government's analysis of the Commerce Clause would bestow upon Congress "numerous and indefinite" powers to regulate "the lives, liberties, and properties of the people," while leaving the States to regulate only that which Congress declines, for the moment, to regulate. *See id.*

A purported limiting principle that the Federal Government has offered is the fact that federal law mandates that doctors and hospitals provide certain services, regardless of the recipient's ability to pay, 42 U.S.C. § 1395dd, while Congress has not imposed similar mandates outside of the health care system. This purported limiting principle is illusory, as it is based solely upon the fact that, at present, Congress has elected to impose a provider mandate regarding emergency health care but not other goods or services. This Court rejected a similar argument in

Morrison. Although the statute prohibited its application in family law cases, this Court noted, "[u]nder our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace." *Morrison*, 529 U.S. at 616; *see also id.* at 616, n.7 (noting that courts have the authority to decide whether Congress has *exceeded the outer bounds of its power*, while "political accountability is and has been the only limit on Congress' exercise of the commerce power *within that power's outer bounds*"). Congress cannot support an unconstitutional assertion of power by simply making a non-binding promise not to go even further in the future. *Cf. United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

The findings Congress set forth to support the individual mandate also illustrate the limitless bounds of Congress's power under the Federal Government's theory. Congress stated that "[t]he economy loses up to $207,000,000,000 a year because of the poorer health and shorter lifespan of the uninsured," and declared that the individual mandate would "significantly reduce this economic cost." 42 U.S.C. § 18091(2)(E). If the economic impact of Americans' poor health provided a sufficient basis for Congress to mandate that individuals buy health insurance, Congress could also mandate that individuals take other actions considered necessary to improve health and lengthen life expectancies – such as requiring

Americans to buy a gym membership, keep a specific body weight, or maintain a healthier diet – or pay penalties for failing to do so.

Congress also alleged that the individual mandate would lower the cost of health insurance premiums for those who buy insurance by reducing cost-shifting. 42 U.S.C. § 18091(2)(F). The Federal Government made a similar cost-shifting argument in *Lopez*, 514 U.S. at 563-64, but this Court held that Congress can only reach "*economic activity*" that substantially affects interstate commerce; neither gun possession nor lawful presence in the United States is economic activity.

In a similar vein, Congress declared that requiring individuals to buy health insurance will benefit those who participate in the health insurance market in various ways, such as by "creating effective health insurance markets in which improved health insurance products . . . can be sold," "reduc[ing] administrative costs[,] and lower[ing] health insurance premiums." 42 U.S.C. § 18091(2)(I), (J). Similar arguments, however, could be made for virtually any market, as forcing unwilling participants into a market would likely benefit voluntary market participants in a variety of ways.

In sum, the individual mandate's unprecedented requirement to buy a product from a private company is inconsistent with our constitutional tradition. Although the ACA is the first federal law relying on the Commerce Clause to cross the line between

encouraging increased market activity and *mandating* individual purchases, it will certainly not be the last if the individual mandate is upheld.

B. The individual mandate is not authorized by the Necessary and Proper Clause.

Article I, Section 8 grants Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The individual mandate exceeds Congress's authority under this Clause, a provision that this Court has characterized as "the last, best hope of those who defend *ultra vires* congressional action." *Printz*, 521 U.S. at 923.

Although the Federal Government has focused its attention on the alleged necessity of the individual mandate to avoid negative consequences that other portions of the ACA would create, *necessity* is only half of the equation; a federal law must also be *proper* (*i.e.*, consistent with the letter and spirit of the Constitution and our system of dual sovereignty) to be within the scope of the Necessary and Proper Clause. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819); *see also Printz*, 521 U.S. at 923-24 (noting that a law is not "proper" if it "violates the principle of state sovereignty"). Given the wide-ranging implications of the arguments offered in support of the

individual mandate, the fact that the Commerce Clause does not authorize the individual mandate (as discussed previously) is strong evidence that it also exceeds the scope of the Necessary and Proper Clause.

In *United States v. Comstock*, 130 S. Ct. 1949 (2010), this Court upheld a federal civil commitment statute that authorized the continued detention of mentally ill, sexually dangerous federal prisoners beyond their normal release date. This Court based its conclusion "on five considerations, taken together":

> (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope.

Id. at 1965.

Regarding the first factor, this Court stated that "the Necessary and Proper Clause grants Congress broad authority to enact federal legislation." *Id.* at 1956. This Court quoted *McCulloch*, which stated, "'[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.'" *Id.* (quoting *McCulloch*, 17 U.S. at 421). A statute based

upon the Necessary and Proper Clause must be "a means that is rationally related to the implementation of a constitutionally enumerated power." *Id.*

With regard to the second and third factors, this Court characterized the statute as "a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades." *Id.* at 1958. The statute was a relatively minor supplement to another statute "which, since 1949, has authorized the post-sentence detention of federal prisoners who suffer from a mental illness and who are thereby dangerous (whether sexually or otherwise)." *Id.* at 1961. The statute satisfied "'review for means-end rationality'" because it "represent[ed] a rational means for implementing a constitutional grant of legislative authority." *Id.* at 1962. This Court held that the statute was "reasonably adapted" to "Congress' power to act as a responsible federal custodian." *Id.* at 1961.

This Court also held that the statute met the fourth factor of "properly account[ing] for state interests." *Id.* at 1962. The statute "require[d] *accommodation* of state interests" by providing the State in which the prisoner lived or was tried with a right to assume responsibility for the prisoner, which would end federal government involvement. *Id.* at 1962; *see also id.* at 1967-68 (Kennedy, J., concurring) ("It is of fundamental importance to consider whether essential attributes [of federalism] are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that

the power is not one properly within the reach of federal power.").

Finally, this Court held that "the links between [the statute] and an enumerated Article I power are not too attenuated. Neither is the statutory provision too sweeping in its scope." *Id.* at 1963. The link between the power to imprison offenders and the power to ensure that they do not endanger the safety of other prisoners or the public is a close one. *Id.* at 1964. Importantly, this Court's holding would not "confer[ ] on Congress a general 'police power, which the Founders denied the National Government and reposed in the States'" because the statute was "narrow in scope." *Id.* (quoting *Morrison*, 529 U.S. at 618). The statute had "been applied to only a small fraction of federal prisoners," and its reach was "limited to individuals already in the custody of the Federal Government." *Id.* (citations omitted). As such, this Court concluded that the statute was "a reasonably adapted and narrowly tailored means of pursuing the Government's legitimate interest as a federal custodian in the responsible administration of its prison system." *Id.* at 1965.

The individual mandate fails the *Comstock* factors and, therefore, exceeds Congress's authority under the Necessary and Proper Clause. Unlike the statute at issue in *Comstock*, the individual mandate is not "a modest addition" to previous federal law but rather is "sweeping in its scope." *Id.* at 1958, 1963. There is no history at all of congressional mandates based upon the Commerce Clause requiring

individuals to purchase a good or service from a private company for the rest of their lives. *See also Lopez*, 514 U.S. at 563 (finding it significant that the Act "plows thoroughly new ground and represents a sharp break with the long-standing pattern of federal firearms legislation."). It takes an immense (and unconstitutional) leap to go from imposing regulations upon the health insurance industry to mandating individual participation in the health insurance market.

Moreover, the individual mandate tramples upon State interests. Before the individual mandate, States were free to determine whether to adopt a mandatory insurance system similar to Massachusetts's or maintain a voluntary free market system. *See* 42 U.S.C. § 18091(2)(D). That is no longer the case. If the individual mandate is upheld, many similar federal laws requiring individuals to buy goods or services would be possible (perhaps likely), further eroding State and local government authority in favor of a broad federal police power.

In addition, the Constitution does not give Congress *carte blanche* to enact any provision of its choosing so long as it bears some connection to a larger regulatory scheme. *See generally Comstock*, 130 S. Ct. at 1970 (Alito, J., concurring) ("The Necessary and Proper Clause does not give Congress *carte blanche*."). The individual mandate's findings section declares: "[T]he Federal Government has a significant role in regulating health insurance. [The individual mandate] is an essential part of this larger regulation of economic activity, and the absence of the requirement

would undercut Federal regulation of the health insurance market." 42 U.S.C. § 18091(2)(H). Congress made a similar argument with respect to the individual mandate's connection to ACA provisions prohibiting insurance companies from denying coverage based upon preexisting medical conditions. 42 U.S.C. § 18091(2)(I). The implications of this line of reasoning are far-reaching for the reasons stated above with respect to the Commerce Clause. Such a broad, unprecedented assertion of power clearly fails the test for "means-end rationality," *see Comstock*, 130 S. Ct. at 1961-62, and is by no means "appropriate" or "consist[ent] with the letter and spirit of the constitution," *McCulloch*, 17 U.S. at 421. In a word, the individual mandate is not *proper*. It is unconstitutional, and the Eleventh Circuit's ruling on this point should be affirmed.[3]

---

[3] Section 5000A is not supported by Congress's taxing power either. The character of Section 5000A's penalty is not one of a tax, but one of a regulatory penalty: (1) Congress replaced the term "tax" with the term "penalty" in the final version of Section 5000A; (2) Congress used the term "tax" to describe other exactions in the ACA; (3) Congress expressly relied on its Commerce Clause power, not its taxing power, to enact Section 5000A; (4) Congress deleted traditional IRS enforcement methods (such as criminal penalties, liens, and levies) for failure to pay the penalty; and (5) Congress did not identify in the ACA any revenue that would be raised from this penalty, whereas Congress specifically listed seventeen other revenue-generating provisions in the ACA. *E.g.*, *Florida v. United States Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1139-40 (N.D. Fla. 2010); *U.S. Citizens Ass'n v. Sebelius*, 754 F. Supp. 2d 903, 911-24 (N.D. Ohio 2010).

CONCLUSION

Amici curiae respectfully request that this Court affirm the Eleventh Circuit's judgment that the individual mandate is unconstitutional.

Respectfully submitted,

JAY ALAN SEKULOW
Counsel of Record
JORDAN SEKULOW
STUART J. ROTH
COLBY M. MAY
JAMES M. HENDERSON SR.
WALTER M. WEBER
EDWARD L. WHITE III
ERIK M. ZIMMERMAN
MILES L. TERRY
AMERICAN CENTER FOR
LAW & JUSTICE
[redacted]

February 8, 2012

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

No. 11-398

IN THE
Supreme Court of the United States

DEPT. OF HEALTH AND HUMAN SERVICES, *et al.*
Petitioners,

v.

STATE OF FLORIDA, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

AMICI CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION, THE SOCIAL SECURITY INSTITUTE AND THE 10TH AMENDMENT FOUNDATION, INC. IN SUPPORT OF RESPONDENTS ON MINIMUM COVERAGE

PETER FERRARA
Counsel of Record
AMERICAN CIVIL RIGHTS UNION
310 Cattell Street
Easton, PA 18042
(703) 582-8466
peterferrara@msn.com

Counsel for Amici Curiae
The American Civil Rights Union
The Social Security Institute
The 10th Amendment Foundation

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
PRELIMINARY STATEMENT	6
ARGUMENT	8
I. THE INDIVIDUAL MANDATE REGULATES INDIVIDUALS NOT PARTICIPATING IN INTERSTATE COMMERCE FOR HEALTH INSURANCE	8
II. THE INDIVIDUAL MANDATE COMPELS INDIVIDUALS TO PURCHASE HEALTH INSURANCE SOLD ONLY WITHIN COMPLETELY INTRASTATE MARKETS BY LAW, AND SO DOES NOT INVOLVE REGULATION OF INTERSTATE COMMERCE FOR THIS REASON AS WELL	17
III. THE INDIVIDUAL MANDATE CANNOT BE JUSTIFIED UNDER THE NECESSARY AND PROPER CLAUSE	19
IV. CONGRESS CAN ACHIEVE ALL THE SOCIAL GOALS MEANT TO BE ADDRESSED THROUGH THE INDIVIDUAL MANDATE THROUGH ALTERNATIVE MEANS THAT ARE FULLY CONSTITUTIONAL	29
CONCLUSION	31

TABLE OF AUTHORITIES

CASES: Page

Bond v. United States, 131 S. Ct. 2355 (2011) 7

Free Enterprise Fund v. Public Co. Accounting Oversight Board, 130 S. Ct. 3138 (2010) 22

Gonzalez v. Oregon, 546 U.S. 243 (2006) 15

Gonzalez v. Raich, 545 U.S. 1 (2005) 11, 23

Gregory v. Ashcroft, 501 U.S. 452 (1991) 16

I.N.S. v. Chadha, 462 U.S. 919, 944 (1983). 23

Jinks v. Richland Co., 538 U.S. 456 (2003). 19

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 19, 23

New York v. United States, 505 U.S. 144 (1992) 7, 16, 20

Printz v. United States, 521 U.S. 898 (1997) 20

Seven-Sky v. Holder, 661 F.3d 1(D.C. Cir. 2011) 13

United States v. Comstock, 130 S. Ct. 1949 (2010) 16, 19, 20

United States v. Lopez, 514 U.S. 549 (1995) 9, 14, 15, 19

United States v. Morrison, 529 U.S. 598 (2000) 16

United States v. South-Eastern Underwriters, Ass'n, 322 U.S. 533 (1944) 18

TABLE OF AUTHORITIES—Continued

Page

Virginia v. Sebelius, No. 3:10-cv-188 (E.D. Va. August 2, 2010) 10

Wickard v. Filburn, 317 U.S. 111 (1942) 11

CONSTITUTION

U.S. Const. art. I, §8, cl. 3 ..... *passim*

U.S. Const. art. I, §8, cl. 18 ..... *passim*

U.S. Const. amend. VIII 20

U.S. Const. amend. X 3, 20

STATUTES:

26 U.S.C. § 501(c)(3) 1

26 U.S.C. § 501(c)(4) 2

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) ..... *passim*

§ 1501 ..... 23, 24

§ 1502 23

§ 1511 23

§ 1513 23

§ 2701 21

§ 2702 21

§ 2704 21

§ 2705 21

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES: Page

American Academy of Actuaries, *Letter to The Honorable Nancy Pelosi and The Honorable Harry Reid, Re: Patient Protection and Affordable Care Act (H.R. 3590) and Affordable Health Care for America Act (H.R. 3962)* (January 14, 2010) 24

Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds, *The 2010 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds* (August 5, 2010) 29

Congressional Budget Office, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act*, Letter to the Honorable, Evan Bayh (November 30, 2009) 25

Congressional Budget Office, *The Budget and Economic Outlook: Fiscal Years 2011 to 2021* (January, 2011) 28

Congressional Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, CBO Memorandum (August, 1994) 12

TABLE OF AUTHORITIES—Continued

Page

CRS Report R40725, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis,* Jennifer Staman and Cynthia Brougher (July 24, 2009) 13

Peter Ferrara, *The Obamacare Disaster: An Appraisal of the Patient Protection and Affordable Care Act*, Heartland Policy Study No. 128, Heartland Institute, Chicago, Ill. (August, 2010) 30

Peter Ferrara and Larry Hunter, "*How ObamaCare Guts Medicare*," The Wall Street Journal (September 9, 2010) 29

Richard S. Foster, Chief Actuary, Centers for Medicare and Medicaid Services, *Estimated Financial Effects of the 'Patient Protection and Affordable Care Act,' as Amended* (April 22, 2010) 25, 28

Richard S. Foster, Chief Actuary, Centers for Medicare and Medicaid Services, *Projected Medicare Expenditures under an Illustrative Scenario with Alternative Payment Updates to Providers* (August 5, 2010) 27

The Founder's Constitution, Vol. 2, Art. I, Section 8, Clause 3 (Commerce) 14

TABLE OF AUTHORITIES—Continued

Page

Will Fox, FSA, MAAA, and John Pickering, FSA, MAAA, *Hospital and Physician Cost Shift: Payment Level Comparison of Medicare, Medicaid, and Commercial Payers*, Milliman, Inc. (December, 2008) 28

John Goodman, *Four Trojan Horses*, Health Alert, National Center for Policy Analysis (April 15, 2010) 23-24

Letter of Richard J. Hillman, Director, Financial Markets and Community Investment, Government Accountability Office (GAO) to Michael G. Oxley, Chairman, Committee on Financial Services, House of Representatives, GAO-05-816R, Ultimate Effects of McCarran-Ferguson Federal Antitrust Exemption on Insurer Activity are Unclear (July 28, 2005) 18

Testimony of J. Robert Hunter, Director of Insurance, Consumer Federation of America, Before the Committee on the Judiciary of the United States Senate, S. Hrg. 111-458 – Prohibiting Price Fixing and Other Anti-Competitive Conduct in the Health Insurance Industry (October 14, 2009) 18

Kaiser Family Foundation, http://healthreform.kff.org/SubsidyCalculator.aspx 9

"*The Massachusetts Health Mess*," The Wall Street Journal (July 11, 2009) 26

TABLE OF AUTHORITIES—Continued

Page

Merrill Mathews, *"Should We Abandon Risk Assessment in Health Insurance,"* Issues and Answers No. 154, Council for Affordable Health Insurance (May, 2009) 25

NASCHIP, *Comprehensive Health Insurance for High-Risk Individuals: A State-by-State Analysis*, 22nd Edition, 2008-2009 (Denver, 2008) 30, 31

Sally C. Pipes, *The Truth About Obamacare*, (Wash DC: Regnery, 2010) 27

Sally C. Pipes, *Mass Health Meltdown Is Your Future*, Pacific Research Institute (May 25, 2010) 26

PriceWaterhouseCoopers, *Impact Potential of Health Reform on the Cost of Private Health Insurance Coverage* (October, 2009) 25

Chris Sagers, *Much Ado About Pretty Little: McCarran-Ferguson Repeal in the Health Care Reform Effort*, 28 YALE LAW AND POLICY REVIEW 325 (2010) 18

Greg Scandlen, *Three Lessons from Massachusetts*, National Center for Policy Analysis, Brief Analysis No. 667 (July 28, 2009) 26

Senate Budget Committee, *Minority Staff, Budget Perspective: The Real Deficit Effect of the Democrats' Health Package* (March 23, 2010) 28-29

TABLE OF AUTHORITIES—Continued

Page

Michael Tanner, *Massachusetts Miracle or Massachusetts Miserable: What the Failure of the "Massachusetts Model" Tells Us about Health Care Reform*, Cato Institute Briefing Papers No. 112 (June 9, 2009) 25-26

Grace Marie Turner, *"The Failure of RomneyCare,"* The Wall Street Journal (March 17, 2010) 26

Grace Marie Turner and Tara Persico, *Massachusetts' Health Reform Plan: Miracle or Muddle?*, Galen Institute (July, 2009) 25

Wellpoint, Inc., *Impact of Health Reform on Premiums* (October, 2009) 25

J.P. Wieske and Merrill Matthews, *Understanding the Uninsured and What to Do About Them*, Council for Affordable Health Insurance (2007) 30

Aaron Yelowitz and Michael F. Cannon, *The Massachusetts Health Plan: Much Pain, Little Gain*, Policy Analysis No. 657, Cato Institute, January (2010) 26

INTEREST OF THE *AMICI CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide, including briefs filed in the instant case on the severability and Medicaid issues.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal

---

[1] Peter Ferrara authored this brief for the American Civil Rights Union (ACRU), the Social Security Institute (SSI), and the 10th Amendment Foundation. No counsel for either party authored the brief in whole or in part and no one apart from the ACRU, SSI or 10th Amendment Foundation made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and were timely notified.

Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

The Social Security Institute is a 501(c)(4), non-profit foundation dedicated to reform of the nation's entitlement programs.

The 10th Amendment Foundation, Inc. is a grass roots, non-profit, non-partisan educational foundation based in Virginia and Tennessee, that opposes attempts by the federal government to exceed its limited powers under the U.S. Constitution.

The Foundation believes that not only does the individual mandate to purchase health insurance violate the Commerce Clause but also that many other provisions of the law, including those that violate basic individual liberty and/or require the disclosure of confidential patient information, violate privacy rights protected by of the Constitution. In that regard, the Foundation intends to pursue related litigation challenging these other provisions if the Court either upholds the individual mandate or strikes it down but does not sever the mandate from the rest of the statute.

This case is of interest to the *Amici* because we seek to ensure that the Constitutional limits to

federal power are fully recognized and enforced. That includes in regard to this case that the scope and boundaries of the Commerce Clause be fully respected and maintained, and properly applied to analysis of the constitutionality of the Patient Protection and Affordable Care Act.

The *Amici* are also concerned with the increasing erosion of federalism and the diminution of the powers that the Tenth Amendment reserves to the individual states and the people, thereby resulting in serious curtailment of liberty and individual freedom.

SUMMARY OF ARGUMENT

The individual mandate compels the uninsured who are not participating in any interstate market for health insurance to purchase comprehensive health insurance complying with all of the benefit mandates and other requirements of the Patient Protection and Affordable Care Act[2] ("ACA"), from insurance companies validated by the federal government as providing the required insurance. Petitioners rely upon the Commerce Clause as the enumerated power supposedly delegating authority to the federal government for this regulatory compulsion.

But the Commerce Clause grants Congress the power to regulate interstate commerce. It does not

---

[2] Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

grant Congress the power to compel individuals to enter into interstate commerce. The Congress itself has recognized this for 220 years, as it has never before enacted a law compelling individuals to purchase particular products and services. Anything like that has always before been recognized as a function of the police power reserved to the states.

As a result, as the courts recognized below, and has been uniformly recognized in related litigation challenging the ACA in courts across the country, no precedent exists upholding anything like the individual mandate compelling all citizens in America to purchase particular products and services.

Upholding the individual mandate here would leave no principled limit on the federal government's powers. As a result, it would demolish the most fundamental doctrine of the Constitution, that the federal government is limited to delegated, enumerated powers.

Every economic decision an individual makes, when aggregated with everyone else, substantially affects interstate commerce in the way the federal government is asserting here. The federal government is claiming here the unlimited power to control every economic decision every individual makes.

Indeed, the unlimited Commerce Clause power Petitioners claim here would be indistinguishable from a national police power, with the federal government authorized to regulate and enforce order to

advance any vision of the general welfare, morals, health, and safety. But if the federal government were considered to hold such a national police power, then the concept of enumerated, delegated powers to the federal level, with traditional government powers otherwise remaining with the states, would be obliterated. All distinctions between federal power and state power, and any scope for state sovereignty, would be demolished. That would destroy a second fundamental doctrine of the Constitution, the constitutional framework of federalism. That is why this Court has always ruled that the police power belongs to the states and not the federal government.

Moreover, the individual mandate compels individuals to purchase health insurance sold only within completely intrastate markets by law, and so does not involve regulation of interstate commerce for this reason as well.

The Necessary and Proper Clause is not a loophole that allows the federal government to exercise authority beyond the delegated, enumerated powers of the Constitution. The Necessary and Proper Clause does not provide an independent justification for the individual mandate, apart from the Commerce Clause. The individual mandate does not carry into execution a federal power delegated and enumerated under the Commerce Clause, or under any other delegated and enumerated power. Consequently, the individual mandate cannot be justified under the Necessary and Proper Clause.

Finally, in the present case, Congress can choose alternative means to achieve all the social goals

meant to be addressed through the individual mandate. So even if the individual mandate is unconstitutional, that does not mean that anyone has to suffer without essential health care.

PRELIMINARY STATEMENT

Upholding the individual mandate in this case would require tearing down fundamental pillars of the entire Constitutional architecture, like blind Sampson pushing over the pillars of the temple, causing it to collapse on the heads of everyone inside.

The first pillar to fall would be the concept of the Constitution as based on the doctrine of limited, enumerated powers for the federal government. If the Commerce Clause could be read to empower the federal government to force every individual in the country into interstate commerce through a mandate that everyone must buy particular products or services as designated by the federal government, then the Commerce Clause would be the power that ate the limits of federal authority. Federal power would then be of unlimited reach, as the Commerce Clause would then grant federal authority not only to regulate those in interstate commerce, but also to compel anyone to participate in such commerce, and thereby submit to federal regulation and control.

As the District Court below explained, "[i]f some type of already-existing activity or undertaking were not considered to be a prerequisite to the exercise of commerce power,...it would be virtually *impossible* to posit *anything* that Congress would be without power to regulate." Pet. App. 325a. Similarly, the Eleventh

Circuit on appeal recognized that, "[a]pplying aggregation principles" to hold that "an individual's decision not to purchase a product" substantially affects commerce "would expand the substantial effects doctrine to one of unlimited scope." Pet. App. 113a.

The second pillar to fall would be the Constitutional framework of federalism. The power to compel the purchase of health insurance for the public good is a function of the police power reserved to the states, and denied to the federal government by the Constitution and this Court's precedents. If the federal government is now to hold a national police power, then the Constitutional framework of federalism, with limited, enumerated powers delegated to the federal government, and the remaining powers of government retained by the states, would be obliterated.

This Court has repeatedly refused to allow that before. That is because this Court has long recognized that the Constitution's federalism is another component of the Constitution's separation of powers, further protecting the liberty of the people. *E.g.*, *New York v. United States*, 505 U.S. 144, 181 (1992) ("federalism secures to citizens the liberties that derive from the diffusion of sovereign power."); *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)(In "denying any one government complete jurisdiction over all the concerns of public life,...federalism protects the liberty of the individual from arbitrary power.").

These are the reasons that the Eleventh Circuit below concluded that, "[t]he federal government's assertion of power, under the Commerce Clause, to issue an economic mandate for Americans to purchase insurance from a private company for the entire duration of their lives is unprecedented, lacks cognizable limits, and imperils our federalist structure." Pet. App. 155a–56a. These are the reasons that the District Court below concluded that "the individual mandate is neither within the letter nor the spirit of the Constitution." Pet. App. 348a. And these are the reasons that this Court must find the individual mandate unconstitutional, to preserve the fundamental integrity of the Constitution.

ARGUMENT

I. THE INDIVIDUAL MANDATE REGULATES INDIVIDUALS NOT PARTICIPATING IN INTERSTATE COMMERCE FOR HEALTH INSURANCE.

The individual mandate compels the uninsured who are not participating in any interstate market for health insurance to purchase comprehensive health insurance complying with all of the benefit mandates and other requirements of the ACA, from insurance companies validated by the federal government as providing the required insurance. Petitioners rely upon the Commerce Clause as the enumerated power supposedly delegating authority to the federal government for this regulatory compulsion. They repeatedly call this individual mandate,

"the minimum coverage provision." The Kaiser Family Foundation estimates that this "minimum coverage" will cost families roughly $20,000 per year to start. Kaiser Family Foundation, http://healthreform.kff.org/SubsidyCalculator.aspx

As the Supreme Court stated in the seminal case of *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), up until now the reach of the Commerce Clause has been limited to delegating the power to regulate (1) "use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce;" and (3) "activities that substantially affect interstate commerce." But an uninsured individual is not using the channels of interstate commerce for health insurance, is not involved with any instrumentality of interstate commerce in regard to health insurance, and is not engaged in any "activity" at all in regard to health insurance, substantially affecting interstate commerce or otherwise. Therefore, the Commerce Clause does not delegate the power to impose the individual mandate forcing individuals to enter the market and purchase health insurance he may not need or want.

The Commerce Clause grants Congress the power to regulate interstate commerce. It does not grant Congress the power to compel individuals to enter into interstate commerce. The Congress itself has recognized this for 220 years, as it has never before enacted a law compelling individuals to purchase particular products and services, which the authorities cited below make clear. Anything like that has

always before been recognized as a function of the police power reserved to the states.

The District Court below recognized all this in denying Defendants' motion to dismiss on this issue, saying in regard to the individual mandate, "[T]he Commerce Clause and Necessary and Proper Clause have never been applied in such a manner before. The power that the individual mandate seeks to harness is simply without prior precedent." Slip Op. at 61. On the merits, the court held, "Never before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive and residing in the United States." Pet. App. 319a. The court added that "[i]t would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause." Pet. App. 324a.

The Eleventh Circuit on appeal affirmed this ruling, holding that the mandate is "unprecedented" and that "th[is] Court has never ... interpret[ed] the Commerce Clause to allow Congress to dictate the financial decisions of Americans through an economic mandate." Pet. App. 104a-05a. The court added that, "[t]he power to regulate commerce, of course, presupposes that something exists to regulate, but the mandate does not regulate any existing commerce." Pet. App. 98a.

The District Court in *Virginia v. Sebelius*, No. 3:10-cv-188 (E.D. Va. July 1, 2010) reached the same conclusion, saying, "Never has the Commerce Clause and associated Necessary and Proper Clause been extended this far." Slip Op. at 25. The Court

reiterated, "No specifically articulated constitutional authority exists to mandate the purchase of health insurance or the assessment of a penalty for failing to do so." Slip Op. at 24.

The individual mandate goes beyond the previous outer limits of Commerce Clause jurisprudence in *Wickard v. Filburn*, 317 U.S. 111 (1942) and *Gonzalez v. Raich,* 545 U.S. 1 (2005). The farmer in *Wickard* affirmatively acted in the voluntary activity to farm and produce wheat which was part of the national, and therefore interstate, stock of wheat. The aggregate of all farmers such as Filburn who consumed their own grown wheat consequently substantially affected the interstate commerce in wheat under the economic laws of supply and demand. Moreover, part of Filburn's "consumption" of his own wheat was to feed it to his farm animals, who produced milk, poultry, and eggs, that he sold in interstate commerce. 317 U.S. at 114. The parties in *Wickard*, in fact, stipulated that such consumption by farmers of their own home grown wheat amounted to more than 20% of domestic U.S. consumption of wheat. *Id.* at 125, 127. Similarly, in *Raich*, the defendant affirmatively acted to grow and produce marijuana, which was part of the total interstate stock of the drug.

But the individual mandate in the present case compels and regulates entirely uninsured individuals who have taken no voluntary, affirmative act at all in regard to health insurance. The District Court below recognized this distinction as well in denying Defendant's Motion to Dismiss on this issue. Slip Op. at 63.

This was recognized as well by the Congressional Budget Office (CBO) in considering the budget treatment of the individual mandate in the Clinton Administration's health care proposals. The CBO said at the time,

> A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States. An individual mandate would have two features that, in combination, would make it unique. First, it would impose a duty on individuals as members of society. Secondly, it would require people to purchase a specific service that would be heavily regulated by the federal government.

The Budgetary Treatment of an Individual Mandate to Buy Health Insurance, CBO Memorandum, at 1 (August, 1994). Similarly, the opinion of the Congressional Research Service regarding the individual mandate of the ACA, provided in response to a request from the Senate Finance Committee, stated,

> Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress

> may use this Clause to require an individual to purchase a good or service.

Cong. Research Serv., *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* at 3 (2009).

The CBO and the Congressional Research Service consequently both affirm that the Congress itself has recognized for 220 years that the Commerce Clause does not grant it the power to compel individuals to enter interstate commerce by requiring them to purchase particular products or services, because it has never before passed a law doing so. *Accord: Seven-Sky v. Holder*, 661 F.3d 1, 14 (D.C. Cir. 2011).

To extend the Commerce Clause as far as the Petitioners seek would leave no principled limit to the federal government's power to regulate under the Commerce Clause. If Congress can compel an individual who is not even participating in interstate commerce in the good or service at issue to purchase the good or service from another citizen or business, which purchase it then regulates in great detail, where is the limit?

The federal government could then require individuals to purchase cars from auto companies it has bailed out, or nationalized. It could compel everyone to purchase cars or housing just to promote the general economy. Any time it wanted to provide a subsidy to any company or industry, it could do so simply by requiring everyone to buy the product or service of the favored enterprises. It could require

individuals to purchase insurance from companies who contributed to the President's reelection campaign. It could require individuals to purchase goods or services from companies that are unionized by the President's supporters. It could mandate that individuals buy and take certain vitamins or nutritional supplements. It could require individuals to visit their dentist for annual checkups, or submit to other preventive care, on the grounds that this would reduce health costs over the long run.

Every economic decision an individual makes, when aggregated with everyone else, substantially affects interstate commerce in the way the federal government is asserting here. The federal government is claiming here the unlimited power to control every economic decision every individual makes.

This is several roads too far from the original Commerce Clause power which, as James Madison explained,

> grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged.

The Founder's Constitution, Vol. 2, Art. I, Section 8, Clause 3 (Commerce). That is why the Supreme Court in *Lopez* has already rejected the notion of

unlimited Commerce Clause power, holding that it will strike down regulation under the Commerce Clause which leaves no principled limit to federal power under the Clause. The Court said, "the Constitution's enumeration of powers does not presuppose something not enumerated and that there will never be a distinction between what is truly national and what is truly local." 514 U.S. at 567-68. Justice Kennedy added further in concurrence in *Lopez* in terms quite apt for the present case, "[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or another level of Government has tipped the scales too far." *Id.* at 578.

Indeed, the unlimited Commerce Clause power Petitioners claim here would be indistinguishable from a national police power, with the federal government authorized to regulate and enforce order to advance any vision of the general welfare, morals, health, and safety. As the Court indicated in *Gonzalez v. Oregon*, 546 U.S. 243, 270 (2006), "protection of the lives, limbs, health, comfort and quiet of all persons" falls within state police power." Historically, that has encompassed state level commands to act to achieve these ends, such as vaccinations and school attendance laws, which are precisely analogous to the individual mandate at issue in the present case.

But if the federal government were considered to hold such a national police power, then the concept of enumerated, delegated powers to the federal level,

with traditional government powers otherwise remaining with the states, would be obliterated. That is why the Supreme Court held in *United States v. Morrison*, 529 U.S. 598. 618-619 (2000), "We *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power." (emphasis in original). *see also* 529 U.S. at 619 n.8 ("the principle that the Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States, is deeply ingrained in our constitutional history.").

Congress may not exercise its enumerated powers in a way that "infring[es] upon th[at] core of state sovereignty." *New York*, 505 U.S. at 177. The Court in *Morrison* rejected the argument that women who are sexually assaulted would need medical care as providing a sufficient interstate commerce connection under the Commerce Clause. 529 U.S. at 615.

As Justice Kennedy explained in *United States v. Comstock*, 130 S. Ct. 1949, 1967 (2010), "the precepts of federalism embodied in the Constitution inform which powers are properly exercised by the National Government in the first place." (Kennedy, J., concurring). The Court added in *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), "[t]he Constitution created a Federal Government of limited powers [and] withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation."

Petitioners repeatedly state that people without health insurance do actively participate in the

interstate market for health care services. But the individual mandate of the ACA does not require people to pay for health care services they have consumed. It requires them to pay for health insurance, a market in which they are free to choose not to participate at all, a freedom protected by the Constitution.

II. THE INDIVIDUAL MANDATE COMPELS INDIVIDUALS TO PURCHASE HEALTH INSURANCE SOLD ONLY WITHIN COMPLETELY INTRASTATE MARKETS BY LAW, AND SO DOES NOT INVOLVE REGULATION OF INTERSTATE COMMERCE FOR THIS REASON AS WELL.

Lawyers not steeped in health policy will not recognize how jarring the idea that the individual mandate involves regulation of the "interstate market in health insurance" will seem to those actually engaged in the business of such insurance. The individual mandate again involves a requirement that individuals and families without employer provided health insurance purchase the mandated health insurance directly in the market. *But there is no interstate market in such health insurance* for individuals and families.

By law, individuals and families seeking health insurance on their own, rather than through their employer, operate in what is called the individual insurance market. In that market, such individuals and families can only buy health insurance authorized, issued and regulated within their state. Such

individuals and families cannot under current law buy health insurance across state lines. *See Testimony of J. Robert Hunter, Director of Insurance, Consumer Federation of America, Before the Committee on the Judiciary of the United States Senate,* October 14,2009; *Letter of Richard J. Hillman, Director, Financial Markets and Community Investment, Government Accountability Office (GAO) to Michael G. Oxley, Chairman, Committee on Financial Services, House of Representatives,* July 28, 2005; Chris Sagers, *Much Ado About Pretty Little: McCarran-Ferguson Repeal in the Health Care Reform Effort 28* YALE LAW AND POLICY REVIEW *325* (2010).

Those who live in New Jersey, for example, cannot buy the much less expensive health insurance sold in Pennsylvania. Those who live in Texas cannot buy health insurance sold in Oklahoma. Those who live in California can fly to Las Vegas to gamble in the casinos there, but they can't buy health insurance sold in Nevada while they are there.

That is why the statement, "No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause," *United States v. South-Eastern Underwriters, Ass'n,* 322 U.S. 533 (1944), does not apply to the health insurance that the individual mandate compels individuals and families to buy. The individual mandate compels individuals and families to purchase health insurance which is sold only within completely intrastate markets by law, and so does not

involve regulation of interstate commerce for this reason as well.

Multistate employers providing insurance to their workers either through a health insurer or through self-insurance under ERISA do cross state lines in the business of insurance. The examples of federal regulation the Petitioners cite involve this interstate employer health insurance market.

III. THE INDIVIDUAL MANDATE CANNOT BE JUSTIFIED UNDER THE NECESSARY AND PROPER CLAUSE.

The Necessary and Proper Clause is not a loophole that allows the federal government to exercise authority beyond the delegated, enumerated powers of the Constitution. As the Court held in *Jinks v. Richland Co.*, 538 U.S. 456, 464 (2003), the Necessary and Proper Clause may not be used "as a pretext for the accomplishment of objects not entrusted to the [federal] government." *Accord: McCulloch v. Maryland*, 17 U.S. 316 (1819); *United States v. Comstock*, 130 S. Ct. 1949 (2010) (Necessary and Proper Clause does not grant the federal government a general police power, which is reserved to the states); *Lopez*, 514 U.S. at 564 ("[I]f we were to accept the government's arguments, we are hard pressed to posit any activity by an individual that Congress is without the power to regulate.").

Just as argued above in regard to the Commerce Clause, if Congress can force those not even participating in health insurance markets to purchase health insurance with detailed benefits and features

as specified by the federal government, from health insurance companies specified as providing the mandated insurance, then all limits to the scope of federal power will have been obliterated. That would obliterate as well all distinctions between federal power and state power, and any scope for state sovereignty, with the federal government granted the unlimited police power the Supreme Court has always ruled belonged to the states and not the federal authority. *E.g., New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898, 923 (1997) ("When a 'la[w]...for carrying into Execution' the Commerce Clause violates the principle of State sovereignty...it is not a 'La[w]...*proper* for carrying into Execution the Commerce Clause.'" (emphasis in original)). The reach of the Necessary and Proper Clause is also circumscribed by the Ninth and Tenth Amendments.

The Necessary and Proper Clause does not provide an independent justification for the individual mandate, apart from the Commerce Clause. As discussed above in Section I, the individual mandate does not carry into execution a federal power delegated and enumerated under the Commerce Clause, or under any other delegated and enumerated power. Consequently, the individual mandate cannot be justified under the Necessary and Proper Clause.

As Justice Kennedy explained in *Comstock*, "It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause[.]" *Comstock*, 130 S. Ct. at 1967-68

(Kennedy, J., concurring). But in this case we have 25 states suing the federal government arguing precisely that the ACA transgresses essential attributes of state sovereignty, namely the police power that the Constitution reserves to the states. Indeed, a dozen of those states have actually enacted police power legislation expressly prohibiting the operation of an individual mandate in their states.

Petitioners argue that the individual mandate is necessary for the entire regulatory scheme of the ACA to work, or even to function. That is because of the Act's regulatory requirements for guaranteed issue and community rating.

The Act requires all insurers to cover all pre-existing conditions and issue health insurance to everyone that applies, no matter how sick they are when they first apply or how costly they may be to cover. *ACA, Sections 2702, 2704, 2705.* This is what is known as guaranteed issue. The Act also prohibits insurers from varying their rates based on the medical condition or illnesses of applicants. Insurers can only vary rates within a limited range for age, geographic location, and family size. *ACA, Section 2701.* This regulatory requirement is known as modified community rating.

Under these regulatory requirements, younger and healthier people delay buying insurance, knowing they are guaranteed coverage at standard rates after they become sick. Sick people show up applying for an insurer's health coverage for the first time with very costly illnesses such as cancer and heart disease,

which the insurer must then cover and pay for. This means the insurer's covered risk pool includes more costly sick people and fewer less costly healthy people, so the costs per person covered soar. The insurer then has to raise rates sharply for everyone just to be sure to have enough money to pay all of the policy's benefits.

Those higher rates encourage even more healthy people to drop their insurance, leaving the remaining pool even sicker and more costly on average, which requires even higher premiums, resulting in a financial death spiral for the insurers and the insurance market.

The ACA tries to counter this problem by adopting the individual and employer mandates, seeking to require everyone to be covered and contributing to the pool at all times. Without these mandates, Petitioners argue, those who would remain uninsured would substantially affect the interstate market for health insurance, by allowing the remaining regulatory requirements to cause soaring health insurance premiums through the above process and ultimately a financial death spiral. That is why, Petitioners argue, the individual mandate challenged here is necessary and proper to the Act's overall regulatory scheme.

But the Necessary and Proper Clause does not justify a federal regulation such as the individual mandate that is beyond any federal power delegated and enumerated under the Constitution, even if Congress has chosen to adopt other regulations that it believes cannot function effectively without it. The

Necessary and Proper Clause does not expand federal power beyond the limits otherwise adopted in the Constitution. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *See also Raich*, 545 U.S. at 38 (Scalia, J., concurring) ("the power to enact laws enabling effective regulation of interstate commerce ... extends only to those measures necessary to make the interstate regulation effective"). The Clause authorizes federal actions necessary to effectuate delegated, enumerated powers, such as regulation of existing interstate commerce. But it does not authorize federal actions to create interstate commerce by federal compulsion so that Congress can regulate it. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983).

Moreover, the individual mandate will ultimately not solve the problems that Petitioners identify, and, therefore, the argument that it is necessary and proper under the ACA is further refuted. The ACA under its own terms and language does not sufficiently enforce the mandates for them to work to solve the fundamental problem with the ACA's regulatory requirements. Individuals who violate the mandate are required to pay $695 per family member, up to a maximum of $2,085 per family. *ACA, Sections 1501, 1502*. The penalty for employers is $2,000-$3,000 per worker. *ACA, Sections 1511, 1513*. But qualifying health insurance coverage will cost close to $20,000 per year or more, as argued above. *See also*, John Goodman, *Four Trojan Horses*,

Health Alert, National Center for Policy Analysis, April 15, 2010.

Workers and employers can save too much by just foregoing the coverage and paying the penalty, if they are caught and forced to pay it. Moreover, the Act expressly states that criminal penalties will not apply for failing to pay the fine, and it cannot be enforced by imposing liens on the taxpayer's property, so the penalties are not even enforceable. *ACA, Section 1501.* But such individuals can still buy insurance after they or a member of their family get sick.

This is why the American Academy of Actuaries warned in regard to the ACA's mandates,

> [T]he financial penalties associated with the bill's individual mandates are fairly weak compared to coverage costs....In particular, younger individuals in states that currently allow underwriting and wider premium variations by age could see much higher premiums than they face currently (and may have chosen to forego). The premiums for young and healthy individuals would likely be high compared to the penalty, especially in the early years, but even after fully phased in, thus likely leading many to forgo coverage.

American Academy of Actuaries, *Letter to The Honorable Nancy Pelosi and The Honorable Harry Reid, Re: Patient Protection and Affordable Care Act (H.R. 3590) and Affordable Health Care for America Act (H.R. 3962),* January 14, 2010, at 4-5.

And this is why studies have concluded that insurance premiums would rise sharply under the ACA's regulatory requirements. PriceWaterhouse Coopers, *Impact Potential of Health Reform on the Cost of Private Health Insurance Coverage,* October, 2009; Wellpoint, Inc., *Impact of Health Reform on Premiums,* October, 2009; Merrill Mathews, *Should We Abandon Risk Assessment in Health Insurance,"* Issues and Answers No. 154, Council for Affordable Health Insurance, May, 2009; Congressional Budget Office, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act,* Letter to the Honorable, Evan Bayh, November 30, 2009; Richard S. Foster, Chief Actuary, Centers for Medicare and Medicaid Services, *Estimated Financial Effects of the 'Patient Protection and Affordable Care Act,' as Amended,* April 22, 2010.

Further confirmation that the mandates will not work is shown by the experience of Massachusetts, where even though the state's individual mandate is enforced, it still doesn't work to solve the problem. As Petitioners themselves suggest, Massachusetts adopted reforms quite similar to the ACA in 2006, with guaranteed issue, community rating, and individual and employer mandates. Since then health insurance premiums in Massachusetts have accelerated faster than the national average, and the state now suffers the highest health insurance costs in the nation. Grace Marie Turner and Tara Persico, *Massachusetts' Health Reform Plan: Miracle or Muddle?,* Galen Institute, July, 2009; Michael Tanner,

Massachusetts Miracle or Massachusetts Miserable: What the Failure of the "Massachusetts Model" Tells Us about Health Care Reform, Cato Institute Briefing Papers No. 112, June 9, 2009; Greg Scandlen, *Three Lessons from Massachusetts,* National Center for Policy Analysis, Brief Analysis No. 667, July 28, 2009; Sally C. Pipes, *Mass Health Meltdown Is Your Future,* Pacific Research Institute, May 25, 2010; Aaron Yelowitz and Michael F. Cannon, *The Massachusetts Health Plan: Much Pain, Little Gain, Policy Analysis No. 657,* Cato Institute, January, 2010.

Harvard-Pilgrim, one of the top insurers in Massachusetts, reported that between April 2008 and March 2009, about 40% of its new enrollees dropped their coverage in less than five months, but incurred about $2,400 in monthly medical expenses, about 600% higher than normal. *"The Massachusetts Health Mess,"* The Wall Street Journal, July 11, 2009. This indicates that many in the state are waiting until they need expensive medical care to buy insurance, then dropping it after the insurer pays the costs, knowing they can always get coverage later when they need further expensive care. *See also* Grace Marie Turner, *"The Failure of RomneyCare,"* The Wall Street Journal, March 17, 2010("There is growing evidence that many people are gaming the system by purchasing health insurance when they need surgery or other expensive medical care, then dropping it a few months later.").

Consequently, the individual mandate will not work to solve the problems caused by the regulatory framework of the ACA. This is consequently a

further reason why that mandate cannot be constitutionally justified under the Necessary and Proper Clause.

Petitioners argue further that the individual mandate is necessary and proper because while the uninsured forego health insurance, they do not forego medical care. Too often, however, they are unable to pay for that care. The cost of that uncompensated care is then shifted to others, either to the public through higher insurance premiums, or to the federal government through programs to help hospitals cover these losses. Petitioners allege that the cost of such uncompensated care amounted to $43 billion in 2008.

This issue needs to be put in context. Total annual health expenditures in the U.S. run at $2.5 trillion per year. Sally C. Pipes, *The Truth About Obamacare,* (Wash D.C., Regnery, 2010), at 23. The cost-shifting Petitioners argues is so troubling amounts to 2% of those total expenditures.

A far bigger source of cost-shifting is the federal government itself. Medicaid payments to doctors and hospitals serving the poor under the program are so meager that many of the poor face great difficulty in even finding essential care. *Pipes,* at 76-79. Medicare payments are so low that in 2008, two-thirds of hospitals were already losing money on Medicare patients. Richard S. Foster, Chief Actuary, Centers for Medicare and Medicaid Services, *Projected Medicare Expenditures under an Illustrative Scenario with Alternative Payment Updates to Providers,* August 5, 2010, at 7. A study conducted

by one of the nation's top actuarial firms, Milliman, Inc., concluded that cost shifting to private insurance due to the low compensation paid to doctors and hospitals by Medicaid and Medicare raised the cost of private health insurance by $88.5 billion per year, or $1,788 for an average family of four. Will Fox, FSA, MAAA, and John Pickering, FSA.MAAA, *Hospital and Physician Cost Shift: Payment Level Comparison of Medicare, Medicaid, and Commercial Payers,* Milliman, Inc., December, 2008. That is twice the amount of cost-shifting due to uncompensated care from the uninsured that Petitioners say the individual mandate is necessary to stop.

Moreover, the ACA greatly increases that cost-shifting arising from Medicaid and Medicare under-payments, in two ways. First, it sharply expands Medicaid to 24 million new beneficiaries by 2015, an increase of over 50%, and to nearly 100 million by 2021, according to CBO. Richard S. Foster, Chief Actuary, Centers for Medicaid and Medicare Services, *Estimated Financial Effects of the 'Patient Protection and Affordable Care Act,' as Amended,* April 22, 2010; Congressional Budget Office, *The Budget and Economic Outlook: Fiscal Years 2011 to 2021,* January, 2011, at 62. That will result in far more Medicaid underpayments to be cost shifted.

Secondly, the ACA sharply cuts Medicare payments to doctors and hospitals even further, to the tune of nearly $3 trillion at least over the first 20 years of full implementation. Senate Budget Committee, Minority Staff, *Budget Perspective: The*

Real Deficit Effect of the Democrats' Health Package, March 23, 2010. Calculations based on the 2009 Annual Report of the Medicare Board of Trustees are even higher. Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds, *The 2010 Annual Report of the Boards of Trustees of the Federal Hospital Insurance and Federal Supplementary Medical Insurance Trust Funds*, August 5, 2010; Peter Ferrara and Larry Hunter, *"How ObamaCare Guts Medicare," Wall Street Journal*, September 9, 2010. Such compensation reductions would shatter all records in cost shifting.

If the ACA is making a much bigger cost shifting problem caused by government so much worse, then how can the individual mandate be necessary to address the far more minor private uncompensated care problem?

In any event, as argued above, the Necessary and Proper Clause cannot be used to justify federal action that does not execute any enumerated power delegated to the federal government.

IV. CONGRESS CAN ACHIEVE ALL THE SOCIAL GOALS MEANT TO BE ADDRESSED THROUGH THE INDIVIDUAL MANDATE THROUGH ALTERNATIVE MEANS THAT ARE FULLY CONSTITUTIONAL.

Congress cannot use unconstitutional means to achieve desirable social goals in any event. But when Congress has a choice between alternative policies to

achieve desirable ends, one of which is constitutional and the other not, it does not have policy discretion. It can only choose the constitutional course. In the present case, Congress can choose alternative means to achieve all the social goals meant to be addressed through the individual mandate. So even if the individual mandate is unconstitutional, that does not mean that anyone has to suffer without essential health care.

For example, each state can set up a high risk pool for the uninsured in the state who have become too sick to obtain new health insurance in the marketplace. Individuals who cannot purchase private health insurance as a result would obtain coverage from the risk pool. They would each pay what they reasonably can for such coverage based on their income. The pools would be subsidized by the general taxpayers to cover remaining costs. J.P. Wieske and Merrill Matthews, *Understanding the Uninsured and What to Do about Them,* Council for Affordable Health Insurance, 2007; NASCHIP, *Comprehensive Health Insurance for High-Risk Individuals: A State-by-State Analysis,* 22nd Edition, 2008-2009, Denver, 2008; Peter Ferrara, *The Obamacare Disaster: An Appraisal of the Patient Protection and Affordable Care Act*, Heartland Policy Study No. 128, Heartland Institute, Chicago, Ill., August, 2010.

This solution would not produce the unstable markets and soaring insurance premiums of guaranteed issue and community rating. Yet the true needs of the uninsured would be covered, at only a fraction of the costs of the ACA's policies. Several states have

already experimented with such risk pools. *NASCHIP, supra.* And the ACA actually sets up a version of them to provide essential coverage for those in need before the Act's much more costly individual mandate, guaranteed issue, and community rating go into effect. Such risk pools can be designed to serve all the needs of the uninsured who become uninsurable, and fully funded to the extent necessary, without violating the Constitution.

Superior alternative solutions within constitutional bounds can also be devised for the problem of cost-shifting due to uncompensated care. The federal government can provide grants to states to establish low cost, quick, collection procedures to enable doctors and hospitals to efficiently collect more of their legitimate charges from those who do have the resources to pay them. New garnishment laws can be established to allow slower, more feasible payment of medical debts over time. The medical costs for the uninsured who cannot make any significant contribution towards their expenses are a general social responsibility, and should be subsidized out of general taxes to the extent the costs are greater than doctors and hospitals can reasonably be expected to absorb as an accommodation to the needy who become sick.

CONCLUSION

For the foregoing reasons, the Court should hold the individual mandate unconstitutional and the ACA invalid.[3]

---

[3] While *amici* believe that the individual mandate is clearly unconstitutional and is not severable from the statute, if the Court rules otherwise, *amici* suggest the Court make clear in its opinion that the remaining provisions of the law not before it

Respectfully submitted,

PETER FERRARA
Counsel of Record
AMERICAN CIVIL RIGHTS UNION
310 Cattell Street
Easton, PA 18042
(703) 582-8466
peterferrara@msn.com

Counsel for Amici Curiae
The American Civil Rights Union
The Social Security Institute
The 10th Amendment Foundation

---

are not necessarily valid in order to avoid any misapprehension of the impact of the Court's ruling by the public.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-398

FILED
FEB 13 2012
OFFICE OF THE CLERK

In The
Supreme Court of the United States

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

STATE OF FLORIDA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* AMERICAN COLLEGE OF PEDIATRICIANS, CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS, AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, CATHOLIC MEDICAL ASSOCIATION, PHYSICIANS FOR LIFE, NATIONAL ASSOCIATION OF PRO LIFE NURSES, AND MEDICAL STUDENTS FOR LIFE OF AMERICA IN SUPPORT OF RESPONDENTS AND AFFIRMANCE ON THE INDIVIDUAL MANDATE ISSUE

(MINIMUM COVERAGE PROVISION)

NIKOLAS T. NIKAS
DORINDA C. BORDLEE, *Counsel of Record*
BIOETHICS DEFENSE FUND
6811 E. Voltaire Avenue
Scottsdale, AZ 85254
(480) 483-3597
dbordlee@bdfund.org

MARK L. RIENZI
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K Street NW, Suite 220
Washington, DC 20007
(202) 319-4970
Rienzi@law.edu

MAILEE R. SMITH
DENISE M. BURKE
AMERICANS UNITED FOR LIFE
655 15th Street NW, Suite 410
Washington, DC 20005
(202) 289-1478
Mailee.Smith@AUL.org
Denise.Burke@AUL.org

STEVEN H. ADEN
MATTHEW S. BOWMAN
ALLIANCE DEFENSE FUND
801 G Street NW, Suite 509
Washington, DC 20001
(202) 393-8690
saden@telladf.org
mbowman@telladf.org

CATHERINE W. SHORT
LIFE LEGAL DEFENSE FOUNDATION
P.O. Box 1313
Ojai, CA 93024-1313
(805) 640-1940
LLDFOjai@cs.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUE PRESENTED 1

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 8

I. THE ACT AND ITS INDIVIDUAL MANDATE VIOLATE THE FREE EXERCISE CLAUSE BY EFFECTIVELY IMPOSING AN "ABORTION PREMIUM MANDATE" ON MILLIONS OF AMERICANS WITHOUT REGARD TO RELIGIOUS OBJECTION 8

A. The Act effectively imposes an "Abortion Premium Mandate" that compels enrollees in certain health plans to pay a separate abortion premium from their own pocket, without the ability to decline abortion coverage based on religious or moral objection 9

B. The Act and its Individual Mandate are invalid under the Free Exercise Clause because the provisions are not generally applicable and fail strict scrutiny 17

TABLE OF CONTENTS – Continued

Page

C. Our nation has a long and deeply-rooted history of respecting and protecting the conscience rights of individuals not to be forced into the practice or funding of elective abortion 22

II. THE FOUNDERS' PROTECTION OF INDIVIDUAL LIBERTY, INCLUDING RELIGIOUS LIBERTY, IS DIRECTLY UNDERMINED BY THE ACT'S TRANSGRESSION OF THE CONSTITUTIONAL LIMITS ON CONGRESSIONAL POWER ... 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Belmont Abbey College v. Sebelius, 1:11-cv-01989-JEB (D. D.C.) 18

Bond v. United States, 131 S.Ct. 2355 (2011) 29

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) 22

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 20, 21

Clinton v. City of New York, 524 U.S. 417 (1998) 28, 29

Colorado Christian Univ. v. Sebelius, 1:11-cv-03350-CMA-BNB (D. Colo.) 18

Employment Div. v. Smith, 494 U.S. 872 (1990) 7, 19

EWTN v. Sebelius, 2:12-cv-00501-SLB (N.D. Ala., So. Div.) 18

Florida v. United States Dep't of Health and Human Servs., 648 F.3d 1235 (11th Cir. 2011) 9

Gonzales v. Carhart, 550 U.S. 124 (2007) 25

Harris v. McRae, 448 U.S. 297 (1980) 24

I.N.S. v. Chadha, 462 U.S. 919 (1983) 29

Liberty Univ. v. Geithner, 753 F. Supp. 2d 611 (W.D. Va. 2010) 14

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 22, 25

Roe v. Wade, 410 U.S. 113 (1973) 22, 23, 24

TABLE OF AUTHORITIES – Continued

Page

Stenberg v. Carhart, 530 U.S. 914 (2000) 22, 23

Thomas v. Review Bd. of Indiana Emp. Sec. Div., 450 U.S. 707 (1981) 18

CONSTITUTION

U.S. CONST. amend. I, § 1 ..... *passim*

STATUTES

42 U.S.C. § 2000bb-2000bb-4 21

42 U.S.C. § 2000bb-1(b)(1) & (2) 22

Fl. Stat. Ann. § 390.0111(8) 23

Interim Final Rule on Preventive Services, 76 Fed. Reg. 46621 (August 3, 2011) (finalized Feb. 10, 2012) 18

Pub. L. No. 111-148, 124 Stat. 119 (2010) *as amended by* the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) ..... *passim*

§ 1303 ..... 6, 10, 12, 15

§ 1303(a) 13

§ 1303(b)(1)(B) 14

§ 1303(b)(1)(B)(i) 10, 11

§ 1303(b)(1)(D)(i) 11

§ 1303(b)(1)(D)(ii) 11

§ 1303(b)(2)(A) 11, 14

TABLE OF AUTHORITIES – Continued

Page

§ 1303(b)(2)(B) 10, 14

§ 1303(b)(2)(B)(i) 11

§ 1303(b)(2)(C) 14

§ 1303(b)(3) 16

§ 1501 ..... 5, 7, 12, 20

OTHER AUTHORITIES

Abortion Haggling Looms Over Health Care Debate in Senate (Nov. 10, 2009), *available at* http://www.foxnews.com/politics/2009/11/10/abortion-haggling-looms-health-care-debate-senate#ixzz1LF6XshKX 12

Alexander Hamilton, *The Federalist* No. 84 28

Anthony Picarello and Michael Moses, *Legal Analysis of the Provisions of the Patient Protection and Affordable Care Act and Corresponding Executive Order Regarding Abortion Funding and Conscience Protection,* United States Conference of Catholic Bishops (Mar. 25, 2010), *available at* http://www.usccb.org/about/general-counsel/upload/Healthcare-EO-Memo.pdf 11, 14, 24, 26

DECLARATION OF INDEPENDENCE 28

Ernest Istook, *The Real Status Quo on Abortion and Federal Insurance*, The Heritage Foundation (Nov. 11, 2009), *available at* http://blog.heritage.org/2009/11/11/the-real-status-quo-on-abortion-and-federal-insurance/ 13

TABLE OF AUTHORITIES – Continued

Page

Helen Alvare, *How the New Healthcare Law Endangers Conscience* (June 29, 2010), *available at* http://www.thepublicdiscourse.com/2010/06/1402 26

Mark L. Rienzi, *The Constitutional Right to Refuse: Roe, Casey, and the Fourteenth Amendment Rights of Healthcare Providers*, 87 NOTRE DAME L. REV. 1, 39 (forthcoming issue), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1749788 23

Maureen L. Condic, Ph.D., *When Does Human Life Begin? A Scientific Perspective*, Westchester Institute White Paper (Oct. 2008), *available at* http://www.westchesterinstitute.net/resources/white-papers/351-white-paper 25

Medical Dictionary of the National Library of Medicine 25

Michael A. Fragoso, Note, *Taking Conscience Seriously or Seriously Taking Conscience?: Obstetricians, Specialty Boards, and the Takings Clause*, 86 NOTRE DAME L. REV. 101 (2011) 26

National Conference of State Legislatures, *Health Reform and Abortion Coverage in the Insurance Exchanges* (Nov. 2011), *available at* http://www.ncsl.org/default.aspx?tabid=21099 13

Protection of Conscience Project, *States and Territories, available at* http://www.conscienceLaws.org/laws/usa/law-usa-01.html 23

TABLE OF AUTHORITIES – Continued

Page

Robert Pear, *Making Exceptions in Obama's Health Care Act Draws Kudos, and Criticism*, THE NEW YORK TIMES, Mar. 20, 2011 at A21 19

William Larsen, HUMAN EMBRYOLOGY (3rd ed. 2001) 25

STATEMENT OF THE ISSUE PRESENTED

Whether the Patient Protection and Affordable Care Act, by virtue of the lack of general applicability of its individual mandate, violates the Free Exercise Clause of the First Amendment by effectively forcing millions of individuals to personally pay a separate abortion premium in violation of their sincerely held religious beliefs.

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are six national organizations whose members include physicians and other healthcare professionals who have a profound interest in defending the sanctity of human life in their dual roles as both healthcare providers and consumers.

As professionals with a vocation to serve every member of the human family, *Amici* are sensitive to healthcare disparities and are supportive of a variety of public, private, and charitable efforts that address healthcare affordability and accessibility. However, *Amici* have a profound interest in opposing the Act because its imposition of the non-generally applicable

[1] Pursuant to this Court's Rule 37.3(a), all parties have submitted to the Clerk blanket consents to the filing of all *amicus* briefs. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

individual mandate forces them in some health plans to make separate personal payments for elective abortion in violation of their sincerely held moral convictions. *Amici* include the following medical associations:

American College of Pediatricians ("College") is a national scientific organization of pediatricians and other healthcare professionals dedicated to the health and well-being of children. Formed in 2002, the College is committed to fulfilling its mission by producing sound policy, based upon the best available research, to assist parents, and to influence society in the endeavor of childrearing. The College currently has members in 47 states, and in four countries outside of the United States. Of particular importance to the College is the sanctity of human life from conception to natural death. As a scientific organization, the College promotes a society where all children, from the moment of their conception, are valued unselfishly.

Christian Medical & Dental Associations ("CMDA") is a non-profit national organization of Christian physicians and allied healthcare professionals with over 16,000 members. In addition to its physician members, it also has associate members from a number of allied health professions, including nurses and physician assistants. CMDA provides up-to-date information on the legislative, ethical, and medical aspects of defending conscience in health care for its members and other healthcare professionals, as well as for patients, institutions, and students in

training. CMDA is opposed to the practice of abortion as contrary to Scripture, a respect for the sanctity of human life, and traditional, historical and Judeo-Christian medical ethics.

American Association of Pro-life Obstetricians & Gynecologists ("AAPLOG") is a non-profit professional medical organization consisting of over 2,000 obstetrician-gynecologist members and associates. The American College of Obstetricians and Gynecologists (ACOG) recognizes AAPLOG as one of its largest special interest groups. The purpose of AAPLOG is to reaffirm the unique value and dignity of individual human life in all stages of growth and development from fertilization onward. AAPLOG views the physician's role as a caregiver, responsible, as far as possible, for the well-being of both the mother and her unborn child. AAPLOG is concerned about the "universal access to abortion" and the "abortion as a fundamental human right" pressures that are being brought to bear through the Act.

Catholic Medical Association ("CMA") is a non-profit national organization founded in 1932 to assist Catholic physicians in upholding the principles of their faith in the science and the practice of medicine and in witnessing to these principles within the medical profession, the Church, and society at large. Comprised of over 1,500 members covering over 75 medical specialties, CMA helps to educate the medical profession and society at large about issues in medical ethics, including healthcare rights of conscience, through its annual conferences and quarterly

journal, *The Linacre Quarterly*. CMA supports Catholic hospitals in faithfully applying Catholic moral principles in health care delivery and helps Catholic physicians to collaborate and support one another in their common goal of providing conscientious health care that respects the dignity of the human person.

Physicians for Life ("PFL") is a national non-profit medical organization that exists to draw attention to the issues of abortion, teen pregnancy, and sexually-transmitted diseases. PFL encourages physicians to educate their patients not only regarding the innate value of human life at all stages of development, but also on the physical and psychological risks inherent in abortion.

National Association of Pro Life Nurses ("NAPN") is a national not-for-profit nurses' organization with members in every state. NAPN unites nurses who seek excellence in nurturing for all, including the unborn, newborn, disabled, mentally and/or physically ill, the aged, and the dying. As a professional organization, NAPN seeks to establish and protect ethical values of the nursing profession.

Medical Students for Life of America ("MedSFLA") is a non-profit national organization of future medical professionals committed to sustainable patient health care improvement and ethical medicine. MedSFLA is an unincorporated subdivision of Students for Life of America, representing a combined 620 student groups in 48 states. The mission of MedSFLA is to highlight a rediscovery of

the patient-doctor relationship with care for every patient – regardless of race, developmental stage, socioeconomic status, and special needs.

SUMMARY OF THE ARGUMENT

Amici adopt the arguments of respondents, and present another argument that independently demonstrates the unconstitutionality of the Patient Protection and Affordable Care Act[2] ("the Act"): Its individual mandate, which is not generally applicable, effectively imposes an "abortion premium mandate" that violates the Free Exercise Clause of the First Amendment. U.S. CONST. amend. I, § 1.

Like a Russian doll, the individual mandate has nestled within it a hidden, but equally unconstitutional, scheme that effectively imposes an "abortion premium mandate" that violates the free exercise rights of millions of Americans who have religious objections to abortion. The individual mandate found in Section 1501 of the Act provides that, beginning in 2014, Americans must either purchase federally approved health insurance or pay a monetary penalty.

Section I(A) of this brief sets forth and decodes the provisions collectively referred to herein as the

[2] Pub. L. No. 111-148, 124 Stat. 119 (2010) *as amended by* the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

"abortion premium mandate." Found in Section 1303 of the Act, the infringing provisions impose inescapable requirements upon millions of Americans who will be, even unwittingly, enrolled in employer or individual health plans that happen to include elective abortion coverage.

Such enrollees are compelled by the Act to pay a separate premium *from their own pocket* to the insurer's actuarial fund designated *solely* for the purpose of paying for other people's elective abortions. As explained below, the Act denies enrollees the ability to decline abortion coverage based on religious or moral objection.

In conjunction with the forced purchase required by the individual mandate, Section 1303's abortion premium mandate thus directly encumbers the conscience and free exercise rights of millions of Americans by imposing an unconstitutional burden on them within the private insurance marketplace. Under the Act, members of *Amici* medical associations and their similarly-situated patients are subject to being unwillingly enrolled by their employer in a plan that requires them to privately pay a separate abortion premium. Alternatively, *Amici* have their marketplace choices impermissibly limited under the Act by being forced to choose between insufficient plans that respect their conscience versus other plans that happen to require an abortion premium, but that may otherwise better meet their health needs or their choice of doctor network.

Section I(B) of this brief explains that the Free Exercise Clause is implicated because the Act's government-imposed burden on *Amici*'s free exercise rights is far from neutral and generally applicable as required in *Employment Div. v. Smith*, 494 U.S. 872 (1990). Section 1501 of the Act provides express statutory *exceptions* to the individual mandate for certain religious objections, but not for religious objections to abortion. The lack of general applicability is further demonstrated by the hundreds of waivers to the individual mandate granted by the Secretary of the Department of Health and Human Services on a case-by-case basis. Because the Act and its individual mandate do not meet *Smith*'s neutral and general applicability standard, it is subject to strict scrutiny, a standard it cannot meet.

Section I(C) of this brief outlines our nation's deeply-rooted history of respecting and protecting the conscience rights of individuals to avoid being forced into the practice or *funding* of elective abortion. *Amici* emphasize how these provisions strike at and undermine their most basic principles of morality and religion that call them to respect and protect vulnerable unborn children and to avoid collaborating in the moral evil of directly paying for elective abortion.

It should be noted that the Act's violation of the Free Exercise Clause addressed in this brief arises from core provisions in the body of the Act, and are distinct from and prior to the recent regulatory decision issued by HHS to mandate virtually all employers to provide insurance coverage for sterilizations,

contraceptives and abortion-inducing drugs, without a meaningful religious employer exemption. Even without the most recent HHS developments, the abortion premium mandate provisions found in the original Act are sufficient alone to substantially burden *Amici*'s free exercise of religion.

Finally, Section II sets forth the basics of the Founders' concept of a limited government designed to protect individual liberty, which suffers when Congress oversteps its enumerated powers. This view of federalism is completely disregarded by the Act's individual mandate and abortion premium mandate, to the detriment of *Amici*'s first and foundational individual liberty, namely, religious liberty.

ARGUMENT

I. THE ACT AND ITS INDIVIDUAL MANDATE VIOLATE THE FREE EXERCISE CLAUSE BY EFFECTIVELY IMPOSING AN "ABORTION PREMIUM MANDATE" ON MILLIONS OF AMERICANS WITHOUT REGARD TO RELIGIOUS OBJECTION

The Eleventh Circuit below properly ruled that the individual mandate of the Patient Protection and

Affordable Care Act[3] ("the Act") is "an unprecedented exercise of congressional power." *Florida v. United States Dep't of Health and Human Servs.*, 648 F.3d 1235, 1311 (11th Cir. 2011). *Amici* herein adopt the arguments of respondents, and present another argument that independently demonstrates the unconstitutionality of the entire Act; namely, that even if, for the sake of argument, this Court were to find that the individual mandate is within the limits of the Commerce Clause, the Act's "abortion premium mandate" violates the Free Exercise Clause of the First Amendment. U.S. CONST. amend. I, § 1.

A. The Act effectively imposes an "Abortion Premium Mandate" that compels enrollees in certain health plans to pay a separate abortion premium from their own pocket, without the ability to decline abortion coverage based on religious or moral objection

The "individual mandate" that compels Americans by threat of penalty to purchase only federally-approved health insurance plans results in the imposition of another unconstitutional mandate that will impact millions of Americans: the "abortion premium mandate."

---

[3] Pub. L. No. 111-148, 124 Stat. 119 (2010) *as amended by* the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

The drafters of the Act sought to include, for the first time in our nation's history, health plans that cover elective abortion within the government subsidized insurance exchanges. Due to the public uproar, the drafters devised a scheme to avoid the direct *federal* funding of abortion. This goal of avoiding the use of tax-payer subsidies for abortion coverage was unfortunately achieved by a means that violates the First Amendment; namely, by compelling the tax-payer to *personally* pay a separate abortion premium. The unconstitutional scheme can be found in Section 1303, which provides that the issuer of a federally subsidized plan that covers elective abortions "shall" obtain a separate and private payment from every enrollee, without exception, to be used by the insurer solely for the payment of other people's elective abortions. Act, § 1303(b)(2)(B).

Under Section 1303 of the Act, all individuals who, even unwittingly, are enrolled in a plan – either on their own or by their employer – that happens to include elective abortion coverage are compelled by the Act to pay a separate premium from their own pocket to the insurer's actuarial fund designated solely for the purpose of paying for other people's elective abortions. As explained below, the Act denies enrollees the ability to decline abortion coverage based on religious or moral objection.

Section 1303(b)(1)(B)(i) of the Act refers to elective abortions as "Abortions For Which Public

Funding is Prohibited" ("elective abortions").[4] The Act then provides that the issuer "shall estimate the basic per enrollee, per month cost, determined on an average actuarial basis, for including coverage under a qualified health plan of the services described in paragraph (1)(B)(i) [*i.e.*, elective abortions]." Act, § 1303(b)(1)(D)(i). Section 1303(b)(1)(D)(ii) mandates that the abortion premium mandate shall not be estimated "at less than $1 per enrollee, per month."

The enrollee must separately pay the abortion premium from his or her own private funds by virtue of the Act's provision stating that in plans covering elective abortion, "the issuer of the plan shall not use any amount attributable to" either tax credits or "cost-sharing reductions" for "the purposes of paying for [elective abortion] services." Act, § 1303(b)(2)(A).

Once some Americans find themselves, for whatever reason, in plans with abortion coverage, the Act denies such enrollees the ability to decline payment for such coverage. This is evidenced by Section 1303(b)(2)(B)(i), which provides that the abortion premium "shall" be collected "without regard to the enrollee's age, sex, or family status." This mandate violates the Free Exercise Clause because the Act lacks an exception for enrollees with religious

---

[4] *See* USCCB Memo, *infra*, note 17, addressing "elective abortions" as any abortion other than in cases of rape, incest or danger to the life of the mother.

objections to abortion to decline personal payment into the insurer's abortion fund.[5]

Ironically, the offending language arose out of an attempt by Senator Ben Nelson, a pro-life Democrat, to find language that would "make it clear that [the healthcare bill] does not fund abortion with government money."[6] After first threatening a filibuster unless the Senate version included the pro-life Stupak Amendment that mirrored the Hyde Amendment, Senator Nelson later agreed to accept certain negotiated language. Now codified at Section 1303 of the Act, the "Nelson Compromise" allows the federal government to break with former federal policy[7] by

---

[5] The only religious exemption found in the entire Act is in Section 1501, which exempts groups such as the Amish who have religious objection to insurance as a whole. Section 1501 of the Act provides that the individual mandate does not apply to members of a "recognized religious sect or division" with "established tenets or teachings" that bar the "acceptance of benefits of any private or public insurance." By favoring the religious liberty of one group, but disregarding the religious objection to abortion held by millions of Americans, the Act shows itself to fail the "generally applicable" test required by this Court, as discussed in Part I(B) of this brief.

[6] *Abortion Haggling Looms Over Health Care Debate in Senate* (Nov. 10, 2009), *available at* http://www.foxnews.com/politics/2009/11/10/abortion-haggling-looms-health-care-debate-senate#ixzz1LF6XshKX (last visited Feb. 6, 2012).

[7] The Act is not in accord with the consistent federal policy since 1996. As explained by the Heritage Foundation before passage of the Act:

> The FEHBP (Federal Employees Health Benefits Plan) provides insurance for millions of federal

(Continued on following page)

allowing Americans to use federal tax credits and subsidies to buy plans that include abortion coverage, provided that their federal subsidies are not applied by insurance companies toward the abortion coverage in such plans. As explained above, this was achieved by compelling enrollees in such plans to make a separate payment from their own private funds to an insurance account designated solely for the payment of other people's elective abortions.[8] The "abortion

---

workers, including Members of Congress. Administered through the federal Office of Personnel Management, FEHBP lets workers choose from a variety of different health insurance plans, but since 1996 the law has required all of these plans to exclude abortion coverage, excepting only rape, incest and the life of the mother. And it's not just FEHBP. Military insurance through TRICARE does not cover abortion unless the mother's life is at risk. Nor does the Indian Health Service.

Ernest Istook, *The Real Status Quo on Abortion and Federal Insurance*, The Heritage Foundation (Nov. 11, 2009), *available at* http://blog.heritage.org/2009/11/11/the-real-status-quo-on-abortion-and-federal-insurance/ (last visited Feb. 6, 2012).

[8] Another part of the compromise was the inclusion of a "State Opt-Out of Abortion" provision. Under Section 1303(a), a "State may elect to prohibit abortion coverage in qualified health plans offered through an Exchange in such State," but a State may later "repeal" such law "and provide for the offering of [abortion] services through the Exchange." As of November 2011, only 13 states had enacted "opt-out" laws: Arizona, Florida, Idaho, Indiana, Kansas (in litigation), Louisiana, Mississippi, Missouri, Nebraska, Oklahoma, Tennessee, Utah, and Virginia. *See* National Conference of State Legislatures, *Health Reform and Abortion Coverage in the Insurance Exchanges* (Nov. 2011),

(Continued on following page)

premium mandate," although not referred to as such, was accurately described by a court in the Western District of Virginia:

> In plans that do provide non-excepted [elective] abortion[9] coverage, a separate payment for non-excepted [elective] abortion services must be made by the policyholder to the insurer, and the insurer must deposit those payments in a separate allocation account that consists solely of those payments; the insurer must use only the amounts in that account to pay for non-excepted [elective] abortion services. Act § 1303(b)(2)(B), (C). Insurers are prohibited from using funds attributable to premium tax credits or [federal] cost-sharing reductions . . . to pay for non-excepted [elective] abortion services. Act § 1303(b)(2)(A).

Liberty Univ. v. Geithner, 753 F. Supp. 2d 611, 643 (W.D. Va. 2010).[10]

---

available at http://www.ncsl.org/default.aspx?tabid=21099 (last visited Feb. 6, 2012).

[9] The court used the phrase "non-excepted" to describe elective abortions (all abortions other than those in cases of rape, incest or life of the mother). Act, § 1303(b)(1)(B); *see also* USCCB Memo, *infra*, note 17.

[10] The federal district court in *Liberty University v. Geithner* focused on the provisions that prohibit federal subsidies from being applied to abortion coverage, missing the point of plaintiffs' argument about the unconstitutional nature of compelling individuals to personally pay into a segregated private abortion

(Continued on following page)

Thus, while Section 1303 cleverly (though superficially) avoids the direct use of tax-payer funds to pay for elective abortions, it in fact does so by forcing private individuals to fund them directly *from their own pockets*, without regard to conscientious objection to the direct and personal funding of abortion.

To make matters worse, the Act does not require clear and sufficient advance notice of which plans in the Exchange contain coverage for elective abortion. In fact, the Act seems to provide to the contrary, such that Americans could easily be forced by the individual mandate into the unwitting purchase of an abortion plan that causes them to personally pay for elective abortions against their sincerely held religious beliefs:

> (3) RULES RELATING TO NOTICE. –
>
> (A) NOTICE. – A qualified health plan that provides for coverage of the services described in paragraph (1)(B)(i) [elective abortion] shall provide a notice to enrollees, **only** as part of the summary of benefits and coverage explanation, **at the time of enrollment**, of such coverage.
>
> (B) RULES RELATING TO PAYMENTS. – The notice described in subparagraph (A), any advertising used by the issuer with respect to the plan, any information provided

---

fund against their consciences and sincerely held religious beliefs.

> by the Exchange, and any other information specified by the Secretary shall provide information **only with respect to the total amount of the combined payments** for services described in paragraph (1)(B)(i) [elective abortion] and other services covered by the plan.

Act, § 1303(b)(3) (emphasis added). Because "enrollment" occurs after a person has already paid for the plan, that means he or she is left in the dark regarding the requirement to pay an itemized abortion premium until payment for enrollment has already been made.

An individual's free exercise of religion should not depend on the vagaries of an insurance exchange market imposed and manipulated by the Act's individual mandate that put them in this position in the first place. The Act and its individual mandate subject *Amici* and Americans with similar moral convictions or religious beliefs into the untenable position of having limited health insurance choices. First, the government forces *Amici* into the market – and then the government limits *Amici*'s options by refusing to honor and protect their rights of conscience and free exercise. In order to have the same healthcare choices as other citizens, the members of the *Amici* medical organizations must be willing to violate their consciences by entering into private contracts – possibly unwittingly or unwillingly – with private insurers in

which they must actively cooperate with their personal funds in the payment of elective abortions.[11]

B. The Act and its Individual Mandate are invalid under the Free Exercise Clause because the provisions are not generally applicable and fail strict scrutiny

For the many millions of Americans who oppose the practice of elective abortion, being forced by the government to *pay* for it – not with tax dollars, but *directly out of their own pockets* – will violate their deeply held religious beliefs and moral convictions. As this Court has explained:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial

---

[11] It is no cure to the constitutional defect to argue that someone could theoretically choose the abortion-free insurance plan required by the Nelson Compromise discussed above. First, many individuals are provided insurance by their employer and have no say as to what plan is available; they should not have to forgo employee benefits to pay more money in the individual market to protect their conscience from the Act's requirement of private abortion payments. Second, there is no guarantee that an abortion-free plan would have the required coverages or physicians in the person's preferred network. An individual should not be forced by the Act to violate her religious beliefs in order to have access to reasonable choices regarding doctor network or insurance coverage.

> pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas v. Review Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 718 (1981).

Accordingly, the Act's abortion premium mandate imposes a substantial burden on the Free Exercise rights of millions of Americans.[12]

---

[12] Not surprisingly, Congress' act of overreaching via the challenged Act to impose a coast-to-coast one-size-fits-all mandatory insurance regime has subsequently infringed religious liberties in other severe ways. In particular, the recent regulatory decision by HHS to force virtually all employers to provide insurance coverage for contraceptives, sterilizations, and abortion-inducing drugs will force many religious individuals and organizations into a choice to either violate their religion or pay exorbitant penalties that could put them out of business. *See, e.g.*, *Belmont Abbey College v. Sebelius*, 1:11-cv-01989-JEB (D. D.C.); *Colorado Christian Univ. v. Sebelius*, 1:11-cv-03350-CMA-BNB (D. Colo.); *EWTN v. Sebelius*, 2:12-cv-00501-SLB (N.D. Ala., So. Div.).

Under the Interim Final Rule on Preventive Services, 76 Fed. Reg. 46621 (Aug. 3, 2011) (finalized Feb. 10, 2012), HHS has provided a grossly inadequate religious employer exemption that would not cover most religious organizations. Nor would it cover *any* individuals morally or religiously opposed to these practices. This is because under the Interim Rule, a "religious employer" is exempt only if, *inter alia*, "it primarily serves persons who share [the organization's religious] tenets," *id.*, a requirement that itself is antithetical to the Christian call to serve all members of the human family regardless of their faith. Specifically, several *Amici* are organizations that ascribe to

(Continued on following page)

Under this Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990), the government is generally free to impose substantial burdens on religion, so long as those burdens are imposed by neutral and generally applicable law. Here, however, the burden is imposed by a law that does not meet *Smith*'s neutral and generally applicable standard. Accordingly, the individual mandate that imposes the abortion premium mandate is subject to strict scrutiny under the Free Exercise clause, a standard it cannot meet.

First, as has been well-documented in the media, the Act is replete with exceptions, and the Department of Health and Human Services has granted hundreds of waivers from its provisions on a case-by-case basis. *See, e.g.*, Robert Pear, *Making Exceptions in Obama's Health Care Act Draws Kudos, and Criticism*, THE NEW YORK TIMES, Mar. 20, 2011 at A21 (noting waivers "for more than 1,000 health plans covering 2.6 million people. . . . [E]xceptions like these have become increasingly common. They provide wiggle room in a law originally thought to be

---

religious tenets and employ persons in their mission to serve people of all faiths or no faith; yet they are left completely unprotected.

HHS has not explained the basis for this extremely cramped view of religious liberty. But regardless of HHS's reasons, it was never supposed to have the power to put religious objectors in this position in the first place because the Founders wisely denied Congress the power to pass onerously invasive laws such as the challenged Act. *See* Section II, *infra*.

strict and demanding. Maine has just won a three-year reprieve from a provision of the law. . . .").

By definition, the existence of such a system of waivers renders the law not generally applicable. As this Court said in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-38 (1993):

> As we noted in *Smith,* in circumstances in which individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." Respondent's application of the ordinance's test of necessity devalues religious reasons . . . by judging them to be of lesser import than nonreligious reasons. Thus, religious practice is being singled out for discriminatory treatment.

Second, the individual mandate itself is subject to several exceptions allowing individuals to opt-out for various reasons – including some apparently government-approved *religious* reasons – but not for moral or religious objection to personally funding abortion. For example, Section 1501 of the Act exempts from the individual mandate those who are members of a "recognized religious sect or division" with "established tenets or teachings" barring the "acceptance of benefits of any private or public insurance." Section 1501 also exempts other groups, including those participating in "health care sharing ministries," native Americans, and the poor. The existence of these exceptions demonstrates that the

government does not actually need to force every individual to purchase healthcare insurance. *See Lukumi*, 508 U.S. at 547 (no compelling interest where government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort").

In light of these waivers and exemptions, it simply cannot be said that the Act is a generally applicable law. Simply put, the law does not apply generally at all. Accordingly, the Act is subject to strict scrutiny.

Here, the Act itself shows that there is no compelling interest in forcing all Americans to purchase health insurance. Both the statutory exceptions and the hundreds of waivers confirm that the individual mandate clearly does *not* need to be imposed in every case, and that the government judges some reasons (though apparently not conscientious objection to abortion) to be sufficiently important to trump its interests. *See, e.g., id.* at 546 (strict scrutiny failed where the "proffered objectives are not pursued with respect to analogous non-religious conduct"). As such, the Act's individual mandate that imposes an abortion premium mandate is invalid under the Free Exercise Clause of the First Amendment.[13]

---

[13] For similar reasons, even if the Act were found "neutral and generally applicable," it would be invalid under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-2000bb-4,

(Continued on following page)

C. Our nation has a long and deeply-rooted history of respecting and protecting the conscience rights of individuals not to be forced into the practice or funding of elective abortion

As this Court has recognized, "the sensitive and emotional nature of the abortion controversy" provokes "vigorous opposing views" and inspires "deep and seemingly absolute convictions." *Roe v. Wade*, 410 U.S. 113, 116 (1973). This Court's abortion jurisprudence is replete with the understanding that the practice of human abortion has "profound moral and spiritual implications," *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992), and that "men and women of good conscience can disagree" about those implications and can find abortion "offensive to [their] most basic principles of morality." *Id.*

Although legal, this Court has recognized that "reasonable people" will differ as to the morality of abortion, *id.* at 853, and "there are common and respectable reasons for opposing it." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). Indeed, as recently as the 2000 *Carhart* decision, this Court acknowledged that "[m]illions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an

---

because it is not the least restrictive means of serving a compelling government interest. *Id.* at § 2000bb-1(b)(1) & (2).

innocent child," *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000).

In the wake of *Roe*, federal and state laws were quickly enacted to ensure that no provider or hospital should be forced to participate in abortions against their will. A full forty-seven states[14] have enacted laws to protect healthcare practitioners' right of conscience to some degree or another, many providing full exemptions to any health practitioner who conscientiously declines to participate in abortion. *See, e.g.*, Fl. Stat. Ann. § 390.0111(8) ("No person . . . who shall state an objection to such procedure on moral or religious grounds shall be required to participate in the procedure which will result in the termination of pregnancy.").[15] In many ways, the widespread agreement to protect provider conscience is unique in our history, and it ranks the right of individual conscience in the abortion area as, in fact, fundamental.[16]

---

[14] *See, e.g.*, Protection of Conscience Project, *States and Territories, available at* http://www.consciencelaws.org/laws/usa/law-usa-01.html (last visited Feb. 6, 2012).

[15] For a broader discussion of the widespread adoption of such conscience provisions in the wake of *Roe v. Wade*, see Mark L. Rienzi, *The Constitutional Right to Refuse: Roe, Casey, and the Fourteenth Amendment Rights of Healthcare Providers*, 87 NOTRE DAME L. REV. 1, 39 (forthcoming issue), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1749788 (last visited Feb. 6, 2012).

[16] *See id.* at 10-11 ("In light of the long history of legal and ethical prohibitions on abortion in many contexts until the 1970s, and the repeated, nearly unanimous, and nearly universal

(Continued on following page)

A similar history from *Roe* to the present arises on the question of whether individual tax-payers may be forced to contribute to abortion services with their tax dollars. Responding to the conscience objections of millions of Americans, Congress endeavored from 1976 onward to make clear with the annual passage of a budget rider known as the Hyde Amendment that, while *Roe* had made abortion legal, federal funds collected from tax-payers would not be used for elective abortions.[17] This Court upheld the Hyde Amendment in *Harris v. McRae*, 448 U.S. 297, 325 (1980), recognizing that "[a]bortion is inherently

---

legislative actions to protect objectors after *Roe*, this Part concludes that a right to refuse to participate in abortions satisfies the Court's traditional analysis for protection under the Fourteenth Amendment.")

[17] Consistent with a legal analysis of the Act by the Office of the General Counsel for the U.S. Conference of Catholic Bishops, the phrase "elective abortion" is used in this brief to refer to abortions that have long been ineligible for federal funding in major health programs – specifically, all abortions except for cases of rape, incest or danger to the life of the mother. The term is used here not as an expression of medical or moral judgment, but rather as shorthand for longstanding federal policy. For a cogent yet comprehensive analysis of how the Act impacts abortion funding and conscience issues beyond the "abortion premium mandate" addressed in this brief, *see* Anthony Picarello and Michael Moses, *Legal Analysis of the Provisions of the Patient Protection and Affordable Care Act and Corresponding Executive Order Regarding Abortion Funding and Conscience Protection*, United States Conference of Catholic Bishops (Mar. 25, 2010), *available at* http://www.usccb.org/about/general-counsel/upload/Healthcare-EO-Memo.pdf (last visited Feb. 6, 2012) ("USCCB Memo").

different from other medical procedures, because no other procedure involves the purposeful termination of a potential life."[18]

To be clear, *Amici* emphasize that this brief does not address the hotly debated issue of whether the Act enabled direct federal funding of elective abortion

---

[18] This Court has since eschewed this inaccurate "potential life" terminology and instead used terms such as "ending fetal life," and recognizing the state's interest in "protecting the health of the woman and the life of the fetus." *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) (citing *Casey*, 505 U.S. at 846). In fact, the *Gonzales* majority was unequivocal in recognizing that abortion destroys a separate human life when it stated: "It is, however, precisely this lack of information concerning the way in which the *fetus will be killed* that is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed." *Id.* at 159 (emphasis added).

This is supported by modern developmental biology establishing that at every phase of human embryonic and fetal development, the unborn child is not a "potential life," but rather an individual human being. *See, e.g.*, William Larsen, HUMAN EMBRYOLOGY 4 (3rd ed. 2001) (explaining that male and female sex cells "unite at fertilization to initiate the embryonic development of a *new individual*.") (emphasis added); *see also* Maureen L. Condic, Ph.D., *When Does Human Life Begin? A Scientific Perspective*, Westchester Institute White Paper (Oct. 2008), *available at* http://www.westchesterinstitute.net/resources/white-papers/351-white-paper (last visited Feb. 6, 2012) (the human zygote (single cell phase) has "all the properties of a fully complete (albeit immature) human organism; it is 'an individual constituted to carry on the activities of life by means of organs separate in function but mutually dependent: a living being.'" (citing the Medical Dictionary of the National Library of Medicine)).

due to the omission of a Hyde-like amendment.[19] Nor does it address future threats to the conscience protections of healthcare providers due to the omission of longstanding conscience protections that were not applied to the Act's separate funding stream, even beyond the current threats of the HHS abortifacient mandate discussed *supra* in note 12.[20]

Rather, *Amici* have focused narrowly on the concrete provisions of the Act's "abortion premium mandate" that directly violate the conscience and free exercise rights of millions of Americans.

---

[19] *See* USCCB Memo, *supra*, note 17.

[20] *Id.*; *see also* Michael A. Fragoso, Note, *Taking Conscience Seriously or Seriously Taking Conscience?: Obstetricians, Specialty Boards, and the Takings Clause*, 86 NOTRE DAME L. REV. 101, 114 (2011) ("As the PPACA contains its own revenue stream (not relying on general omnibus Congressional appropriations), the Hyde-Weldon and Church Amendments would not apply to it. Further, the Act was passed without a comprehensive conscience rider – although Senator Tom Coburn (an obstetrician) of Oklahoma proposed one. The result is that the Act contains the potential to contravene established physicians' conscience protections in the area of reproductive health in its regulatory interpretation."); *see also*, Helen Alvare, *How theNew Healthcare Law Endangers Conscience* (June 29, 2010), *available at* http://www.thepublicdiscourse.com/2010/06/1402 (last visited Feb. 6, 2012).

II. THE FOUNDERS' PROTECTION OF INDIVIDUAL LIBERTY, INCLUDING RELIGIOUS LIBERTY, IS DIRECTLY UNDERMINED BY THE ACT'S TRANSGRESSION OF THE CONSTITUTIONAL LIMITS ON CONGRESSIONAL POWER

The analysis of Congress' First Amendment overreach regarding the Act's abortion premium mandate, as demonstrated in the sections above, finds its grounding in the traditional and recently affirmed understanding of federalism constructed by the Founders to protect individual liberty. Allowing the Act's threat to religious liberty – our nation's first freedom – to stand would fly in the face of the very system of limited Government established by our nation's Founders.

Our nation was founded on the principle that the best way to protect individual liberty was to create a government with limited and enumerated powers. When Congress transgresses these Constitutional limits on its powers, liberty is at risk – especially religious liberty.

When the Founders met in Philadelphia in 1787 to construct a better government, they were performing a task set forth for them in the Declaration of Independence. The Declaration explains that "Governments are instituted among Men" for the purpose of securing their rights. When a form of government fails in this regard, the Declaration proclaims the right of the people to "institute new Government, *laying its foundation on such principles and organizing its*

powers in such form, as to them shall seem most likely to effect their Safety and Happiness." DECLARATION OF INDEPENDENCE (emphasis added).

The Founders believed that they had created a government that would not endanger individual liberty because they had "la[id] its foundation on such principles" and "organiz[ed] its powers in such form" as to create a limited government, with enumerated powers. The architects of the Constitution were so convinced that liberty would be protected in this manner that they initially believed a Bill of Rights was not even necessary. *See, e.g.*, Alexander Hamilton, *The Federalist* No. 84 ("The truth is, after all the declamations we have heard, that the Constitution is itself, in every practical sense, and to every useful purpose, a Bill of Rights."). Instead, they believed that the careful limitations they had placed on the powers of the new national government would provide the best protection for liberty.

This Court has frequently recognized the fact that the Constitution's careful limitations on government power exist to protect liberty. For example, as Justice Kennedy explained in *Clinton v. City of New York*,

> In recent years, perhaps, we have come to think of liberty as defined by that word in the Fifth and Fourteenth Amendments and as illuminated by the other provisions of the Bill of Rights. The conception of liberty embraced by the Framers was not so confined. They used principles of separation of powers

> and federalism to secure liberty in the fundamental political sense of the term. . . .

524 U.S. 417, 450 (1998) (Kennedy, J., concurring).[21]

This Court recently and unanimously reaffirmed the critical role these restraints play in protecting liberty in *Bond v. United States*:

> *Federalism secures the freedom of the individual.* It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. . . . [T]he individual liberty secured by federalism is not simply derivative of the rights of the States.
>
> Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. *By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.*

131 S.Ct. 2355, 2364 (2011) (emphasis added).

---

[21] *See also I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983) ("With all the obvious flaws of delay, untidiness, and potential for abuse, *we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.*") (emphasis added).

These principles are directly at stake in this case, as Congress' overreaching has threatened individual liberty. This overreaching threatens to give "one government complete jurisdiction over all the concerns of public life" and therefore exposes "the individual [to] arbitrary power." This threat to liberty is particularly acute in the area of religious liberty.

CONCLUSION

For these reasons, the Court should affirm the judgment below.

Respectfully submitted,

NIKOLAS T. NIKAS
DORINDA C. BORDLEE,
Counsel of Record
BIOETHICS DEFENSE FUND
6811 E. Voltaire Avenue
Scottsdale, AZ 85254
(480) 483-3597
dbordlee@bdfund.org

MARK L. RIENZI
THE BECKET FUND FOR
RELIGIOUS LIBERTY
3000 K Street NW, Suite 220
Washington, DC 20007
(202) 319-4970
Rienzi@law.edu

MAILEE R. SMITH
DENISE M. BURKE
AMERICANS UNITED FOR LIFE
655 15th Street NW, Suite 410
Washington, DC 20005
(202) 289-1478
Mailee.Smith@AUL.org
Denise.Burke@AUL.org

STEVEN H. ADEN
MATTHEW S. BOWMAN
ALLIANCE DEFENSE FUND
801 G Street NW, Suite 509
Washington, DC 20001
(202) 393-8690
saden@telladf.org
mbowman@telladf.org

CATHERINE W. SHORT
LIFE LEGAL DEFENSE FOUNDATION
P.O. Box 1313
Ojai, CA 93024-1313
(805) 640-1940
LLDFOjai@cs.com

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-398

JAN 13 2012
OFFICE

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners,
v.
STATE OF FLORIDA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS SUGGESTING REVERSAL OF THE DECISION BELOW ON THE MINIMUM COVERAGE PROVISION ISSUE

Of Counsel:
LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

LYNN K. RHINEHART
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES:

Gonzales v. Raich, 545 U.S. 1 (2005) 3

STATUTES:

26 U.S.C. § 36B 13

26 U.S.C. § 45R 13

26 U.S.C. § 4980H 13

26 U.S.C. § 5000A 3, 13

42 U.S.C. §§ 300gg 13

42 U.S.C. §§ 300gg-4(a) 13

42 U.S.C. §§ 300gg-3(a) 13

42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) 13

42 U.S.C. § 18031 13

42 U.S.C. § 18071 13

MISCELLANEOUS:

Nina Bernstein, "Nurses Threaten Strike at Three New York Hospitals," *New York Times*, December 15, 2011 10

California Nurses Ass'n, "6,000 California RNs Hold One-Day Strike: Dec. 22" (CNA Dec. 22, 2011) 10

Andre Chappel, "The Value of Health Insurance: Few of the Uninsured Have Adequate Resources to Pay Potential Hospital Bills," *ASPE Research Brief* (Assistant Secretary for Planning and Evaluation, Department of Health and Human Services, May 2011) 12

Jon Collins, "Locked Out Union to Bring American Sugar Offer to Vote," *Minnesota Independent*, October 26, 2011 10

TABLE OF AUTHORITIES—Continued

Page

Sharon DeVaney & Sophia Anong, "The Likelihood of Having Employer-Sponsored Health Insurance," *U.S. Bureau of Labor Statistics* (Nov. 2007) 5, 6

"Disneyland Hotel Workers to Take Healthcare Struggle to Annual Shareholder Meeting," *UNITE HERE Local 11* website, March 14, 2010 9

Maralyn Edid, "Collective Bargaining 101: The Trauma Over Health Care," *IWS Issue Brief* (Cornell University Industrial and Labor Relations School, Nov. 1, 2003) 11

"Employer-Sponsored Health Insurance: Trends in Costs & Access," *AHRQ Research in Action*, Issue #17 (U.S. Department of Health & Human Services, Agency for Healthcare Research and Quality Sept. 2004) 5, 6

Families USA, "Hidden Health Tax: Americans Pay a Premium," p. 2 (2009) 12

FMCS, *Sixty-Third Annual Report* p. 1 (2010) 8

Paul Fronstin, "Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2011 Current Population Survey," *EBRI Issue Brief*, no 362, Figure 1 (Employee Benefit Research Institute, Sept. 2011) 3, 4, 6, 7, 12, 13

Paul Fronstin, "Tracking Health Insurance Coverage by Month: Trends in Employment-Based Coverage Among Workers, and Access to Coverage Among Uninsured Workers, 1995-2010, *EBRI Notes*, vol. 32, no. 10 (Employee Benefits Research Institute, October 2011) 4, 12

TABLE OF AUTHORITIES—Continued

Page

Paul Fronstin, "Union Status and Health Care Coverage of Workers: The Impact of the Recession," *EBRI Notes*, vol. 32, no. 7 (Employee Benefits Research Institute, July 2011) 4, 7

Kaiser Family Foundation and Health Research and Educational Trust, "Employer Health Insurance Costs and Worker Compensation" (Feb. 2011) 8

Kaiser Family Foundation and Health Research and Educational Trust, "Employer Health Benefits 2011 Annual Survey," p.1 ..... 6, 8

Hugo Martin, "Disneyland and Union Settle Long Labor Dispute," *Los Angeles Times*, December 8, 2011 9

Elizabeth Mendes, "Employer-Based Health Insurance Continues to Trend Down," *Gallup Poll* (Nov. 11, 2011) 11

Len Nichols & Sarah Axeen, "Employer Health Costs in a Global Economy: A Competitive Disadvantage for U.S. Firms," p. 9 (New America Foundation, May 2008) 7

"Verizon Strike: Healthcare at Core of Conflict," *International Business Times*, August, 14, 2011 .. 8

"Verizon Unions Strike after Contract Talks Fail," *Reuters*, August 7, 2011 9

John Wojcik, "Workers Reject Sugar Company Demands; Lockout Continues," *People's World*, November 3, 2011 10

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS SUGGESTING REVERSAL OF THE DECISION BELOW ON THE MINIMUM COVERAGE PROVISION ISSUE

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 57 national and international labor organizations with a total membership of approximately 12.2 million working men and women.[1] This case concerns the constitutionality of the minimum coverage provision of the Affordable Care Act. The AFL-CIO has an interest in this issue because the collective bargaining agreements negotiated by its affiliated unions almost universally provide for employment-based health insurance for covered employees and their immediate families. The system of employment-related health insurance has come under tremendous pressure from the steadily increasing costs of health insurance coverage. The Affordable Care Act addresses the problem of increasing insurance costs in part by encouraging universal coverage, and the minimum coverage provision is essential to the Act's plan for achieving that purpose.

SUMMARY OF ARGUMENT

Private health insurance in the United States is by and large provided as part of the employment compensation package. The provision of employment-related health

---

[1] Counsel for the petitioners and counsel for the respondents have filed letters consenting to the filing of *amicus* briefs on either side. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

insurance coverage has come under increasing pressure from steadily rising premium costs. Large employers and employers with union-represented workforces have responded by seeking to increase the employees' share of the cost of coverage. The result of this response has been labor disputes over health insurance and decisions by individual employees to drop coverage. Smaller and nonunion employers have tended to respond to the premium increases by dropping employee coverage altogether. The net result is that the system of employment-related insurance coverage is eroding.

The Affordable Care Act is based on the reasonable premise that the increasing cost of health insurance is due in large part to the unreimbursed costs of health care consumed by uninsured individuals. The Act attempts to address that problem by encouraging, through various means, universal health insurance coverage. There can be little question that the Act's provisions encouraging universal health insurance coverage regulate activities that substantially affect interstate commerce.

The minimum coverage provision at issue in this case itself directly encourages increased health insurance coverage by imposing adverse tax consequences on certain individuals who decline health insurance coverage. In addition, the minimum coverage provision is integrally related to other provisions in the Act that directly affect health insurance coverage, such as those forbidding the adverse treatment by insurance companies of individuals with pre-existing medical conditions and those encouraging increased employer-provided health insurance coverage. The minimum coverage provision is, therefore, an integral part of the Affordable Care Act's comprehensive regulation of the health insurance market and, as such, represents a proper exercise of Congress's power to regulate interstate commerce.

ARGUMENT

"Congress has the power to regulate activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). The provision and procurement of health insurance are activities that are not only commercial in themselves but also have substantial effects on other aspects of interstate commerce. The Affordable Care Act's interlocking provisions regulate the health insurance market in a manner that comes comfortably within Congress's authority to regulate interstate commerce.

The delivery of health care in the United States is financed largely through a system of public and private health insurance. By far the largest source of private health insurance are employment-related policies covering the employees of those employers who choose to offer such coverage and, frequently, also the immediate family members of those employees. As matters stand, employment-related health insurance has come under tremendous economic pressure from continually increasing premium costs. The Affordable Care Act comprehensively regulates the national health insurance market in a manner that is designed to relieve the economic pressures that threaten the continued availability of employment-related health insurance. The minimum coverage provision of the Act, 26 U.S.C. § 5000A – the constitutionality of which is at issue in this case – is a critical component of that regulatory scheme.

1. The overwhelming majority of individuals in the United States covered by private health insurance are covered by employment-related health insurance policies that are provided either by the individual's own employer or by the employer of a close family member. Thus, in 2010, 58.7% of the nonelderly population was covered by employer-provided health insurance. Paul Fronstin, "Sources of

Health Insurance and Characteristics of the Uninsured: Analysis of the March 2011 Current Population Survey," *EBRI Issue Brief*, no. 362, Figure 1 (Employee Benefit Research Institute, Sept. 2011).[2] By contrast, only 7.1% of the nonelderly population was covered by individually-purchased health insurance. *Ibid.* The remainder of the nonelderly population was either covered by a public health insurance plan (21.6%) or uninsured (18.5%). *Ibid.*

Over the past three decades, "the percentage of individuals without health insurance has generally been increasing." Paul Fronstin, "Tracking Health Insurance Coverage by Month: Trends in Employment-Based Coverage Among Workers, and Access to Coverage Among Uninsured Workers, 1995-2010," *EBRI Notes*, vol. 32, no. 10, p. 16 (Employee Benefit Research Institute, October 2011).[3] This steady decline in overall health insurance coverage was caused "in large part because rising health benefit costs [have] eroded employment-based coverage." *Ibid.*

Two characteristics typify enterprises that continue to offer any health insurance coverage to their employees. First, union-represented employees are much more likely to be covered by employer-provided insurance than are unrepresented employees. In 2009, 80.4 % of union-represented employees were covered by health benefits provided through their own job. Paul Fronstin, "Union Status and Health Care Coverage of Workers: The Impact of the Recession," *EBRI Notes*, vol. 32, no. 7 (Employee Benefit Research Institute, July 2011).[4] By contrast, only 52.2% of nonunion workers had health benefits provided

---

[2] Available at http://www.ebri.org/pdf/briefspdf/EBRI_IB_09-2011_No362_Uninsured1.pdf.

[3] Available at http://www.ebri.org/pdf/notespdf/EBRI_Notes_10_Oct-11.IRA-K_HI.pdf.

[4] Available at http://www.ebri.org/pdf/notespdf/EBRI_Notes_07_July-11.TaxCap_UnionHI.pdf.

through their own job. *Ibid.* Because their own direct employers are more likely to provide health benefits, union workers are relatively less likely to be covered as dependents by insurance provided by employers of family members – 10.6% of union workers are covered as dependents compared to 18.4% of nonunion workers. *Ibid.* The employer-provided coverage for union workers is more likely to extend to dependents than that provided to nonunion workers. *See* "Employer-Sponsored Health Insurance: Trends in Cost and Access," *AHRQ Research in Action*, Issue # 17 (U.S. Department of Health & Human Services, Agency for Healthcare Research and Quality Sept. 2004).[5] The higher rate of employer-provided health insurance coverage for union workers is explained by the fact that union-represented employees have sufficient bargaining power to negotiate employment terms that are tailored to their long-term economic needs, such as, seniority-based protections and advantages, retirement pensions, promotion and training opportunities, and protection against unjust termination.

Second, larger employers are more likely to provide health insurance coverage for their employees than are smaller employers. A 2006 survey found that 84% of workers in firms with 100 or more employees had health insurance coverage compared to 59% of workers in firms with fewer than 100 employees. Sharon DeVaney & Sophia Anong, "The Likelihood of Having Employer-Sponsored Health Insurance," *U.S. Bureau of Labor Statistics* (Nov. 2007).[6] There are several reasons for this disparity. First, and most important, the larger employers are able to assemble a sufficiently large pool of covered

---

[5] Available at http://www.ahrq.gov/research/empspria/empspria.pdf.

[6] Available at http://www.bls.gov/opub/cwc/cm20071128ar01p1.htm.

individuals to make insurance viable. *Ibid.* *See* Fronstin, "Sources of Health Insurance." Second, large employers have sufficient resources to self-insure, if they so choose, which provides a more efficient alternative to purchasing a policy on the market. Relatedly, if large employers do choose to purchase an insurance policy to cover their employees, the self-insurance option gives them sufficient bargaining power to negotiate more favorable terms with the insurance carriers than smaller employers. *See* DeVaney & Anong, "The Likelihood of Having Employer-Sponsored Health Insurance." Finally, larger employers are able to more efficiently absorb the costs of underwriting and administration. *Ibid.*

The complementary point, which bears emphasis, is that small and nonunion employers are much less likely to offer any form of health insurance coverage to their employees. "Employer-Sponsored Health Insurance: Trends in Cost and Access," *AHRQ Research in Action*, Issue # 17 (U.S. Department of Health & Human Services, Agency for Healthcare Research and Quality Sept. 2004).[7]

2. The rising cost of health insurance has placed sufficient economic pressure on the employment-related health insurance system to threaten the continued viability of that system. Between 2001 and 2011, the average annual premium for family health insurance increased by 113%. Kaiser Family Foundation and Health Research and Educational Trust, "Employer Health Benefits 2011 Annual Survey," p. 1.[8] Employers cannot pass along the increased costs of employee health insurance to consumers because of competitive pressures in the markets in which they sell their goods and services.

---

[7] Available at http://www.ahrq.gov/research/empspria/empspria.pdf.

[8] Available at http://ehbs.kff.org/pdf/2011/8225.pdf.

The increased health insurance costs are a particular problem for domestic manufacturing employers, who tend to have a high rate of employee health insurance coverage. Fronstin, "Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2011 Current Population Survey," p. 15. For example, General Motors reported that, prior to its 2007 agreement with the United Automobile Workers shifting much of the automobile manufacturer's health insurance costs to separate trust funds, the Company's per vehicle costs associated with health insurance exceeded the cost of the steel contained in each vehicle.[9] Domestic manufacturers face additional pressure from competition with manufacturers based in countries that have universal government provided health insurance. Len Nichols & Sarah Axeen, "Employer Health Costs in a Global Economy: A Competitive Disadvantage for U.S. Firms," p. 9 (New America Foundation, May 2008).[10]

While the manufacturers face particularly acute problems in this regard, other employers who continue to offer employment-related health insurance coverage are similarly caught between the pressure of rising premium costs and competition from employers in their product market that do not offer employee health insurance coverage. Competitive pressures in the product markets prevent employers from passing on the increased costs of health insurance to consumers, forcing these employers to demand higher contributions from their employees. *See* Fronstin, "Union Status and Health Care Coverage of Workers: The Impact of the Recession." The higher pre-

---

[9] Declaration of David W. Meline ¶ 5, *International Union, UAW v. General Motors Corp.*, Case 07-14074 (E.D. Mich.).

[10] Available at http://newamerica.net/publications/policy/ employer_health_costs_global_economy.

mium contributions in turn discourage employee participation in the employer-provided plans. *Ibid.*

The increase in the worker-contribution required for employment-related family coverage has been substantial over the last ten years, increasing by 131%. "Employer Health Benefits 2011 Annual Survey," p. 1. By comparison, wages rose only by just over 40%. Kaiser Family Foundation and Health Research and Educational Trust, "Employer Health Insurance Costs and Worker Compensation" (Feb. 2011).[11]

Against that background, it is hardly surprising, as the Federal Mediation and Conciliation Service recently observed, that, aside from the "instability associated with the recession, the next single biggest contributor to labor relations conflicts and work stoppages in the past decade has been health care." FMCS, *Sixty-Third Annual Report* p. 1 (2010).[12] As the FMCS puts it, "No issue stands to engender bargaining conflicts more than health care benefits, their distribution and their associated increased costs." *Ibid.*

The experience of the AFL-CIO's affiliated unions is fully consistent with the FMCS's observations. To take several recent disputes:

- 45,000 workers struck Verizon for two weeks in August in response to the company proposal of deep cuts to healthcare benefits.[13] The Communications Workers of America takes the position that "the contributions to

---

[11] Available at http://www.kff.org/insurance/snapshot/Employer-Health-Insurance-Costs-and-Worker-Compensation.cfm.

[12] Available at http://fmcs.gov/assets/files/annual%20reports/FY2010_Annual_Report.pdf.

[13] "Verizon Strike: Health Care at Core of Conflict," *International Business Times*, August, 14, 2011, *available at*: http://www.ibtimes.com/articles/197536/20110814/verizon-strike-union-health-care.htm.

healthcare that Verizon wants the union members to make were unacceptable, and that increases in deductibles would make the proposed healthcare plan unaffordable."[14] The two sides have yet to reach agreement on a new contract to replace the previous, which expired Aug. 6.

- A contract dispute between Disneyland Resorts and UNITE HERE Local 11 in California stretched on nearly four years mostly over union demands to maintain healthcare benefits.[15] Local 11 has taken the position that "[h]otel workers want the company to continue contributing to their current healthcare plan, which covers workers and their family members," pointing out that, over the years, "workers have forgone significant wage raises in order to maintain their quality, affordable healthcare. But now Disney is calling for workers to shoulder the costs of an unaffordable monthly premium that is expected to reach $500 for a family of four by the contract's end. For the majority of workers whom Disney pays less than $13 an hour, a monthly premium of $500 is simply unaffordable."[16]
- 1,300 members of the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union have

---

[14] "Verizon Unions Strike after Contract Talks Fail," *Reuters*, August 7, 2011, *available at*: http://www.reuters.com/article/2011/08/07/verizon-labor-idUSN1E77605U20110807.

[15] Hugo Martin, "Disneyland and Union Settle Long Labor Dispute," *Los Angeles Times*, December 8, 2011, *available at*: http://latimesblogs.latimes.com/money_co/2011/12/disneyland-and-union-settle-long-labor-dispute.html.

[16] "Disneyland Hotel Workers to Take Healthcare Struggle to Annual Shareholder Meeting," *UNITE HERE* Local 11 website, March 14, 2010, *available at*: http://www.unitehere11.org/press-releases/disneyland-hotel-workers-to-take-healthcare-struggle-to-annual-shareholder-meeting.

been locked out by American Crystal Sugar Co., after they rejected a deal that would have, among other things, significantly increased their healthcare costs.[17] BCTGM and American Crystal had previously enjoyed 30 years of labor peace.[18]

- Thousands of California nurses recently struck, partially in response to "hospital demands for sweeping increases in healthcare premiums, and thousands of other nurses in New York were recently poised to strike over similar employer health insurance demands.[19]

Several aspects of bargaining over health care concessions make these disputes particularly intractable. In the first place, as with all concessionary demands, employees tend to resent the reduction in over-all compensation. With health insurance coverage, moreover, there tends to be divisions among the employees based on their age, present health and family situation. Finally, the unpredictable nature of health insurance premiums makes it difficult for the parties negotiating collective bargaining

---

[17] Jon Collins, "Locked Out Union to Bring American Crystal Sugar Offer to Vote," *Minnesota Independent*, October 26, 2011, *available at*: http://minnesotaindependent.com/90678/locked-out-union-to-bring-american-crystal-sugar-offer-to-vote.

[18] John Wojcik, "Workers Reject Sugar Company Demands; Lockout Continues," *People's World*, November 3, 2011, *available at*: http://www.peoplesworld.org/workers-reject-sugar-company-demands-lockout-continues-2/.

[19] California Nurses Ass'n, "6,000 California RNs Hold One-Day Strike: Dec. 22" (CNA Dec. 22, 2011), *available at* http://www.nationalnursesunited.org/press/entry/6000-california-rns-begin-one-day-strike/; Nina Bernstein, "Nurses Threaten Strike at Three New York Hospitals," *New York Times*, December 15, 2011, *available at*: http://www.nytimes.com/2011/12/16/nyregion/nurses-threaten-strike-at-3-new-york-hospitals.html.

agreements, which typically run for at least three years, to anticipate future increases.

In short, "health insurance is now the single most contentious issue in collective bargaining." Maralyn Edid, "Collective Bargaining 101: The Trauma Over Health Care," *IWS Issue Brief* (Cornell University Industrial and Labor Relations School, Nov. 1, 2003).[20]

While large and unionized employers have attempted to shift the cost of health insurance to the covered employees, smaller and nonunion employers have frequently simply dropped coverage altogether. *See* "Employer-Sponsored Health Insurance: Trends in Cost and Access."

The net effect of cost-shifting and dropped coverage is a steady decrease in the number of individuals covered by employment-related health insurance plans. Elizabeth Mendes, "Employer-Based Health Insurance Continues to Trend Down," *Gallup Poll* (Nov. 11, 2011).[21]

3. The Affordable Care Act rests on the perfectly reasonable premise that a necessary condition for bringing the health insurance market under control is universal or near universal coverage. A central purpose of the Affordable Care Act is precisely to bring about universal coverage. Legislation that helps achieve that purpose would substantially affect interstate commerce by reducing the occurrence of labor disputes over the division of health insurance costs.

A significant portion of health insurance premiums is attributable to the cost of health care services consumed

---

[20] Available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1005&context=briefs.

[21] Available at http://www.gallup.com/poll/150692/employer-based-health-insurance-continues-trend-down.aspx.

by uninsured individuals. Individuals without health insurance are less likely to receive basic health care services and more likely to seek care through hospital emergency rooms. Fronstin, "Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2011 Current Population Survey," *EBRI Issue Brief*, no 362, p. 18. The hospitals tend to cover the costs of such expensive – but unpaid-for – emergency services by increasing the charges to other patients, who are covered by insurance. *See* Andre Chappel, "The Value of Health Insurance: Few of the Uninsured Have Adequate Resources to Pay Potential Hospital Bills," *ASPE Research Brief* (Assistant Secretary for Planning and Evaluation, Department of Health and Human Services, May 2011).[22] The insurance companies, in turn, pass these added costs along in the form of higher premiums. As a result, it is estimated that the annual premium for each family health insurance policy includes a charge exceeding $1,000 that is attributable to otherwise uncompensated health care services for the uninsured. Families USA, "Hidden Health Tax: Americans Pay a Premium," p. 2 (2009).[23]

As noted above, employers have responded to increasing health insurance premiums by dropping coverage or by insisting that employees pay a higher share of the cost of health insurance as a condition for continued coverage. Higher costs discourage employees from accepting coverage when their employers do offer it. Fronstin, "Tracking Health Insurance Coverage by Month," *EBRI Notes*, vol. 32, no. 10, p. 16. The ultimate effect of increased premiums is lower rates of participation, i.e.,

---

[22] Available at http://aspe.hhs.gov/health/reports/2011/valueofinsurance/rb.shtml.

[23] Available at http://familiesusa2.org/assets/pdfs/hidden-health-tax.pdf.

reduced insurance coverage, which in turns causes further premium increases and further reductions in coverage. Predictably, the percentage of nonelderly individuals covered by employer-provided health insurance dropped from 69.3% in 2000 to 58.7% in 2010. Fronstin, "Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2011 Current Population Survey," p. 10.

4. The Affordable Care Act regulates the health insurance market through five integrally-related components that together serve to preserve and strengthen the employment-related insurance coverage that is the heart of the insurance-based system for funding health care in the United States. First, the Act requires most individuals to obtain minimum health insurance coverage. 26 U.S.C. § 5000A. Second, the Act fortifies the system of employer-provided coverage that is the predominant source of private health insurance by penalizing large employers who fail to offer coverage to their employees and by providing tax incentives for small employers to do so. 26 U.S.C. §§ 45R & 4980H. Third, the Act provides for the creation of state-run exchanges that will allow small employers and individuals to obtain health insurance at more affordable rates. 42 U.S.C. § 18031. Fourth, the Act prohibits insurance companies from raising premiums or denying coverage based on individuals' preexisting medical conditions or history. 42 U.S.C. §§ 300gg & 300gg-4(a) & -3(a). Fifth, the Act expands the federal program of assisting the low income families with obtaining health insurance through tax credits, 26 U.S.C. § 36B, subsidies, 42 U.S.C. § 18071, and broadening Medicaid eligibility, 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

The minimum coverage provision at issue in this case directly promotes universal coverage by imposing adverse tax consequences on certain individuals who,

despite the opportunities to purchase more affordable health insurance made possible by the Act, choose to forego health insurance coverage. In addition, the minimum coverage provision is an essential adjunct to other provisions of the Act that promote broader health insurance coverage.

The minimum coverage provision also provides essential support to the provisions in the Act that prohibit insurance companies from raising premiums or denying coverage based on medical history is most obvious and has been frequently remarked upon in various lower court opinions. Without the minimum coverage provision, the prohibition against basing premium or coverage decisions on medical history would create strong incentives for individuals to refrain from purchasing health insurance until they required medical treatment that would cost more than the premiums charged for coverage, the "adverse selection" problem.

The prohibition on denying coverage or increasing premiums based on prior medical history, in turn, is essential to successfully encouraging small employers to provide health insurance coverage for their employees. A significant problem faced by small employers in providing coverage is that their workforce and thus the pool of insured individuals is small. That being so, the small employer faces essentially the same problems in securing health insurance coverage for its employees at reasonable rates as does an individual seeking coverage. If one of the small employer's small group of employees has a medical condition requiring costly treatment, the insurance company will raise the premiums for the group to cover the cost of treatment, just as it would for an individual with a medical history.

* * *

The rapidly increasing health insurance premiums have made it difficult for employers to continue coverage for their employees and the employees' family members. The Affordable Care Act addresses this economic problem by encouraging universal health insurance coverage through a variety of means. The minimum coverage provision is an essential component of the Act's measures directed toward encouraging universal coverage and thus represents an exercise of Congress's authority to regulate interstate commerce.

CONCLUSION

The decision of the Eleventh Circuit invalidating the minimum coverage provision of the Affordable Care Act should be reversed.

Respectfully submitted,

LYNN K. RHINEHART
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

Of Counsel:
LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

AMICUS CURIAE BRIEF

No. 11-398

IN THE
Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners,

v.

FLORIDA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE AMERICAN HOSPITAL ASSOCIATION ET AL. AS AMICI CURIAE IN SUPPORT OF PETITIONERS WITH RESPECT TO THE INDIVIDUAL MANDATE

SHEREE R. KANNER
CATHERINE E. STETSON*
DOMINIC F. PERELLA
MICHAEL D. KASS
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491
cate.stetson@hoganlovells.com

Counsel for Amici Curiae
**Counsel of Record*

(additional amicus representatives listed on inside cover)

Additional amicus representatives:

MELINDA REID HATTON
MAUREEN D. MUDRON
American Hospital Association
325 Seventh Street, N.W.
Suite 700
Washington, D.C. 20001
(202) 638-1100

IVY BAER
FRANK R. TRINITY
Association of American Medical Colleges
2450 N Street, N.W.
Washington, D.C. 20037
(202) 828-0499

JEFFREY G. MICKLOS
Federation of American Hospitals
750 Ninth Street, NW
Suite 600
Washington, D.C. 20001
(202) 624-1521

BARBARA EYMAN
National Association of Public Hospitals and Health Systems
1301 Pennsylvania Ave., N.W.
Suite 950
Washington, D.C. 20004
(202) 585-0100

LISA GILDEN
The Catholic Health Association of the United States
1875 Eye Street, N.W.
Suite 1000
Washington, D.C. 20006
(202) 296-3993

National Association of Children's Hospitals
401 Wythe Street
Alexandria, VA 22314
(703) 684-1355

Additional counsel:

SEAN MAROTTA*
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004

**Admitted in New Jersey and New York; Washington, D.C. admission pending*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THE CRISIS OF UNINSURANCE SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE 6

A. The Uninsurance Crisis Substantially Affects Interstate Commerce 6

B. The Eleventh Circuit's Holding Ignores Facts About the Market And Fails To Defer to Congress's Assessment of That Market 13

II. THE "ACTIVITY" TEST IS NOT THE LAW, AND IN ANY EVENT IT FAILS ON ITS OWN TERMS 16

A. The "Activity" Test Should Be Rejected 17

B. In Any Event, The Uninsured Participate In Relevant Economic Activity 19

III. THE "SLIPPERY SLOPE" CLAIMS FAIL TO RECOGNIZE THE UNIQUENESS OF THE HEALTH CARE MARKET 23

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases:

Gibbons v. *Ogden*,
22 U.S. (9 Wheat.) 1 (1824) 24

Gonzales v. *Raich*,
545 U.S. 1 (2005) 5

Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964) 17

Maryland v. *Wirtz*,
392 U.S. 183 (1968)..... 17

Seven-Sky v. *Holder*,
661 F.3d 1 (D.C. Cir. 2011)..... *passim*

Charles C. Steward Machine Co. v. *Davis*,
301 U.S. 548 (1937)..... 17

Thomas More Law Center v. *Obama*,
651 F.3d 529 (6th Cir. 2011) ..... *passim*

United States v. *Comstock*,
130 S. Ct. 1949 (2010) 16

United States v. *Lopez*,
514 U.S. 549 (1995)..... 4, 15, 17

United States v. *Nascimento*,
491 F.3d 25 (1st Cir. 2007) 22

United States v. *Wrightwood Dairy Co.*,
315 U.S. 110 (1942) 14

Wickard v. *Filburn*,
317 U.S. 111 (1942)..... 17, 18, 24

Statutes:

42 U.S.C. § 1395dd 9

42 U.S.C. § 18091(a)(2)(A) 22

42 U.S.C. § 18091(a)(2)(F) 11, 15, 19

Legislative Materials:

Million and Counting: Why the Health Care Marketplace Is Broken: Hearing Before the S. Comm. on Finance, 110th Cong. 49 (2008) 11

Other Authorities:

American Hosp. Ass'n, *Uncompensated Hospital Care Cost Fact Sheet* (Jan. 2012) 3

E. Bakhtiari, *In-Hospital Mortality Rates Higher for the Uninsured*, HealthLeaders Media (June 14, 2010) 21

Centers for Disease Control and Prevention, *Vital Signs: Access to Health Care* (Nov. 9, 2010) 7

Changes in Health Care Financing & Organization, *Challenges Facing the Health Care Safety Net* (Feb. 2008) 8

G. Fosler, *Sizing Up the U.S. Health Care Challenge* (July 2011) 12

P. Gerepka, *Cost Benefit Analysis of Providing Level II Trauma Care at William Beaumont Army Medical Center (WBAMC)* (2002) 9

J. Hadley *et al.*, *Covering The Uninsured In 2008: Current Costs, Sources of Payment, & Incremental Costs*, Health Affairs, Aug. 25, 2008 ..... 4, 6, 8, 11

G. Halvorson, *Health Care Reform Now!* (Wiley & Sons 2007) 12

Healthcare Fin. Mgmt. Ass'n, *A Report from the Patient Friendly Billing Project* (2005) 10, 11

Institute of Med., *America's Health Care Safety Net: Intact But Endangered* (2000) 8

Institute of Med., *America's Uninsured Crisis: Consequences for Health & Health Care* (Feb. 2009) 12, 21

Kaiser Comm'n on Medicaid & the Uninsured, *The Uninsured & the Difference Health Care Makes* (Sept. 2010) 21

J. E. O'Neill and D.M. O'Neill, *Who Are the Uninsured? An Analysis of America's Uninsured Population, Their Characteristics and Their Health* (2009) 7

J. Reichard, *CDC: Americans Uninsured at Least Part of the Year on the Rise, Harming Public Health*, CQ Healthbeat News, Nov. 9, 2010 21

T. Serafin, *Just How Much is $60 Billion?*, Forbes Magazine, June 27, 2006 8

U.S. Dep't of Health & Human Servs., *New Data Say Uninsured Account for Nearly One-Fifth of Emergency Room Visits* (July 15, 2009) 6

IN THE

Supreme Court of the United States

No. 11-398

DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners,

v.

FLORIDA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE AMERICAN HOSPITAL ASSOCIATION ET AL. AS AMICI CURIAE IN SUPPORT OF PETITIONERS WITH RESPECT TO THE INDIVIDUAL MANDATE

STATEMENT OF INTEREST[1]

The American Hospital Association, Association of American Medical Colleges, Catholic Health Association of the United States, Federation of American Hospitals, National Association of Children's Hospitals, and National Association of Public Hospitals and Health Systems respectfully submit this brief as *amici curiae*.

[1] No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. No one other than *amici* or their members or counsel made a monetary contribution to the brief. All parties filed blanket *amicus* consent letters.

The American Hospital Association represents nearly 5,000 hospitals, health care systems, and networks, plus 37,000 individual members. AHA members are committed to improving the health of communities they serve and to helping ensure that care is available to, and affordable for, all Americans. The AHA educates its members on health care issues and advocates to ensure that their perspectives are considered in formulating health care policy.

The Association of American Medical Colleges represents about 300 major non-federal teaching hospitals, all 136 accredited medical schools, and the clinical faculty and medical residents who provide care to patients there.

The Catholic Health Association of the United States is the national leadership organization for the Catholic health ministry. Comprised of more than 600 hospitals and 1,400 long-term care and other health facilities in all 50 states, the Catholic health ministry is the largest group of nonprofit health care providers in the nation. CHA works to advance the ministry's commitment to a just, compassionate health care system that protects life.

The Federation of American Hospitals is the representative of investor-owned or managed community hospitals and health systems. FAH has nearly 1,000 member hospitals in 46 states and Washington D.C. These members include rural and urban teaching and non-teaching hospitals and provide a wide range of acute, post-acute, and ambulatory services.

The National Association of Children's Hospitals supports its 221 hospital members in addressing public policy issues. N.A.C.H.'s mission is to promote the health and well-being of children and their

families through support of children's hospitals and health systems. Medicaid is the single largest insurer of children and the largest payer for children's hospitals. On average, 50 percent of the patients at children's hospitals are enrolled in Medicaid.

The National Association of Public Hospitals and Health Systems is comprised of some 140 of the nation's largest metropolitan safety net hospitals and health systems, committed to providing health care to all without regard to ability to pay. NAPH represents members' interests in matters before Congress, the Executive Branch, and the courts.

The six Hospital Associations represent virtually every hospital and health system in the country. Their members will be deeply affected by the outcome of this case: American hospitals are committed to the well-being of their communities and offer substantial community-benefit services, and as part of that mission they dedicate massive resources to caring for the uninsured. Nearly every hospital with an emergency department is required to provide emergency services to anyone, regardless of ability to pay. And even when an uninsured patient arrives planning to pay his or her own way, that patient may struggle to pay for an extended stay. The upshot: Hospitals treat tens of millions of uninsured individuals each year, and most of that care is uncompensated. Indeed, in the last decade, hospitals provided more than ***$300 billion*** in uncompensated care to the uninsured and under-insured. American Hosp. Ass'n, *Uncompensated Hospital Care Cost Fact Sheet* 4 (Jan. 2012)[2]; *see also* J. Hadley *et al.*, *Covering The*

---

[2] *Available at* http://www.aha.org/content/12/11-uncompensated-care-fact-sheet.pdf.

Uninsured In 2008: Current Costs, Sources of Payment, & Incremental Costs 403, Health Affairs, Aug. 25, 2008 ("*Covering The Uninsured*").[3] And although hospitals do what they can to assist patients, burdens on uninsured individuals remain heavy. Millions of families are just one major injury or illness from financial ruin.

That is why the Hospital Associations favored enactment of the Patient Protection and Affordable Care Act ("ACA"). The legislation extends coverage to millions more Americans. To undo it now would be to maintain an unacceptable status quo—a result that is neither prudent nor compelled by the Constitution.

SUMMARY OF ARGUMENT

1. This Court should uphold the individual mandate for a simple reason: The way uninsured Americans pay—or are unable to pay—for the health care they consume "substantially affects" interstate commerce. *United States* v. *Lopez*, 514 U.S. 549, 559 (1995). Indeed, to use that term of art is to engage in massive understatement. Some 50 million Americans lack health insurance, the vast majority of them receive health care, and that care costs tens of billions of dollars each year. That cost is borne, in large measure, by third parties, including hospitals and health care systems as well as American taxpayers. On these facts, as the D.C. Circuit recognized, the "substantial effect" on interstate commerce is obvious: "Congress reasonably determined that as a *class*, the uninsured create market failures" that

---

[3] *Available at* http://content.healthaffairs.org/cgi/reprint/27/5/w399.

justify regulating how they finance the health care they receive. *Seven-Sky* v. *Holder*, 661 F.3d 1, at *20 (D.C. Cir. 2011).

The Eleventh Circuit reached the contrary conclusion, reasoning that any link between the uninsured and interstate commerce is too attenuated because "[a]t best, we can say that the uninsured *may*, at some point in the *unforeseeable future*, create [a] cost-shifting consequence." Pet. App. 134a. That is a demonstrably incorrect statement. The economic activity undertaken by the uninsured creates a well-documented "cost-shifting consequence"—and a massive one at that—that distorts the health care and insurance markets by billions of dollars a year. The Eleventh Circuit's holding thus either rests on a false premise or entirely fails to recognize that Congress can regulate economic activity "in the aggregate," *Gonzales* v. *Raich*, 545 U.S. 1, 22 (2005), or both. Either way, its decision is fatally flawed. It should be reversed.

2. The Courts of Appeals roundly rejected respondents' proposed "activity" requirement for Commerce Clause regulation. This Court should do the same. The requirement has no basis in law and is unworkable to boot. But even if "activity" were required, the requirement would be met here because uninsured Americans unquestionably *do* participate in relevant economic activity: They obtain massive quantities of health care services for which they cannot or do not pay. The "activity" argument fails on its own terms.

3. Respondents argued below that if Congress can mandate the purchase of health insurance, then it could make Americans purchase anything, from cars to broccoli. Those arguments fall flat because the

purchase the ACA mandates—insurance—is a mere financing mechanism for another product the uninsured *already* consume—health care. Congress did not make people obtain that underlying product in new or different quantities. In that way, as the D.C. Circuit recognized, health care is unique. This case cannot be resolved based on facile comparisons to dissimilar markets.

ARGUMENT

I. THE CRISIS OF UNINSURANCE SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE.

The fundamental question in this case is whether "the national problem Congress has identified"—namely, the crisis of uninsurance—"is one that substantially affects interstate commerce." *Seven-Sky*, 661 F.3d 1, at *19. The answer clearly is yes: America's tens of millions of uninsured residents consume tens of billions of dollars' worth of health care each year. Others pick up much of the cost. The result is extreme distortion of both the health care and health insurance markets. That is a substantial effect if ever there was one.

A. The Uninsurance Crisis Substantially Affects Interstate Commerce.

1. In 2008 alone, uninsured Americans received $86 billion worth of health care from all providers. *Covering The Uninsured* 399, 402-403. The uninsured also made more than 20 million trips to hospital emergency rooms. U.S. Dep't of Health & Human Servs., *New Data Say Uninsured Account for Nearly One-Fifth of Emergency Room Visits* (July 15, 2009).[4]

---

[4] *Available at* http://www.hhs.gov/news/press/2009pres/07/20090715b.html.

Without the individual mandate, those numbers likely would continue to rise. The number of adults aged 18-64 who go without health insurance for some portion of the year has been increasing steadily over the past few years. Centers for Disease Control and Prevention, *Vital Signs: Access to Health Care* (Nov. 9, 2010).[5] Approximately 50 million people fell into this category over the course of 2010. *Id.*

The vast majority of these millions of uninsured individuals seek and receive health care services at some point—a point the lower courts repeatedly have recognized. *See Thomas More Law Center* v. *Obama*, 651 F.3d 529, 545 (6th Cir. 2011) ("virtually every individual in this country consumes these services"); *Seven-Sky*, 661 F.3d 1, at *18 ("virtually everyone" participates in the health care market); *see also* J. E. O'Neill and D.M. O'Neill, *Who Are the Uninsured? An Analysis of America's Uninsured Population, Their Characteristics and Their Health* 21 & tbl.9 (2009).[6] For example, 68 percent of the uninsured population had a routine check-up in the past five years, and 50 percent had one in the past two years. *Id.* at 20. Sixty-five percent of uninsured women had a mammogram within the last five years; 80 percent of uninsured women had a Pap smear in that time frame; and 86 percent of uninsured individuals had a blood pressure check. *Id.* at 20-22 & tbl.9. The takeaway is simple enough: "[T]he uninsured receive significant amounts of healthcare[.]" *Id.* at 24.

2. And those services are costly. As mentioned above, the uninsured pay a portion of the bill them-

---

[5] *Available at* http://www.cdc.gov/vitalsigns/HealthcareAccess/index.html.

[6] *Available at* http://epionline.org/studies/oneill_06-2009.pdf.

selves. *Covering The Uninsured* 399. But the bulk of the cost is borne by hospitals, health systems, doctors, insurers, and even other patients.

To begin with the providers: Of the $86 billion in care the uninsured received in 2008, some $56 billion was in the form of uncompensated care provided by hospitals, doctors, clinics, and health-care systems. *Id.* That amount exceeds the gross domestic product of some 70 percent of the world's nations. *Covering The Uninsured* 399, 403; *see* T. Serafin, *Just How Much is $60 Billion?*, Forbes Magazine, June 27, 2006.[7] All hospitals and health care systems—public and private, urban and rural, teaching and children's, investor-owned and nonprofit—shoulder these uncompensated-care costs. But the costs fall particularly heavily on core "safety net" hospitals—the term for hospitals or health systems that serve a substantial share of uninsured, Medicaid, and other vulnerable patients. Institute of Med., *America's Health Care Safety Net: Intact But Endangered* (2000).[8] For these hospitals, uncompensated care amounts to some 21 percent of total costs. *See* Changes in Health Care Financing & Organization, *Challenges Facing the Health Care Safety Net* (Feb. 2008).[9]

3. To be sure, hospitals bear many of these expenses as part of their mission. But that does not change

---

[7] *Available at* http://www.forbes.com/2006/06/27/billion-donation-gates-cz_ts_0627buffett.html.

[8] *Available at* http://www.iom.edu/~/media/Files/Report%20Files/2000/Americas-Health-Care-Safety-Net/Insurance%20Safety%20Net%202000%20%20report%20brief.pdf.

[9] *Available at* http://www.hcfo.org/publications/challenges-facing-health-care-safety-net.

the fact that uninsured individuals' collective need to seek care causes a substantial—indeed, massive—effect on interstate commerce.

A description of how hospitals work to serve uninsured patients illustrates how the crisis of uninsurance shifts costs to hospitals, and eventually to everyone in the health care market. Nearly every hospital with an emergency department is required to provide emergency services to anyone, regardless of ability to pay, at least until the patient's condition stabilizes. *See* Emergency Medical Treatment and Active Labor Act of 1986, 42 U.S.C. § 1395dd. State statutes and common-law rules also impose these duties in many jurisdictions. *See* U.S. Br. 39. As the Government rightly notes, these statutory duties reflect "deeply ingrained societal norms" that obligate health care providers to treat and stabilize those in need of emergency assistance. *Id.* That emergency care is often very costly. Trauma care, for example, requires hospitals to dedicate massive resources that, in serious cases, can quickly produce costs in the tens of thousands, or even hundreds of thousands, of dollars per patient. *See* P. Gerepka, *Cost Benefit Analysis of Providing Level II Trauma Care at William Beaumont Army Medical Center (WBAMC)* 12 (2002).[10] And hospitals, of course, must maintain sufficient emergency staff and equipment to serve the *whole* population, not just those who are insured. The costs are huge—and the majority of the bill goes unpaid. *See* U.S. Br. 8.

But even when the patient's need does not rise to the level of an emergency, hospitals regularly pro-

---

[10] *Available at* http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA421102.

vide free or deeply discounted care. Most hospitals' policies "specify that certain patients," such as "those who do not qualify for Medicare or other coverage and with household incomes up to a specified percentage of the Federal Poverty Level or 'FPL,' " will not be charged at all for the care they receive. Healthcare Fin. Mgmt. Ass'n, *A Report from the Patient Friendly Billing Project* 8 (2005).[11] Other patients, such as those "with incomes up to some higher specified percentage of the FPL," will "qualify for discounts on their hospital bills." *Id.*

Most uninsured (and under-insured) patients with incomes that exceed these levels, however, also face difficulty paying for services, especially if they require an extended hospital stay. The simple fact is that the machines, medicines, and technologies required to practice modern medicine are expensive—which is why, as the Government observes, the average bill for a single hospital stay for an uninsured person is some $22,500, and many procedures cost far more. *See* U.S Br. 8, 36. That is beyond the means of most American families.

Hospitals do what they can to help. Despite their incomes, some of these uninsured individuals may qualify for reduced-price care under hospital policies that assist the "medically indigent"—*i.e.*, "patients whose incomes may be relatively high, but [whose] hospital bills exceed a certain proportion of their annual household income or assets." *Patient Friendly Billing Project* at 11. For others, hospitals offer financial counseling, flexible payment plans, interest-free loans, and initiatives that help patients

---

[11] *Available at* http://www.hfma.org/HFMA-Initiatives/Patient-Friendly-Billing/PFB-2005-Uninsured-Report.

apply for grants or Medicaid. *Id.* at 11-15. These services advance hospitals' missions to serve the community—but they also require substantial resources that add to the already massive costs hospitals absorb to treat the uninsured.

Hospitals and other health care providers do not shoulder the burden alone. Supplemental Medicare and Medicaid payment programs also fund care for the uninsured and under-insured—in other words, American taxpayers share the cost. *Covering The Uninsured* 403-404. State and local governments—taxpayers again—likewise fund certain of these expenses. *Id.* at 405. Finally, insured patients (and their insurers) end up effectively paying a portion of the bills generated by their uninsured counterparts: As hospitals and other providers absorb costs of uncompensated care, they have fewer funds to reinvest and to cover their ongoing expenses, and that in turn drives costs higher. *Id.* at 406. Congress determined that cost "is passed on * * * 'to private insurers, which pass on the cost to families.'" *Thomas More*, 651 F.3d at 545 (quoting 42 U.S.C. § 18091(a)(2)(F)). "This cost-shifting inflates the premiums that families must pay for their health insurance 'by on average over $1,000 a year.'" *Id.* And " '[r]ising premiums push even more individuals out of the health insurance market, further increasing the cost of health insurance and perpetuating the cycle.'" *Id.* (quoting *47 Million and Counting: Why the Health Care Marketplace Is Broken: Hearing Before the S. Comm. on Finance*, 110th Cong. 49 (2008) (statement of Mark A. Hall)).

4. The crisis of uninsurance also substantially affects interstate commerce in another, related way: It increases the incidence of chronic conditions,

which in turn accounts for the vast majority of the nation's health care expenses.

As discussed at greater length below, *see infra* at 20-21, uninsured Americans are more likely to see health care providers only sporadically and to delay before seeking treatment for illnesses. That leads to a greater incidence of chronic diseases such as diabetes and coronary artery disease, as well as poorer health outcomes for people suffering from those diseases. *See* Institute of Med., *America's Uninsured Crisis: Consequences for Health & Health Care* 2-4 (Feb. 2009). And "[t]he total medical care costs for people with chronic disease account for more than *70 percent* of the nation's health care expenditures"—a massive sum. G. Halvorson, *Health Care Reform Now!* 3 (Wiley & Sons 2007) (emphasis added). That is a "substantial effect" in its own right. And it can only be ameliorated by broad-based coverage, because broad-based coverage gives health care providers the resources and continuity to effectively manage a patient's care over time. The ACA's reforms properly recognize that broader coverage, and integrated care delivery, are crucial to controlling the nation's spiraling health costs.

* * *

In short, the vast cost of health care for the uninsured is borne by the rest of the nation. That cost-shifting badly distorts prices in the health care sector—a sector that accounts for "almost one-fifth of the U.S. economy" and that is nearly as large as the gross domestic product of France. G. Fosler, *Sizing Up the U.S. Health Care Challenge* (July 2011).[12]

---

[12] *Available at* http://www.gailfosler.com/commentary/chart-of-the-week/sizing-up-the-u-s-health-care-challenge.

That is a quintessential "substantial effect" on interstate commerce. Nothing more is required to uphold the individual mandate as a constitutional exercise of Congress' Commerce Clause power.

B. The Eleventh Circuit's Holding Ignores Facts About the Market And Fails To Defer To Congress's Assessment Of That Market.

The Eleventh Circuit majority held that the crisis of uninsurance lacks a substantial effect on interstate commerce. But it erred twice over in reaching that conclusion: It badly misconstrued the realities of the health care and health insurance markets, and it failed to defer to Congress's understanding of those markets.

1. The Eleventh Circuit stated that "the regulated conduct giving rise to the cost-shifting" in this case "is divorced from a commercial transaction." Pet. App. 133a-134a. It asserted that "[a]t best, we can say that the uninsured *may*, at some point in the *unforeseeable future*, create that cost-shifting consequence." Pet. App. 134a (emphasis in original). And it opined that "the question" in the case was "whether Congress may regulate individuals *outside the stream of commerce*, on the theory that those 'economic and financial decisions' to avoid commerce *themselves* substantially affect interstate commerce." Pet. App. 113a (first emphasis added).

These three assertions drove the court's conclusion that too many "inferential leaps" are required to justify Commerce Clause regulation. Pet. App. 133a. But each one of the assertions is obviously incorrect. The conduct giving rise to the cost-shifting is not "divorced from a commercial transaction"; quite the contrary, that conduct is the consumption of massive

amounts of health care services without the capacity to pay the bill—"commercial" behavior by any definition. And the class of regulated individuals is not "outside the stream of commerce." Instead, they seek health care services frequently and in great numbers, and the value of those services amounts to $86 billion per year. *See supra* at 8. For these reasons, it is indefensible to assert that "[a]t best, we can say that the uninsured *may*, at some point in the *unforeseeable future*, create [a] cost-shifting consequence." Pet. App. 134a. The uninsured most assuredly create a "cost-shifting consequence" in the present—one that distorts the health care and health insurance markets to the tune of hundreds of millions of dollars per day, each and every day of the year. To refuse to recognize as much is either to ignore the facts or to ignore the law, which has long authorized Congress to regulate in the aggregate. *See Raich*, 545 U.S. at 17-19; *Seven-Sky*, 661 F.3d 1, at *19 ("Whether any 'particular person * * * is, or is not, also engaged in interstate commerce' * * * is a mere 'fortuitous circumstance' that has no bearing on Congress's power to regulate an injury to interstate commerce.") (quoting *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 121 (1942)) (first alteration in *Seven-Sky*). Either way it is a fatal flaw in the analysis.

The Eleventh Circuit's attempt to compare this case to the attenuated economic effects present in *Lopez*, Pet. App. 131a-133a, accordingly fails. In *Lopez*, the Court determined that there was an insufficient nexus between the challenged criminal statute and interstate commerce. The chain of inferences required to connect the regulated event (gun possession in a school zone) to a substantial

effect on interstate commerce was long and winding, not to mention unquantifiable: First, one had to assume that firearm possession in a school zone leads to violent crime; second, that guns in schools accordingly "threaten[ ] the learning environment"; third, that the "handicapped educational process" supposedly produced by guns in school zones would "result in a less productive citizenry"; and finally, that this firearm-hampered citizenry would dampen the national economy. *Lopez*, 514 U.S. at 563-564. Nearly every step in this chain was a matter of conjecture and hypothesis. Here, by contrast, the connection between a lack of pre-financed health-care purchases and interstate commerce is immediate and demonstrable: The uninsured receive health care they cannot afford, and as a result billions of dollars a year in costs are absorbed by third parties, distorting the market. Congress so found, *see* 42 U.S.C. § 18091(a)(2)(F), and its findings were not just rational—they were plainly correct. *See Thomas More*, 651 F.3d at 545. No "inference" is required.

2. In short, the crisis of uninsurance substantially affects interstate commerce, and the link between the two is clear and direct. But of course, the Court need not even accept those propositions to uphold the mandate; instead, all that is required is that "a 'rational basis' exists for so concluding." *Raich*, 545 U.S. at 22. That test is met in spades here. It is obviously rational to conclude, based on the facts just discussed, that the requisite "substantial effect" is present. Nor is the outcome different if the test has more teeth in this context—if, as Justice Kennedy has said, it requires "a demonstrated link in fact, based on empirical demonstration." *United States* v. *Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy,

J., concurring). The evidence set forth above, and recited by Congress in the ACA, amply demonstrates just such a link and relies on empirical evidence to do it. As the Sixth Circuit determined after reviewing that evidence: "Self-insuring for the cost of health care directly affects the interstate market for health care delivery and health insurance. These effects are not at all attenuated[.]" *Thomas More*, 651 F.3d at 545. Exactly. Whatever the rational-basis test requires in this context, the facts Congress relied upon in enacting the ACA easily clear the bar.

II. THE "ACTIVITY" TEST IS NOT THE LAW, AND IN ANY EVENT IT FAILS ON ITS OWN TERMS.

Every Court of Appeals to reach the question has rejected respondents' attempt to create, and inject into the Commerce Clause analysis, an "activity" requirement. *See* Pet. App. 100a ("[W]e are not persuaded that the formalistic dichotomy of activity and inactivity provides a workable or persuasive enough answer in this case."); *Seven-Sky*, 661 F.3d 1, at *17 (rejecting the argument that "an existing activity is some kind of touchstone or a necessary precursor to Commerce Clause regulation"); *Thomas More*, 651 F.3d at 548 (same). As these courts have correctly recognized, *e.g.*, *Seven-Sky*, 661 F.3d 1, at *17-*18, the proposed "activity" requirement is both unworkable and foreclosed by this Court's precedents. In any event, even if there were an "activity" requirement, it would be met on these facts because uninsured Americans participate in relevant economic activity: They obtain health care services, and they make decisions—by omission or otherwise—about how to fund those purchases.

A. The "Activity" Test Should Be Rejected.

1. This Court has never created or endorsed an "activity" requirement. The Court has used the term only as a descriptor in discussing the broad outlines of Congress's power, *see Lopez*, 514 U.S. at 567 (explaining that legal standards for the Commerce Clause "are not precise formulations, and in the nature of things they cannot be"), and has not used it in every instance when describing congressional power. *See, e.g.*, *Raich*, 545 U.S. at 17 (Congress may regulate "a practice" that poses "a threat to the national market"). Nor would it make sense to require "activity" as a separate prong of the Commerce Clause analysis. The relevant question under the Commerce Clause is not whether Congress is targeting activity, but whether the object of congressional regulation is causing a substantial "impact on commerce." *Maryland* v. *Wirtz*, 392 U.S. 183, 196 n.27 (1968).

Indeed, to superimpose an activity requirement "is to plunge the law in endless difficulties," *Charles C. Steward Machine Co.* v. *Davis*, 301 U.S. 548, 589-590 (1937), because—as the *Seven-Sky* court correctly recognized, 661 F.3d 1, at *17—whether a regulated individual is engaged in relevant activity depends on one's perspective. Almost any individual subject to regulation can be described as "active" or "inactive," depending on the level of generality one adopts. The motel owners in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964), for example, were "inactive" in the sense that they refused to do something—serve black customers—and were forced to do it by federal law. The farmers in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), were "inactive" in the sense that they refused to do something—participate

in the public wheat market—and were "forc[ed] * * * into the market to buy what they could provide for themselves." *Id.* at 129; *see also Seven-Sky*, 661 F.3d 1, at *17. And one can imagine a range of other circumstances in which the regulated individual would be "inactive" and yet Congress clearly could regulate. Take, for example, protesters who choose to sit passively at the entrance to nuclear power plants, refusing to move and blocking the way for crucial employees. Surely Congress would be entitled to forbid that "inactivity" if it found that it substantially affected the interstate energy market.

The mandate's challengers, no doubt, would respond that all of these examples involve some underlying active component—for example, walking to the nuclear facility to start the passive protest. But so too here. Uninsured individuals seek and obtain health care services in a massive national market. That is an active component, and one that has a very substantial effect on interstate commerce. Respondents' argument thus only underscores the fact that whether a regulated individual is sufficiently "active" is a matter of perspective. "[T]he constitutionality of the minimum coverage provision cannot be resolved with a myopic focus on a malleable label." *Thomas More*, 651 F.3d at 548. When such "malleable label[s]" have been created in the past, they have quickly been abandoned as unworkable failures. *See Wickard*, 317 U.S. at 120 ("[Q]uestions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' * * * ."). There is no reason to go down that road again.

B. In Any Event, The Uninsured Participate In Relevant Economic Activity.

Even if "activity" were required to justify Commerce Clause regulation, that requirement would be met here because the uninsured *do* participate in relevant economic activity: They obtain health care services that they cannot afford. Indeed, "virtually everyone" obtains health care services sooner or later, *Seven-Sky*, 661 F.3d 1, at *18, and the cost of providing them to the uninsured is extraordinary. *See supra* at 7-8. Thus an individual's decision to purchase or decline health insurance is nothing other than a decision about whether he will pay, or ask others to pay, for existing and future health care costs—*i.e.*, how he will pay for services he will receive. That is quintessential economic activity.

1. Challengers to the mandate argued in the courts below that the uninsured are simply "declining to enter a commercial transaction," and are engaging in no "relevant current economic or commercial activity." Opening Br. of Plaintiffs-Appellants 33, *Seven-Sky*, 661 F.3d 1 (D.C. Cir. 2011) (No. 11-5047), 2011 WL 1877683 ("*Seven-Sky Brief*"). That is inaccurate for the reasons set forth at length above. The uninsured in the aggregate consume $86 billion of health care per year. *See supra* at 8. Much of the cost "is passed on * * * 'to private insurers, which pass on the cost to families.'" *Thomas More*, 651 F.3d at 545 (quoting 42 U.S.C. § 18091(a)(2)(F)). And "[t]his cost-shifting inflates the premiums that families must pay for their health insurance 'by on average over $1,000 a year.'" *Id.*

That is "relevant current economic or commercial activity" by any measure. As the Sixth Circuit

recognized: "The activity of foregoing health insurance and attempting to cover the cost of health care needs by self-insuring is no less economic than the activity of purchasing an insurance plan. Thus, the financing of health care services, and specifically the practice of self-insuring, is economic activity." *Thomas More*, 651 F.3d at 544; *see also id.* at 561 (Sutton, J., concurring) ("[I]naction *is* action, sometimes for better, sometimes for worse, when it comes to financial risk.") (emphasis in original). To say the uninsured become "inactive" by declining to purchase insurance is to ignore reality. The uninsured still obtain health care; others just pay for it.

2. Respondents' assertions that they as individuals do not participate in the relevant market are inaccurate for two additional reasons. First, one cannot simply "exit" the health care market. Nearly all people, sooner or later, receive health care whether they would have chosen to or not. When a person has a medical crisis, or is in a car accident, or falls and breaks a limb, he or she is transported to the hospital and provided care. The choice each one of us faces is not whether to participate in the market; it is how to pay for the care we inevitably will receive.

Second, the decision of some uninsured individuals to put off regular preventive care actually *increases* their activity in the health care market in the long run and increases the costs to treat them. That is because "[d]elaying or forgoing needed care can lead to serious health problems, making the uninsured more likely to be hospitalized for avoidable conditions." Kaiser Comm'n on Medicaid & the Uninsured, *The Uninsured & the Difference Health Care*

Makes 2 (Sept. 2010).[13] As the Centers for Disease Control and Prevention observed: "Approximately 40 percent of persons in the United States have one or more chronic disease[s], and continuity in the health care they receive is essential to prevent complications, *avoidable long-term expenditures*, and premature mortality." J. Reichard, *CDC: Americans Uninsured at Least Part of the Year on the Rise, Harming Public Health*, CQ Healthbeat News, Nov. 9, 2010 (emphasis added). For example, "[s]kipping care for hypertension can lead to stroke and costly rehabilitation" and "[s]kipping it for asthma can lead to hospitalization." *Id.*; *see America's Uninsured Crisis*, *supra*, at 2-3 (collecting research findings on poorer outcomes for uninsured patients suffering from various serious diseases).

This is not mere rhetoric. Studies have shown that "[l]ength of stay" in the hospital is "significantly longer" for uninsured patients who suffer from heart attacks, stroke, and pneumonia than for insured patients with those conditions—a disparity researchers attribute at least in part to "uninsured patients' lack of access to primary care and preventive services." E. Bakhtiari, *In-Hospital Mortality Rates Higher for the Uninsured*, HealthLeaders Media (June 14, 2010).[14] For this reason, too, it makes little sense to suggest that people can declare themselves out of the health care market. Any decision to avoid the health care market in the short term simply

---

[13] *Available at* http://www.kff.org/uninsured/upload/1420-12.pdf.

[14] *Available at* http://www.healthleadersmedia.com/content/QUA-252419/InHospital-Mortality-Rates-Higher-for-the-Uninsured.html.

produces more market activity in the medium and long term. Congress has the authority to recognize as much, and to regulate uninsureds' choices about who will pay for that market activity.

3. In the end, respondents can assert that the uninsured are engaged in mere "inactivity" only by focusing exclusively on the health *insurance* market and ignoring the broader market Congress chose to regulate through the ACA—the health *care* market. *See* 42 U.S.C. § 18091(a)(2)(A). But that argument, too, fails on its own terms, because the uninsured *are* active in the health insurance market in an important sense: Even those who do not obtain access to that market in a given year are obtaining the free, present benefit of an insurance-funded infrastructure waiting to care for them when they need it. *See Thomas More*, 651 F.3d at 557 (Sutton, J., concurring) ("Congress could reasonably conclude that the decisions and actions of the self-insured substantially affect interstate commerce" because one way to self-insure "is to save nothing and to rely on something else—good fortune or the good graces of others—when the need arises."); U.S. Br. 51.

In any event, the Court should reject respondents' invitation to redefine the lens through which Congress viewed the facts. Congress was entitled to perceive its task as the regulation of the whole health care market, and to recognize that "[i]nsurance is the customary means of payment for services in the health care market." U.S. Br. 2. The Court must "respect the level of generality at which Congress chose to act." *United States* v. *Nascimento*, 491 F.3d 25, 42 (1st Cir. 2007) (citing *Raich*, 545 U.S. at 22); *see* U.S. Br. 41.

III. THE "SLIPPERY SLOPE" CLAIMS FAIL TO RECOGNIZE THE UNIQUENESS OF THE HEALTH CARE MARKET.

The individual mandate's challengers relied heavily below on slippery-slope arguments, insisting that if Congress can require participants in the health care market to buy insurance, then Congress effectively will be permitted to exercise a "federal police power allowing Congress—for the first time—to mandate a host of purchases by individuals." *Seven-Sky Brief* at 32. Congress's assertion of authority in the ACA, they said, means it could also "mandate that all Americans above a certain income level buy a General Motors vehicle" or "requir[e] Americans to buy a gym membership, keep a specific body weight, or maintain a healthier diet[.]" *Id.* at 39-40, 57.

No. There is a key difference between this case and respondents' hypotheticals: In this case the activity individuals are being "forced" to undertake is a mere financing mechanism for another activity they *already* undertake—consumption of health care. Congress did not make people obtain that underlying product in new or different quantities, and this case does not present the question whether Congress could do so. *See Seven-Sky*, 661 F.3d 1, at *18 ("It suffices for this case to recognize" that "the health insurance market is a rather unique one * * * because the uninsured inflict a disproportionate harm on the rest of the market as a result of their later consumption of health care services."). Instead, Congress made sure people pay for what they get. To put things in the challengers' terms, Congress did not make anyone buy a General Motors vehicle. It instead made sure no one can drive a General Motors

vehicle off the lot and tell the car dealership to bill their neighbor (or to absorb the cost itself).

The alarmist hypotheticals are not just inapposite but unrealistic; they ignore the limits the political process places on Congress's actions. This Court has recognized for two centuries that while the Commerce Clause power is broad, Congress is restrained by the electorate. Put another way, it has recognized that "effective restraints on [the] exercise" of the Commerce power "must proceed from political, rather than from judicial, processes." *Wickard*, 317 U.S. at 120 (citing *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824)). To suggest that Congress would force all Americans to buy a particular make of vehicle, or buy a pound of broccoli every week, or sleep at particular times, or any of the rest of the pundits' parade of fantastical hypotheticals, is to abandon all faith in representative democracy.

CONCLUSION

Hospitals will continue to care for the uninsured, as they have for generations, regardless of their ability to pay—and indeed, for many hospitals that service is at the core of their mission. But let there be no mistake: The choice to forego health insurance is not a "passive" choice without concrete consequences. The health care uninsured Americans obtain has real costs. Their decision to obtain care, and how to pay for it, is economic activity with massive economic effects, including the imposition of billions in annual costs on the national economy. In regulating the national health care industry, Congress possessed ample authority to address those costs by changing the way uninsured Americans finance the services they receive.

For the foregoing reasons, this Court should uphold the individual mandate.

Respectfully submitted,

SHEREE R. KANNER
CATHERINE E. STETSON*
DOMINIC F. PERELLA
MICHAEL D. KASS
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491
cate.stetson@hoganlovells.com

MELINDA REID HATTON
MAUREEN D. MUDRON
American Hospital Association
325 Seventh Street, N.W.
Suite 700
Washington, D.C. 20001
(202) 638-1100

IVY BAER
FRANK R. TRINITY
Association of American Medical Colleges
2450 N Street, N.W.
Washington, D.C. 20037
(202) 828-0499

BARBARA EYMAN
National Association of Public Hospitals and Health Systems
1301 Pennsylvania Ave., N.W.
Suite 950
Washington, D.C. 20004
(202) 585-0100

JEFFREY G. MICKLOS
Federation of American Hospitals
750 Ninth Street, NW
Suite 600
Washington, D.C. 20001
(202) 624-1521

LISA GILDEN
The Catholic Health Association of the United States
1875 Eye Street, N.W.
Suite 1000
Washington, D.C. 20006
(202) 296-3993

National Association of Children's Hospitals
401 Wythe Street
Alexandria, VA 22314
(703) 684-1355

Counsel for Amici Curiae
**Counsel of record*

January 13, 2012

AMICUS CURIAE BRIEF

No. 11-398

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
PETITIONERS

v.

STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

(Minimum Coverage Provision)

SETH L. COOPER
AMERICAN LEGISLATIVE
EXCHANGE COUNCIL
1101 Vermont Ave., NW
Washington, DC 20005
(202) 466-3800

JOHN P. ELWOOD
Counsel of Record
ERIC A. WHITE
VINSON & ELKINS LLP
2200 Pennsylvania Ave.,
NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

Table of Authorities III

Interest of *Amicus Curiae* 1

Summary of Argument 3

Argument 7

I. The Individual Mandate Exceeds Congress's Authority Under The Commerce Clause, As Informed By Core Principles Of Federalism 7

A. Core Principles Of Federalism Constrain Congress's Commerce Clause Authority, And Deny The Federal Government A General Police Power 8

B. Upholding The Individual Mandate As A Valid Exercise Of The Commerce Power Would Upset The Federal-State Balance And Effectively Grant Congress A Plenary Police Power 11

II. The Individual Mandate Exceeds Congress's Authority Under The Necessary And Proper Clause, As Informed By Core Principles Of Federalism 15

A. In Exercising Authority Under The Necessary And Proper Clause, Congress Must Give Proper Account To "[S]tate [I]nterests" 17

B. The ACA's Individual Mandate Fails To Account For State Interests 18

Table of Contents—Continued: **Page**

III. Upholding The Individual Mandate Would "Displace State Policy Choices" And Stifle The States' Constitutional Role As Laboratories Of Democracy 19

Conclusion 28

TABLE OF AUTHORITIES

Cases: **Page(s)**

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935) 9

Barnes v. *Glen Theatre, Inc.*, 501 U.S. 560 (1991) 5-6

Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 9

Free Enter. Fund v. *Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) 12

Free Enter. Fund v. *Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008) 12

Gonzales v. *Oregon*, 546 U.S. 243 (2006) 10, 15

Gonzales v. *Raich*, 545 U.S. 1 (2005) 9, 12, 27

Head v. *New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424 (1963) 15

Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964) 12

Hill v. *Colorado*, 530 U.S. 703 (2000) 15, 18

McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 16

Medtronic, Inc. v. *Lohr*, 518 U.S. 470 (1996) 15

New State Ice Co. v. *Liebmann*, 285 U.S. 262 (1932) 4, 20

New York v. *United States*, 505 U.S. 144 (1992) ..... *passim*

Cases—Continued: **Page(s)**

NLRB v. *Jones & Laughlin Steel Corp.*,
301 U.S. 1 (1937) 4, 9

Printz v. *United States*,
521 U.S. 898 (1997) 6, 16, 18

Reina v. *United States*,
364 U.S. 507 (1960) 1

San Antonio Indep. Sch. Dist. v. *Rodriguez*,
411 U.S. 1 (1973) 4

Sporhase v. *Nebraska ex rel. Douglas*,
458 U.S. 941 (1982) 6, 9, 15

United States v. *Comstock*,
130 S. Ct. 1949 (2010) ..... *passim*

United States v. *Darby*,
312 U.S. 100 (1941) 27

United States v. *Lopez*,
514 U.S. 549 (1995) ..... *passim*

United States v. *Morrison*,
529 U.S. 598 (2000) ..... *passim*

Virginia ex rel. Cuccinelli v. *Sebelius*,
728 F. Supp. 2d 768 (E.D. Va. 2010),
vacated, 656 F.3d 253 (4th Cir. 2011) 2

Wickard v. *Filburn*,
317 U.S. 111 (1942) 12

Constitutional Provisions:

U.S. Const. art. I, § 8, cl. 3
(Commerce Clause) ..... *passim*

U.S. Const. art. I, § 8, cl. 18
(Necessary and Proper Clause) ..... *passim*

Constitutional Provisions—Continued: Page(s)

U.S. Const. amend. X 1, 8
Ariz. Const. art. 27, § 2 19

Statutes and Regulations:

Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd 14
Patient Protection And Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 ..... *passim*
42 U.S.C. §§ 18031-18033 22
Ala. Code § 27-52-1 (2010) 21
Alaska Stat. § 21.55.010 (2011) 21
Ariz. Rev. Stat. § 20-122 (2011) 23
Ariz. Rev. Stat. § 20-181 (2011) 25
Ark. Code Ann. § 23-79-501 (2011) 21
Ark. Code § 26-51-2101 (2011) 23
Cal. Health & Safety Code § 127660 (West 2011) 25
Cal. Ins. Code § 12700 (West 2011) 21
Colo. Rev. Stat. § 10-8-501 (West 2011) 21
Colo Rev. Stat. Ann. § 10-16-103 (West 2011) 25
Colo. Rev. Stat. § 25-35-103 (West 2011) 23
Conn. Gen. Stat. § 38a-556 (2011) 21
Fla. Stat. § 624.1265 (2011) 23
Fla. Stat. Ann. § 499.029 (West 2011) 23
Fla. Stat. § 624.215 (2011) 25
Fla. Stat. § 627.648 (2011) 21
Ga. Code Ann § 33-1-19 (West 2011) 23
Ga. Code Ann § 33-1-20 (West 2011) 23

Statutes and Regulations—Continued: Page(s)

Ga. Code Ann. § 33-24-60 (West 2010) 25
Ga. Code Ann. § 33-29A-30 (West 2011) 25
Ga. Code Ann. § 48-7-27(13)(A) (West 2010) 23
Haw. Rev. Stat. § 23-51 (West 2011) 25
Idaho Code § 39-9003 (2011) 19
Idaho Code § 41-5501 (2011) 21
Idaho Code Ann. § 63-3029K (West 2011) 23
215 Ill. Comp. Stat. 105/1 (2011) 21
Ind. Code Ann. § 27-1-3-30 (West 2011) 25
Ind. Code § 27-8-10-1 (2011) 21
Iowa Admin. Code 701-40.66(422) (2011) 23
Iowa Code Ann. § 505.22 (West 2011) 23
Iowa Code § 514E.1 (2011) 21
Kan. Stat. Ann. § 40-202(j) (West 2010) 22
Kan. Stat. Ann. § 40-2117 (West 2011) 21
Kan. Stat. Ann. § 40-2248 (West 2010) 25
Ky. Rev. Stat. Ann. § 194A.450 (West 2011) 23
Ky. Rev. Stat. Ann. § 304.1-120(7) (West 2010) 23
Ky. Rev. Stat. Ann. § 304.17B-001 (2011) 21
Ky. Rev. Stat. Ann. § 6.948 (West 2010) 25
La. Rev. Stat. Ann. § 22:1201 (West 2010) 21
La. Rev. Stat. Ann. § 24:603.1 (2010) 25
La. Rev. Stat. Ann. § 47:297(N)(1) (2010) 23
Me. Rev. Stat. tit. 24-A, § 405-A (2011) 25
Me. Rev. Stat. tit. 24-A, § 704(3) (2011) 22
Me. Rev. Stat. tit. 24-A, § 2752 (2010) 25

Statutes and Regulations—Continued: Page(s)

Md. Code Ann., Ins. § 1-202 (West 2010) 23
Md. Code Ann., Ins. § 14-501 (West 2010) 21
Md. Code Ann., Ins. § 15-1501 (West 2010) 25
Mass. Gen. Laws Ann. ch. 3, § 38C (West 2011) 25
956 Mass. Code Regs. 5.03(4)(c) (West 2011) 23
Mich. Comp. Laws Ann. § 333.17780 (West 2011) 23
Minn. Stat. Ann. § 151.55 (West 2011) 23
Minn. Stat. Ann. § 290.01(19b)(12) (West 2010) 23
Minn. Stat. Ann. § 62E.10 (West 2011) 21
Minn. Stat. Ann. § 62J.26 (West 2011) 25
Miss. Code Ann. § 27-7-18 (5)(A) (West 2010) 23
Miss. Code Ann. § 83-9-201 (West 2010) 21
Mo. Ann. Stat. § 376.960 (West 2011) 21
Mo. Ann. Stat. § 376.1750 (West 2011) 23
Mont. Code Ann. § 33-22-1501 (2011) 21
Mont. Code Ann. § 37-7-1401 (2009) 23
N.H. Rev. Stat. Ann. § 400-A:39-b (2010) 25
N.H. Rev. Stat. § 404-G:5-a (2011) 21
N.J. Stat. Ann. § 17B:27D-1 (West 2011) 25
N.M. Stat. Ann. § 59A-54-1 (West 2010) 21-22
N.M. Stat. Ann. § 7-2-36 (West 2010) 23
N.Y. Ins. Law § 213 (McKinney 2011) 25
N.Y. Tax Law § 612(38)(A)-(B) (McKinney 2010) 23
Neb. Rev. Stat. § 44-4216 (West 2010) 22
Neb. Rev. Stat. § 71-2422 (2010) 23
Nev. Rev. Stat. Ann. § 457.400 (West 2010) 23
N.C. Gen. Stat. Ann. § 58-50-175 (West 2010) 22

Statutes and Regulations—Continued: Page(s)

N.D. Cent. Code § 26.1-08-01 (2011) 22
N.D. Cent. Code § 54-03-28 (2009) 25
N.D. Cent. Code § 57-38-30.3(2)(j) (2011) 23
Pa. Code, tit. 28, ch. 931 §§ 1-4 25
40 Pa. Cons. Stat. Ann. § 23(b) (West 2010) 22
62 Pa. Cons. Stat. Ann. § 2921 (West 2011). 23
Ohio Rev. Code Ann. § 103.144 (West 2011) 25
Ohio Rev. Code Ann. § 5747.01(A)(25)(West 2010) ... 23
Okla. Stat. Ann. tit. 36, § 110(11)(a) (West 2011) 22
Okla. Stat. Ann. tit. 36, § 6531 (West 2011) 22
Okla. Stat. Ann. tit. 68, § 2358(E)(21)(a)
(West 2011) 23-24
Or. Rev. Stat. § 735.600 (2011) 22
Or. Rev. Stat. Ann. §§ 171.870, .875, .880
(West 2011) 25
R.I. Gen. Laws. Ann. § 44-30-12(c)(7) (West 2011) ... 24
S.C. Code § 38-74-10 (2011) 22
S.D. Codified Laws § 58-17-115 (2011) 22
Tenn. Code Ann. § 3-2-111 (West 2010) 25
Tenn. Code Ann. § 56-7-2901 (West 2010) 23
Tex. Ins. Code Ann. § 1506.001 (West 2011) 23
Tex. Ins. Code Ann. § 38.251 (West 2009) 25
Utah Code § 31A-1-103(3)(c) (2010) 23
Utah Code § 31A-29-101 (2011) 23
Utah Code § 36-12-5 (2011) 25
Utah Code § 59-10-1015 (2011) 24
Utah Code § 63M-1-2505.5 (2011) 19

Statutes and Regulations—Continued: Page(s)

Va. Code Ann. § 2.2-2505 (West 2011) 25
Va. Code Ann. § 38.2-3430.1:1 (West 2011) 19
Va. Code Ann. § 38.2-6300 (West 2011) 23
Va. Code Ann. § 58.1-322(D)(13) (West 2011) 24
Wash. Rev. Code § 48.41.010 (2011) 23
Wash. Rev. Code Ann. §§ 48.47.005, .010, .020, .030 (West 2011) 25
W. Va. Code § 33-48-1 (2011) 23
Wis. Stat. § 149.10 (2011) 23
Wis. Stat. Ann. § 600.01(1)(b)(9) (West 2011) 23
Wis. Stat. Ann. § 601.423 (West 2011) 25
Wis. Stat. Ann. § 71.05(10)(i)(1) (West 2011) 24
Wyo. Stat. § 26-18-205 (2011) 25
Wyo. Stat. § 26-43-101 (2011) 22

Other Authorities:

ALEC, Cancer Drug Donation Program Act (2008) 23
ALEC, Freedom of Choice in Health Care Act (2009) 1-2, 19
ALEC, Health Care Choice Act for States (2007) 3, 24
ALEC, High Risk Health Insurance Pool Act (2007) 2
ALEC, Long Term Care Tax Credit Act (1997) 26
ALEC, Mandated Benefits Review Act (2002) 3

Other Authorities—Continued: **Page(s)**

ALEC, Medical School Loan Repayment Act (1995) 26

ALEC, Patients First Medicaid Reform Act (2010) 25

ALEC, State Children's Health Insurance (SCHIP) Anti-Crowd Out Act (2008) 25-26

Congressional Budget Office Cost Estimate, H.R. 2355, Health Care Choice Act of 2005 (Sept. 12, 2005) 24

Davey, Monica, *Health Care Overhaul and Mandatory Coverage Stir States' Rights Claims*, N.Y. Times, Sept. 28, 2009 2

The Federalist No. 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 16

The Federalist No. 45 (James Madison) (Clinton Rossiter ed., 1961) 8

Larson, Sven R., *The Health Care Choice Act: Lowering Costs by Allowing Competition in the Individual Insurance Market*, Prosperitas, Vol. 9 (Oct. 2009) 24-25

Lawson, Gary & Granger, Patricia B., *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267 (1993) 18

Volden, Craig, *States as Policy Laboratories: Emulating Success in the Children's Health Insurance Program*, 50 Am. J. Pol. Sci. 294 (2006) 26

INTEREST OF *AMICUS CURIAE*[1]

The American Legislative Exchange Council ("ALEC") is the Nation's largest nonpartisan, individual-membership association of state legislators. ALEC has approximately 2,000 members—nearly one-third of all state legislators in the United States. It serves to advance Jeffersonian principles of individual liberty, free and efficient markets, responsible and accountable government, and federalism. ALEC has a number of interests in this litigation, reflected in its official activities, policies, and publications.

The Patient Protection and Affordable Care Act of 2010 ("the ACA" or "the Act") is an extraordinary law, founded on an expansive conception of federal legislative authority that is without precedent in our Nation's history, and fundamentally incompatible with the principles of limited government held by ALEC and its members. The ACA's individual mandate, which requires that virtually all individuals living in the United States purchase and maintain health insurance meeting federal specifications, is based on a sweeping view of federal legislative authority tantamount to the general police power the Tenth Amendment to the Constitution has long reserved to the States. See *Reina* v. *United States*, 364 U.S. 507, 510-511 (1960). ALEC and its members believe that such a theory of congressional authority is incom-

---

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae* and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

patible with the Constitution's enumeration of federal powers, and will have profound effects on the relationship between the federal Government and the States.

In 2008, ALEC developed influential model legislation, the Freedom of Choice in Health Care Act, that brought national attention to State-level opposition to the Administration's health reform agenda.[2] The model act served as the basis for legislation that was found to give the Commonwealth of Virginia standing in *Virginia ex rel. Cuccinelli* v. *Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010), *vacated*, 656 F.3d 253 (4th Cir. 2011), the first-in-the-nation challenge to the ACA.

The ACA's individual mandate is incompatible with ALEC's State-level efforts to reform health care and secure broader coverage through market-driven, cost-effective measures that preserve individual liberty and State sovereignty. For instance, ALEC's High Risk Health Insurance Pool Model Act (2007) is designed to make affordable health insurance coverage available for individuals with preexisting conditions and the medically uninsurable, through a state- and industry-funded high-risk pool. To date, 35 states have created high-risk pools guaranteeing universal access to health insurance without mandates or market-distorting price controls.

ALEC's efforts predate passage of the ACA: it has long supported market-based solutions to the rising

---

[2] See, *e.g.*, Monica Davey, *Health Care Overhaul and Mandatory Coverage Stir States' Rights Claims*, N.Y. Times, Sept. 28, 2009, http://www.nytimes.com/2009/09/29/us/29states.html (discussing ALEC model legislation).

costs of health coverage, which numerous states have adopted in varying forms. These efforts are called into question—if not directly displaced by—the ACA's homogenizing federal mandate. ALEC's model Health Care Choice Act for States (2007), for instance, would allow individuals to purchase quality, affordable health insurance across state lines, in contrast to current policy, which restricts individuals to coverage sold within their State, constraining choices and increasing costs. And ALEC's model Mandated Benefits Review Act (2002) helps keep health coverage affordable by providing an institutional check on mandated health insurance benefits (*i.e.*, benefits individuals are required to "purchase" if they want to buy health coverage at all).

As the Court of Appeals noted, ALEC "filed a helpful *amicus* brief" with that court, "documenting the diverse array of policies implemented by states to provide their citizens with health coverage." Pet. App. 142a-143a n.124.

SUMMARY OF ARGUMENT

The Respondents persuasively demonstrate that the ACA's individual mandate exceeds Congress's authority under the Commerce Clause and the Necessary and Proper Clause; that the District Court correctly concluded that the individual mandate is not severable; and that (as argued by the States) the ACA's expansion of Medicaid exceeds Congress's Spending Clause authority. We do not attempt to repeat the full constitutional analysis set forth in those briefs.

Rather, as *amicus curiae*, ALEC undertakes the more limited task of demonstrating that the ACA's

individual mandate—and the expansive theory of federal legislative authority the Government has developed to defend it—are inconsistent with core constitutional principles of federalism that constrain the scope of the Commerce and Necessary and Proper Clauses. Contrary to the claims of some of petitioners' *amici* that this case does not involve "'the proper division of authority between the Federal Government and the States,'" Br. of the States of Maryland *et al.* as *Amici Curiae* 2 ("Maryland Br.") (quoting *New York* v. *United States*, 505 U.S. 144, 149 (1992)), ALEC and its member legislators recognize that upholding the constitutionality of the individual mandate would have profound effects on the State-federal relationship. The individual mandate represents a high-water mark for the assertion of federal legislative authority, transgressing long-established boundaries between state and federal legislation, and disrupting an array of State-level legislative and regulatory initiatives. The ACA cannot be reconciled with the core values of "our federalism," which protects "each State's freedom to 'serve as a laboratory; and try novel social and economic experiments'" designed to "tailor local programs to local needs." *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 49-50 (1973) (quoting *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); see also *United States* v. *Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

Principles of federalism and enumerated powers lie at the core of this Court's modern Commerce Clause jurisprudence. Notwithstanding the expansion of congressional authority to accommodate the modern U.S. economy, this Court has consistently ar-

ticulated the need for definite boundaries on the Commerce power. Two longstanding principles are that the Commerce Clause must not be construed so broadly as to "'obliterate the distinction between what is national and what is local,'" *Lopez*, 514 U.S. at 557 (quoting *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)), and that the Constitution reserves to the States, and denies the federal Government, a general police power, *United States* v. *Morrison*, 529 U.S. 619 n.8 (2000) (quoting *New York* v. *United States*, 505 U.S. at 155). These constraints apply with particular force in areas where States have historically possessed primary regulatory authority.

Upholding the ACA's individual mandate would disregard these fundamental principles. At bottom, the Government claims authority to force individuals to participate not only in interstate commerce, but in local, *intra*state commerce, on the theory that individual abstention from purchasing health insurance (whether stemming from a conscious decision or simple inattention) negatively affects the market for health insurance as compared to when individuals uniformly purchase insurance under a federal mandate. The Government's theory of the Commerce power admits of no principled limit, as Congress could mandate activity that affects interstate commerce with respect to nearly every individual decision, amounting to a general federal police power. Moreover, regulation of public health and welfare has historically been understood as a core component of the sovereignty reserved to the States. See, *e.g.*, *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined

as the authority to provide for the public health, safety, and morals . . . .").

Similar federalism principles constrain Congress's authority under the Necessary and Proper Clause. That Clause cannot sustain legislation that violates the Constitution's textual and structural protections for state sovereignty, because such laws are not "proper" but rather "usurpations" of authority. *Printz* v. *United States*, 521 U.S. 898, 923-924 (1997) (internal quotations and citation omitted). The ACA's individual mandate fails to "properly account[] for state interests," *United States* v. *Comstock*, 130 S. Ct. 1949, 1962 (2010), in a "core" area of State regulatory power—regulation to protect public health, *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 956 (1982)—as it vests no discretion in the States to avoid regulation in this area of traditional state authority; disrupts and homogenizes a range of ongoing State legislative efforts; and grants the federal Government a general police power.

The federal individual mandate will disrupt or displace an array of health reforms numerous states are currently undertaking. These initiatives include market-based, cost-effective solutions such as the creation by some 35 States of high-risk pools to provide insurance to individuals who are otherwise medically uninsurable. The federalism costs of the ACA are heightened by the fact that Congress's rush to legislative judgment interrupted this active and ongoing State-level dialogue. And it did so just as a critical mass of States has begun to develop legislation tailored to their particular circumstances, and before they had an adequate opportunity to operate in their intended role as "laboratories of democracy"

to develop programs that other States could emulate. Although some of petitioners' *amici* assert that State legislation cannot effectively address issues involving the health care market, those claims simply do not reflect the States' more recent experience, and their recent and ongoing successes in this area.

ARGUMENT

"[D]eeply ingrained in our constitutional history" is the proposition that the "'Constitution created a Federal Government of limited powers,' while reserving a generalized police power to the States." *Morrison*, 529 U.S. at 618 n.8 (quoting *New York*, 505 U.S. at 155). That core principle has long informed this Court's efforts to delineate clear boundaries for Congress's authority under the Commerce and Necessary and Proper Clauses. ALEC agrees with, and does not attempt to replicate, the compelling constitutional analysis set forth in the briefs for the Respondents. Rather, ALEC focuses on the federalism implications of the Government's expansive theory of federal legislative authority, which transgresses longstanding limits on Congress's legislative authority and divests the States of their traditional role as policy innovators in an area of historic State authority and sovereignty.

I. THE INDIVIDUAL MANDATE EXCEEDS CONGRESS'S AUTHORITY UNDER THE COMMERCE CLAUSE, AS INFORMED BY CORE PRINCIPLES OF FEDERALISM

It is a telling fact that, in its sixty-three-page opening brief urging the constitutionality of the ACA, the Government makes not one mention of the word "federalism." See generally Br. of United States. The

ACA's minimum coverage provision runs counter to that fundamental principle, effectively displacing State authority in a domain long considered to be a central part of their general police power. Indeed, the Government's expansive reading of the Commerce Clause admits of no principled limit to what activities the federal Government can choose to regulate.

A. Core Principles Of Federalism Constrain Congress's Commerce Clause Authority, And Deny The Federal Government A General Police Power

This Court's modern Commerce Clause jurisprudence rests on an irreducible "first principle[]" of federalism: that the "enumerated powers" delegated to the federal Government by the Constitution are "'few and defined,'" while "'[t]hose which . . . remain in the State governments are numerous and indefinite.'" *Lopez*, 514 U.S. at 552 (quoting The Federalist No. 45, at 292-293 (James Madison) (Clinton Rossiter ed., 1961)). Congress exercises its Article I authorities "subject to the limitations contained in the Constitution," including the Tenth Amendment. *New York*, 505 U.S. at 155-156. "[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Id.* at 181 (internal quotations and citation omitted); see also *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring).

From its early efforts to reconcile core federalism principles with Congress's expanded role in regulating the Nation's modern, industrialized economy, this

Court expressed "the fear that [without principled boundaries on the Commerce power] 'there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government.'" *Lopez*, 514 U.S. at 555 (quoting *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 548 (1935)). Although the Court's precise doctrinal formulations have varied, one enduring guidepost is that the Commerce power "is subject to outer limits" and must be construed "'in the light of our dual system of government.'" *Lopez*, 514 U.S. at 557 (quoting *Jones & Laughlin Steel*, 301 U.S. at 37). The Clause must never be read to "'effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *Id.*

In addition to regulating the channels and instrumentalities of interstate commerce, Congress may regulate activities that "substantially affect" interstate commerce. *Gonzales* v. *Raich*, 545 U.S. 1, 17 (2005). In defining the outer boundaries of this aspect of the Commerce power, this Court has shown particular solicitude for areas in which States historically have "'possess[ed] primary authority,'" including criminal law, education, family law, *Lopez*, 514 U.S. at 561 n.3 (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993)), and regulating "to protect the health of its citizens." *Sporhase*, 458 U.S. at 956. See generally *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring) ("[Courts] must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern."); *Morrison*, 529 U.S. at 615-616.

When Congress attempts to legislate in such areas, it "displace[s] state policy choices" and affects the "sensitive relation[s]" between the federal Government and the States. *Lopez*, 514 U.S. at 561 n.3 (internal quotations and citation omitted). There is "no better" an example of a power historically reserved to the States than the general police power: "the Founders denied the National Government" a "'plenary police power'" and instead "reposed [it] in the States." *Morrison*, 529 U.S. at 618 (quoting *Lopez*, 514 U.S. at 566); see also *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring in judgment) ("Residual power, sometimes referred to (perhaps imperfectly) as the police power, belongs to the States and the States alone."). And, as this Court has explained in adjudicating a conflict between federal and state regulation of public health, "the structure and limitations of federalism[] . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales* v. *Oregon*, 546 U.S. 243, 270 (2006) (internal quotations omitted).

Indeed, this Court has examined closely "the implications" of any particular theory of Commerce Clause authority for the relationship between the federal Government and the States. And it has emphatically rejected an interpretation under which Congress could regulate "any activity that it found was related to the economic productivity of individual citizens," as it was "difficult to perceive any limitation on [that conception of] federal power, even in areas . . . where States historically have been sovereign." *Lopez*, 514 U.S. at 564.

B. Upholding The Individual Mandate As A Valid Exercise Of The Commerce Power Would Upset The Federal-State Balance And Effectively Grant Congress A Plenary Police Power

The core principles of federalism that have informed Commerce Clause jurisprudence are incompatible with the expansive reading of the Commerce power necessary to sustain the ACA's individual mandate. The Government initially contends that the mandate is an appropriate exercise of the Commerce power because it regulates "the way in which individuals finance their participation in the health care market"—in particular, the participation of "[i]ndividuals without insurance." Br. of United States 18. But the ACA does not regulate the practice of obtaining health care services without insurance; rather, it mandates the purchase of insurance, regardless of whether, when, or how an individual eventually obtains health care services.

The Government falls back on the argument that the individual mandate is "essential" to offset the negative economic effects on the insurance market that will otherwise result from the Act's guaranteed-issue and community-rating reforms. Br. of United States 27. Under this theory, the Government contends, an individual's inaction in failing to purchase insurance "substantially affects" interstate commerce. *Id.* at 23-27. This conception of the "substantially affects" test is not only without precedent in U.S. law, but creates grave federalism concerns by conferring a plenary police power on the federal Government.

Under the "substantially affects" test, the Court has upheld Congress's authority to restrict purely intrastate activity that has undesirable effects on interstate commerce, such as growing wheat, or cultivating marijuana, for private use. See *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942); *Raich*, 545 U.S. at 17-18. And the Court has upheld under that test Congress's authority to remove burdens or obstructions to interstate commerce. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252-258 (1964). Nonetheless, the Court has counseled caution in applying the "substantially affects" test, in recognition that its ready application could obliterate the distinction between what is local and what is national. *Lopez*, 514 U.S. at 559, 567. At bottom, the Court has applied this test only to activity, and economic activity at that. It has never held, or even suggested, that *inactivity* is an activity that obstructs or burdens interstate commerce. See Br. of State Respondents 18-28; Br. of Private Respondents 15-19, 32-34, 53.

Legislative action, such as the ACA, that impinges in an entirely novel way on the Constitution's structural division of power and sovereignty raises unique concerns. In *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010), for instance, this Court struck down a novel multilevel for-cause removal restriction on an executive officer. The Court emphasized that the statute at issue was "highly unusual" in light of "the past practice of Congress," and found as "'[p]erhaps the most telling indication of the severe constitutional problem . . . the lack of historical precedent for [such an enactment].'" *Id.* at 3159 (quoting 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)). So it is here.

Even eighty years after the Court first adopted its current broad reading of the Commerce Clause, it is telling indeed that Congress has never before seen fit—even when confronted with a World War, the Cold War, the Great Depression, recessions, oil shocks, farm crises, the savings and loan crisis, and myriad other disruptions great and small—to seek to regulate *abstaining* from economic activity under its Commerce power. And it is particularly troubling in light of this Court's expressed discomfort with extending application of the Clause beyond "economic activity." *Lopez*, 514 U.S. at 559.

The Government's theory in this case reduces to the idea that an individual's failure to purchase health insurance has a negative effect on the interstate market for health insurance, as compared to when individuals uniformly purchase such insurance under Government compulsion. But this bootstrapping rationale is equally true—that is, trivially so—with respect to nearly every individual decision not to participate in commerce: Congress can always conceive of some activity which, if mandated, would substantially affect interstate commerce. Indeed, it is difficult to conceive of an activity that, if mandated of every member of society, would not "substantially affect[]" commerce, whether it would be getting an annual physical or eating an apple a day. Put differently, the Government asks this Court to transform Congress's enumerated power to "regulate" interstate commerce, U.S. Const. art. I, § 8, cl. 3, into the boundless authority to "create" commerce by mandating individual participation, and then to regulate the conscripted participants based on their "involvement" in commerce.

Such a conception of the Commerce Clause is indistinguishable from a plenary federal police power. In the field of health care, Congress could regulate a wide array of personal decisions, such as exercise, diet, or even undergoing particular medical procedures, based on the purported effects of abstention. Nor is the Government's theory limited to health care, as nearly every individual decision can be connected to a market through a potential Government mandate, including decisions about food, clothing, transportation, or education, to name a few.

The Government resists the startling implications of its theory by suggesting the "health care market" is unique because all individuals will participate in it at some point, and participation without insurance shifts costs to others. Br. of United States 2-3, 7-8, 18-19, 28-29. But the factual premise of the Government's argument is mistaken: not all individuals will receive health care during their lifetimes, due perhaps to religious beliefs or individual preferences. See Br. of State Respondents 26. Many more will receive health care services for which they will pay, without insurance. More importantly, cost-shifting is virtually ubiquitous in the modern welfare state, encompassing not only government involvement in food and housing, but societal safety nets such as bankruptcy protection or Medicaid. And as the Respondents explain, and the Government appears to concede, the cost-shifting in this case is largely of Congress's own creation, stemming from the requirement in the Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd, that hospitals provide emergency medical care regardless of ability to pay. See Br. of State Respondents 49-50; Br. of United States 7-8.

Congress cannot bootstrap a radical expansion of its Commerce power simply by legislating cost-shifting measures.

The Government's expansive conception of the Commerce power is particularly troubling because protecting the public health is an essential component of the States' traditional police power. "[A] State's power to regulate . . . for the purpose of protecting the health of its citizens . . . is at the core of its police power." *Sporhase*, 458 U.S. at 956. In *Head* v. *New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 428 (1963), for instance, this Court characterized a statute "directly addressed to protection of the public health" as "within the most traditional concept" of the State police power. See also *Hill* v. *Colorado*, 530 U.S. 703, 715 (2000) ("It is a traditional exercise of the States' 'police powers to protect the health and safety of their citizens.'") (quoting *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 475 (1996)). Indeed, in part for this reason, this Court recently recognized that displacing state law by a uniform federal statute in the area of public health would "effect a radical shift of authority from the States to the Federal Government"; on that basis the Court declined to read the federal law to so "alter the federal-state balance." *Gonzales* v. *Oregon*, 546 U.S. at 275.

II. THE INDIVIDUAL MANDATE EXCEEDS CONGRESS'S AUTHORITY UNDER THE NECESSARY AND PROPER CLAUSE, AS INFORMED BY CORE PRINCIPLES OF FEDERALISM

Perhaps recognizing the weaknesses in its arguments, the Government glides over the Necessary

and Proper Clause. The briefs for the Respondents demonstrate persuasively why the Government's argument must be rejected, and ALEC does not attempt to reproduce that analysis. Rather, ALEC again highlights the federalism principles that constrain Congress's authority under the Necessary and Proper Clause, and explains why the individual mandate threatens the State-federal balance of authority.

Congress may "make all Laws which shall be necessary and proper for carrying into Execution [its enumerated] Powers." U.S. Const. art. I, § 8, cl. 18. In Chief Justice Marshall's canonical formulation, the Necessary and Proper Clause grants Congress the "incidental" authority to use "means which are appropriate" to "carr[y] into execution" its enumerated powers. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). But "[w]hen a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principles of state sovereignty reflected in" the Constitution's text and structure, it is not "'proper'" and thus "'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'" *Printz*, 521 U.S. at 923-924 (quoting The Federalist No. 33, at 204 (Alexander Hamilton)); accord *Comstock*, 130 S. Ct. at 1957.

In its most recent exposition of the Necessary and Proper Clause, this Court adopted a multi-factor test for determining the scope of Congress's "incidental" authority. See *Comstock*, 130 S. Ct. at 1965. The conclusion in *Comstock* that a civil-commitment statute could be sustained under the Necessary and Proper Clause depended on several contextual factors, including "the long history of federal involvement," *id.*, in "prison-related mental-health statutes,"

id. at 1958; the fact that the federal law served as a "reasonabl[e] exten[sion]" of past federal statutes, *id.* at 1961; the statute's "narrow scope," *id.* at 1965; and—most relevant here—"the statute's accommodation of state interests," *id.*

A. In Exercising Authority Under The Necessary And Proper Clause, Congress Must Give Proper Account To "[S]tate [I]nterests"

This Court's decision in *Comstock* made clear that Congress's exercise of authority under the Necessary and Proper Clause must "properly account[] for state interests." 130 S. Ct. at 1962; see also *id.* at 1967-1968 (Kennedy, J., concurring in the judgment) ("It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause . . . ."). Legislation resting on the Necessary and Proper Clause must not "invade state sovereignty or otherwise improperly limit the scope of powers that remain with the States." *Id.* at 1962 (internal quotations and citation omitted). In *Comstock*, the federal civil-commitment statute affirmatively "require[d] accommodation of state interests" and essentially allowed States to "opt out": States had substantial discretion about whether to take custody of an individual; could assert such authority "at any time"; and could displace the federal Government's role entirely by taking custody of a detainee. *Id.* at 1962-1963. In upholding that statute, this Court concluded that its interpretation of the Necessary and Proper Clause would not "confer on Congress a general 'police power, which the Founders denied the National Government and reposed in the States,'" *id.* at 1964 (quoting *Morrison*, 529 U.S.

at 618), because the statute was "narrow in scope," applied to only a "small fraction of federal prisoners," and was "limited" in "reach" to individuals already in federal custody. *Id.* at 1964-1965.

And in *Printz* this Court concluded that a law impinging on aspects of sovereignty reserved to the States under the Constitution was not "proper," but rather a federal "usurpation." *Id.* As the Respondents observe, the Court's emphasis on state interests in *Comstock* and *Printz* is consistent with Founding-era practice, which "'suggests that a "proper" law is one that is within the peculiar jurisdiction or responsibility of the relevant governmental actor.'" Br. of Private Respondents 58 (quoting Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267, 291 (1993)).

B. The ACA's Individual Mandate Fails To Account For State Interests

There can be little question that the ACA's individual mandate fails to account adequately for state interests and therefore is not a "proper" means of carrying into execution Congress's Commerce power. See *Comstock*, 130 S. Ct. at 1962. The individual mandate "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise": the adoption of measures to protect public health and welfare. *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); see also *Hill*, 530 U.S. at 715. As explained below, the ACA disrupts or displaces a wide range of ongoing State and local policymaking initiatives that reflect the interests and values of particu-

lar States. And, unlike the civil commitment statute at issue in *Comstock*, the ACA's individual mandate gives States no discretion to exempt their citizens and provide an alternate State scheme. Nor do the States retain discretion to oust the federal Government from any "appropriate role" the States would ordinarily have discretion to perform. 130 S. Ct. at 1962-1963.

That the ACA impinges on state sovereignty is hardly a theoretical proposition. Some twelve States (Arizona, Georgia, Idaho, Indiana, Kansas, Louisiana, Missouri, New Hampshire, North Dakota, Tennessee, Utah, and Virginia) have enacted laws expressly guaranteeing their citizens the freedom to choose not to purchase health insurance, and Arizona, Ohio, and Oklahoma have enacted constitutional amendments. See, *e.g.*, Idaho Code § 39-9003; Utah Code § 63M-1-2505.5 (2011); Va. Code Ann. § 38.2-3430.1:1 (West 2011); Ariz. Const. art. 27, § 2 (as approved Nov. 2, 2010).[3] And the lack of any limiting principle for the Government's theory confers on Congress a de facto general police power long reserved to the States. Cf. *Comstock*, 130 S. Ct. at 1964.

III. UPHOLDING THE INDIVIDUAL MANDATE WOULD "DISPLACE STATE POLICY CHOICES" AND STIFLE THE STATES' CONSTITUTIONAL ROLE AS LABORATORIES OF DEMOCRACY

In addition to transgressing specific boundaries on the Commerce power and Necessary and Proper

---

[3] See also Freedom of Choice in Health Care Act, ALEC, *available at* http://www.alec.org/freedom-of-choice-in-health-care-act.

Clause long recognized by this Court, the ACA's individual mandate (and related provisions) "displace state policy choices," *Lopez*, 514 U.S. at 561 n.3 (internal quotations and citation omitted), discouraging innovation and preventing "a single courageous State [from], if its citizens choose, serv[ing] as a laboratory; and try[ing] novel social and economic experiments without risk to the rest of the country." *New State Ice*, 285 U.S. at 311 (Brandeis, J., dissenting). ALEC and its member legislators have considerable experience with an evolving array of State and local initiatives to reform the health insurance market and to make health care more affordable through market-driven, cost-effective mechanisms.

Federal respect for States' traditional roles as policy innovators preserves for them great flexibility in exercising their general police power. In recent years, numerous States have successfully enacted the kinds of market-based, cost-effective solutions for implementing health care reform at the State and local level that ALEC and its member legislators have long advocated. In this brief, ALEC highlights only a few examples of initiatives that will be disrupted and, in some cases, directly displaced by the ACA's homogenizing federal approach—not only through the individual mandate, but also related provisions, such as the establishment of State-level high-risk pools governed by federal eligibility rules. The details of particular State-level initiatives necessarily vary, but even a general survey of some ongoing policy initiatives demonstrates the significant federalism costs of sustaining the ACA's blanket approach.

The federalism costs of the ACA's rush to legislative judgment are particularly high because many of

these State-level initiatives are of recent vintage. The field of health care regulation is not, as some of petitioners' *amici* claim, an instance of State reforms failing after being given a fair trial. See Maryland Br. 20-24. It is, rather, an instance of a homogenizing federal mandate being forced down to interrupt an active and ongoing State-level dialogue just as it has begun to yield results in a critical mass of States, and just as the promise of State-level reform has started to be apparent. By imposing a uniform federal mandate, the ACA not only displaces promising initiatives before they have had adequate opportunity to prove their value, but also forestalls other States from learning from, adapting, and improving upon policies with a demonstrated record of success.

One particularly significant trend of State-level innovation is the creation by some 35 States of high-risk pools that provide insurance for individuals with preexisting health conditions—prior to, and outside of, the similar pools required by the ACA.[4] These

---

[4] See Ala. Code §§ 27-52-1 to -6 (West 2010); Alaska Stat. §§ 21.55.010 to .500 (2010); Ark. Code Ann. §§ 23-79-501 to -513 (2011); Cal. Ins. Code §§ 12700-12739.4 (West 2011); Colo. Rev. Stat. § 10-8-501 to -534 (2010); Conn. Gen. Stat. Ann. § 38a-556 (West 2011); Fla. Stat. Ann. §§ 627.648 to .6498 (West 2011); Idaho Code Ann. §§ 41-5501 to -5511 (West 2011); 215 Ill. Comp. Stat. Ann. 105/1 to 105/15 (West 2011); Ind. Code Ann. §§ 27-8-10-1 to -11.2 (West 2011); Iowa Code Ann. §§ 514E.1 to .11 (West 2011); Kan. Stat. Ann. §§ 40-2117 to -2131 (West 2011); Ky. Rev. Stat. Ann. §§ 304.17B-001 to -037 (2011); La. Rev. Stat. Ann. §§ 22:1201 to :1215 (2010); Md. Code Ann., Ins. §§ 14-501 to -508 (2010); Minn. Stat. Ann. § 62E-10 (West 2011); Miss. Code Ann. §§ 83-9-201 to -222 (West. 2010); Mo. Ann. Stat. §§ 376.960 to .989 (West 2011); Mont. Code Ann. §§ 33-22-1501 to -1524 (West 2011); Neb. Rev. Stat. §§ 44-4216 to -4233 (West 2010); N.H. Rev. Stat. Ann. §§ 404-G:5-a to :5-g (West 2011); N.M. Stat. Ann.

State high-risk pools provide coverage for individuals who would otherwise be denied access to individual market health insurance because of pre-existing conditions. ALEC's model High-Risk Health Insurance Pool Act spreads the cost of insuring high-risk individuals across all insurance carriers doing business in a State, without the need for an individual mandate. The federal health exchanges created by the ACA prohibit denying coverage or adjusting premiums based on individual health status, and limit cost-sharing. See 42 U.S.C. §§ 18031-18033. As a result, individuals enrolled in existing State high-risk pools will likely switch to plans created under the ACA.[5]

---

§§ 59A-54-1 to -21 (West 2010); N.C. Gen. Stat. §§ 58-50-175 to -255 (West 2010); N.D. Cent. Code Ann. §§ 26.1-08-01 to -14 (West 2009); Okla. Stat. Ann., tit. 36, §§ 6531-6545 (West 2011); Or. Rev. Stat. § 735.600 to .650 (2009); S.C. Code Ann. §§ 38-74-10 to -90 (West 2010); S.D. Codified Laws §§ 58-17-115 to -130 (West 2010); Tenn. Code Ann. §§ 56-7-2901 to -2916 (West 2010); Tex. Ins. Code Ann. §§ 1506.001 to .305 (West 2009); Utah Code Ann. §§ 31A-29-101 to -123 (West 2010); Wash. Rev. Code Ann. §§ 48.41.010 to .910 (West 2011); W. Va. Code Ann. §§ 33-48-1 to -12 (West 2011); Wis. Stat. Ann. §§ 149.10 to .53 (West 2011); Wyo. Stat. Ann. §§ 26-43-101 to -114 (West 2010).

[5] The ACA may also undermine, even without displacing, a promising trend of faith-based, voluntary, health care cost-sharing arrangements facilitated by exemptions from regulation under State insurance codes. Some sixteen States have created regulatory exemptions for such cost-sharing initiatives, through which more than 110,000 Americans share more than $75 million per year for one another's health costs. See Ariz. Rev. Stat. Ann. § 20-122 (West. 2011); Fla. Stat. Ann. § 624.1265 (West 2011); Ga. Code Ann. § 33-1-19 to -20 (West 2011); Iowa Code Ann. § 505.22 (West 2011); Kan. Stat. Ann. § 40-202(j) (West 2010); Ky. Rev. Stat. Ann. § 304.1-120(7) (West 2010); 956 Mass. Code Regs. Ann. § 5.03(4)(c) (West 2011); Me. Rev. Stat. Ann. tit. 24-A, § 704-3 (West 2011); Md. Code Ann., Ins. § 1-202 (West

ALEC has also pursued incentive-based, market-driven solutions through amendments to State public health and tax codes that may be undermined, if not directly displaced, by the ACA. ALEC's model Cancer Drug Donation Program Act, for instance, establishes a voluntary system for cancer patients to donate unused prescription drugs to uninsured and underinsured patients. Nine states have established repositories to secure prescription drug access in this manner.[6] Similarly, ALEC has developed model legislation to provide tax deductions for qualified expenses related to organ donation by living donors; sixteen states have enacted some form of this legislation, helping defray costs of organ donation that are not covered by traditional insurance.[7]

2010); Mo. Ann. Stat. § 376.1750 (West 2011); N.C. Gen. Stat. Ann. § 135-45 to -48 (West. 2011); Okla. Stat. Ann., tit. 36, § 110(11)(a)-(e) (West 2011); 40 Pa. Stat. Ann. § 23(b) (West 2010); Utah Code Ann. § 31A-1-103(3)(c) (West 2010); Va. Code Ann. §§ 38.2-6300 to -6301 (West 2010); Wis. Stat. Ann. § 600.01(1)(b)(9) (West 2011).

[6] See Colo. Rev. Stat. Ann. § 25-35-103 (West 2011); Fla. Stat. Ann. § 499.029 (West 2011); Ky. Rev. Stat. Ann. §§ 194A.450 to .458 (West 2010); Mich. Comp. Laws. Ann. § 333.17780 (West 2011); Minn. Stat. Ann. § 151.55 (West 2011); Mont. Code Ann. § 37-7-1401 (2009); Neb. Rev. Stat. §§ 71-2422 to -2430 (2010); Nev. Rev. Stat. Ann. §§ 457.400 to .490 (West 2010); 62 Pa. Cons. Stat. Ann. §§ 2921-2927 (West 2010).

[7] See Ark. Code Ann. §§ 26-51-2101 to -2103 (West 2010); Ga. Code Ann. § 48-7-27(13)(A)-(B) (West 2010); Idaho Code Ann. § 63-3029K (West 2011); Iowa Admin. Code 701-40.66(422) (2011); La. Rev. Stat. Ann. § 47:297(N)(1)-(2) (2010); Minn. Stat. Ann. § 290.01(19b)(12) (West 2010); Miss. Code Ann. § 27-7-18 (5)(A)-(B) (West 2010); N.D. Cent. Code Ann. § 57-38-30.3(2)(j) (West 2009); N.M. Stat. Ann. § 7-2-36 (West 2010); N.Y. Tax Law § 612(38)(A)-(B) (McKinney 2010); Ohio Rev. Code Ann. § 5747.01(A)(25) (West 2010); Okla. Stat. Ann., tit. 68,

ALEC has also worked to help states eliminate barriers to competition in the insurance market, for instance through the model Health Care Choice Act for States, which allows individuals to purchase quality, affordable health insurance across state lines. To date, 28 states have introduced—and Georgia, Maine, and Wyoming have enacted—such legislation, which expands coverage choices and lowers costs.[8] Health care choice legislation highlights an additional benefit from a pluralistic, State-based approach: the substantial cost savings and efficiencies to be gained by fostering interstate competition in the provision of health insurance. See, *e.g.*, Sven R. Larson, *The Health Care Choice Act: Lowering Costs by Allowing Competition in the Individual Insurance Market*, Prosperitas, vol. 9 (Oct. 2009). Indeed, the nonpartisan Congressional Budget Office concluded that permitting interstate competition in insurance sales would cut health care costs by five percent and save the Government $12 billion.[9]

---

§ 2358(E)(21)(A)-(B) (West 2011); R.I. Gen. Laws. Ann. § 44-30-12(7) (West 2010); Utah Code Ann. § 59-10-1015 (West 2010); Va. Code Ann. § 58.1-322(D)(13) (West 2010); Wis. Stat. Ann. § 71.05(1)(i)(1)-(3) (West 2010).

[8] See Ga. Code Ann. § 33-29A-30 (West 2011); Wyo. Stat. Ann. § 26-18-205 (West 2010). Maine recently enacted insurance choice across state lines, but restricted the eligible area to the New England region. See Me. Rev. Stat. Ann. tit. 24-A, § 405-A (West 2011). The Arizona legislature passed a health care choice provision in Senate Bill 1593, which was vetoed by the Governor.

[9] See Congressional Budget Office Cost Estimate, H.R. 2355, Health Care Choice Act of 2005 (Sept. 12, 2005), *available at* http://www.cbo.gov/doc.cfm?index=6639&type=0.

ALEC has also supported legislation to provide a State-level institutional check on mandated health insurance benefits (*i.e.*, benefits individuals are required to "purchase" if they want to buy health coverage at all). Twenty-seven states have enacted mandated benefits review, helping to curb high-cost mandates that keep health coverage unaffordable.[10]

ALEC has considerable experience in State-level policy initiatives that ensure health care access for the poor. In August 2010, ALEC approved its model Patients First Medicaid Reform Act, which establishes Medical Savings Accounts for Medicaid beneficiaries, allowing individuals to use the accounts to purchase a high-deductible health policy and pay for out-of-pocket medical expenses. And, in 2008, ALEC developed a model State Children's Health Insurance

---

[10] See Ariz. Rev. Stat. Ann. §§ 20-181 to -183 (2011); Cal. Health & Safety Code §§ 127660-127665 (West 2011); Colo. Rev. Stat. Ann. § 10-16-103 (West 2011); Fla. Stat. Ann. § 624.215 (West 2011); Ga. Code Ann. §§ 33-24-60 to -67 (West 2010); Haw. Rev. Stat. §§ 23-51, -52 (West 2010); Ind. Code Ann. § 27-1-3-30 (West 2011); Kan. Stat. Ann. §§ 40-2248 to -2249 (West 2010); Ky. Rev. Stat. Ann. § 6.948 (West 2010); La. Rev. Stat. Ann. § 24:603.1 (2010); Me. Rev. Stat. tit. 24-A, § 2752 (2010); Md. Code Ann., Ins. §§ 15-1501 to -1502 (West 2010); Mass. Gen. Laws Ann. ch. 3, § 38C (West 2011); Minn. Stat. Ann. § 62J.26 (West 2010); N.H. Rev. Stat. Ann. § 400-A:39 (2010); N.J. Stat. Ann. § 17B:27D-1 to -9 (West 2011); N.Y. Ins. Law § 213 (McKinney 2010); N.D. Cent. Code Ann. § 54-03-28 (West 2009); Ohio Rev. Code Ann. §§ 103.144 to .146 (West 2011); Or. Rev. Stat. Ann. §§ 171.870, .875, .880 (West 2011); Pa. Code, tit. 28, ch. 931 §§ 1-4; Tenn. Code Ann. § 3-2-111 (West 2010); Tex. Ins. Code Ann. §§ 38.251 to .254 (West 2009); Utah Code Ann. § 36-12-5 (West 2010); Va. Code Ann. § 2.2-2505 (West 2010) ; Wash. Rev. Code Ann. §§ 48.47.005, .010, .020, .030 (West 2011); Wis. Stat. Ann. § 601.423 (West 2011).

("SCHIP") Anti-Crowd Out Act, which encourages the use of private insurance by offering premium assistance to individuals who are eligible for SCHIP, but also have access to employer-sponsored coverage. ACA disrupts these and other innovative proposals while they are still in the pipeline of policy development.[11]

This brief has set forth only a handful of examples of the recent and ongoing state legislative initiatives for health care reform; there are numerous others. The existence of this wide range of ongoing policy initiatives belies the suggestion, raised by some states as *amici*, that individual States have "disincentives" to reform health care and health insurance markets, for instance because of a risk that successful policies would become a magnet for migration by the needy and dependant, or because private insurance providers might flee a State adopting restrictive insurance practices. See Maryland Br. 15-18; Br. of the Governor of Washington as *Amicus Curiae* 22-26. Moreover, a growing number of studies provide strong empirical evidence that successful State policies are likely to "diffuse" elsewhere when States have freedom to tailor their local policies. See, *e.g.*, Craig Volden, *States as Policy Laboratories: Emulating Success in the Children's Health Insurance Program*, 50 Am. J.

---

[11] To similar effect, ALEC's model Long Term Care Tax Credit Act provides a state income tax credit to encourage seniors to purchase private insurance to meet their needs and preserve Medicaid for the truly needy. ALEC's model Medical School Loan Repayment Act encourages physicians to practice in underserved areas by requiring the state to repay up to $50,000 of medical school loans for a physician who agrees to practice in a "medical shortage" area.

Pol. Sci. 294 (2006). In particular, one study has demonstrated that "changes that reined in the cost of the CHIP program were made in ways that emulated the cost-saving activities of successful governments elsewhere." *Id.* at 310. The importance of the State interests at stake here counsels caution, not haste, before Congress may determine that State efforts are fruitless and force a uniform federal program on unwilling States that are still experimenting with their own solutions.

* * * * *

In a system that fosters pluralism among the several States, it is unsurprising that some States, acting as *amici* to this Court, apparently welcome the policies reflected in the ACA notwithstanding potential infringement on their sovereignty. See Maryland Br. 24-29; see also Br. of the Governor of Washington 33-37; Br. of State Legislators 2. But direct federal involvement in an area of high costs and frequent State budget shortfalls raises federalism concerns of a different sort: the potential to discourage States' traditional innovation and instead foster dependency on the central Government in an area of traditional State responsibility. In part for this reason, "[S]tate acquiescence to federal regulation cannot expand the bounds of the Commerce Clause," under which Congress's authority cannot be "'enlarged'" by the "'non-exercise of state power.'" *Raich*, 545 U.S. at 29 (quoting *United States* v. *Darby*, 312 U.S. 100, 114 (1941)). In other words, "[w]here Congress exceeds its authority relative to the States, . . . the departure from the constitutional plan cannot be ratified by the 'consent' of State officials." *New York*, 505 U.S. at 182.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH L. COOPER
AMERICAN LEGISLATIVE EXCHANGE COUNCIL
1101 Vermont Ave., NW
Washington, DC 20005
(202) 466-3800

JOHN P. ELWOOD
Counsel of Record
ERIC A. WHITE
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

Counsel for Amicus Curiae

FEBRUARY 2012

AMICUS CURIAE BRIEF

No. 11-398

In the Supreme Court of the United States

OCTOBER TERM 2011

UNITED STATES DEPARTMENT OF HEALTH AND

HUMAN SERVICES, ET AL.

Petitioners,

v.

STATE OF FLORIDA, ET AL.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR AMERICAN LIFE LEAGUE AS

AMICU CURIAE SUPPORTING RESPONDENTS

BRIEF IS RE MINIMUM COVERAGE PROVISION AND SUGGESTS RULING IN FAVOR OF RESPONDENTS

Robert L. Sassone
Attorney at Law

ITEM
PAGE

1 3 Rule 37.6
statement 1

2 The 14th Amendment to the United States Constitution Equal Protection Clause

Rule 37.6 statement 1

Footnote 1 No counsel for a party or party to the present case authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief

SUMMARY OF ARGUMENT

The Minimum Coverage Provision of the Patient Protection and Affordable Care Act violates the 14th Amendment Equal Protection Clause first because it too substantially penalizes by taxing the plans of those who currently have what it defines as luxury medical plans, which penalty is likely to cause millions of people to not be able to afford their previous medical plans. The problem is not that the Patient Protection and Affordable Care Act prohibits belonging to previous medical plans, but rather that the Patient Protection and Affordable Care Act penalizes many of those who belong to plans which better protect members, thereby making it economically impossible for many to continue belonging to their plans of choice.

This tax places millions who would survive if they were able to continue their present insurance under threat of dying sooner because the future medical insurance to which they will be forced to switch by the tax on their current medical plans may be insufficient to save their life. The discrimination against health plans which were considered by the authors to be too good, acts to discriminate

THE PARTIES HAVE STIPULATED TO CONSENT TO THE FILING OF ALL SUBMITTED AMICUS CURIAE BRIEFS.

INTEREST OF AMICUS CURIAE

American Life League is a Section 501 (c) (3) educational and research organization specializing in the right to life and related requirements such as health.

TABLE OF CONTENTS

ITEM
PAGE

CONSENT OF PARTIES TO FILING OF ALL SUBMITTED AMICUS CURIAE BRIEFS.

TABLE OF AUTHORITIES

RULE 37.6 STATEMENT

SUMMARY OF ARGUMENT

ARGUMENT

CONCLUSION

TABLE OF AUTHORITIES

The relevant part re The Equal Protection Clause is: "No State shall...deny to any person within its jurisdiction the equal protection of the laws." The Fourteenth Amendment Equal Protection Clause applies only to state governments, but the requirement of equal protection has been read to apply to the federal government as a component of Fifth Amendment due process. Bolling v Sharpe 347 US 497 states at 498-499:

> "We have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools. The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."

Amicus does not allege that Congress, in legislating, must cause benefits and burdens to fall exactly evenly on all. What Amicus does allege is that while Congress has the power to make political decisions, Congress does not have an unlimited power to give unlimited benefits to one class or unlimited burdens to another class. If Congress continues over time to give increasing benefits to one class or increasing burdens to another class, eventually a point must be reached where this Court should hold the Equal Protection Clause violated.

Among the factors which should cause this Court to determine whether a favoring of one class at the expense of another class violates the Equal Protection Clause are:

> the number of people prejudiced against;
>
> the severity of the prejudice against the members of prejudiced against classes;

especially against the elderly who have medical problems which cannot be alleviated, solved, or controlled by less expensive health plans.

In addition, The Patient Protection and Affordable Care Act attempts to reduce costs by imposing price controls on health care providers. Price controls cause efforts to maintain high income by reducing costs/ In the case of health care price control must lead to rationing of the more expensive classes of health care which are needed by some patients, especially the elderly.

The Patient Protection and Affordable Care Act also continues a long standing prejudice against men by singling out women for additional health care assistance via an office on women's health and additional spending to alleviate women's health problems. Men, on whose health less is spent, have a lower life expectancy than women. Nearly zero is spent to learn about and alleviate the physical and non-physical differences between men and women which cause men on average to die sooner.

ARGUMENT

THE PATIENT PROTECTION AND AFFORDABLE CARE ACT VIOLATES

THE 14th AMENDMENT EQUAL PROTECTION CLAUSE AS APPLIED VIA FIFTH AMENDMENT DUE PROCESS CLAUSE

The 14th Amendment to the United States Constitution begins:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

EXCISE TAX ON HEALTH COVERAGE

The Patient Protection and Affordable Care Act SEC. 9001. adds SEC. 4980I to the Internal Revenue Code "EXCISE TAX ON HIGH COST EMPLOYER-SPONSORED HEALTH COVERAGE." Subsection (a) (2) states: "there is hereby imposed a tax equal to 40% of the excess value" (of the employer-sponsored coverage).

Unfortunately for mere citizens and tax-payers, the same thing that Congress alleges is the excess value of the employer-sponsored coverage may be the additional medical care needed to save the citizen's life or alleviate a serious medical problem. "40% of the excess value" is likely to be sufficient to cause many, perhaps millions of taxpayers to choose a cheaper medical insurance coverage which will provide less protection to patients. This economically forced choice is likely to hit hardest at the elderly who have more fragile health, who more frequently require more costly medical care, and may have relied on the state of the law in locking themselves into a health care plan the Patient Protection and Affordable Care Act now taxes so heavily as to make them unable to afford.

The Patient Protection and Affordable Care Act SEC 1251 is entitled "PRESERVATION OF RIGHT TO MAINTAIN EXISTING COVERAGE" The right of patients to maintain existing coverage is a misleading statement of the issue. The real issue is the impact of the Patient Protection and Affordable Care Act on the economic ability of patients to maintain existing coverage. Many people, perhaps millions will be forced by the economic pressure on them by The Patient Protection and Affordable Care Act to give up coverage they would like to keep because they cannot afford to keep it.

In like manner, The Patient Protection and Affordable Care Act SEC 1555 is entitled FREEDOM NOT TO PARTICIPATE IN FEDERAL INSURANCE PROGRAMS. The important point is not that patients have the freedom to not participate in Federal insurance programs but rather whether economic changes imposed by The Patient Protection and Affordable Care Act will enable them to be able to afford to not participate in Federal insurance programs. The Patient Protection and Affordable Care Act is an effort use economic force to cause patients who do not want to carry insurance to purchase medical insurance priced so high that their participation is required

the importance of the area where prejudice is imposed; and

the alleged necessity for the prejudice'

The Patient Protection and Affordable Care Act violates the Equal Protection Clause in its treatment of patients who are not in favored classes, the members of which are enabled to purchase more effective health insurance. Three parts of The Patient Protection and Affordable Care Act which violate the Equal Protection Clause by imposing too much and too severe prejudice establish price controls, high taxes on reasonably necessary medical care, and continue the policy of vast spending to alleviate women's health problems while essentially ignoring the major men's health problems.

PRICE CONTROLS IMPOSED ON HEALTH CARE

The Patient Protection and Affordable Care Act imposes price controls. Price controls inherently cause providers to attempt to evade the price controls and save money by reducing quality. Quality of medical care reduction will result in longer waiting times before care, fewer prescriptions for expensive treatments such as higher price antibiotics, omitting necessary but expensive examinations such as MRIs, much shorter office visits with physicians, et al. Such a quality of care reduction will cause by omission the death of thousands, perhaps millions of people and will especially cause the early death of elderly people whose more fragile health on average requires more health care spending if the elderly are to receive reasonable medical care. With price controls, there will be pressure on health care plans to approve fewer medically necessary but expensive treatments. There will be more pressure for procedures which save the plan money at the expense of the patient's life or health. There will be more pressure to define expensive treatments as futile by considering the patient's condition to refuse expensive treatment that would routinely be given if medical appropriateness were the only factor being considered.

The Patient Protection and Affordable Care Act imposes taxes on reasonably necessary medical care. Of course, it is not called "reasonably necessary medical care". What it apparently seeks to destroy, The Patient Protection and Affordable Care Act first demonizes. Four levels of coverage in ascending order of cost are defined as: "bronze", "silver", "gold", and "platinum" in SEC 1302 (d) (1).

Patient Protection and Affordable Care Act whether to offer qualified health plans in the large group market through an Exchange, the State shall take into account any excess of premium growth outside of the Exchange as compared to the rate of such growth inside the Exchange.

Section 9101 imposes an excise tax of 40% of excess value on high cost employer-sponsored health coverage. When the government gives you a right to retain your current health care plan, then prevents you from exercising the right by taxing it so heavily that you cannot afford to exercise it, the right is illusory. The Government uses taxing to coerce selected Americans of a certain income and asset range to switch to less expensive health plans which fail to protect against problems that many Americans' health insurance now protect against. This coercion via specially aimed taxing constitutes a violation of the 14th Amendment Equal Protection Clause as applied to the Federal Government via the Fifth Amendment Due Process Clause.

Section 3509 of The Patient Protection and Affordable Care Act adds sections 229 et al. to U.S.C. 202 et seq. The stated purpose is to improve women's health. In recent years, Women's life expectancy has been about five to seven years greater than the life expectancy of men in the United States. The Patient Protection and Affordable Care Act violates the Equal Protection Clause because Section 3509 establishes and funds an Office of Women's Health thereby continuing the past practice of funding substantial efforts to improve women's health while refusing to reasonably fund men's health.

Women are treated as a privileged class in that appropriations have been and continue to be directed towards improving women's health and extending women's life span. In 1991 Congress established the office on Women's Health in HHS. There is and has been no Office on Men's Health.

Funding the specialized health problems of women (which is not opposed by amicus) while in comparison ignoring the specialized health problems of the

to subsidize other people who do not pay the full cost of their medical insurance.

SEC. 1003. ENSURING THAT CONSUMERS GET VALUE FOR THEIR DOLLARS.

Part C of title XXVII of the Public Health Service Act (42 U.S.C. 300gg–91 et seq.), as amended by section 1002, is further amended by adding at the end the following:

"SEC. 2794. ENSURING THAT CONSUMERS GET VALUE FOR THEIR DOL-LARS.

"(a) INITIAL PREMIUM REVIEW PROCESS.— "(1) IN GENERAL.—The Secretary, in conjunction with States, shall establish a process for the annual review, beginning with the 2010 plan year and subject to subsection (b)(2)(A), of unreasonable increases in premiums for health insurance coverage. "(2) JUSTIFICATION AND DISCLOSURE.—The process established under paragraph (1) shall require health insurance issuers to submit to the Secretary and the relevant State a justification for an unreasonable premium increase prior to the implementation of the increase. Such issuers shall prominently post such information on their Internet websites. The Secretary shall ensure the public disclosure of information on such increases and justifications for all health insurance issuers. "(b) CONTINUING PREMIUM REVIEW PROCESS.— "(1) INFORMING SECRETARY OF PREMIUM INCREASE PATTERNS.—As a condition of receiving a grant under subsection (c)(1), a State, through its Commissioner of Insurance, shall— "(A) provide the Secretary with information about trends in premium increases in health insurance coverage in premium rating areas in the State; and "(B) make recommendations, as appropriate, to the State Exchange about whether particular health insurance issuers should be excluded from participation in the Exchange based on a pattern or practice of excessive or unjustified premium increases. "(2) MONITORING BY SECRETARY OF PREMIUM INCREASES.— "(A) IN GENERAL.—Beginning with plan years beginning in 2014, the Secretary, in conjunction with the States and consistent with the provisions of subsection (a)(2), shall monitor premium increases of health insurance coverage offered through an Exchange and outside of an Exchange. "(B) CONSIDERATION IN OPENING EXCHANGE.—In determining under section 1312(f)(2)(B) of the

class of all men for decades, should violate the Equal Protection Clause. The excuse is given that the men's lower life expectancy and higher death rate from all major causes of death cannot be fixed because it is caused by inherent incurable weakness in men or by unwise conduct by men. Congress treats an early grave as if it were men's inevitable destiny, when justice and equity require that it be treated as a problem that needs to be solved. It is not known if the problem of early male deaths can be alleviated because definitive research to go beyond mere identification of possible causes of male deaths to find how to alleviate the problems has never been performed. If it has a physical cause, the logic of the fight against AIDS should be applied to it. If male conduct causes the problem, the logic of the campaign to reduce smoking should apply advertising to it.

The AIDS history suggests that when sufficient research is performed re a seemingly hopeless medical problem, eventually substantial useful information can be found. Initially, AIDS was spread by and almost exclusively infected male homosexuals and appeared to possibly be incurable because AIDS operated in a manner different than diseases which had been controlled. To the surprise of some, a sufficient amount of money and years of research resulted in substantial control which helps most current AIDS victims avoid the fate of earlier victims.

The number of people prejudiced against by the funding of Women's health and refusal to fund men's health includes US men. The class of US men comprises almost half of the US adult population, but it would comprise more than half of the US adult population if so many men had not died early from causes that might have been alleviated, cured, or prevented by appropriate research and other action or the spending of money on the men's health problems that has been spent on women's health problems.

The severity the violation of the Equal Protection Clause causes is a possibly early death or disability for millions of men and grieving for more millions of their loved ones, many of whom are women or children.

Amicus does not allege that money spent on women's health is wrong, but that it is a violation of The Equal Protection Clause to spend it while spending so close to zero dollars on an office of men's health and or on men's health problems, especially research on alleviating the early deaths which lower male life expectancy.

CONCLUSION

The Patient Protection and Affordable Care Act should be held unconstitutional because it violates the equal protection required by the Fifth Amendment Due Process Clause.

Respectfully submitted,

ROBERT L SASSONE, Attorney for Amicus Curiae American Life League

AMICUS CURIAE BRIEF

No. 11-398

In The
Supreme Court of the United States

DEPARTMENT OF HEALTH
AND HUMAN SERVICES, et al.,

Petitioners,

v.

STATE OF FLORIDA, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

BRIEF FOR *AMICI CURIAE* AMERICAN NURSES ASSOCIATION; AMERICAN ACADEMY OF PEDIATRICS; AMERICAN MEDICAL STUDENT ASSOCIATION; DOCTORS FOR AMERICA; NATIONAL HISPANIC MEDICAL ASSOCIATION; AND THE NATIONAL PHYSICIANS ALLIANCE IN SUPPORT OF PETITIONERS AND REVERSAL ON THE MINIMUM COVERAGE PROVISION

IAN MILLHISER
CENTER FOR AMERICAN PROGRESS
1333 H St. NW, 10th Floor
Washington, DC 20005
(202) 481-8228
imillhiser@americanprogress.org
Attorney for Amici Curiae

TABLE OF CONTENTS

Page

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. FINANCING HEALTH COSTS IS AN ECONOMIC ACTIVITY THAT SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE 4

A. Uninsured Americans Frequently Delay Care Until Their Conditions Become Much More Difficult And Expensive To Treat 6

B. The Costs Of Caring For Uninsured Americans Drive Up The Cost Of Medicare And Private Insurance Plans 10

II. ADVERSE SELECTION – THE ACTIVITY OF DELAYING THE PURCHASE OF HEALTH INSURANCE UNTIL AFTER A PERSON REQUIRES CARE – IS AN ECONOMIC ACTIVITY THAT MAY BE REGULATED BY CONGRESS 12

III. THERE ARE CLEAR DOCTRINAL LIMITS ON CONGRESSIONAL POWER WHICH ENABLE THIS COURT TO UPHOLD THE MINIMUM COVERAGE PROVISION WITHOUT RAISING THE SPECTER OF A FEDERAL POLICE POWER 16

TABLE OF CONTENTS – Continued

Page

A. A Decision Upholding The Minimum Coverage Provision Would Preserve Existing Limits On Congressional Power And Need Not Authorize Hypothetical Laws Requiring Consumers To Purchase Other Products 16

B. Public Health Laws Regulating Individuals Who Are Not Presently Engaged In Commerce Are An Important Element Of Long-Existing Federal Law 19

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Florida v. Dep't of Health and Human Servs., 648 F.3d 1235 (11th Cir. 2011) 17, 20

Florida v. Dep't of Health and Human Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2010) 18

Gibbons v. Ogden, 22 U.S. (9 Wheat.) (1824) 3, 20

Gonzales v. Raich, 545 U.S. 1 (2005) 3, 15, 16, 18

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 20

Morgan's S.S. Co. v. Louisiana Bd. of Health, 118 U.S. 455 (1886) 22

R.R. Ret. Bd., 295 U.S. 330 (1935) 22

Rancho Viejo, LLC v. Norton, 334 F.3d 1158 (D.C. Cir. 2003) 20

Seven-Sky v. Holder, No. 11-5074, 2011 U.S. App. Lexis 22566 (Nov. 8, 2011) 16, 17

Thomas More Law Center v. Obama, 651 F.3d 529 (6th Cir. 2011) 3, 5, 11, 17

United States v. Comstock, 130 S. Ct. 1949 (2010) 15

United States v. Lopez, 514 U.S. 549 (1995) ... 3, 15, 17, 20

United States v. Morrison, 529 U.S. 598 (2000) 17

United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942) 16

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd 10

Patient Protection and Affordable Care Act, Pub L. No. 111-148, 124 Stat. 119 (2010) ..... *passim*

Public Health Service Act of 1944, 42 U.S.C. § 264 21

42 C.F.R. § 70.6 22

OTHER AUTHORITIES

Adele M. Kirk, *Riding the Bull: Experience with Individual Market Reform in Washington, Kentucky and Massachusetts*, 25 J. of Health Politics, Pol'y and L. 133 (2000) 14, 19

Alan C. Monheit et al., *Community Rating and Sustainable Individual Health Insurance Markets in New Jersey*, 23 Health Affairs 167 (2004) 15

Andrew P. Wilper et al., *Health Insurance and Mortality in US Adults*, 99 Am. J. Pub. Health 2289 (2009) 4

Ben Furnas & Peter Harbage, Ctr. for Am. Progress, *The Cost-shift from the Uninsured* 2 (March 24, 2009) 11, 19

Brief for Respondent, *Gonzales v. Raich*, 545 U.S. 1 (2005) 22, 23

Brief for Respondent, *United States v. Comstock*, 130 S. Ct. 1949 (2010) 22

TABLE OF AUTHORITIES – Continued

Page

Brief for the Appellee upon Re-Argument, *Wickard v. Filburn*, 317 U.S. 111 (1942) 23

Brief of Appellee, *United States v. Darby*, 312 U.S. 100 (1941) 23

Brief of Petitioner, *Northern Securities Co. v. United States*, 193 U.S. 197 (1904) 23

Brief of Petitioner, *Perez v. United States*, 402 U.S. 146 (1971) 23

Brief of Petitioner, *South Dakota v. Dole*, 483 U.S. 203 (1987) 23

Congressional Budget Office, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* 2 (June 16, 2010) 14

David I. Auerbach & Arthur L. Kellermann, *A Decade Of Health Care Cost Growth Has Wiped Out Real Income Gains For An Average US Family*, 30:9 Health Affairs 1 (2001) 4, 5

Institute of Medicine, America's Uninsured Crisis: Consequences for Health and Health Care (February 2009) 6, 7, 9

Institute of Medicine, Care Without Coverage: Too Little, Too Late (2002) 8, 10

Institute of Medicine, Health Insurance is a Family Matter (2002) 6

Jay J. Shen and Elmer L. Washington, *Disparities in Outcomes Among Patients With Stroke Associated With Insurance Status*, 38 Stroke 1010 (2007) 9

TABLE OF AUTHORITIES – Continued

Page

Jonathan Gruber, Ctr. for Am. Progress, *Health Care Reform is a "Three-Legged Stool"* 1 (Aug. 5, 2010) 14

Kaiser Family Foundation, The Uninsured: A Primer (Oct. 2011) 4

Kevin T. Stroupe, et al., *Chronic Illness and Health Insurance Related-Job Lock*, 20 J. Pol'y Analysis & Mgmt. 525 (2001) 4

Maine Bureau of Insurance, *White Paper: Maine's Individual Health Insurance Market* (January 22, 2001) 15, 19

Oral Argument Tr. of *United States v. Comstock*, 130 S. Ct. 1949 (2010) 22

Peter G. Szilagyi, et al., *Improved Asthma Care After Enrollment in the State Children's Health Insurance Program in New York*, 117 Pediatrics 486 (2006) 8

President's Council of Advisors on Science and Technology, *Report to the President on U.S. Preparations for 2009 – H1N1 Influenza* (Aug. 7, 2009) 24

Reply Brief of Petitioner, *Sabri v. United States*, 541 U.S. 600 (2004) 23

Supplemental Brief of Respondent, *Katzenbach v. McClung*, 379 U.S. 294 (1964) 23

TABLE OF AUTHORITIES – Continued

Page

Thomas R. McLean, *International Law, Telemedicine & Health Insurance: China as a Case Study*, 32 Am. J. L. and Med. 7, 21 (2006) 12

Vickie Yates Brown, et al., *Health Care Reform in Kentucky – Setting the Stage for the Twenty-First Century?*, 27 N. Ky. L. Rev. 319 (2000) 14

INTERESTS OF *AMICI CURIAE*[1]

Amici are diverse health care provider organizations representing millions of doctors, nurses and other health care professionals throughout the country. *Amici* believe that the Affordable Care Act is a significant achievement for the patients that their members serve because it ensures greater protection against losing or being denied health insurance coverage and it promotes better access to primary care and to wellness and prevention programs. The Act's goal of optimizing health insurance coverage for the greatest number of people permits healthcare professionals to place their attention on the most important thing – the patient's well-being and healing – rather than on economic considerations.

Amici have a significant interest in assisting the Court in understanding that the minimum coverage provision challenged by Respondents is essential to the Affordable Care Act's provisions ensuring that health insurance is both universally available and affordable. Because *amici*'s members work on the front lines of the health care system, they know from

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amici*, its members or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of *amicus* briefs and have filed letters reflecting their blanket consent with the Clerk.

experience that patients who put off needed care due to lack of insurance often end up sicker and require much costlier emergency room care. Moreover, *amici*'s members work throughout the continuum of care and in all settings within the health care industry – from direct care to hospital administration. As a result, *amici* have a uniquely broad and informed perspective on the impact of the Affordable Care Act and the capacity to offer an expert perspective that can guide the court's understanding of the consequences of removing the minimum coverage provision to the health provider, patients, and insurance markets as a whole.

SUMMARY OF THE ARGUMENT

The Patient Protection and Affordable Care Act's, Pub L. No. 111-148, 124 Stat. 119 (2010) ("ACA") minimum coverage provision[2] regulates trade in health care services by requiring most Americans to finance their health costs through insurance. It regulates an activity known as "adverse selection" where consumers delay purchasing health insurance until after they become likely to receive more in benefits than they pay into an insurance plan. And it is an essential

[2] The ACA labels its requirement that nearly all Americans either carry insurance or pay a tax penalty, § 1501(a)(2)(G), the "Requirement to Maintain Minimum Essential Coverage." § 1501. The provision is referred to as the "minimum coverage provision" throughout this brief.

element of a broader scheme regulating the national health care and health insurance markets.

Each of these three facts is sufficient to render the minimum coverage provision constitutional. As Chief Justice Marshall explained, "no sort of trade can be carried on" that Congress' power over interstate commerce "does not extend" to except for wholly local matters that concern only one state. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 193-95 (1824). This power includes the power to regulate trade in health services, a power which is "plenary" and which "acknowledges no limitations, other than are prescribed in the constitution." *Id.* at 196-97.

Additionally, "[n]o one is inactive when deciding how to pay for health care," *Thomas More Law Center v. Obama*, 651 F.3d 529, 561 (6th Cir. 2011) (Sutton, J., concurring), and this Court's precedents extend the commerce power to all economic activity that substantially affects interstate commerce. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). Delaying the purchase of insurance in order to effectively transfer the cost of health care to third parties is an activity that substantially affects interstate commerce, and thus may be regulated by Congress.

Finally, even if the minimum coverage provision could not be enacted on its own, this Court should affirm it as an "essential part of a larger regulation of economic activity." *Id.* at 24 (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)). As this brief explains, much of the ACA's broader regulation of the

health insurance industry simply cannot function effectively absent a minimum coverage provision.

ARGUMENT

I. FINANCING HEALTH COSTS IS AN ECONOMIC ACTIVITY THAT SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE

Approximately 50 million non-elderly Americans do not have health insurance, Kaiser Family Foundation, The Uninsured: A Primer 1 (Oct. 2011), leaving millions unable to pay for adequate medical care. This is not simply a public health crisis – according to one study uninsurance accounted for more than 44,000 deaths in 2005, Andrew P. Wilper et al., *Health Insurance and Mortality in US Adults*, 99 Am. J. Pub. Health 2289, 2295 (2009) – it also is one of the greatest burdens on the American economy. Sixty-two percent of all personal bankruptcies are caused in part by medical expenses. ACA § 10106(a). Thousands of workers forgo a new job opportunity or the chance to start a business because they cannot afford to leave a job that provides them with health insurance. Kevin T. Stroupe, et al., *Chronic Illness and Health Insurance Related-Job Lock*, 20 J. Pol'y Analysis & Mgmt. 525, 525 (2001).

Between 1999 and 2009, "the percentage of GDP devoted to health care climbed from 13.8 percent to 17.6 percent, and per capita health spending grew from $4,600 to just over $8,000." David I. Auerbach &

Arthur L. Kellermann, *A Decade Of Health Care Cost Growth Has Wiped Out Real Income Gains For An Average US Family*, 30:9 Health Affairs 1 (2001). This costs the median family that receives health insurance through an employer nearly 90 percent of their income gains during this ten-year period after accounting for taxes and non-health care inflation. *Id.* at 3.

For the uninsured, who are a primary beneficiary of the Affordable Care Act, the picture is even worse. Although virtually everyone participates in the national market for health care regardless of whether or not they finance the cost of this care through insurance, *Thomas More Law Center*, 651 F.3d at 544, consumers who do finance their care through insurance are more likely to receive swift and inexpensive treatment, while the uninsured are prone to delay care until their condition worsens into something much more severe and costly to treat. Additionally, the uninsured are far more likely to shift the costs of their health care to people with insurance or to federal and state governments. Thus, the economic activity of financing health care purchases through insurance or some other method substantially affects interstate commerce by impacting both the cost of care and who winds up paying for it.

A. Uninsured Americans Frequently Delay Care Until Their Conditions Become Much More Difficult And Expensive To Treat

Many health conditions and illnesses, if caught early and treated with appropriate follow-up care, can be relatively inexpensive to resolve. Many more conditions can be avoided altogether through preventive care. Yet if these conditions or illnesses do not receive prompt and appropriate treatment, they can often require hospitalization or otherwise deteriorate into a serious condition requiring expensive care. *See* Institute of Medicine, Health Insurance is a Family Matter 106 (2002).

The likelihood that a patient will receive adequate preventive care or early treatment is directly related to whether the patient is insured. One study determined that children enrolled in a public health insurance plan were 15 percentage points more likely to receive preventive care than those who were not. Institute of Medicine, America's Uninsured Crisis: Consequences for Health and Health Care 61 (February 2009) ("Uninsured Crisis"). Likewise, multiple studies found that uninsured children are "less likely to be up-to-date on their immunizations than insured children, controlling for observed characteristics of the children." *Id.* Use of dental services also increases between 16 and 40 percentage points among children who are insured. *Id.* at 62.

The data for adult patients is even starker:

> [C]hronically ill adults who lacked health insurance had five to nine fewer health care visits per year than chronically ill adults who have health insurance. Uninsured adults with chronic illnesses were much more likely than their insured peers to go without any medical visits during the year – even when they were diagnosed with serious conditions such as asthma (23.4 of uninsured adults with no visits vs. 6.2 percent of insured adults), COPD (13.2 vs. 4.0 percent), depression (19.3 vs. 5.2 percent), diabetes (11.0 vs. 5.2 percent), heart disease (8.7 vs. 2.9 percent), or hypertension (12.7 vs. 5.3 percent).
>
> Similarly, uninsured adults with asthma, cancer, COPD, diabetes, heart disease, or hypertension are at least twice as likely as their insured peers to say that they were unable to receive or had to delay receiving a needed prescription[.]

Id. at 65. Likewise, routine preventive care such as "mammography, Pap testing, cholesterol testing, and influenza vaccination" is far less common among adults who experience frequent periods of uninsurance. *Id.* While women who are consistently insured have a 76.7 percent chance of receiving mammographies, that chance declines to 34.7 percent for women who experience frequent periods of uninsurance. *Id.* Uninsured adults are also much less likely to have a continuing relationship with a single provider. Among uninsured adults, "19 percent with

heart disease, 14 percent with hypertension, and 26 percent with arthritis do not have a regular source of care, compared with 8, 4, and 7 percent, respectively, of their insured counterparts." Institute of Medicine, Care Without Coverage: Too Little, Too Late 29 (2002) ("Care Without Coverage"). This disparity is troubling because patients with chronic conditions often must "modify[ ] their behavior, monitor[ ] their condition and participat[e] in treatment regimens" in order to keep their condition under control. *Id.* at 57. Such tasks require patients to develop a complex understanding of their condition and to master tasks that do not come naturally to persons without education or training in the health sciences. Thus, a patient's continuing relationship with a single provider who can answer their questions and monitor their care is "a key to high-quality health care" for persons with chronic conditions. *Id.*

There is robust data demonstrating that uninsured patients' diminished access to care is associated with deterioration of their medical conditions. One study found that "near-elderly adults who lost their insurance were subsequently 82 percent more likely than those who kept their private insurance to report a decline in overall health." Uninsurance Among Adults 469. The rate of asthma-related hospital stays for children with asthma in New York dropped from 11.1 percent to 3.4 percent when those children were enrolled in a state insurance program. Peter G. Szilagyi, et al., *Improved Asthma Care After Enrollment in the State Children's Health Insurance*

Program in New York, 117 Pediatrics 486, 491 (2006). Uninsured children diagnosed with diabetes are "more likely to present with severe and life-threatening diabetic ketoacidosis" than insured children with the same condition. Uninsured Crisis at 71. Among stroke patients, "[t]he mortality risk of uninsured patients was 24% to 56% higher than that of their privately insured peers for acute hemorrhagic and acute ischemic stroke, respectively." Jay J. Shen and Elmer L. Washington, *Disparities in Outcomes Among Patients With Stroke Associated With Insurance Status*, 38 Stroke 1010, 1013 (2007). Likewise, "5-year survival rates for uninsured adults were significantly lower than for privately insured adults diagnosed with breast or colorectal cancer – two prevalent cancers for which there are not only effective screening tests, but also treatments demonstrated to improve survival." Uninsured Crisis at 78. Indeed, a recent Institute of Medicine report documented dozens of empirical studies linking uninsurance with poor health outcomes and deteriorated medical conditions. *See generally* Uninsured Crisis.

Severe conditions, which have reached that point because of delayed care, are often drastically more expensive to treat than if they had been treated in a timely fashion. Moreover, patients who suffer from severe medical conditions are frequently less able to be productive in the workplace, and may even develop a chronic condition that permanently decreases their ability to earn a living. Had these patients been insured, however, a great deal of these substantial

effects on interstate commerce would have been avoided.

B. The Costs Of Caring For Uninsured Americans Drive Up The Cost Of Medicare And Private Insurance Plans

Uninsured patients' likelihood to delay care and the subsequent deterioration of health also drive up Medicare costs. A twelve-year study of patients approaching the age of Medicare eligibility found that previously uninsured patients with cardiovascular disease (hypertension, heart disease, or stroke) or diabetes often did not receive widely-available and effective treatments to prevent costly complications if their conditions developed before they qualified for Medicare. As a result, "previously uninsured Medicare beneficiaries with these conditions reported 13 percent more doctor visits, 20 percent more hospitalizations, and 51 percent more total medical expenditures" than similarly situated patients who were insured prior to qualifying for Medicare. Uninsurance Among Adults at 468.

Additionally, because federal law requires virtually all emergency rooms to stabilize patients regardless of their ability to pay, *see* Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd, uninsured patients frequently receive uncompensated care from these emergency rooms. These costs are then transferred to patients with insurance. *See* Care Without Coverage at 58 (indicating that many uninsured

patients "identify an emergency department as their regular source of care"). The cost of this uncompensated care is then distributed to patients with insurance. Congress found that "[t]his cost-shifting increases family premiums by on average over $1,000 a year." ACA § 10106(a). Similarly, one study estimated that cost-shifting due to uncompensated care adds, on average, $410 to each individual insurance premium and $1,100 to each family premium. Ben Furnas & Peter Harbage, Ctr. for Am. Progress, *The Cost-Shift from the Uninsured* 2 (March 24, 2009) ("Cost-Shift").

"Faced with $43 billion in uncompensated care, Congress reasonably could require *all* covered individuals to pay for health care now so that money would be available later to pay for *all* care as the need arises." *Thomas More Law Center*, 651 F.3d at 557 (Sutton, J., concurring). This is especially true because this uncompensated care affects nearly every consumer in the health insurance market by driving up the cost of their premiums. Because this cost-shifting is an activity that substantially affects interstate commerce, laws regulating it – such as the minimum coverage provision – fit comfortably within Congress' authority.

II. ADVERSE SELECTION – THE ACTIVITY OF DELAYING THE PURCHASE OF HEALTH INSURANCE UNTIL AFTER A PERSON REQUIRES CARE – IS AN ECONOMIC ACTIVITY THAT MAY BE REGULATED BY CONGRESS

Adverse selection occurs when an individual "wait[s] to purchase health insurance until they need[ ] care," thus enabling them to receive benefits from an insurance plan that they have not previously contributed to. ACA § 10106(a). This activity, whereby insurance consumers time the purchase of insurance to coincide with when they most need it, substantially affects interstate commerce by requiring insurers to develop complex countermeasures that drive millions of Americans out of the health insurance market.

Insurers typically defend against adverse selection by screening potential customers with disabilities or preexisting conditions, but the ACA specifically forbids this practice. § 2704. When insurers are unable to deploy their normal countermeasures against adverse selection, the result is an insurance "death spiral" which can eventually collapse an insurance market. *See* Thomas R. McLean, *International Law, Telemedicine & Health Insurance: China as a Case Study*, 32 Am. J. L. and Med. 7, 21 (2006) ("[A]dverse selection removes good-risk patients from the market, resulting in the need for insurers to raise their premiums; which triggers another round of adverse selection.") This "death

spiral" is also a substantial effect on interstate commerce caused by people engaging in adverse selection.

Thus, the ACA requires most currently healthy Americans to participate in the insurance market to prevent them from strategically avoiding that market until they become ill or injured. § 10106(a) ("[A minimum coverage provision] is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of preexisting conditions can be sold.") Because the minimum coverage provision enables an insurance market to continue functioning when insurers cannot screen out high risk consumers, it is necessary to ensure that the ACA's insurance reforms function effectively.

The Congressional Budget Office estimates that premiums will increase drastically absent a minimum coverage provision due to the problem of adverse selection:

> CBO and [the Joint Committee on Taxation] estimate that, relative to current law, the elimination of the mandate would reduce insurance coverage among healthier people to a greater degree than it would reduce coverage among less healthy people. As a result, in the absence of a mandate, those who enroll would be less healthy, on average, than those enrolled with a mandate. *This adverse selection would increase premiums for new non-group policies (purchased either in the exchanges or directly from insurers in the*

> *non-group market) by an estimated 15 to 20 percent relative to current law.* Without the mandate, Medicaid enrollees would also have higher expected health spending, on average, than those enrolled under current law.

Congressional Budget Office, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* 2 (June 16, 2010) ("Effects of Eliminating") (emphasis added); *see also* Jonathan Gruber, Ctr. for Am. Progress, *Health Care Reform is a "Three-Legged Stool"* 1 (Aug. 5, 2010) (estimating that the average premium for a non-group health insurance plan would increase 27% by 2019 if the ACA goes into effect without a minimum coverage provision).

If anything, this CBO estimate greatly underestimates the cost of excising the minimum coverage provision. Many states that required insurers to cover individuals with preexisting conditions but did not enact a minimum coverage provision experienced far more drastic consequences than the premium spikes CBO predicts. Kentucky, Maine, New Hampshire and Washington each lost most or all of their individual market insurers after those states enacted insurance reforms similar to those in the ACA without enacting a minimum coverage provision, and the cost of some New Jersey health plans more than tripled after that state enacted a similar law. *See* Vickie Yates Brown, et al., *Health Care Reform in Kentucky – Setting the Stage for the Twenty-First Century?*, 27 N. Ky. L. Rev. 319, 330 (2000) ("Health Care Reform in Kentucky"); Adele M. Kirk, *Riding the Bull: Experience with*

Individual Market Reform in Washington, Kentucky and Massachusetts, 25 J. of Health Politics, Pol'y and L. 133, 140, 152 (2000) ("Riding the Bull"); Maine Bureau of Insurance, *White Paper: Maine's Individual Health Insurance Market* 5, 8, (January 22, 2001) ("Maine's Individual Health Insurance Market"), Alan C. Monheit et al., *Community Rating and Sustainable Individual Health Insurance Markets in New Jersey*, 23 Health Affairs 167, 169–70 (2004).

As the experience of these states and the weight of economic evidence demonstrates, the minimum coverage provision is necessary to prevent the ACA's insurance reforms from creating a fatal adverse selection spiral. Thus, even if adverse selection were not itself an economic activity that substantially affects interstate commerce – and it is – the minimum coverage provision still must be upheld as an "essential part of a larger regulation of economic activity." *Raich*, 545 U.S. at 24 (quoting *Lopez*, 514 U.S. at 561); *see also United States v. Comstock*, 130 S. Ct. 1949, 1968 (2010) (Kennedy, J., concurring in the judgment) (explaining that Congress may exercise its necessary and proper power to ensure that another provision of law does "not put in motion a particular force . . . that endangers others"). Congress's Necessary and Proper power is at its apex when, as is the case here, there is an empirically-demonstrated link between a provision of law regulating interstate commerce and another provision chosen to ensure that the commercial regulation functions effectively. *See id.* at 1966 (Kennedy, J.,

concurring in the judgment) ("When the injury is whether a federal law has sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links in the congressional-power chain but on the strength of the chain."); *Raich*, 545 U.S. at 36 (Scalia, J., concurring in the judgment) ("where Congress has the authority to enact a regulation of interstate commerce, 'it possesses every power needed to make that regulation effective.'" (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-19, 62 S. Ct. 523, 526 (1942))).

III. THERE ARE CLEAR DOCTRINAL LIMITS ON CONGRESSIONAL POWER WHICH ENABLE THIS COURT TO UPHOLD THE MINIMUM COVERAGE PROVISION WITHOUT RAISING THE SPECTER OF A FEDERAL POLICE POWER

A. A Decision Upholding The Minimum Coverage Provision Would Preserve Existing Limits On Congressional Power And Need Not Authorize Hypothetical Laws Requiring Consumers To Purchase Other Products

Respondents "cannot find real support . . . in either the text of the Constitution or Supreme Court precedent." *Seven-Sky v. Holder*, No. 11-5074, 2011 U.S. App. Lexis 22566, at *47 (Nov. 8, 2011). Nevertheless, the Eleventh Circuit accepted their invitation to strike down the minimum coverage provision

because it believed that any decision upholding this law would "lack[ ] cognizable limits." *Florida v. Dep't of Health and Human Servs.*, 648 F.3d 1235, 1313 (11th Cir. 2011).

This decision is incorrect. Nothing in the two court of appeals decisions upholding the minimum coverage provision disturbs existing doctrinal limits on laws focused merely on non-economic concerns or on those focused on wholly intrastate matters. *See Seven-Sky*, 2011 U.S. App. Lexis 22566, at *49 ("[T]he distinctions that separate national and local spheres have been understood as those between intrastate and interstate commerce, and between traditional, non-economic areas of state concern and those involving commerce." (citing *United States v. Morrison*, 529 U.S. 598, 617-619 (2000)); *Thomas More Law Center*, 651 F.3d at 558 (Sutton, J., concurring) ("As *Lopez* and *Morrison* suggest, a majority of the Court still appears to accept the line between regulating economic and non-economic conduct, which is why a general murder or assault statute would exceed congressional power. Measured by these conventional commerce clause benchmarks, the minimum-essential-coverage provision passes.") A short list of wholly non-economic laws that are unconstitutional under either of the lower court decisions upholding the minimum coverage provision includes nationwide bans on murder, rape or assault, federal laws regulating sexual morality, and many federal laws governing the family.

Additionally, as explained above, the minimum coverage provision regulates the economic activity of adverse selection. Adverse selection is a problem peculiar to the insurance market. Thus, a decision upholding the minimum coverage provision as a valid regulation of the economic activity of adverse selection would not raise the specter of a federal policy power because the problem of adverse selection simply does not exist in ordinary consumer markets such as the market for broccoli or automobiles.

Moreover, *Raich*'s doctrine preserving laws that comprise an "essential part of a larger regulation of economic activity" also provides a meaningful doctrinal limit on Congressional power. Despite the district court's suggestion that a decision upholding the minimum coverage provision would also require this Court to uphold laws mandating the purchase of broccoli or automobiles, *see Florida v. Dep't of Health and Human Servs.*, 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2010), there is no federal law which depends upon mandatory car ownership or mandatory food purchases in order to function properly in the same way that the ACA's preexisting conditions provision can only function properly in the presence of a minimum coverage provision. Accordingly, broccoli or automobile purchase mandates do not comprise an "essential part" of any broader regulatory scheme.

Nor, for that matter, could they. As explained above, the minimum coverage provision is essential to the ACA's insurance regulations because the health insurance market simply does not function like other

markets. The health insurance market faces a unique "cost shifting" problem, which causes prices in the health care market to behave in a counterintuitive manner. *See* Cost-Shifting at 2 (explaining that uncompensated care provided to the uninsured adds $410 to each individual insurance premium and $1,100 to each family premium). Similarly, the national market for vegetables is not in danger of collapsing if Congress does not require people to buy broccoli. Nor is there a risk that Americans will cease to be able to obtain automobiles absent a law requiring the purchase of GM cars. The nation's individual health insurance market, by contrast, is susceptible to complete collapse if people can wait until they are ill or injured to buy insurance. *See* Riding the Bull at 140 & 152 (describing the catastrophic consequences of enacting a preexisting conditions law without a minimum coverage provision in Kentucky and Washington); Maine's Individual Health Insurance Market at 5 & 8 (describing same in Maine and New Hampshire).

B. Public Health Laws Regulating Individuals Who Are Not Presently Engaged In Commerce Are An Important Element Of Long-Existing Federal Law

The Eleventh Circuit rejected Respondents' extraconstitutional claim that an individual is immune to regulation under the Commerce Clause if they are not presently "engaged in commerce, or activities associated with commerce" because it determined that "the

formalistic dichotomy of activity and inactivity" does not provide "a workable or persuasive enough answer in this case." *Florida*, 648 F.3d at 1285-86. Nevertheless, the Eleventh Circuit's decision striking down the minimum coverage provision relied, at least in part, on its belief that the minimum coverage provision is an "unprecedented exercise of congressional power" because past decisions of this Court "all involved attempts by Congress to regulate preexisting, freely chosen classes of activities."[3] *Id.* at 1286 & 1311.

---

[3] To the extent that the Eleventh Circuit deemed the minimum coverage provision unconstitutional because it disapproved of the mechanism Congress chose to regulate interstate commerce – requiring individuals to carry insurance – that decision was in error. Under this Court's precedents, Congress' Commerce power extends to all laws which regulate "activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 559 (1995). Once this Court determines that the activity subject to regulation under the minimum coverage provision – trade in health services and adverse selection within the health insurance market – substantially affects interstate commerce, that is the end of the Court's enumerated powers inquiry. *Id.*; *see also Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from the denial of rehearing en banc) (emphasizing that the Commerce Clause inquiry hinges upon whether "the *activity* being regulated" substantially affects interstate commerce (emphasis in original)). All mechanisms which are not "prescribed" by another provision of the Constitution fall within Congress' "plenary" authority to regulate activity that substantially affects interstate commerce. *Gibbons*, 22 U.S. (9 Wheat.) at 196-97; *see McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but

(Continued on following page)

Public health laws, however are centrally focused on the subject of preventing or mitigating illness or injury – and illness or injury are almost never the result of a "freely chosen" class of activity. This is especially true with respect to airborne illnesses, which can be transmitted even to entirely dormant individuals whose only activity is breathing.

Moreover, public health laws regulating individuals who are not presently engaged in a "freely chosen" class of activity are far from unprecedented. Federal law has long regulated individuals who develop serious and highly contagious illnesses, regardless of whether the individual subject to that regulation is presently engaged in interstate commerce or any other form of activity. The Public Health Service Act of 1944 permits the Surgeon General to "provide for the apprehension and examination of any individual reasonably believed to be infected with a communicable disease in a qualifying stage and . . . to be a probable source of infection to individuals who, while infected with such disease in a qualifying stage, will be moving from a State to another State." 42 U.S.C. § 264. Regulations promulgated under this Act authorize "the detention, isolation, quarantine, or conditional release of individuals, for the purpose of preventing the introduction, transmission, and spread of the communicable diseases" listed in an

---

consist with the letter and spirit of the constitution, are constitutional.")

executive order. 42 C.F.R. § 70.6. Individuals subject to such detention, isolation or quarantine are not required to be presently engaged in any kind of activity in order to fall within the Surgeon General's authority.

There is more than a century of precedent establishing that quarantine laws fit within Congress' commerce authority. In *Morgan's S.S. Co. v. Louisiana Bd. of Health*, 118 U.S. 455 (1886), this Court explained that Congress possesses the power to displace state quarantine laws because such laws "whether passed with intent to regulate commerce or not, must be admitted to have that effect." *Id.* at 465. More recently, Justice Scalia expressed this view more succinctly: "if anything relates to interstate commerce, it's communicable diseases." Oral Argument Tr. of *United States v. Comstock*, 130 S. Ct. 1949 (2010) at 30.

Thus, federal health laws regulating presently inactive individuals under the Commerce Clause are far from "unprecedented,"[4] as the Eleventh Circuit

---

[4] Moreover, it is far from clear how the minimum coverage provision's alleged novelty is relevant to its constitutionality. *See R.R. Ret. Bd.*, 295 U.S. 330, 346 (1935) ("The fact that the compulsory scheme is novel is, of course, no evidence of unconstitutionality.") The history of this Court's enumerated powers jurisprudence is paved with briefs submitted by losing parties arguing that the law they challenged was in some way unprecedented. *See, e.g.*, Brief for Respondent at 52, *United States v. Comstock*, 130 S. Ct. 1949 (2010) ("There is no historical precedent for a broad federal civil commitment authority.); Brief for

(Continued on following page)

suggested. Rather, longstanding federal law subjects individuals with communicable diseases to massive intrusions upon their liberty – up to and including detention for the length of their illness – even if those individuals engaged in no activity whatsoever.

Respondent at 12, *Gonzales v. Raich*, 545 U.S. 1 (2005) ("Should the Court rule for Petitioners, this case would immediately replace *Wickard v. Filburn*, 317 U.S. 111 (1942) as 'the most far reaching example of Commerce Clause authority over intrastate activity.'"); Reply Brief of Petitioner at 8, *Sabri v. United States*, 541 U.S. 600 (2004) ("The Court has never recognized that expansive authority."); Brief of Petitioner at 9, *South Dakota v. Dole*, 483 U.S. 203 (1987) ("Congress has sought, for the first time since the adoption of the Twenty-first Amendment, to assume absolute control of a significant portion of the core area of liquor regulation reserved to the states."); Brief of Petitioner at 9, *Perez v. United States*, 402 U.S. 146 (1971) ("[N]ever has this Court upheld such regulation over so broad and unrestricted a class."); Supplemental Brief of Respondent, *Katzenbach v. McClung*, 379 U.S. 294 (1964) ("[T]here is no statutory precedent to support the Solicitor General's position in this case."); Brief for the Appellee upon Re-Argument at 13, *Wickard v. Filburn*, 317 U.S. 111 (1942) (Claiming that no prior Commerce Clause precedent "go[es] so far in the extension and application of the Commerce Clause of the Constitution as Government Counsel now ask this Court to go"); Brief of Appellee at 82, *United States v. Darby*, 312 U.S. 100 (1941) ("[A]n additional statement as to the individual and cumulative effect of §§15(a)(1) and 15(a)(2) may demonstrate the unprecedented scope of the regulation attempted by the Fair Labor Standards Act."); Brief of Petitioner at 12, *Northern Securities Co. v. United States*, 193 U.S. 197 (1904) ("Congress has never assumed any such power over the internal affairs of corporations or their corporate shares, nor has Congress ever attempted to regulate in any way the method by which corporate franchises might be extended, merged or consolidated.")

Moreover, were this Court to embrace the Eleventh Circuit's novel rule prohibiting Congress from regulating anything other than "preexisting, freely chosen classes of activities," it could have disastrous effects. To give just one example, approximately three or four times every century new subtypes of influenza arise which sweep through a human population that has no significant immunity to them. President's Council of Advisors on Science and Technology, *Report to the President on U.S. Preparations for 2009 – H1N1 Influenza* 7 (Aug. 7, 2009) *available at* http://www.whitehouse.gov/assets/documents/PCAST_H1N1_Report.pdf. Although these pandemics vary in severity, their effects can be calamitous. In 1918 and 1919, a global influenza pandemic killed an estimated 40-100 million people worldwide, between 500,000 and 750,000 of whom were in the United States. *Id.* at 8.

Managing a pandemic that is similarly widespread, virulent and deadly could not be done by fifty divergent state governments. It would require the kind of coordinated response that can only be conducted by the federal government. Yet, if this Court were to adopt the rule suggested by the Eleventh Circuit, federal officials would lack the authority to regulate people who became infected through no "freely chosen" action of their own.

CONCLUSION

For the forgoing reasons, *amici* respectfully submit that this Court should reverse the decision of the Eleventh Circuit with respect to the minimum coverage question.

Respectfully submitted,

IAN MILLHISER
CENTER FOR AMERICAN PROGRESS
1333 H St. NW, 10th Floor
Washington, DC 20005
(202) 481-8228
imillhiser@americanprogress.org
Attorney for Amici Curiae

AMICUS CURIAE BRIEF

Nos. 11-393, 11-398, and 11-400

In The Supreme Court of the United States

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, *ET AL.*,
Petitioners,
v.
KATHLEEN SEBELIUS, SECRETARY OF HEALTH & HUMAN SERVICES, *ET AL.*

DEPARTMENT OF HEALTH & HUMAN SERVICES, *ET AL.*,
Petitioners,
v.
FLORIDA, *ET AL.*

FLORIDA, *ET AL.*, *Petitioners*,
v.
DEPARTMENT OF HEALTH & HUMAN SERVICES, *ET AL.*

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMERICA'S HEALTH INSURANCE PLANS AND THE BLUE CROSS BLUE SHIELD ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF REVERSAL OF THE COURT OF APPEALS' SEVERABILITY JUDGMENT

ROGER G. WILSON
SENIOR VICE-PRESIDENT & GENERAL COUNSEL
BLUE CROSS BLUE SHIELD ASSOCIATION
225 N. Michigan Ave.
Chicago, IL 60601
(312) 297-6000

Counsel for Blue Cross Blue Shield Association

JOSEPH MILLER
JULIE SIMON MILLER
AMERICA'S HEALTH INSURANCE PLANS
601 Pennsylvania Avenue, N.W.
South Building, Suite 500
Washington, DC 20004
(202) 778-3200

PATRICIA A. MILLETT
Counsel of Record
ORLY DEGANI
JAMES E. TYSSE
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave N.W.
Washington, DC 20036
(202) 887-4000
pmillett@akingump.com

Counsel for America's Health Insurance Plans

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE 2

INTRODUCTION 4

SUMMARY OF THE ARGUMENT 7

ARGUMENT 11

ACA'S INSURANCE-MARKET REFORMS CANNOT FUNCTION AS CONGRESS INTENDED WITHOUT THE MINIMUM INDIVIDUAL COVERAGE PROVISION AND THUS ARE INSEVERABLE FROM THE MANDATE 11

A. The Critical Severability Inquiry Is Whether Congress Intended ACA's Insurance-Market Reforms To Function Without The Minimum Individual Coverage Provision That Congress Deemed "Essential" To Their Operation 11

B. ACA's Plain Text Establishes That The Minimum Individual Coverage Provision Is "Essential" To And Thus Inseverable From The Guaranteed Issue, Preexisting Conditions, Health-Status Discrimination, And Adjusted Community Rating Reforms 15

1. The Mandate and the Insurance-Market Reforms Are Textually Linked 15

2. Congress's Linkage Accords with the Legislature's Knowledge of Marketplace Realities 18

C. **Congress Knew That States' Efforts To Implement Similar Market Reforms Without A Mandate Had Not Worked** 26

1. Congress Was Aware of Failed State Reform Efforts 26

2. The Court of Appeals Failed to Focus on How Congress Intended the Mandate and Reforms to Function Together 35

CONCLUSION 39

TABLE OF AUTHORITIES

CASES:

Aetna Health Inc. v. Davila,
542 U.S. 200 (2004) 4

Alaska Airlines, Inc. v. Brock,
480 U.S. 678 (1987) ..... *passim*

Allen v. City of Louisiana,
103 U.S. 80 (1880) 12, 17

Ayotte v. Planned Parenthood of N. New England,
546 U.S. 320 (2006) 12, 13

Blodgett v. Holding,
275 U.S. 142 (1927) 11

Carter v. Carter Coal Co.,
298 U.S. 238 (1936) 17, 26

Denver Area Educ. Telecomms. Consortium, Inc. v. FCC,
518 U.S. 727 (1996) 13

Federal Ins. Co. v. Raytheon Co.,
426 F.3d 491 (1st Cir. 2005) 22

Free Enter. Fund v. Public Co. Accounting Oversight Bd.,
130 S. Ct. 3138 (2010) 26

Huntington v. Worthen,
120 U.S. 97 (1887) 12, 38

Metropolitan Life Ins. Co. v. Glenn,
554 U.S. 105 (2008) 3

Regan v. Time, Inc.,
468 U.S. 641 (1984) 12

Rust v. Sullivan,
500 U.S. 173 (1991) 11

Sereboff v. Mid Atl. Med. Servs., Inc.,
547 U.S. 356 (2006) 3, 4

Tilton v. Richardson,
403 U.S. 672 (1971) 17, 18

United States v. Booker,
543 U.S. 220 (2005) 13, 14, 17, 36

United States v. Norton,
97 U.S. 164 (1877) 24

STATUTES:

26 U.S.C. (Suppl. IV 2011)
§ 5000A 4, 7, 39

42 U.S.C. (2009)
§ 300gg 6
§ 300gg-1 6
§ 300gg-11 6

42 U.S.C. (Suppl. IV 2011)
§ 300gg(a) 38, 39
§ 300gg(a)(1) 5, 6, 15
§ 300gg-1 ..... *passim*
§ 300gg-3 ..... *passim*
§ 300gg-4 ..... *passim*
§ 300gg-41(a) 6, 7
§ 300gg-41(b) 6, 7
§ 300gg-41(f) 6, 7
§ 18091(2)(I) ..... *passim*
§ 18091(2)(B) 5
§ 18091(2)(C) 5
§ 18091(2)(D) 5
§ 18091(2)(E) 5
§ 18091(2)(F) 5
§ 18091(2)(G) 5

Anti-Injunction Act, 28 U.S.C. § 2283 (1948) 4

Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 ..... 3, 4, 5

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) 3, 4, 5
§ 1001(3) 6
§ 1201(2)(A) 5, 6
§ 1201(3)(A) 5, 6
§ 1201(3)(B) 6
§ 1201(4) 5, 6
§ 1501(a) 5
§ 1562(c)(8) 6
§ 1563(c)(8) 6
§ 10107 6

Public Health Service Act of 1944, 42 U.S.C.
§§ 201 *et seq.* 5
§ 2701 ..... 5, 6
§ 2702 5
§ 2704 ..... 5, 37
§ 2705 ..... 5, 15, 37

OTHER AUTHORITIES:

AHIP, *Small Group Health Insurance in 2008: A Comprehensive Survey of Premiums, Product Choices, and Benefits* (Mar. 2009) ... 20, 21

Besio, Susan, *Vermont Health Care Reform: Five-Year Implementation Plan* (Dec. 1, 2006) 33

Blumberg, Linda & John Holahan, *Do Individual Mandates Matter? Timely Analysis of Immediate Health Policy Issues* (Jan. 2008) 19

Congressional Budget Office, Effects of Eliminating the Individual Mandate to Obtain Health Insurance (June 16, 2010) 25

Congressional Budget Office, Key Issues in Analyzing Major Health Insurance Proposals (Dec. 2008) 24

Congressional Record, 156 Cong. Rec. H1854 (daily ed. Mar. 21, 2010) (statement of Rep. Miller) 34

Covering the Uninsured: Making Health Insurance Markets Work: Hearing Before the S. Committee on Finance, 110th Cong., 2d. Sess. (2008) (statement of Pam McEwan, Executive Vice President, Public Affairs and Governance, Grp. Health Coop.) 24, 34

Damler, Rob, *Experience Under The Healthy Indiana Plan: The Short-Term Cost Challenges of Expanding Coverage to the Uninsured*, Milliman Health Reform Briefing Paper (Aug. 2009) 33

Ericksen, Doug and Roger Stark, *What Washington, D.C. Could Learn from Washington State Health Care Reform*, Washington Policy Center (July 2010) 31

Families USA, *Hidden Health Tax: Americans Pay a Premium* (May 2009) 20

Feldvebel, Alexander K. & David Sky, *A Regulator's Perspective on Other States' Experiences*, 25 J. Health Politics, Policy & Law 197 (2000) 29

Gorman, B., *et al.*, *Reform Options for Maine's Individual Health Insurance Market: An Analysis Prepared for the Bureau of Insurance* (May 30, 2007) 27

Hall, Mark A., *An Evaluation of Vermont's Reform Law*, 25 J. Health Politics, Policy & Law 101 (2000) 33

Howard, Paul, *Building a Market-Based Health-Insurance Exchange in New York*, Manhattan Institute for Policy Research (Apr. 2011) 32, 33

Kaiser Family Foundation, *Health Care Costs: A Primer* (Mar. 2009) 19

Kirk, Adele M., *Riding the Bull: Experience With Individual Market Reform in Washington, Kentucky, and Massachusetts* 25 J. Health Politics, Policy & Law 175 (2000) 28, 30, 32

Linehan, Kathryn, *Underwriting in the Non-Group Health Insurance Market: The Fundamentals* (June 4, 2009) 18, 21

Long, S.K., *On the Road to Universal Coverage: Impact of Reform In Massachusetts At One Year*, 27 Health Affairs w270 (June 3, 2008) 32

Maine Bureau of Insurance, *White Paper: Maine's Individual Health Insurance Market* (Jan. 22, 2001) 27, 28

Masterson, Les, *Indiana Program Shows Health Reform Without Individual Mandate Is Costly*, HealthLeaders Media (Sept. 9, 2009) 33

McDonough, J.E., *et al.*, *Massachusetts Health Reform Implementation: Major Progress and Future Challenges*, 27 Health Affairs w285 (June 3, 2008) 32

Meier, Conrad F., *Universal Health Insurance in Washington State: A Grim Prognosis for All of Us*, Medical Sentinel (Mar./Apr. 2000) 30

Monheit, Alan C., *et al.*, *Community Rating and Sustainable Individual Health Insurance Markets in N.J.*, 23 Health Affairs 167 (2004) 9, 22, 32

National Ass'n of Health Underwriters, *Analysis of State-Level Health Insurance Market Reforms* (Oct. 2005) 29

National Inst. For Health Care Mgmt., *Understanding U.S. Health Care Spending* (NIHCM Foundation Data Brief July 2011) 19

New Hampshire Insurance Department, *An Analysis of the Nongroup Market with Recommendations for Change* (Oct. 27, 1997) 29

Nichols, Len M., *State Regulation: What Have We Learned So Far?*, 25 J. Health Politics, Policy & Law 175 (2000) 28

Press Release, Office of Governor Gary Locke, "Locke signs bill to revive individual health insurance market" (Mar. 23, 2000), *available at* http://www.digitalarchives.wa.gov/GovernorLocke/ press/press-view.asp?pressRelease=283&newsType=1 30

Reinhardt, Uwe E., *The Case for Mandating Health Insurance*, N.Y. Times (Oct. 23, 2009, 7:06 AM), http://economix.blogs.nytimes.com/2009/10/23/the-case-for-mandating-health-insurance/ 23

Richards, Bill, *Perils of Pioneering: Health-Care Reform In State of Washington Riles Nearly Everyone*, Wall St. J., Apr. 4, 1996 31

Robert Wood Johnson Foundation, *Issue Brief: Recognizing Destabilization in the Individual Health Insurance Market* (July 2010) 31

S. Rep. No. 89, 111th Cong., 1st Sess. (2009) 6, 23, 24

Sky, David, *High Risk Pool Alternatives: A Case Study of New Hampshire's Individual Health Insurance Market Reforms*, 16 J. Ins. Reg. 399 (Summer 1998) 29, 36

Stanton, Mark W., *The High Concentration of U.S. Health Care Expenditures*, Research in Action, Issue 19, Agency for Healthcare Research and Quality, Publication No. 06-0060 (June 2006) 19

Stark, Roger, *Overview of the Individual Health Insurance Market in Washington State*, Washington Policy Center (Jan 2011) 30

Suderman, Peter, *The Lesson of State Health-Care Reforms*, Wall St. J., Oct. 15, 2009 30

Turnbull, Nancy C., *et al.*, *Insuring the Healthy or Insuring the Sick? The Dilemma of Regulating the Individual Health Insurance Market: Short Case Studies of Six States* (Feb. 2005) 28, 29, 32

U.S. Census Bureau, Historical Health Insurance Tables, Table HI-6 (1987—2005), *available at* http://www.census.gov/hhes/www/hlthins/data/historical/original.html 27

Wicks, Elliott K., *The Individual Market in Vermont: Problems and Possible Solutions* (prepared for Vermont Department of Banking, Insurance, Securities and Health Care Administration) (Dec. 2006) 33

Wulsin, Jr., Lucien & Adam Dougherty, *Individual Mandate: A Background Report* (Apr. 2009) 20

In The
Supreme Court of the United States

No. 11-393

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, *ET AL.*,

Petitioners,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH & HUMAN SERVICES, *ET AL.*

No. 11-398

DEPARTMENT OF HEALTH & HUMAN SERVICES, *ET AL.*,

Petitioners,

v.

FLORIDA, *ET AL.*

No. 11-400

FLORIDA, *ET AL.*, *Petitioners*,

v.

DEPARTMENT OF HEALTH & HUMAN SERVICES, *ET AL.*

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF AMERICA'S HEALTH INSURANCE PLANS AND THE BLUE CROSS BLUE SHIELD ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF REVERSAL OF THE COURT OF APPEALS' SEVERABILITY JUDGMENT

INTEREST OF AMICI CURIAE[1]

America's Health Insurance Plans ("AHIP") is the national trade association that represents companies providing health insurance coverage to more than 200 million Americans. AHIP has over fifty years of experience in the health insurance industry (as AHIP and its predecessors). Its members offer a wide range of insurance options to consumers, employers of all sizes, and governmental purchasers nationwide. As a result, AHIP's members have extensive experience working with hospitals, physicians, pharmaceutical and device companies, and other health care stakeholders to ensure that patients have access to needed treatments and medical services. That gives AHIP extensive first-hand and historical knowledge about the Nation's health care and health insurance systems and a unique understanding of how those systems work.

The Blue Cross and Blue Shield Association ("Blue Cross Blue Shield") is a non-profit association of 38 independent, community-based, and locally operated health insurance companies. Those companies collectively provide healthcare coverage for nearly 99 million people—one out of three Americans—in every zip code in the United States, the District of Columbia, and Puerto Rico. Blue Cross and Blue Shield companies offer a variety of

---

[1] All parties have consented to the filing of this brief through universal letters of consent on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than amici made a monetary contribution intended to fund the preparation or submission of this brief.

insurance products to all segments of the population, including federal employees, large employer groups, small businesses, and individuals. As leaders in the healthcare community for more than 80 years, the Blue Cross and Blue Shield companies have a commitment to making healthcare work for all Americans and have an extensive knowledge of and experience with the health insurance marketplace.

Health insurance plans are among the entities most directly and extensively regulated by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 ("ACA" or "Act"). AHIP and Blue Cross Blue Shield are filing this brief to share with the Court the uniquely comprehensive information that they and their members possess about how the health insurance market operates, the changes that will be made by the Act, and the consequences that would follow from decoupling the Act's minimum individual insurance coverage provision from certain insurance-market reforms.

AHIP and Blue Cross Blue Shield have each previously appeared as amicus curiae before this Court in other cases involving issues of particular importance to the health insurance industry. *See, e.g., Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008) (Blue Cross Blue Shield & AHIP; judicial review of benefit determinations by ERISA plan administrators); *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006) (Blue Cross Blue Shield & AHIP; addressing whether an ERISA fiduciary may sue a

beneficiary for reimbursement of medical expenses paid by the ERISA plan when the beneficiary has recovered for its injuries from a third party); *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004) (ERISA preemption of state-law claims against health maintenance organizations) (brief filed by AHIP's predecessor, AAHP-HIAA).

INTRODUCTION

1. This brief does not address the constitutionality of ACA's minimum individual insurance coverage provision, 26 U.S.C. § 5000A (Suppl. IV 2011). Nor does this brief address the Anti-Injunction Act, 28 U.S.C. § 2283 (1948), or Medicaid questions pending before this Court. Instead, this brief focuses exclusively on severability, in the event the Court reaches that question. With respect to that issue, AHIP's and Blue Cross Blue Shield's extensive, first-hand, and on-the-ground experience with health insurance markets, as well as their direct experience with earlier failed state efforts to implement certain insurance-market reforms without a minimum individual coverage mandate, allow them to bring a uniquely informed voice to this Court. The purpose of this brief is to share that perspective with the Court to help guide the proper legal analysis. This brief does not address any other constitutional, procedural, or severability questions that are outside AHIP's and Blue Cross Blue Shield's unique expertise in the health insurance market.

2. On March 30, 2010, Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by the

Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 ("ACA" or "Act"). ACA is a voluminous statute with a multitude of interlocking and interdependent provisions. Congress's stated intent was to increase the accessibility and affordability of health insurance and to reduce the frequency with which the cost of care for the uninsured is shifted to those who maintain health insurance. 42 U.S.C. § 18091(2)(B)-(G) (Suppl. IV 2011) (ACA § 1501(a)). While ACA addresses those issues through a variety of provisions, some of the Act's most significant reforms are aimed at the health insurance market.[2]

As most relevant to this brief, ACA's reforms of the insurance market include: (i) a "guaranteed issu[e]" provision that requires insurers to issue health care coverage to any individual who applies for it, 42 U.S.C. § 300gg-1 (PHSA § 2702, as amended by ACA § 1201(3)(A)); (ii) a prohibition on excluding preexisting medical conditions from coverage or imposing a waiting period before their coverage, 42 U.S.C. § 300gg-3 (PHSA § 2704, as added by ACA § 1201(2)(A)); (iii) a prohibition on the establishment of coverage eligibility rules that are based on health-status related factors, 42 U.S.C. § 300gg-4 (PHSA § 2705, as added by ACA § 1201(4)); and (iv) the required use of an adjusted "community rating" system that prevents health plans from setting premium prices based on an individual applicant's medical history and that sharply limits variations in

---

[2] The reforms relevant here were implemented through amendments and additions to the Public Health Service Act of 1944, 42 U.S.C. §§ 201 *et seq.* ("PHSA").

rates based on age, rating areas, or tobacco usage, *see* 42 U.S.C. § 300gg(a)(1) (PHSA § 2701, as added by ACA § 1201(4)). Those four reforms are referred to here collectively as "the insurance-market reforms." Congress packaged them together as a legislative mechanism for ensuring that all individuals have access to health insurance that is based on premium prices that are rated across a community of individuals rather than individual risk factors.[3]

---

[3] Traditionally, health insurance in the United States is sold in three markets: individual consumers, small group, and large group. S. Rep. No. 89, 111th Cong., 1st Sess. 10 (2009). The guaranteed-issue requirement existed in the small group market prior to ACA, and limitations on preexisting condition exclusions and on coverage eligibility rules that discriminated based on health status previously existed in both the large and small group markets. *See* 42 U.S.C. § 300gg (2009) (limiting preexisting condition exclusions in the small and large group markets), amended and transferred to 42 U.S.C. § 300gg-3 by ACA § 1201(2)(A); 42 U.S.C. § 300gg-11 (2009) (guaranteeing issuance of coverage in the small group markets), redesignated as 42 U.S.C. § 300gg-1 by ACA § 1001(3), stricken by ACA § 1562(c)(8) (renumbered as ACA § 1563(c)(8) by ACA § 10107), amended and transferred to 42 U.S.C. § 300gg-1 by ACA § 1201(4); 42 U.S.C. § 300gg-1 (2009) (prohibiting coverage eligibility rules in the group markets based on certain health-status-related factors), stricken by ACA § 1201(3)(A) and transferred by ACA § 1201(3)(B) to end of new 42 U.S.C. § 300gg-4. Similar protections also applied pre-ACA in the individual market, but only to certain individuals exiting prior group coverage who (1) were no longer eligible for group coverage, (2) satisfied specified "creditable coverage" conditions, (3) exhausted all available COBRA and any similar state coverage programs, (4) were not eligible for coverage under any other government program, and (5) were not terminated from the immediately prior coverage based on nonpayment of premiums or fraud. There was no restriction on setting premium rates for such individuals based on health status or

In conjunction with its adoption of those insurance-market reforms, Congress also enacted a provision that requires every person, with limited exceptions, to maintain "minimum essential" health insurance coverage. 26 U.S.C. § 5000A. That provision is sometimes referred to as the "individual mandate."

In ACA, Congress found that, if the guaranteed-issue requirement and the prohibitions on preexisting-condition exclusions and health-status-related eligibility determinations were implemented without the minimum individual coverage mandate, "many individuals would wait to purchase health insurance until they needed care." 42 U.S.C. § 18091(2)(I). Congress further found that the individual coverage requirement would help to "minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." *Id.* Congress thus concluded that the minimum individual coverage provision is "essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." *Id.*

SUMMARY OF THE ARGUMENT

The central flaw in the Eleventh Circuit's holding that the minimum individual coverage provision is

---

age. *See* 42 U.S.C. § 300gg-41(a), (b), (f). Those protections that preexisted ACA are not at issue in this brief.

completely severable from the balance of ACA is that the court largely confined its analysis to the narrow question of whether ACA could structurally be operative or enacted as a law without the minimum individual coverage provision. This Court, however, has held that severability turns on whether the remaining portions of the law "will function in a manner consistent with the intent of Congress" without the minimum individual coverage provision. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (emphasis omitted). Indeed, it is this Court's duty, in executing a judgment of unconstitutionality (should one arise), to undertake a full severability analysis that determines which provisions are so dependent on the mandate that, to leave them in place, would violate congressional intent and would, in effect, judicially create a statute that Congress would not have enacted.

Congress adopted its insurance-market reforms—guaranteed issue, prohibitions on preexisting condition exclusions or waiting periods, ban on coverage eligibility rules based on health-related factors, and the adjusted community rating system—together with the mandate as a package deal. The statutory text and legislative record establish that Congress would not have intended those insurance-market reforms to operate on their own, without the vital counterbalance of the minimum individual coverage mandate there to prevent the skyrocketing premiums that would otherwise arise due to crippling adverse-selection and cost-shifting problems.

Indeed, the Congress that enacted ACA had already seen the failed consequences of state efforts

to impose similar guaranteed issue, preexisting condition, health-status discrimination, and adjusted community rating reforms in the insurance market without a minimum individual insurance coverage mandate. Congress knew that, with such reforms, those who are most at risk of incurring substantial health costs pour into the insurance market once coverage is guaranteed and rates and exclusions are uncoupled from their individual health risk. At the same time, healthy individuals largely stay out, preferring to wait and purchase insurance only if and when the need arises.

In the absence of an individual coverage requirement, those reforms would dramatically skew the insurance pool by eliminating the price incentives for young and healthy people to purchase coverage, leading to a higher-cost mix of individuals in the insurance pool. This, in turn, would further increase premium prices, driving still more healthy individuals out of the insurance market. The result would be a "marketwide adverse-selection death spiral" that would thwart rather than advance Congress's goal of expanding affordable health care.[4]

The antidote to such market-crippling adverse-selection and cost-shifting problems, Congress determined, was the imposition of a mandate that all individuals have insurance. In Congress's judgment, the requirement that individuals maintain a base level of health insurance would ensure a workable

---

[4] Alan C. Monheit, *et al.*, *Community Rating and Sustainable Individual Health Insurance Markets in N.J.*, 23 Health Affairs 167, 169 (2004).

insurance system with a stable and balanced insurance-risk pool and without the adverse-selection and cost-shifting problems that would otherwise arise if insurance could be easily purchased only when needed. Indeed, Congress expressly found that the minimum individual coverage provision is "essential" to making its insurance-market reforms work. 42 U.S.C. § 18091(2)(I).

Congress's express finding of an "essential" link between the minimum individual coverage provision and the insurance-market reforms, combined with Congress's awareness of the States' distressing experiences with mandate-less insurance reforms, together demonstrate that Congress did not intend to implement those reforms without the mandate. Congress instead legislatively calibrated a package of insurance-market reforms that interlocked with the minimum individual coverage mandate to counterbalance the adverse-selection problems and spiraling premiums that such reforms, operating alone, had been shown to cause.

Were the mandate to be invalidated, those interdependent legislative provisions would be torn apart and the "essential" counterbalance stripped away, leaving the insurance-market reforms incapable by themselves of functioning as Congress intended. In fact, without a minimum individual coverage mandate to prevent the congressionally acknowledged adverse-selection and cost-shifting problems, those insurance-market reforms would confound Congress's legislative aims by causing premium prices to rise dramatically, thereby driving insurance products and consumers out of the

marketplace. In other words, the insurance-market reforms without the minimum individual coverage provision would be an edifice without a foundation, delivering the opposite of what Congress intended by ensuring that there would not be "affordable care" under the Affordable Care Act.

ARGUMENT

ACA'S INSURANCE-MARKET REFORMS CANNOT FUNCTION AS CONGRESS INTENDED WITHOUT THE MINIMUM INDIVIDUAL COVERAGE PROVISION AND THUS ARE INSEVERABLE FROM THE MANDATE

A. The Critical Severability Inquiry Is Whether Congress Intended ACA's Insurance-Market Reforms To Function Without The Minimum Individual Coverage Provision That Congress Deemed "Essential" To Their Operation

"[A] decision to declare an Act of Congress unconstitutional 'is the gravest and most delicate duty that this Court is called on to perform.'" *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)). When, in executing that constitutional duty, the Court determines that only a portion of a statute is unconstitutional, the Court must decide whether to invalidate the statute in its entirety, the unconstitutional provision alone, or the unconstitutional provision and those provisions that

Congress intended to work in inextricable conjunction with the unconstitutional provision.

Because the enactment of legislation is constitutionally confined to the Legislative Branch, basic separation-of-powers principles require that, when implementing a judgment of unconstitutionality, this Court not leave standing a law that would "'circumvent the intent of the legislature,'" *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329-330 (2006), or that Congress "'would not pass * * * independently,'" *Allen v. City of Louisiana*, 103 U.S. 80, 84 (1880).

Accordingly, if "different clauses of an act are so dependent upon each other that it is evident the legislature would not have enacted one of them without the other," *Huntington v. Worthen*, 120 U.S. 97, 102 (1887), then it is this Court's "duty" to strike down those provisions in conjunction with the invalidated provision, just as much as it is the Court's "'duty * * * to maintain the act in so far as it is valid,'" *Regan v. Time, Inc.*, 468 U.S. 641, 652-653 (1984). In either circumstance, severability analysis implements this Court's constitutional judgment in a manner that fully respects the constitutional assignment of legislative power to the Congress and "give[s] effect to what appears to have been the intent of the legislature." *Allen*, 103 U.S. at 84.

This Court's test for determining severability is "well-established" and reflects the Court's duty to implement its constitutional judgment consistent with those separation-of-powers principles: If Congress "'would not have enacted those provisions

which are within its power, independently of that which is not,'" then the provisions are inseverable and, if one is invalidated, the dependent provisions must be stricken too. *Alaska Airlines*, 480 U.S. at 684. That inquiry entails more than the abstract question of whether the remaining portions of a statute could operate or be enacted as law, *see id.*, which was the main focus of the court of appeals' analysis, No. 11-398, Pet. App. 172a-186a. Rather, the critical inquiry "is whether the statute," stripped of the unconstitutional provision, would "function in a manner consistent with the intent of Congress." *Alaska Airlines*, 490 U.S. at 685 (emphasis omitted).

"[T]he touchstone" for severability analysis, therefore, "is legislative intent." *Ayotte*, 546 U.S. at 330. That intent, moreover, must be assessed not from the vantage point of Congress's original desire to enact the entire law, but what Congress's view would have been "*in light of [the] holding*" invalidating a portion of the law. *United States v. Booker*, 543 U.S. 220, 265 (2005).

Accordingly, if this Court were to invalidate the minimum individual coverage provision that Congress deemed "essential" to the insurance-market reforms, 42 U.S.C. § 18091(2)(I), the Court will have to determine whether the statute could "function" as Congress would have intended, *Alaska Airlines*, 490 U.S. at 685, "'had it known'" that the mandate's counterbalance would be stricken out of the law, *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 767 (1996) (plurality opinion); *see Alaska Airlines*, 490 U.S. at 685 (unconstitutional provision cannot be severed if "the statute created in

its absence is legislation that Congress would not have enacted").

Furthermore, because ACA is "a highly complex statute" with "interrelated provisions," the Court "cannot assume that Congress, if faced with the statute's invalidity" in "key" respects, would have preferred that those "interrelated provisions," once disunited, continue to operate alone. *Booker*, 543 U.S. at 248. The Court instead must determine whether Congress "link[ed] specifically the operation" of the minimum individual coverage provision and its insurance-market reforms, or whether Congress instead would have intended for the reforms to "stand on their own, independent of" an invalidated mandate. *Alaska Airlines*, 480 U.S. at 688-689.[5]

ACA's text, structure, and legislative record establish that Congress enacted the minimum individual coverage mandate and its insurance-market reforms as a package deal, that those reforms cannot function as Congress intended without the mandate, and that, in fact, the continued operation of those reforms without the mandate would thwart Congress's central purpose of guaranteeing broad access to *affordable* health care.

---

[5] While the presence of a severability clause "creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision," the absence of a severability clause in ACA does not create any countervailing presumption. *Alaska Airlines*, 480 U.S. at 686.

B. ACA's Plain Text Establishes That The Minimum Individual Coverage Provision Is "Essential" To And Thus Inseverable From The Guaranteed Issue, Preexisting Conditions, Health-Status Discrimination, And Adjusted Community Rating Reforms

1. The Mandate and the Insurance-Market Reforms Are Textually Linked

ACA's plain text ties the minimum individual coverage provision and the insurance-market reforms tightly together. Congress expressly found that the minimum individual coverage mandate "is *essential* to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." 42 U.S.C. § 18091(2)(I) (emphasis added). Congress textually extended that same finding to ACA's prohibition on discrimination based on other health-status-related factors. *See Id.* (citing PHSA § 2705's (42 U.S.C. § 300gg-4) prohibition on health-status discrimination).

That congressional judgment that the mandate is "essential" to guarantee the issuance of insurance to all who apply without regard to health condition, 42 U.S.C. § 18091(2)(I), necessarily subsumed the adjusted community rating system reform, 42 U.S.C. § 300gg(a)(1), as well. The adjusted community rating requirement, which prohibits rates from varying based on health status and limits variations based on age, is a mechanism for spreading risk

across a broad, demographically diverse insurance pool and enforcing cross-subsidization by which low-risk individuals (generally young and healthy) collectively pay more and high-risk individuals (generally older and sicker) collectively pay less. Such pooling ensures that the highest cost individuals can purchase health insurance at an affordable premium.

That community rating cross-subsidization is indispensable to making the "guaranteed issue" of insurance and the bar on preexisting condition exclusions and eligibility rules based on health status work. Without a balanced risk pool of sick and healthy alike, premiums would skyrocket because only those who needed coverage would purchase it, while the younger and healthier individuals would postpone purchasing insurance until a health crisis arose. Accordingly, Congress's finding that the mandate is "essential to creating effective health insurance markets" in which insurance is "guaranteed issue" without regard to health status, 42 U.S.C. § 18091(2)(I), necessarily also applies to the adjusted community rating requirement and its inherent dependence on the diverse insurance pool created by the individual coverage mandate.[6]

---

[6] Of course, the affordability of health insurance, even with a mandate, is subject to additional factors such as the nature of the benefit package required and the rising cost of care. The point here is that, without community rather than individual-condition based ratings, Congress's effort to make affordable health insurance universally available would have stopped at the starting gate.

Congress's express statutory judgment in Section 18091(2)(I) thus provides the specific legislative linkage that makes the insurance-market reforms—guaranteed issue, preexisting condition prohibitions, health-status discrimination, and adjusted community rating—"'so mutually connected with and dependent on'" the minimum individual coverage provisions "'as to warrant a belief that the legislature intended them as a whole,'" and "if all could not be carried into effect, the legislature would not pass the residue independently[.]" *Allen*, 103 U.S. at 84. When Congress enacts a statutory scheme designed to be "upheld by two legs at once," that itself "suggests the improbability that Congress would have assented to a code supported by only one." *Carter v. Carter Coal Co.*, 298 U.S. 238, 314 (1936). Such "manifest" expressions of statutory "interdependence" by Congress require joint treatment in severability analysis. *Id.* at 315; *see also Booker*, 543 U.S. at 260 ("critical cross-references" between two provisions of a statute requires that both provisions be stricken from the statute).[7]

This case, in fact, is the flipside of *Tilton v. Richardson*, 403 U.S. 672 (1971), in which this Court

---

[7] *Carter* was decided at a time when this Court generally applied a presumption of inseverability, 298 U.S. at 312, which this Court has since rejected, *see Alaska Airlines*, 480 U.S. at 686. Because the law at issue in *Carter* contained a severability clause, however, that case was decided under a presumption "of separability," which could be overcome only by "'the clear probability that the invalid part being eliminated the Legislature would not have been satisfied with what remains,'" *Carter*, 298 U.S. at 312, and thus the analysis fully comported with current severability analysis.

held that an invalidated provision was fully severable because "nothing in the statute or its objectives intimat[ed] that Congress considered" the unconstitutional provision to be "essential" to the statutory program, *id.* at 684. Congress, of course, not only intimated, but actually found precisely the opposite here, determining that the mandate is "essential" to the intended operation of the guaranteed issue, preexisting conditions, health-status discrimination, and adjusted community rating reforms in the insurance market. *Cf. Alaska Airlines*, 480 U.S. at 688 (finding full severability where "Congress did not link specifically the operation" of two statutory provisions).

2. Congress's Linkage Accords with the Legislature's Knowledge of Marketplace Realities

Congress's decision to textually weave the mandate and its insurance-market reforms together reflects its knowledge and understanding of the practical interconnection of those measures in creating a viable market for universal insurance.

The insurance market is particularly susceptible to the economic phenomenon of "adverse selection" and its companion problem of cost shifting.[8] Adverse selection occurs because individuals with higher anticipated health care costs—generally less healthy and older individuals—are more likely than healthy and younger people to enter an insurance market.

---

[8] *See* Kathryn Linehan, *Underwriting in the Non-Group Health Insurance Market: The Fundamentals* 4 (June 4, 2009).

Health insurance is particularly prone to adverse selection because individuals know more about their own health than insurers do, creating incentives for people at low risk of significant health care needs and expenses to postpone purchasing coverage until they suffer from an illness or expect to need medical treatment.

Such adverse selection significantly increases the costs for all participants in the insurance market. Because insurers generally set premiums according to the expected medical costs of those participating in a coverage pool, premiums increase for all participants when individuals with higher expected health care costs dominate the pool. *See* Linda Blumberg & John Holahan, *Do Individual Mandates Matter? Timely Analysis of Immediate Health Policy Issues* 2 (Jan. 2008). Moreover, it takes little disproportionality in the insurance pool to shift health care costs dramatically. Estimates are that just 5% of the population accounts for almost 50% of all health care costs, and the top 1% accounts for 20% of all health costs. At the same time, half of the population accounts for just 3% of health care spending. *See* Mark W. Stanton, *The High Concentration of U.S. Health Care Expenditures*, Research in Action, Issue 19, Agency for Healthcare Research and Quality, Publication No. 06-0060 (June 2006).[9]

---

[9] *See also* Kaiser Family Foundation, *Health Care Costs: A Primer*, at 5 (Mar. 2009); National Inst. for Health Care Mgmt., *Understanding U.S. Health Care Spending*, at 1, 4 (NIHCM Foundation Data Brief July 2011).

The resulting increased cost of insurance makes it even more unlikely that healthy people will purchase coverage. Indeed, up to 20% of uninsured individuals have the financial means to obtain coverage but forgo it, relying instead on emergency care when they need medical treatment. *See* Lucien Wulsin, Jr. & Adam Dougherty, *Individual Mandate: A Background Report* 3-4 (Apr. 2009). When those "free riders," *id.* at 4, require medical care, hospitals and other providers charge those who do have coverage higher prices to compensate for lost costs. Those higher prices, in turn, translate into increased health insurance premiums. Those with insurance are ultimately hit with a "hidden tax" estimated at $368 annually for a single person and over $1,017 for a family to pay for that uncompensated care. Families USA, *Hidden Health Tax: Americans Pay a Premium*, at 6-7 (May 2009) (citing 2008 analysis of private actuarial consulting firm); *see also* Wulsin, Jr. & Dougherty, *supra*, at 3-4 (hidden tax ranges from two to ten percent of private premiums).[10]

---

[10] Adverse selection and the resultant cost shifting are of particular concern in the individual market because employers do not subsidize the cost of coverage, as they typically do in the large and small group markets. The group markets are composed of employees formed for purposes other than obtaining insurance, and the subsidy offered by employers results in high participation rates, including by healthy workers, such that the demographic and health status mix in a given pool tends to track the workforce as a whole. But in the individual market, where insureds pay the full premium with no employer subsidy, consumers are naturally more price-sensitive and more likely to wait to purchase insurance until they expect to need medical care. *See* AHIP, *Small Group Health Insurance in 2008:*

Prior to ACA, insurance companies were able to combat those problems of adverse selection and cost shifting by employing the actuarial mechanism of underwriting to set premium rates. That process allowed them to manage risk and hold down costs for their existing enrollees by assessing each applicant's health and age and then making an actuarial judgment about the amount and types of medical services that he or she would likely need. Based on that determination, the insurer might exclude coverage for an applicant's known preexisting conditions, impose a waiting period for coverage (which can prevent the belated or selectively timed purchase of insurance), adjust the applicant's premium to account for the risk, or deny coverage altogether. *See* Linehan, *supra*, at 4-6. By regulating risk, those underwriting practices also allowed insurers to offer lower premiums to younger and healthier people, thereby reducing the disincentives to purchasing insurance and attracting them into the insurance pool. *Id.*

ACA's insurance-market reform provisions eliminate many of those risk-management tools. For example, the guaranteed issue provision requires insurers to issue health care coverage to all individuals who are able to pay the premium. 42 U.S.C. § 300gg–1. The adjusted community rating system prohibits insurers from pricing policies according to an applicant's health status and sharply limits age-based variations. 42 U.S.C. § 300gg. In

---

A Comprehensive Survey of Premiums, Product Choices, and Benefits 4 (Mar. 2009).

addition, insurers will no longer be permitted to exclude preexisting conditions from coverage, 42 U.S.C. § 300gg–3, or to base coverage eligibility on an applicant's health status, medical condition, or related factors, 42 U.S.C. § 300gg–4.

The effect of those reforms is to alter fundamentally the insurance business and, in particular, the mechanisms employed for spreading risk and keeping premiums affordable. First, prohibiting reliance on the traditional tools of underwriting would make participation in the insurance market more attractive for older and less healthy individuals with higher expected health care costs, thereby increasing the pressure on premiums, which in turn renders the insurance market less attractive for younger and healthier persons who have lower expected costs and are highly price sensitive. The attraction of a disproportionate share of high-risk individuals into the insurance pool will raise average costs, resulting in higher premiums for everyone. That deep imbalance in the pool of insurance customers can create a "marketwide adverse-selection death spiral" in the individual insurance market. Monheit, *supra*, at 169.

Second and relatedly, Congress recognized that, were the insurance-market reforms to be implemented without the mandate, healthy and younger individuals would have every incentive to take a "wait-and-see" approach, postponing the "purchase [of] health insurance until they needed care," 42 U.S.C. § 18091(2)(I)—the equivalent of "'insuring the building already on fire,'" *Federal Ins. Co. v. Raytheon Co.*, 426 F.3d 491, 499 (1st Cir. 2005).

Since health plans could neither exclude applicants from coverage based on preexisting conditions or other health-related factors, nor increase premiums based on health status, it would often be an entirely rational economic decision for healthy and low-risk individuals to forgo obtaining insurance coverage until their medical circumstances changed.

At the same time, guaranteed issue and community rating provide every incentive for the most unhealthy or medically risky individuals to flood the market because initial premiums could not be increased to reflect their individual medical risk. As a result, the insurance pool would skew dramatically toward individuals with higher health care costs, in turn driving up the cost of insurance—the polar opposite of Congress's intent in enacting the "Affordable" Care Act. *See* Uwe E., *The Case for Mandating Health Insurance*, N.Y. Times (Oct. 23, 2009, 7:06 AM), http://economix.blogs.nytimes.com/2009/10/23/the-case-for-mandating-health-insurance/.

Congress enacted the minimum individual coverage mandate as an antidote to those otherwise economically crippling adverse-selection and cost-shifting problems. *See* 42 U.S.C. § 18091(2)(I). Congress specifically found that, "[b]y significantly increasing health insurance coverage," the mandate requirement would help to "minimize * * * adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." *Id.*; *see* S. Rep. No. 89, 111th Cong., 1st Sess. 5 (2009) ("To ensure the insurance market reforms function properly, the [Act]

would create a personal responsibility requirement for health care coverage[.]").[11]

Congress also was informed that "guaranteed issue, community rating, and limits on pre-existing condition exclusions and waiting periods *will only be successful if there is an individual mandate to balance the risk in the insured population.*" *Covering the Uninsured: Making Health Insurance Markets Work: Hearing Before the S. Committee on Finance*, 110th Cong., 2d. Sess. 3 (2008) (statement of Pam McEwan, Executive Vice President, Public Affairs and Governance, Grp. Health Coop.) (emphasis added); *see also* Congressional Budget Office, Key Issues in Analyzing Major Health Insurance Proposals, Ch. 2, at 27 (Dec. 2008) (noting that "mandate[s] would increase insurance coverage by making it more costly for individuals to be uninsured and for employers not to offer coverage to their employees").

---

[11] The court of appeals described the mandate as "toothless" and thus entirely severable because the amount of the penalty is relatively low and the statute limits enforcement of the penalty provision. No. 11-398, Pet. App. 151a-152a, 183a. However, this Court's operating "presumption of law [is] that * * * citizens obey the law," not that they disregard it in the absence of draconian penalties. *United States v. Norton*, 97 U.S. 164, 168 (1877). In any event, the strength of the penalty needed to enforce mandated behavior in any statute is a quintessentially legislative policy judgment. It has no bearing on the separate legal question of whether Congress, had it known that the mandate would be invalidated, would have wanted the insurance-market reforms to stand on their own, without *any* statutory mechanism (of any strength) for countering the known adverse-selection and cost-shifting problems.

Finally, the vital interconnectedness of the minimum individual coverage mandate and the insurance-market reforms was reconfirmed by the Congressional Budget Office, which advised shortly after the law's passage that, implementation of those market reforms without the minimum individual coverage provision would increase premiums for new policies by approximately 15% to 20% because of the adverse-selection problem that would result. *See* Congressional Budget Office, Effects of Eliminating the Individual Mandate to Obtain Health Insurance at 2 (June 16, 2010). About 16 million additional people would remain uninsured in 2019 (39 million rather than 23 million) without the mandate, according to that report. *Id.*[12]

Those reasons are why Congress determined that the minimum individual coverage mandate "is *essential* to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." 42 U.S.C. § 18091(2)(I) (emphasis added). Given the known economically and programmatically damaging consequences of guaranteeing the issuance of insurance without regard to individual health status or the timing of the insurance application,

---

[12] Because of adverse selection, that missing 16 million individuals is likely to include healthier and younger individuals, underscoring that a system of market reforms unaccompanied by an individual mandate would create widespread and potentially economically disabling instability in the insurance market. Over time, that would substantially reduce access to affordable coverage, the opposite of what Congress sought to achieve by enacting ACA.

Congress would not have wanted its insurance-market reforms to "stand on their own," *Alaska*, 480 U.S. at 689, without the mandate present to temper the severe adverse-selection and cost-shifting problems. Quite the opposite, ACA's text documents that Congress considered the minimum individual coverage provision and its insurance-market reforms "not like a collection of bricks, some of which may be taken away without disturbing the others, but rather * * * like the interwoven threads constituting the warp and woof of a fabric, one set of which cannot be removed without fatal consequences to the whole." *Carter*, 298 U.S. at 315-316.

C. Congress Knew That States' Efforts To Implement Similar Market Reforms Without A Mandate Had Not Worked

1. Congress Was Aware of Failed State Reform Efforts

To determine whether a law can "function in a manner consistent with * * * the original legislative bargain," this Court considers not only the text and structure of the law, but also the experiential backdrop against which Congress legislated. *Alaska Airlines*, 480 U.S. at 685 (emphasis omitted); *see id.* at 691-696 (considering legislative history in determining severability); *see also Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162 (2010) (considering statute's "historical context" in determining severability). Here, that history is one of severely compromised or failed legislative efforts to implement market reforms

without an adequate mandate of minimum individual insurance coverage.

In the 1990s, a number of States enacted individual market reforms, including guaranteed issue and various community rating requirements, without a minimum individual coverage requirement. The result in each State was a general destabilization of individual markets, increases in premiums, and declining enrollment.

For example, Maine enacted guaranteed issue and modified community rating reforms for its individual market in 1993, allowing limited price variation only for age, occupation or industry, and geographic location. *See* B. Gorman, *et al.*, *Reform Options for Maine's Individual Health Insurance Market: An Analysis Prepared for the Bureau of Insurance* 5 (May 30, 2007). According to the Maine Bureau of Insurance's report analyzing the ensuing problems, the "market for individual HMO coverage" as of January 2001 "appear[ed] to be in a death spiral." Maine Bureau of Insurance, *White Paper: Maine's Individual Health Insurance Market* 4 (Jan. 22, 2001). Premiums for indemnity coverage increased dramatically, *id.* at 4-7, and coverage rates plummeted as a result, dropping from an enrollment of 102,000 to 54,000 between 1994 and 2000. *See* U.S. Census Bureau, Historical Health Insurance Tables, Table HI-6 (1987—2005), *available at* http://www.census.gov/hhes/www/hlthins/data/historical/original.html. State regulators attributed those trends in part to the modified community rating requirement, which "result[ed] in the risk pool having

a higher average age and therefore higher costs." Maine Bureau of Insurance, *supra*, at 10.

In Kentucky, adverse selection similarly contributed to significant destabilization of the individual market. Within two years of Kentucky's enactment of comprehensive insurance market reforms in 1994—including guaranteed issue and modified community rating requirements—more than forty insurers ended their participation in Kentucky's individual market, with only two insurers remaining to sell new policies in the individual market. Adele M. Kirk, *Riding the Bull: Experience With Individual Market Reform in Washington, Kentucky, and Massachusetts*, 25 J. Health Politics, Policy & Law 152 (2000).[13] Responding to the collapse of the individual market and fearing that many residents across the State no longer had coverage options, Len M. Nichols, *State Regulation: What Have We Learned So Far?*, 25 J. Health Politics, Policy & Law 175, 194 (2000), the Kentucky legislature began repealing the insurance reforms in 1997, eventually eliminating many of the reforms' core provisions, including guaranteed issue and modified community rating. *See* Kirk, *supra*, at 152, 158; Nancy C. Turnbull, *et al.*, *Insuring the Healthy or Insuring the Sick? The Dilemma of Regulating the Individual Health Insurance Market: Short Case Studies of Six States* 7 (Feb. 2005) ("The 1998 reforms were meant to attract

---

[13] Approximately 23 of these insurers were holding more than 100 individual policies but stopped selling new coverage when the reforms were enacted. Holding only a few or no policies, the rest of the insurers left Kentucky's individual market altogether. *See* Kirk, *supra*, at 152.

carriers back into the market and reduce rates for the healthy enrollees of existing carriers.").

The deterioration of the insurance market likewise led the New Hampshire legislature eventually to repeal its reforms of the individual health insurance market. In 1994, New Hampshire enacted reforms that included guaranteed issue, modified community rating, and limits on preexisting condition exclusions. *See* Alexander K. Feldvebel & David Sky, *A Regulator's Perspective on Other States' Experiences*, 25 J. Health Politics, Policy & Law 197, 198 (2000). Between 1994 and 2000, the number of carriers participating in the individual market dropped from twelve to two, and the two insurers that remained offered individual policies at higher prices. *Id.* at 197, 199. In 1997, the New Hampshire Insurance Department characterized those market changes as a "market-wide antiselection spiral." David Sky, *High Risk Pool Alternatives: A Case Study of New Hampshire's Individual Health Insurance Market Reforms*, 16. J. Ins. Reg. 399, 401 (Summer 1998) (citing New Hampshire Insurance Department, *An Analysis of the Nongroup Market with Recommendations for Change* (Oct. 27, 1997)). In 2001, the New Hampshire legislature repealed the guaranteed issue requirement and allowed insurers once again to use medical underwriting for policies sold in the individual market. National Ass'n of Health Underwriters, *Analysis of State-Level Health Insurance Market Reforms* 11-12 (Oct. 2005).

Similarly, volatility in the individual market prompted the State of Washington to repeal the individual market reforms it had passed in 1993.

The 1993 reforms included a guaranteed issue provision, a phased-in community rating requirement, and limits on preexisting condition exclusions. *See* Kirk, *supra*, at 133, 136-137. In the ensuing three years, premiums in the individual market rose by as much as 78 percent. *See* Peter Suderman, *The Lesson of State Health-Care Reforms*, Wall St. J., Oct. 15, 2009, at A21. Over that same period, enrollment in Washington's individual market fell by 25 percent, *id.*, and the market retracted from having 19 private health insurers in 1993 to only three by 1999, Roger Stark, *Overview of the Individual Health Insurance Market in Washington State*, Washington Policy Center (Jan. 2011) at 1.

By September 1999, there were only two insurers offering individual health insurance, both of which announced their intention to stop selling individual policies in Washington because the reforms rendered it unviable for them to continue offering affordable coverage to consumers. Stark, *supra*, at 1 (explaining that by 1999 "the individual market had essentially collapsed"); *see* Press Release, Office of Governor Gary Locke, "Locke signs bill to revive individual health insurance market" (Mar. 23, 2000), *available at* http://www.digitalarchives.wa.gov/GovernorLocke/press/press-view.asp?pressRelease=283&newsType=1 ("The governor noted that he signed the law at a time when individuals in 36 of 39 counties cannot buy individual policies at any price."); *see also* Conrad F. Meier, *Universal Health Insurance in Washington State: A Grim Prognosis for All of Us*, Medical Sentinel (Mar./Apr. 2000).

Starkly demonstrating the problem of adverse selection, "Washington state also became a magnet for patients from around the country who had serious and expensive medical conditions because they knew they could get immediate health insurance coverage." Doug Ericksen and Roger Stark, *What Washington, D.C. Could Learn from Washington State Health Care Reform*, Washington Policy Center (July 2010). Additionally, many people took advantage of the system by, for example, changing from a low-cost health insurance plan with a high deductible to a high-coverage plan with a low deductible when they needed major medical treatment, and then changing back or dropping their coverage altogether after receiving the treatment. *Id.*; *see* Bill Richards, *Perils of Pioneering: Health-Care Reform In State of Washington Riles Nearly Everyone*, Wall St. J., Apr. 4, 1996, at A1 (describing cancellation letter insurer received from a Washington woman who praised the policy's maternity benefits and "would be sure to come back and get another [policy] if she got pregnant again").

As a result of the near "collapse" of the individual insurance market, the Washington legislature repealed the market reforms in 2001, and subsequently enacted legislation designed to encourage carriers to reenter Washington's individual market. *See* Robert Wood Johnson Foundation, *Issue Brief: Recognizing Destabilization in the Individual Health Insurance Market* 4 (July 2010).

Finally, in 1996, the Massachusetts legislature passed reforms, including guaranteed issue of certain

benefit packages, a prohibition on preexisting condition exclusions and waiting periods, and a modified community rating system. Kirk, *supra*, at 161; *see also* Turnbull, *supra*, at 11. After those reforms were implemented, premiums rose and coverage rates fell, with enrollment in the individual market declining from approximately 135,000 people in 1996 to just over 55,000 in 2000. Turnbull, *supra*, at 13; *see also* Kirk, *supra*, at 167-68.

In 2000, the Massachusetts legislature began modifying those provisions, Turnbull, *supra*, at 13, culminating with the passage of a comprehensive health reform bill in 2006. S.K. Long, *On the Road to Universal Coverage: Impact of Reform In Massachusetts At One Year*, 27 Health Affairs w270, w270 (June 3, 2008). The 2006 reform package maintained some of the measures passed a decade earlier, including guaranteed issue and modified community rating, but added numerous new requirements, including a minimum individual coverage mandate that required every qualifying Massachusetts resident over the age of 18 to purchase health insurance. J.E. McDonough, *et al.*, *Massachusetts Health Reform Implementation: Major Progress and Future Challenges*, 27 Health Affairs w285, w291 (June 3, 2008).

Other States that enacted market reforms without an individual mandate in the 1990s experienced similar destabilization. *See* Monheit, *supra*, at 168 (as of 2004, New Jersey individual market was "heading for collapse"); Paul Howard, *Building a Market-Based Health-Insurance Exchange in New York*, Manhattan Institute for Policy

Research at 6-7 (Apr. 2011) (noting that "New York has one of the most expensive individual and small-group insurance markets in the country, largely as a result of its 1992 community-rating/open-enrollment" law, and explaining that regulatory policies like community rating "[o]ver time * * * can lead to a 'death spiral,' where the risk pool—and the market—collapses entirely (as it has in New York)"); Mark A. Hall, *An Evaluation of Vermont's Reform Law*, 25 J. Health Politics, Policy & Law 101 (2000) (Vermont); Elliott K. Wicks, *The Individual Market in Vermont: Problems and Possible Solutions* 15 (Dec. 2006) (reporting that the individual health insurance market in Vermont "seems to be performing badly: the number of people buying such coverage is falling drastically; coverage is unaffordable for many; and the only coverage that is available has very high cost sharing") (prepared for Vermont Department of Banking, Insurance, Securities and Health Care Administration); Susan Besio, *Vermont Health Care Reform: Five-Year Implementation Plan* 3, 10 (Dec. 1, 2006) ("[T]he Vermont non-group market is characterized by declining enrollment, adverse selection, increasing prices, and limited carrier participation."); *see also* Les Masterson, *Indiana Program Shows Health Reform Without Individual Mandate Is Costly*, HealthLeaders Media (Sept. 9, 2009); Rob Damler, *Experience Under The Healthy Indiana Plan: The Short-Term Cost Challenges of Expanding Coverage to the Uninsured*, Milliman Health Reform Briefing Paper (Aug. 2009).

Congress enacted ACA and its minimum individual coverage provision against that backdrop of severely compromised and failed state efforts at

mandate-less market reforms, and it aimed to inoculate its insurance-market reforms against the same adverse-selection and cost-shifting problems that had plagued the States by requiring a minimum level of individual insurance coverage. Indeed, Congress was expressly advised of the market disruptions that occurred with State reform efforts and the ensuing lesson that the minimum individual coverage mandate is "a critical linchpin * * * to the overall effort to reform the health care market and bring associated costs under control." 156 Cong. Rec. H1854, H1882 (daily ed. Mar. 21, 2010) (statement of Rep. Miller); *see, e.g., Covering the Uninsured: Making Health Insurance Markets Work: Hearing Before the S. Committee on Finance*, 110th Cong., 2d. Sess. 3 (2008) (statement of Pam McEwan, Executive Vice President, Public Affairs and Governance, Grp. Health Coop.) (noting that the absence of a minimum individual coverage mandate in Washington state during the mid-1990s effort to reform insurance markets "rapidly led to a classic adverse risk spiral in the marketplace").

Accordingly, when Congress labeled the mandate "essential" to the implementation of its insurance-market reforms, 42 U.S.C. § 18091(2)(I), that judgment was based on its knowledge that state efforts to implement similar insurance market reforms without the economic counterbalance of a minimum individual coverage requirement had not worked. Congress specifically found both that, "if there were no [minimum individual coverage mandate] requirement, many individuals would wait to purchase health insurance until they needed care," and that the mandate would help to "minimize this

adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." *Id.*

In other words, Congress's finding that the mandate "is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold," 42 U.S.C. § 18091(2)(I), means exactly what it says. It embodies Congress's judgment that the minimum individual coverage provision and the insurance-market reforms regarding guaranteed issue, preexisting conditions, health-status discrimination, and adjusted community rating are inseparable components of a unified legislative design that, for severability purposes, must rise or fall together. Indeed, implementation of ACA's market reforms in the absence of the minimum coverage provision would thwart Congress's central goal of increasing the availability of affordable health care coverage.

2. The Court of Appeals Failed to Focus on How Congress Intended the Mandate and Reforms to Function Together

The Eleventh Circuit reached a contrary result, holding that the mandate is entirely severable from the balance of ACA. Pet. App. 5a, 172a-186a. But the court was able to do so only because its analysis focused on whether a statute with insurance reforms but without a mandate could be operative or enacted as law. Of course it could. Many States passed such

laws. But Congress knew that, without a mandate, they had produced disastrous results.

The relevant question for severability purposes, however, is whether the Congress that looked at those State experiences and labeled the mandate "essential" to the proper functioning of its insurance-market reforms would have intended, if the mandate were stricken, to replicate on a national level the profound adverse selection and cost-shifting problems that had afflicted State reform efforts. *See, e.g.*, *Booker*, 543 U.S. at 265. The court of appeals, in other words, failed to ask the right question about Congress's intended functioning of the law and, in so doing, never came to grips with the implications of Congress's knowledge of state reform efforts, and the proven, substantial risk of profound economic displacement and a "market-wide antiselection spiral" that the reforms would cause in the absence of a mandate.[14]

Tellingly, the federal government has agreed in previous briefing that the minimum individual coverage provision is not severable from ACA's guaranteed issue, preexisting conditions, health-status discrimination, and adjusted community rating provisions. *See, e.g.*, No. 11-398, U.S. Pet. at 25 ("Indeed, no party to this case has suggested that the guaranteed-issue and community-rating requirements could function effectively without the minimum coverage provision."); Nos. 11-393, 11-400,

---

[14] David Sky, *High Risk Pool Alternatives: A Case Study of New Hampshire's Individual Health Insurance Market Reforms*, 16 J. Ins. Reg. 399, 401 (Summer 1998).

U.S. Brief in Response at 10-11 (similar); Br. of United States, *Florida v. HHS*, Nos. 11-11021 & 11-11067 (11th Cir. Apr. 1, 2011) at 59 (recognizing "that the minimum coverage provision is integral to the Act's guaranteed-issue and community-rating provisions").[15]

Those insurance-market reforms not only cannot function as Congress intended if enforced without a minimum coverage mandate, but in fact would thwart congressional intent if left to operate alone. The Eleventh Circuit cited no case, and amici are aware of none, where severability was found in the face of such a plain textual linkage, express findings, extensive evidence of the catastrophic consequences of leaving just half of a legislated package intact, and the Executive Branch's judgment that specified

---

[15] The Government's briefs consistently use the term "guaranteed issue" as an umbrella term encompassing not only the guarantee of insurance for all qualified applicants, but also the prohibitions on preexisting-condition exclusions and other health-status discrimination in coverage eligibility. *See* No. 11-398, U.S. Pet. at 4 (describing fact that Act "will bar insurers from refusing coverage because of a pre-existing medical condition" as the "guaranteed-issue" provision, and citing to both 42 U.S.C. § 300gg-1, the guaranteed issue provision, and 42 U.S.C. § 300gg-3, the provision barring preexisting condition exclusions); Nos. 11-393, 11-400, U.S. Resp. Br. 4 (same), 10, 31-32 (arguing that, without the individual mandate, "the guaranteed-issue and community-rating provisions would not advance Congress's efforts to make affordable coverage widely available," citing to Congress's finding in 42 U.S.C. § 18091(2)(I) that the prohibitions on preexisting condition exclusions (PHSA § 2704, 42 U.S.C. § 300gg-3) and other health status discrimination in coverage eligibility (PHSA § 2705, 42 U.S.C. § 300gg-4), standing alone, would lead to adverse selection).

provisions are inextricably bound together. This case should not be the first to cast aside such powerful evidence that the specified statutory provisions would not function as Congress intended, and indeed that severing the interconnected provisions within the statute would likely do significant harm.

* * * * *

Should this Court strike the mandate and have to address the severability question, then this Court must determine whether "different clauses of [the] act are so dependent upon" the minimum individual coverage mandate "that it is evident the legislature would not have enacted one of them without the other," *Huntington v. Worthen*, 120 U.S. 97, 102 (1887), and whether those additional provisions could, standing alone, "function in a manner consistent with the intent of Congress," *Alaska Airlines*, 490 U.S. at 685 (emphasis omitted). In undertaking that analysis, this brief addresses only the insurance-market reform provisions with which AHIP, Blue Cross Blue Shield, and their members have direct experience both generally and in particular with respect to reform efforts at the state level. Based on that expertise, at a minimum, the insurance-market reforms implemented by ACA cannot function as Congress intended without the individual coverage requirement and, in fact, would likely impede Congress's goal of ensuring affordable universal health care if left to operate on their own. Those market reforms include the guaranteed issue provision (42 U.S.C. § 300gg-1), the provisions prohibiting waiting periods, preexisting condition exclusions, and other health status discrimination

(42 U.S.C. §§ 300gg-3, 300gg-4), and the adjusted community rating provision (42 U.S.C. § 300gg(a)). The insurance-market reforms are thus inseverable from the minimum individual coverage provision and would have to be stricken from ACA if the individual coverage requirement were to be invalidated.

CONCLUSION

For the foregoing reasons, if this Court invalidates the minimum individual coverage provision, 26 U.S.C. § 5000A, the court of appeals' severability judgment should be reversed and, with respect to the minimum individual coverage mandate's operation, this Court should sever, along with Section 5000A, ACA's guaranteed issue, preexisting conditions, health-status discrimination, and adjusted community rating provisions.

Respectfully submitted.

Roger G. Wilson
Senior Vice-President
& General Counsel
BLUE CROSS BLUE SHIELD
ASSOCIATION
225 N. Michigan Ave.
Chicago, IL 60601
(312) 297-6000

Counsel for Blue Cross Blue Shield Association

Patricia A. Millett
Counsel of Record
Orly Degani
James E. Tysse
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Avenue, N.W.
Washington, DC 20036
(202) 887-4000
pmillett@akingump.com

Joseph Miller
Julie Simon Miller
AMERICA'S HEALTH
INSURANCE PLANS
601 Pennsylvania
Avenue, N.W.
South Bldg., Suite 500
Washington, DC 20004
(202) 778-3200

Counsel for America's Health Insurance Plans

January 6, 2012

AMICUS CURIAE BRIEF

No. 11-398

IN THE
Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVS., ET AL.,

Petitioners,

v.

FLORIDA, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC., AND INDIVIDUAL PHYSICIANS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

(INDIVIDUAL MANDATE ISSUE)

ANDREW L. SCHLAFLY
939 OLD CHESTER ROAD
FAR HILLS, NJ 07931
(908) 719-8608
aschlafly@aol.com

DAVID P. FELSHER
Counsel of Record
488 MADISON AVE.
NEW YORK, NY 10022
(212) 308-8505
dflaw@earthlink.net

Counsel for Amici

QUESTIONS PRESENTED

1. When Congress simultaneously presented conflicting versions of the "Individual Mandate" to the President, pursuant to Sections 1501 and 10106, did it violate the Presentment Clause?
2. Without a party and a counterparty, is there "Commerce" for Congress "To regulate" as required by the text and structure of Article I, Section 8, Clause 3?
3. Assuming *arguendo* the "Individual Mandate" is unconstitutional, did Congress fail to exercise its taxing power because the "Penalty Amount" is triggered solely by non-compliance with the unconstitutional "Individual Mandate"?

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
INTERESTS OF *AMICI CURIAE* 1
PRELIMINARY STATEMENT 4
SUMMARY OF ARGUMENT 5
ARGUMENT 8

I. THE PRESENTMENT CLAUSE PREVENTS CONGRESS FROM SIMULTANEOUSLY ENACTING AND AMENDING A SINGLE PROVISION WITHIN THE SAME STATUTE 8

A. The Presentment Clause Provides a Single, Finely Wrought and Exhaustively Considered Procedure to Enact, Amend or Repeal Legislation 8

B. Simultaneously Enacting and Amending a Single Provision Within the Same Statute Cross-Nullifies the Base Provision and the Amendment 12

C. Various Provisions within ACA, Including the Individual Mandate, Cross-Nullify Each Other 14

II. WITHOUT "COMMERCE" BETWEEN A PARTY AND A COUNTERPARTY, CONGRESS HAS NO POWER "TO REGULATE" 18

A. The Text and Structure of Article I, Section 8, Requires "Commerce" Between Two Parties Before Congress May Exercise Its Power "To regulate" 19

B. The Legislative and Executive Branches Have Understood that "Commerce" Requires Two Parties 23

C. This Court Has Recognized That Commerce Requires Two Parties 24

D. States, Businesses, and Individuals Understand That "Commerce" Requires Two Parties 25

III. THE INDIVIDUAL MANDATE WAS NOT AND COULD NOT BE ENACTED UNDER THE TAXING CLAUSE 26

A. Petitioners Have Mistakenly Conflated the Penalty with the Individual Mandate 26

B. Congress Did Not Properly Exercise its Revenue-Raising Power..... 27

C. The Anti-Injunction Act Is Not Applicable Because There Is No Tax Liability to Assess or Collect..... 29

CONCLUSION 30

TABLE OF AUTHORITIES

Pages

Cases

Association of American Physicians and Surgeons, Inc. v. Sebelius, Case No. 1:10-cv-0499-ABJ (D.D.C.) 2

Clinton v. City of New York, 524 U.S. 417 (1998) 9, 11

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 24-25

Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) 9, 11

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 18

Stenberg v. Carhart, 530 U.S. 914 (2000) 2

United States v. Lopez, 514 U.S 549 (1995) ..... *passim*

United States v. Morrison, 529 U.S. 598 (2000) 18

Constitution

U.S. CONST.

Art. I 11

§ 1 9

§ 2, cl. 5 22

§ 3, cl. 6 22

§ 5, cl. 2 22

§ 7 11

cl. 1 27
cl. 2 ..... *passim*
§ 8 ..... 19, 21, 22
cl. 1 ..... 27, 28
cl. 3 ..... *passim*
cl. 7 21
cl. 9 22
cl. 11 21
cl. 13 21
§ 9, cl. 4 ..... 27, 28
§ 9, cl. 6 27
U.S. CONST. art. II, § 2, cl. 2 22
U.S. CONST. art. V 22
U.S. CONST. amend. XVI 27, 28

Statutes

Balanced Budget Act of 1997, Public Law 105-33 11
Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010) 3
Section 1002(a)(2) 15
Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) ..... *passim*
Section 1501 ..... *passim*
Section 1501(a) 14, 21
Section 1501(a)(1) 7
Section 1501(a)(2) 7, 14

Section 1501(a)(2)(E) 14
Section 1501(b) ..... *passim*
Section 10106 ..... *passim*
Section 10106(a) 7, 14, 21
Section 10106(b) 3
Section 10106(b)(2) 15
Section 10106(b)(3) 15
Section 10106(c) 3, 5, 15
Section 10901 29
Title IX 29
Title X 18
18 U.S.C. §1951(b)(3) 23
26 U.S.C. §5000A ..... *passim*
26 U.S.C. §5000A(a) ..... *passim*
26 U.S.C. §5000A(a)(1) 15
26 U.S.C. §5000A(b) ..... *passim*
26 U.S.C. §5000A(c) 15
26 U.S.C. §5000A(d) ..... *passim*
26 U.S.C. §5000A(e) 27, 28
26 U.S.C. §7421(a) 29
29 U.S.C. §152 ..... 23, 24
42 U.S.C. §18091 21
Neb. (U.C.C.) §1-201(3) 25
Neb. (U.C.C.) §1-201(35) 25
Neb. (U.C.C.) §3-104(a)(1) 25

Legislative Materials

141 Cong. Rec. S4443-4449 (104th Cong. 1st Sess. 1995) (Sen. Moynihan) 10

H.R. 3590 ..... 6, 16, 17

How Our Laws Are Made, Doc. No. 96-352 6-7

Office of the Legislative Counsel, U.S. House of Representatives, 111th Cong.. 2d Sess., *Compilation of Patient Protection and Affordable Care Act [As Amended Through May 1, 2010]* 15, 16, 17, 18

Articles, Books and Brief

Brief of Appellees Snake River Potato Growers, Inc. and Mike Cranney in *Clinton v. City of New York* (Docket No. 97-1374) 10

Albert Einstein, *The Meaning of Relativity* 4 (5th ed. 1956) (posthumously) 20

Ernst & Young, LLP, *Summary of the Patient Protection and Affordable Care Act, incorporating The Health Care and Education Reconciliation Act (May 2010)* 15, 16, 17, 18

Euclid, *Elements of Geometry* 6 (Greek Text of J.L. Heiberg (1883-1885)) (R. Fitzpatrick,ed. & translator) 20

The Federalist, No. 41 (Madison) (C. Rossiter, ed. 1961) 22

The Federalist, No. 62 (Madison) (C. Rossiter, ed. 1961) 10-11, 17

Paul A. Samuelson, *Economics* 3 (10th ed., 1976) 20, 21

George B. Thomas, Jr., *Calculus and Analytic Geometry* 9 (4th ed. 1968) 20

Internet

http://docs.house.gov/energycommerce/ppacacon.pdf 15

No. 11-398

IN THE
Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVS., ET AL.,

Petitioners,

v.

FLORIDA, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae ("*Amici*") are individual physicians and a national association of physicians. *Amici* file this brief to assist the Court in defining and resolving the "Individual Mandate" issue, one of four issues for which this Court has directed the parties, and any interested *amicus curiae*, to brief. Order dated, December 8, 2011 ("Briefing Order").[2]

[1] This brief is filed with the written consent of all parties. Those blanket consents are filed with the Clerk of this Court. Pursuant to Sup. Ct. Rule 37.6, counsel for *Amici Curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici*, members of *Amicus* AAPS, or *Amici*'s counsel make a monetary contribution to the preparation or submission of this brief.

[2] The Court has also directed separate briefing regarding the following issues: (1) the constitutionality of the Medicaid Expansion provisions; (2) the applicability of the Anti-Injunction Act;

Since 1943, *Amicus* The Association of American Physicians and Surgeons, Inc. ("AAPS") has been dedicated to the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the patient-physician relationship. AAPS has filed numerous *amicus curiae* briefs in noteworthy cases like this one. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 933 (2000) (citing an AAPS *amicus* brief). Because AAPS has also commenced an action against several Respondents which contains overlapping allegations of unconstitutionality, the disposition of this Petition may affect the rights of AAPS and its members. *Association of American Physicians and Surgeons, Inc. v. Sebelius*, Case No. 1:10-cv-0499-ABJ (D.D.C.).

Amicus Leah S. McCormack, M.D., privately practices dermatology in New York City, New York. She earned certification from the American Board of Dermatology and is a fellow of the American Academy of Dermatology. She is the immediate Past-President of the Medical Society of the State of New York.

Amicus Guenter L. Spanknebel, M.D., privately practiced gastroenterology. He is a Past-President of the Massachusetts Medical Society and is currently chair of its History Committee. He has served as a Trustee of the Health Foundation of Central Massachusetts and on the faculties of the medical schools at Tufts University and the University of Massachusetts.

---

and (3) severability. Briefing Order. On January 6, 2012, *Amici* filed a brief in support of Petitioners regarding severability. On January 17, 2012, *Amici* filed a brief in support of Petitioners regarding the Medicaid Expansion provisions.

Amicus Janis Chester, M.D., privately practices psychiatry in Delaware, serves as chair of the Department of Psychiatry at a community hospital, is a member of the faculty at Jefferson Medical College and holds a variety of positions with organized medicine and psychiatry, locally and nationally.

Amicus Mark J. Hauser, M.D., privately practices psychiatry and forensic psychiatry in Massachusetts and Connecticut.

Amicus Graham Spruiell, M.D., privately practices forensic psychiatry and psychoanalysis in the Boston area.

Amici have followed attempts in recent years to enact health care reform legislation. As active members of the medical profession and pursuant to their ethical obligations, *Amici* have monitored the introduction, passage and early implementation of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) ("ACA"), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010) ("HCERA" or "Reconciliation Act"). For the reasons set forth below, the *Amici* believe that the attempted enactment and amendment of 26 U.S.C. §5000A(a) (the "Individual Mandate"), pursuant to Subsection 1501(b) of ACA and Subsection 10106(c) of ACA, involve unconstitutional "ends" accomplished by unconstitutional "means".[3]

---

[3] As explained below, the Individual Mandate is separate and distinct from the penalty set forth in 26 U.S.C. §5000A(b)(1) (the "Penalty"), pursuant to Sections 1501(b) and 10106(b) of ACA.

PRELIMINARY STATEMENT

The "statute before us upsets the federal[- citizen] balance to a degree that renders it an unconstitutional assertion of the commerce power, and [the Court's] intervention is required." *United States v. Lopez*, 514 U.S 549, 580 (1995) (Kennedy, J. concurring). "[N]either the actors nor their conduct has a commercial character, and neither the purposes nor the design of the [statutory provision] has an evident commercial nexus ...." *Id.*[4] "In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but [the Court has] not yet said the commerce power may reach so far." *Id.*

The Court has an opportunity here to "temper [its] Commerce Clause jurisprudence." *Id.* at 584 (Thomas, J., concurring). Previously, this Court stated: "Congress may regulate not only 'Commerce ... among the several States' ... but also anything that has a 'substantial effect' on such commerce." *Id.* (internal citations and text omitted). Furthermore, "[t]his test, if taken to its logical extreme, would give Congress a 'police power' over all aspects of American life." *Id.* This case affords the Court the opportunity to "come to grips with this implication of [the] substantial effects formula." *Id.*

The Court should reject Petitioners' argument for the Individual Mandate, which would "convert congressional authority under the Commerce Clause to a general police power ...." *Id.* at 567 (Rehnquist, Ch. J).

---

[4] The Individual Mandate is actually directed towards inaction, *i.e.*, the absence of conduct, by individuals.

SUMMARY OF ARGUMENT

While ACA and particularly the Individual Mandate[5] have divided our Nation prior to enactment, during enactment, and since enactment, this Court's sole focus is to determine the constitutionality of the "Individual Mandate." It need not and should not consider whether the Individual Mandate is desirable or politically wise.

"We start with first principles. The Constitution creates a Federal Government of enumerated powers." *Lopez*, 514 U.S. at 552. The Individual Mandate is an inexcusable assault on those principles. If allowed to stand, our Federal Government will be transformed from a government of limited powers into a government of unlimited power.

The appropriate beginning for the Court's analysis are the words of the Individual Mandate. Those words are set forth in Section 1501 of ACA, as amended by Section 10106 of ACA. The Individual Mandate provides: "An applicable individual ['Applicable Individual'] shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month."[6]

The Individual Mandate offends the Constitution in several ways.

---

[5] Pursuant to 26 U.S.C. §5000A(a), as added by Sections 1501(b) of ACA and amended by Section 10106(c).

[6] It is actually the "religious conscience exemption," an exception to the term Applicable Individual, which was allegedly modified by Subsection 10106(c) of ACA. *See infra* at pages 8, 15, and 16.

First, it fails to invoke the Commerce Clause which requires "commerce" between a party and a counterparty. The Individual Mandate attempts to regulate inactivity of a single party. Specifically, *Amici* ask the Court to revise its Commerce Clause jurisprudence to first ask the question: Is there "commerce"?

Second, by simultaneously trying to enact and amend the Individual Mandate, pursuant to Sections 1501 and 10106 of ACA, respectively, Congress cross-nullified those sections in violation of the Presentment Clause. These Sections attempt to simultaneously enact and amend 26 U.S.C. §5000A(a). 124 Stat. 244 and 124 Stat. 910, respectively. While the Petitioners have merely set forth the relevant portions of 26 U.S.C. §5000A, as amended by Section 10106,[7] *Amici* ask the Court to examine and compare the countervailing texts of Sections 1501 and 10106[8] to establish the proposition that those sections cross-nullify each other.[9]

---

[7] Petitioners' Appendix ("PetApp") at 476-490; Brief for Petitioners (Minimum Coverage Provision) ("PetBrief") at 1a-15a. *See also* Petition at 4.

[8] The full texts of Sections 1501 and 10106 of ACA may be found at 124 Stat. 242-249 and 124 Stat. 907-911, respectively. *Amici* take the language of these sections directly from Public Law 111-148 as it appears in "124 Stat." and not as it was consolidated into the "United States Code."

[9] In addition to the length of this legislation, the numerous cross-nullifying provisions (possibly more than one hundred) made it difficult, if not impossible, for members of the House and Senate to have fully "considered" the bill (*i.e.*, H.R. 3590), as implicitly required by the Presentment Clause, in the time available. "Our democratic tradition demands that bills be given consideration by the entire membership with adequate opportunity for debate and the proposing of amendments." *How*

Third, Congress did not invoke its revenue-raising power for the several reasons: Because the alleged Penalty (*i.e.*, the alleged "tax liability") specified in 26 U.S.C. §5000A(b) is conditioned upon a failure to comply with §5000A(a), it can never be triggered if the Individual Mandate is declared unconstitutional for either of the above reasons; (2) Congress also tried to simultaneously enact and amend the Penalty in violation of the Presentment Clause; and (3) the words of Subsection 1501(a)(1) and Subsection 1501(a)(2), as amended by Subsection 10106(a), clearly evince an intent to invoke the Commerce Clause and not the "Taxing Clause."[10]

Finally, without the existence of a "tax liability," *i.e.*, the Penalty, to assess or collect, the Anti-Injunction Act does not apply to this case.

Our Laws Are Made 26, Doc. No. 96-352 (Presented by Hon. Peter W. Rodino, Chairman, Committee on the Judiciary of the House of Representatives, pursuant H. Con. Res. 95, 96th Cong., 2d Sess., June 5, 1980).

[10] Although Congress said, "The individual responsibility requirement provided for in this section ... is commercial and economic in nature, and substantially affects interstate commerce ...," 124 Stat.242, saying something is so ("commercial" or "economic"), does not make it so. *See infra* at 14, 16, 20, 21, 29. The Court should not defer to this finding of Congress because the definitions of "commerce" and "economics" both implicate a party and a counterparty, which is absent from the Individual Mandate. *See* Argument II.A.

ARGUMENT

I. THE PRESENTMENT CLAUSE PREVENTS CONGRESS FROM SIMULTANEOUSLY ENACTING AND AMENDING A SINGLE PROVISION WITHIN THE SAME STATUTE

Congress simultaneously passed Sections 1501 and 10106 of ACA. The former provision creates 26 U.S.C. §5000A, 124 Stat. at 244, while the latter provision contains revisions to some portions of 26 U.S.C. §5000A, 124 Stat. at 909, including the definition of "applicable individual," which is the core component driving the Individual Mandate. Since Sections 1501 and 10106 contain incompatible definitions of Applicable Individual,[11] they cross-nullify each other in violation of the Presentment Clause, *i.e.*, they cannot be presented to the President in the same bill.

A. The Presentment Clause Provides a Single, Finely Wrought and Exhaustively Considered Procedure to Enact, Amend or Repeal Legislation

Congress may not simultaneously enact and revise any provision within the same statute because

---

[11] As discussed in Argument I.C, *infra*, the literal language of the term Applicable Individual is not altered by Section 10106. Rather, it is the "religious conscience exemption," one of the exceptions to the term Applicable Individual, that is altered by Section 10106. Sections 1501 and 10106 also contain incompatible findings regarding personal bankruptcies and incompatible definitions of the terms "Penalty Amount" and "applicable dollar amount." These incompatibilities cross-nullify each other in violation of the Presentment Clause.

that simultaneity violates the Presentment Clause, the "single, finely wrought and exhaustively considered, procedure" which is used to enact Federal legislation. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951 (1983); *Clinton v. City of New York*, 524 U.S. 417, 439-440 (1998). Strict adherence to that procedure is required and is set forth in the Bicameral Clause, U.S. CONST. art. I, § 1, and the Presentment Clause, U.S. CONST. art. I, § 7, cl. 2.

The Bicameral Clause provides "**All legislative Powers** herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1 (emphasis added).

The Presentment Clause provides:

> Every **Bill** which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return **it**, with his Objections to that House in which **it** shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider **it**. If after such reconsideration two thirds of that House shall agree to pass the **Bill**, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the **Bill** shall be entered on the Journal of each House respectively. If any **Bill** shall not be returned by the President within ten

> Days (Sunday excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

U.S. CONST. art. I, § 7, cl. 2 (emphasis added).

At the core of the Presentment Clause is the requirement that both the House of Representatives and the Senate pass, in exactly the same final form, every bill that enacts, "adds, amends, or repeals any provision of any federal statute. Each bill so passed must be presented to the President, whose choices are limited to approving it in whole, returning it in whole, or taking no action." Brief of Appellees Snake River Potato Growers, Inc. and Mike Cranney at 2 in *Clinton v. City of New York* (Docket No. 97-1374).[12]

The bicameral system to enact federal legislation that was crafted by the Framers may be viewed as requiring certain legislative concurrences. First, the House of Representatives must agree within itself to the text of a bill.[13] Second, the Senate must also agree within itself to the text of a bill.[14] Third, the text of the House-passed bill must exactly match the text of the Senate-passed bill.[15] Fourth, once the

---

[12] The repeated use of the terms "the Bill," "it", "its" and "reconsider" in the Presentment Clause are consistent with the proposition that a bill that was passed by both Houses of Congress and presented to the President is ***indivisible***. *See* 141 Cong. Rec. S4443-4449 (104th Cong. 1st Sess. 1995) (Sen. Moynihan).

[13] By a majority vote.

[14] By a majority vote.

[15] In explaining the Great Compromise, Madison said: "No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then of a majority of the States."

House and Senate agree to the same text of a bill, that bill is presented to the President for his or her agreement or veto.

In *Clinton v. City of New York*, the Court articulated this point as follows:

> Third, our decision rests on the narrow ground that the procedures authorized by the Line Item Veto Act are not authorized by the Constitution. The Balanced Budget Act of 1997 is a 500-page document that became "Public Law 105-33" after three procedural steps were taken: (1) a bill containing its exact text was approved by a majority of the Members of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President. The Constitution explicitly requires that each of those three steps be taken before a bill may "become a law." Art. I, § 7.

Clinton, 524 U.S. at 448.[16]

"[R]epeal of statutes, no less than enactment, must conform with Art. I." *Clinton*, 524 U.S. at 438 (quoting *Chadha*, 462 U.S. at 954). The same principle applies to revisions and amendments of statutes. Consequently, two versions of a single statutory provision, *e.g.*, 26 U.S.C. §5000A, may not coexist within a single bill or statute. *See* Argument I.C, *infra*.

The Federalist No. 62, at 378 (Madison) (C. Rossiter, ed. 1961). In other words, the House of Representatives represents the people and the Senate represents the States.

[16] A bill may also become a law if the President vetoes a bill but two-thirds of the members of both Houses subsequently override that veto pursuant to the Presentment Clause. U.S. CONST. art. I, § 7, cl. 2.

B. Simultaneously Enacting and Amending a Single Provision Within the Same Statute Cross-Nullifies the Base Provision and the Amendment

Whenever either House of Congress passes a bill with dueling provisions it creates several constitutional paradoxes. How can the other chamber agree simultaneously to both the base provision and its variant regarding precisely the same subject matter? How can the two houses of Congress present both the base provision and its variant to the President? How can the President agree simultaneously to both the base provision and its variant? This is a problem of Congress's own making and easily could have been avoided if both Houses of Congress had taken the time to strike the original language and leave only the replacement language in the bicamerally passed bill that is to be presented to the President.

The problem can be best understood by an example. Consider the following hypothetical bill (the "Hypo-Bill") with two sections: Section (A) provides: "The Washington Monument shall be red." Section (B) provides: "Section (A) is amended to provide 'The Washington Monument shall be white.'"[17] While either House could enact the Hypo-Bill first, as written, it is impossible for the second House to agree with both sections as passed by the first House.

---

[17] As explained below, many of ACA's provisions were revised in this manner. Where one of the amended provisions is amended a second time, a third section could be added to the hypothetical Hypo-Bill to provide: "Section (A), as amended by Section (B), is further amended to provide 'The Washington Monument shall be blue.'"

Assume *arguendo* the House passes the Hypo-Bill first and the Senate passes it (with identical language) subsequently. Under this scenario, Section (A) of the House-passed Hypo-Bill would nullify Section (B) of the Senate-passed Hypo-Bill and Section (B) of the House passed Hypo-Bill would nullify Section (A) of the Senate-passed Hypo-Bill. Similarly, Section (A) of the Senate-passed Hypo-Bill would nullify Section (B) of the House-passed Hypo-Bill and Section (B) of the Senate-passed Hypo-Bill would nullify Section (A) of the House passed Hypo-Bill. Thus, even though the intent of each House of Congress to amend its choice of color for the Washington Monument is quite clear, and the same as the other House, Sections (A) and (B) cannot coexist, even for a scintilla of time. Sections (A) and (B) cross-nullify each other. The House and Senate cannot agree to both provisions at the same time.

Cross-nullification of the Hypo-Bill's incompatible provisions, *i.e.*, Sections (A) and (B), also occurs in connection with the presentment of the Hypo-Bill to the President, even though the Hypo-Bill would have been identically passed by both Houses. The President's agreement to Section (A) would nullify Section (B) of the bicamerally passed Hypo-Bill and the President's agreement to Section (B) would nullify Section (A) of the bicamerally passed Hypo-Bill. Similarly, Section (A) of the bicamerally passed Hypo-Bill would nullify the President's agreement to Section (B) and Section (B) of the bicamerally passed Hypo-Bill would nullify the President's agreement to Section (A). Thus, even though the intents of both Congress and the President to amend the choice of color for the Washington Monument are the same and quite clear, sections (A) and (B) of the Hypo-Bill can-

not coexist, even for a scintilla of time. These sections cross-nullify each other. Congress and the President cannot agree to both provisions simultaneously.

C. Various Provisions within ACA, Including the Individual Mandate, Cross-Nullify Each Other

Although ACA contains scores of provisions that cross-nullify each other, a comparison of four subsections within Sections 1501 and 10106, for example, illustrates this point with great clarity.

First, Congress made contradictory "findings" for the same fact regarding personal bankruptcies in Subsections 1501(a) and 10106(a). In Subsection 1501(a)(2)(E), Congress made the following finding: "***Half of all personal bankruptcies*** are caused in part by medical expenses...." 124 Stat. 243 (emphasis added). In Subsection 10106(a) (which amended Subsection 1501(a)(2), Congress made the following contradictory finding: "***62 percent of all personal bankruptcies*** are caused in part by medical expenses." 124 Stat. 908 (emphasis added). It is impossible for both "findings" to be true. Perhaps, neither is true.[18] In any case, the Presentment Clause requires that they be declared unconstitutional because they cross-nullify each other.

Second, Sections 1501 and 10106 contain different, cross-nullifying versions of "amount of penalty,"

---

[18] Whenever Congress presents "findings", those so-called "findings" are not facts at all, but rather something else - a conclusion based on a vote.

26 U.S.C. §5000A(c)(1&2) (the "Penalty Amount").[19] Subsections 26 U.S.C. §5000A(c)(1&2), as added by Subsection 1501(b) of ACA, are allegedly replaced in their entirety by Subsection 10106(b)(2) of ACA. *Compare* 124 Stat. at 244-45 with 124 Stat. at 909. *See* Office of the Legislative Counsel, United States House of Representatives, 111th Cong.. 2d Sess., *Compilation of Patient Protection and Affordable Care Act [As Amended Through May 1, 2010]* ("*Compilation Report*") at 145-46.[20] *See also* Ernst & Young, LLP, *Summary of the Patient Protection and Affordable Care Act, incorporating The Health Care and Education Reconciliation Act (May 2010)* ("*E&Y Summary*") at 43.

Third, Sections 1501 and 10106 contain different, cross-nullifying, versions of the "applicable dollar amount," Subsection 26 U.S.C. §5000A(c)(3) (the "Applicable Dollar Amount"). Subsection 26 U.S.C. §5000A(c)(3), as added by Subsection 1501(b) of ACA, is allegedly revised by Subsection 10106(b)(3) of ACA.[21] *Compare* 124 Stat. at 245 with 124 Stat. at 910. *See Compilation Report* at 146-147; *E&Y Summary* at 43.

Fourth, and most importantly, Subsection 10106(c) alters the "religious conscience exemption" (the "RCX") contained in 26 U.S.C. §5000A(d)(2)(A), as added by Subsection 1501(b) of ACA, and thereby

---

[19] This is for the payment of the Penalty required by 26 U.S.C. §5000A(b) for the failure to maintain the coverage required by 26 U.S.C. §5000A(a)(1).

[20] http://docs.house.gov/energycommerce/ppacacon.pdf (viewed 10/23/11).

[21] It is also allegedly revised by Subsection 1002(a)(2) of the Reconciliation Act, a statute which is or may be unconstitutional in its entirety.

alters the definition of Applicable Individual as specified in 26 U.S.C. §5000A(d)(1), as added by Subsection 1501(b) of ACA.[22] Compare 124 Stat. at 246 with 124 Stat. at 910. *See Compilation Report* at 147-148; *E&Y Summary*) at 43.

Under the Presentment Clause, the President may only approve or veto a bill in its entirety. Because Sections 1501 and 10106 contain incompatible definitions of RCX (making the definitions of Applicable Individual incompatible), it is impossible for the President to have approved H.R. 3590 (which became ACA) in its entirety. The President's approval of the RCX definition in Section 1501 nullified the definition presented to him in Section 10106 and the President's approval of the RCX definition in Section 10106 nullified the definition presented to him in Section 1501. The incompatible definitions of RCX (and thus the incompatible definitions of Applicable Individual) contained in Sections 1501 and 10106 prevent the House and Senate from having actually agreed on the definition of each of these terms (*i.e.*, before the two chambers presented the bill to the President).

This reasoning applies to the dueling personal bankruptcy findings, the dueling Penalty Amounts,

---

[22] At first glance, Section 10106 does not appear to alter 26 U.S.C. §5000A(d)(1) which provides: "[t]he term 'applicable individual' means, with respect to any month, an individual other than an individual described in paragraphs (2), (3), or (4)." 124 Stat. 246. However, paragraphs (2), (3), and (4) are incorporated by reference into the term Applicable Individual. Because Section 10106 alters the exception specified in paragraph "(2)", the term "Applicable Individual" is cross-nullified and is, therefore, unconstitutional. According to its plain language, the Individual Mandate applies only to Applicable Individuals. Therefore, the Individual Mandate should be declared unconstitutional as well."

and the dueling Applicable Dollar Amounts. Each set of cross-nullifying provisions prevents compliance with the Presentment Clause.

While simultaneously enacting and revising 26 U.S.C. §5000A may have led to needless complexity, incongruity, and ambiguity for our citizenry and judiciary,[23] the gravamen of the constitutional defect is that both the original and revised versions of Section 5000A were presented to the President within the same bill. Therefore, it could be said that 26 U.S.C. §5000A did not exist when each House passed H.R. 3590 nor did it exist when the bicamerally passed H.R. 3590 was presented to the President. In other words, all three entities, *i.e.*, the Senate, the House of Representatives and the President, were attempting to amend a nullity. For 26 U.S.C. §5000A to have

---

[23] During debate over the ratification of the Constitution, James Madison stated laws should be understandable, not too long, and "not be revised before they are promulgated." *The Federalist*, No. 62, at 381 (Madison). He wrote:

> The internal effects of a mutable policy are still more calamitous. It poisons the blessings of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice if the laws be so ***voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated,*** or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?

Id. (emphasis added). Congress ignored Madison's warning and passed H.R. 3590, a 2400 page bill, which became ACA upon the President's signature. *See generally Compilation Report and E&Y Summary. Amici* believe that the numerous instances of cross-nullification in ACA make it far too difficult for members of the medical and legal professions – let alone the population in general - to fully read and understand.

been revisable, Section 10106 would have to have been enacted after section 1501, not simultaneously with it.

This unconstitutional practice completely infects ACA. Pursuant to Title X, Congress attempted to simultaneously enact and amend scores of ACA's provisions.[24] Indeed, Title X of ACA, which amends the first nine titles of ACA, is a 140-page tome in itself. 124 Stat. 883-1024. *See Compilation Report* and *E&Y Summary*.

II. WITHOUT "COMMERCE" BETWEEN A PARTY AND A COUNTERPARTY, CONGRESS HAS NO POWER "TO REGULATE"

"Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *United States v. Morrison*, 529 U.S. 598, 607 (2000); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers."). One of those powers is the Commerce Clause.

Petitioners have argued that Congress may enact the Individual Mandate under the Commerce Clause. PetBrief at 17-52. Because the Individual Mandate does not involve any commerce, this argument fails.

While "commerce" may occur between two people, between two entities, or between a person and an entity, there is no "commerce" when a single person or entity is involved. Since the Individual Mandate involves only a single individual, it does not pertain to

---

[24] 124 Stat. at 883-1024.

a transaction, agreement, traffic or interrelationship between two parties. Rather, Section 1501 attempts to regulate individuals where no counterparty exists. The individual mandate involves no "commerce". Without "commerce", there is no need to examine the interstate commerce sub-clause.

A. The Text and Structure of Article I, Section 8, Requires "Commerce" Between Two Parties Before Congress May Exercise Its Power "To regulate"

Congress lacks power to enact the Individual Mandate under the Commerce Clause. The language and structure of article I, section 8 make this clear. Under clause 3, the power is "To regulate" and the object of that power is "Commerce". The Constitution does not give Congress power to regulate all commerce. Rather, the Constitution restricts Congress to regulating a set of only three types of commerce: (1) "with" the Indian Tribes; (2) "among" the several States; and (3) "with" foreign nations. All three members of this set necessarily involve at least a dyad or pair of parties. Without two or more parties, the words "with" and "among" are meaningless.

Therefore, in deciding this matter, the Court should undertake a two-step analysis. First, it should determine if Congress attempted "To regulate Commerce." Only if this question is answered affirmatively should the Court undertake step two, an analysis of the "interstate commerce" sub-clause. Petitioners have only addressed step two. Congress has not only ignored step one; Congress simply cannot establish the "Commerce" required by step one. Conse-

quently, there is no "Commerce Clause" power and Petitioners' argument fails.

With regard to step one, the key is to understand that "Commerce" may be viewed as the interrelationship, traffic, agreement or transaction between parties. For example, we may see vendors paired with vendees; sellers paired with buyers; lessors paired with lessees; borrowers paired with lenders; and debtors paired with creditors. Expressed in mathematical terms, "commerce" is Euclid's line between two points or Einstein's interval between two points on an ideal rigid body, where the points represent the two parties and the line or interval represents the commercial transaction, agreement, traffic or interrelationship. *See* Euclid, *Elements of Geometry* 6 (Greek Text of J.L. Heiberg (1883-1885)) (R. Fitzpatrick,ed. & translator) ("And the extremities of a line are points"); Albert Einstein, *The Meaning of Relativity* 4 (5th ed. 1956) (posthumously); George B. Thomas, Jr., *Calculus and Analytic Geometry* 9 (4th ed. 1968) ("Let *L* be the line through points $P_1(x_1,y_1)$ and $P_2(x_2,y_2)$") (emphasis in original).

The "substantial economic effects" test, as argued by the Petitioners, should not be used to establish that the Individual Mandate may be enacted under the Commerce Clause. *Amici* believe the "substantial effects" test leads to false positive results and should be replaced. Furthermore, *Amici* believe that the term "economics", like the term "commerce", involves a party and a counterparty. In fact, similar to the definition of commerce, "economics" has been defined as requiring at least a dyadic relationship. Paul A. Samuelson, *Economics* 3 (10th ed., 1976) ("Economics ... is the study of those activities which, with or with-

out money, involve ***exchange transactions among people***") (emphasis added).[25]

Petitioners have pointed to a litany of congressional "findings" to argue that Congress properly enacted Section 1501 under the Commerce Clause - on the basis that the lack of adequate insurance coverage has a substantial effect upon the economy.[26] PetBrief at 27-30 (References 42 U.S.C. §18091 which is the codification in the "United States Code" of Subsection 1501(a), as amended by Subsection 10106(a)). Applying Petitioners' rationale, courts could easily find the other enumerated powers superfluous including the powers To declare war, U.S. CONST. art. I, § 8, cl. 11, To establish post offices, *id.* at cl. 7, and To provide and maintain a Navy, *id.* at cl. 13. Under Petitioners' theory, these clauses are unnecessary. *Lopez*, 514 U.S. at 589 (Thomas, J., concurring) ("Put simply, much if not all of Art. I, § 8 (including portions of the Commerce Clause itself), would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce").

First, we begin with the text of the Constitution. "The Congress shall have Power ... **To regulate** Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3 ("Regulation Clause")

---

[25] Professor Samuelson's treatise was the most popular economics textbook of the second half of the twentieth century. He was Economic Advisor to President Kennedy and received the second Nobel Prize in Economics in 1970.

[26] As argued above in Argument I, *supra*, the findings in Subsections 1501(a) and 10106(a) cross-nullify each other and thereby violate the Presentment Clause.

(emphasis added). Whether called the "Commerce Clause" or the "Regulation Clause," the alleged source of congressional authority is the highlighted language above. Its appellation is irrelevant.

Second, each of the powers enumerated in Article I, Section 8 begins with the capitalization of the word "To".[27] That means a capitalized "To" signals the enumerated power. Indeed, nowhere else in the remainder of the Constitution is the word "to" capitalized. The term "Commerce Clause" is technically a misnomer. In this case the power is "To regulate" and the object of that power is "Commerce".

Third, only a semicolon separates the powers enumerated in Article I, Section 8. U.S. CONST. art. I, § 8. *See The Federalist*, No. 41, 263 (Madison).

Fourth, because the powers enumerated in Article I, Section 8, form a single sentence, Congress is limited to those lawmaking powers.[28]

---

[27] Each of the eighteen clauses enumerating the powers of Congress has the same grammatical structure. They begin with the infinitive form of an action verb followed by an object of that action verb. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 9 ("To constitute Tribunals inferior to the [S]upreme Court"). The verb is "To constitute." The object of that verb is "Tribunals inferior to the [S]upreme Court."

[28] Congress has other powers that are non-lawmaking. These include, but are not limited to, the following: (1) the power of the House of Representatives to impeach, U.S. CONST. art. I, § 2, cl. 5; (2) the power of the Senate to try impeachments, *id.* art. I, § 3, cl. 6; (3) the power of each chamber to determine the Rules of its Proceedings, *id.* art. I, § 5, cl. 2; (4) the power of the Senate to ratify treaties, *id.* art. II, § 2, cl. 2; (5) the power of the Senate to confirm ambassadors and members of this Court, *id.* art. II, § 2, cl. 2; and (6) the power to propose amendments to the Constitution, *id.* art. V.

Fifth, the language "**To regulate** Commerce" and the placement of that language before the provision "with foreign Nations, and among the several States, and with the Indian Tribes," U.S. CONST. art. I, § 8, cl. 3 (emphasis added), is indicative of a limitation on the allowable purposes for the exercise of congressional power "To regulate." To argue otherwise would mean: (1) that the ends would justify means outside of the enumerated powers; and (2) that the remainder of the enumerated powers are superfluous.

Without "commerce", Congress cannot exercise its power "To regulate."

B. The Legislative and Executive Branches Have Understood that "Commerce" Requires Two Parties

Various federal laws have been enacted which recognize that "commerce" involves a party and a counterparty. *See, e.g.*, 18 U.S.C. §1951(b)(3); and 29 U.S.C. §152. These two references explicitly recognize that "commerce" must occur between two points.

According to 18 U.S.C. §1951(b)(3):

> The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce ***between any point in*** a State, Territory, Possession, or the District of Columbia ***and any point outside*** thereof; all commerce ***between points*** within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Id. (emphasis added).

According to 29 U.S.C. §152:

> The term 'commerce' means trade, traffic, commerce, transportation, or communication ***among*** the several States, or ***between*** the District of Columbia or any Territory of the United States and any State or other Territory, or ***between*** any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or ***between points*** in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

29 U.S.C. §152 (emphasis added).

As the above statutes illustrate, at least two points are required for there to be "commerce".

C. This Court Has Recognized That Commerce Requires Two Parties

This Court has long understood and continues to recognize that "commerce", by definition, necessarily involves two or more parties:

> The commerce power "is the power to ***regulate***; that is, to prescribe the rule by which commerce is to be governed ..." The *Gibbons* Court, however, acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause.
>
> It is not intended to say that these words comprehend that commerce, which is completely internal, which is ***carried on between man and man*** in a State, or ***between different parts*** of the same State, and which does not extend to or affect other States....

Lopez, 514 U.S. at 553 (*quoting Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824) (Marshall, Ch. J.) (emphasis added).

D. States, Businesses, and Individuals Understand That "Commerce" Requires Two Parties

The Uniform Commercial Code (the "UCC") has been enacted, with some variations, in all fifty states. According to the UCC, a variety of party/counterparty transactions are contemplated. *See, e.g.*, Neb. (U.C.C.) §1-201(3) ("Agreement", as distinguished from "contract", means the bargain of the ***parties*** in fact, as found in ***their*** language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade..."); *id.* §1-201(35) (The definition of "Security Interest" references buyers and sellers of goods); and *id.* §3-104(a)(1) (this subsection contemplates that a negotiable instrument is payable to someone, *i.e.*, "to order" or "to bearer" and that there is an issuer).

Many who have shipped or received a package via the United Parcel Service ("UPS") have seen the phrase "Synchronizing the World of Commerce®." Not only is this trademarked phrase emblazoned on airplanes and brown trucks used by UPS, but it is also printed on the UPS packaging used to ship overnight mail or packages.

It is well recognized that the word "synchronize" does not apply to a unitary person, entity or thing. As used by the UPS, the word "synchronize" invokes the idea that "commerce" involves the movement of

packages between two or more persons or entities or between two or more places.

III. THE INDIVIDUAL MANDATE WAS NOT AND COULD NOT BE ENACTED UNDER THE TAXING CLAUSE

A. Petitioners Have Mistakenly Conflated the Penalty with the Individual Mandate

Furthermore, Petitioners conflated their use of the terms Individual Mandate and Penalty. *See, e.g.,* Pet. Brief at 52-62. That is an error. They are distinct terms that first appeared in separate subsections of Section 1501.[29] Their language is different. They are directed towards different people. The Individual Mandate applies to an Applicable Individual, while the Penalty Amount applies to a "taxpayer". Most importantly, the Penalty Amount is not triggered unless and until there is a failure to comply with the Individual Mandate. Thus, if the Individual Mandate is unconstitutional, either because it is beyond the power of Congress "To regulate" or because Sections 1501 and 10106 cross-nullify each other, then this Court need not consider the taxing power. The Penalty Amount can never be triggered. In other words, the Penalty Amount - the alleged tax liability- will never exist. To bootstrap the Individual Mandate onto the Penalty Amount would be to ignore the plain meaning of ACA's words in an attempt to justify the Individual Mandate as an exercise of the "Taxing" power of Congress. The Court may not put the proverbial "cart before the horse."

---

[29] Amendments to the Individual Mandate and Penalty Amount are set forth in separate subsections of Section 10106.

B. Congress Did Not Properly Exercise its Revenue-Raising Power

When Congress exercises its power "To lay and collect Taxes, Duties, Imposts, and Excises," U.S. CONST. Art. I, § 8, cl. 1, it must comply with the following five provisions of the Constitution: (1) "All Bills for raising Revenue shall originate in the House of Representatives ...," *id.* at art. I, § 7, cl. 1; (2) "all Duties, Imposts and Excises shall be uniform throughout the United States," *id.* at art. I, § 8, cl. 1; (3) "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration ...," *id.* at art. I, § 9, cl. 4; (4) "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another ...," *id.* at art. I, § 9, cl. 6; and (5) "The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration," *id.* at amend. XVI.

The Penalty does not involve the purchase or importation of any good or service, and thus it falls outside of the definition of a Duty, Impost or Excise. Even assuming *arguendo* the Penalty is within the definition of a Duty, Impost or Excise, the Penalty should be declared unconstitutional because it is nonuniform throughout the country. Under 26 U.S.C. §5000A(d), as added by Subsection 1501(b), incarcerated individuals are specifically excluded from the definition of Applicable Individual, and under 26 U.S.C. §5000A(e), as added by Subsection 1501(b), members of Indian Tribes would be exempt from the payment of the Penalty even if they were Applicable

Individuals who failed to comply with the Individual Mandate. As a result, residents of prisons and Indian reservations would be able to avoid paying the Penalty. *See* 26 U.S.C. §5000A(d)(4) and 26 U.S.C. §5000A(e)(3), 124 Stat. at 246-47, respectively. This directly contradicts the Constitution's requirement of "uniform[ity] ***throughout*** the United States." U.S. CONST. art. I, § 8, cl. 1 (emphasis added).

Direct Taxes other than Income Taxes must be apportioned in proportion to the census or enumeration as required by art. I, § 9, cl. 4 of the U.S Constitution. Section 1501 makes no such apportionment. Neither does Section 10106.

In contrast, the Sixteenth Amendment permits Congress to impose taxes on income without apportionment and without regard to any census or enumeration. U.S. CONST. amend. XVI. However, the Penalty imposed by 26 U.S.C. §5000A(b) is not a tax on income. It is triggered solely by doing nothing, *i.e.*, an individual's decision to not purchase medical coverage.[30] It is not a tax on income because it excludes entire classes of individuals, including incarcerated individuals, certain religious sects, and illegal aliens, from paying the Penalty because those individuals are excluded from the definition of Applicable Individual.[31] 26 U.S.C. §5000A(d). Furthermore, it is not a tax on income because it excludes members of Indian Tribes from paying the Penalty even if they

---

[30] If the Mandate and the Penalty were allowed to stand, then an individual could theoretically be penalized for: not eating broccoli; not crossing the George Washington Bridge; not climbing Mount Everest; and not sky-diving.

[31] Such exclusions likely deny to others equal protection of the law.

are Applicable Individuals who failed to comply with the Individual Mandate. In other words, one person might have to pay, while another person working by his or her side, would not have to pay, even though both individuals had identical taxable incomes. In an extreme example, an incarcerated billionaire would be exempt from the Penalty, even if he or she were to annually receive hundreds of millions of dollars in portfolio income.

Finally, Congress made no attempt to treat the Penalty for the failure to comply with the Individual Mandate as a revenue provision. The structure of ACA makes this clear. The revenue provisions were lumped together in Title IX of ACA, which is entitled "Revenue Provisions." The Penalty was neither included in Title IX nor in the amendments to Title IX, found at Sections 10901 *et seq.* Furthermore, the language contained in the "findings" of Sections 1501 and 10106 is an attempt to establish "Commerce" power as opposed to an attempt to establish the "Taxing" power of Congress.

C. The Anti-Injunction Act Is Not Applicable Because There Is No Tax Liability to Assess or Collect

Lacking a constitutional Applicable Individual for the Individual Mandate, it is impossible to trigger the Penalty, and thus there is no "tax liability" to "assess or collect." This should render the Anti-Injunction Act, 26 U.S.C. §7421(a), inapplicable here.

CONCLUSION

For the foregoing reasons, the Court should affirm that the Individual Mandate is unconstitutional. Furthermore, the Penalty cannot be justified as a tax to assess and collect, because the Penalty will never be triggered.

Respectfully submitted,

ANDREW L. SCHLAFLY
939 OLD CHESTER ROAD
FAR HILLS, NJ 07931
(908) 719-8608
aschlafly@aol.com

DAVID P. FELSHER
Counsel of Record
488 MADISON AVENUE
NEW YORK, NY 10022
(212) 308-8505
dflaw@earthlink.net

Counsel for Amici

Dated: February 13, 2012

AMICUS CURIAE BRIEF

No. 11-398

In The
Supreme Court of the United States

DEPT. OF HEALTH AND HUMAN SERVICES, et al.,

Petitioners,

v.

STATE OF FLORIDA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AUTHORS OF *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (GARY LAWSON, ROBERT G. NATELSON & GUY SEIDMAN) AND THE INDEPENDENCE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

(MINIMUM COVERAGE PROVISION)

DAVID B. KOPEL
Counsel of Record
INDEPENDENCE INSTITUTE
727 East 16th Avenue
Denver, Colo. 80203
(303) 279-6536
david@i2i.org
Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Independence Institute states that it is a non-profit corporation, incorporated in Colorado.

Independence Institute has no parent corporations, nor is there any publicly held corporation that owns more than 10% of its stock.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

STATEMENT OF AMICI INTERESTS 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. The government's claim that the individual mandate is supported by the Commerce Power is really a claim that it is supported by the Necessary and Proper Clause rather than by the Commerce Clause alone 5

II. The Necessary and Proper Clause is a recital informing the reader that the doctrine of incidental powers applies to the Constitution's enumerated grants of authority 9

A. Under founding-era law and practice, when an instrument granted enumerated powers and then followed the enumeration with a clause authorizing "necessary" actions in furtherance thereof, the clause was a mere recital that the doctrine of incidental powers applied to the instrument 9

TABLE OF CONTENTS – Continued

Page

B. The drafting history of the Necessary and Proper Clause also confirms that it is a recital of the founding-era incidental powers doctrine 12

C. The ratification history of the Necessary and Proper Clause further demonstrates its role as a recital of the founding-era incidental powers doctrine 15

D. Subsequent history confirms that the Necessary and Proper Clause is a recital of the incidental powers doctrine..... 17

III. Under the original meaning, for an unstated power to qualify as "necessary" (i.e., incidental) to an express power, the unstated power had to be both (1) inferior to the express power, and (2) so connected to it by custom or need as to justify inferring that the parties intended the inferior power to accompany the express power 19

A. For an unstated power to qualify as "necessary" (incidental) to an express power, it must be "inferior" to it – less valuable, and subsidiary 20

TABLE OF CONTENTS – Continued

Page

B. For an inferior power to qualify as "necessary" (incidental), it also had to be so connected to its principal by custom or need as to justify inferring that the parties intended the inferior power to accompany the express power 24

C. In the years since the Founding, this Court has applied similar tests of incidence in many contexts 25

IV. The individual mandate is not authorized by the Necessary and Proper Clause because under the meaning of that Clause, the mandate does not qualify as "incidental" to the regulation of commerce 29

V. The Necessary and Proper Clause also serves as a recital informing the reader that laws are subject to fiduciary ("public trust") constraints 31

A. To be "proper" within the meaning of the Clause, a law must comply with basic fiduciary norms 31

B. The fiduciary rules encapsulated by the requirement that laws be "proper" included well-established limitations on delegated governmental power..... 33

VI. The individual mandate is not a "proper" law for executing the Commerce Power..... 36

CONCLUSION..... 40

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Anderson v. Forty-Two Broadway Co., 239 U.S. 69 (1915) 26

City of Covington v. South Covington & C. St. Ry. Co., 246 U.S. 413 (1918) 28

Comm'r of Internal Revenue v. Wodehouse, 337 U.S. 369 (1948) 28

Cox v. Wood, 247 U.S. 3 (1918) 8

Crowell v. Benson, 285 U.S. 22 (1932) 28

Dames & Moore v. Regan, 453 U.S. 654 (1981) 26, 27, 28

Duncan v. Walker, 533 U.S. 167 (2001) 21

Ex Parte, In the Matter of Duncan N. Hennen, 38 U.S. 230 (1839) 27

Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1 (1961) 26

First National Bank in St. Louis v. State of Missouri, 263 U.S. 640 (1924) 26

Fort Smith Spelter Co. v. Clear Creek Oil & Gas Co., 267 U.S. 231 (1925) 28

Gonzales v. Raich, 545 U.S. 1 (2005) 5, 6, 7

Hawes v. State of Georgia, 258 U.S. 1 (1922) 28

Hawk v. Olson, 326 U.S. 271 (1945) 22

Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) 19

TABLE OF AUTHORITIES – Continued

Page

International Union v. Russell, 356 U.S. 634 (1958) 26

Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913) 26

Linder v. United States, 268 U.S. 5 (1925) 25

Marin v. Augedahl, 247 U.S. 142 (1918) 27

McCulloch v. Maryland, 17 U.S. 316 (1819) ..... *passim*

Michaelson v. United States ex rel. Chicago, St. P., M. & O. Ry. Co., 266 U.S. 42 (1924) 26

Miller v. King, 223 U.S. 505 (1912) 27

Nebraska v. Wyoming, 325 U.S. 589 (1945) 26

New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918) 25

Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) 19

Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968) 26

United States v. Barnett, 376 U.S. 681 (1964) 27

United States v. Carbone, 327 U.S. 633 (1946) 28

United States v. Carter, 231 U.S. 492 (1913) 27

United States v. Comstock, 130 S.Ct. 1949 (2010) 19

United States v. Coombs, 12 Pet. 72, 9 L.Ed. 1004 (1838) 7

United States v. Darby, 312 U.S. 100 (1941) 5

TABLE OF AUTHORITIES – Continued

Page

United States v. Equitable Life Assur. Society, 384 U.S. 323 (1966) 28

United States v. Lopez, 514 U.S. 549 (1995) 7

United States v. Pink, 315 U.S. 203 (1942) 28

United States v. Sealy, 388 U.S. 350 (1967) 26

Wickard v. Filburn, 317 U.S. 111 (1942) 5-6

Wood v. Chesborough, 228 U.S. 672 (1913) 26, 27

OTHER CASES

Anonymous (K.B. 1701) 12 Mod. 514, 88 Eng. Rep. 1487 25

Boroughe's Case (K.B. 1596) 4 Co. Rep. 72b, 76 Eng. Rep. 1043 12

Case of Monopolies (Q.B. 1602) 11 Co. 84b, 77 Eng. Rep. 1260 38

Estwick v. City of London (K.B. 1647) Style 42, 82 Eng. Rep. 515 34

Keighley's Case (C.P. 1709) 10 Co. Rep. 139a, 77 Eng. Rep. 1136 ..... 35, 36, 37

Leader v. Moxon (C.P. 1773) 2 Bl. W. 924, 96 Eng. Rep. 546 ..... 35, 36, 37

Rooke's Case (C.P. 1598) 5 Co. Rep. 99b, 77 Eng. Rep. 209 ..... 33-34, 36

TABLE OF AUTHORITIES – Continued

Page

The King v. Richardson (K.B. 1757) 2 Keny. 85, 96 Eng. Rep. 1115 24

United States v. Haga, 276 F. 41 (D. Idaho 1921) 26

CONSTITUTIONAL PROVISIONS

U.S. CONST., art. I, §1 14-15

U.S. CONST., art. I, §8 14

U.S. CONST., art. I, §8, cl.1 ..... 8, 14, 22

U.S. CONST., art. I, §8, cl.3 ..... 4, 5-8, 14, 22, 29-30

U.S. CONST., art. I, §8, cl.7 8

U.S. CONST., art. I, §8, cl.9 8

U.S. CONST., art. I, §8, cl.11 ..... 8, 22

U.S. CONST., art. I, §8, cl.12 8

U.S. CONST., art. I, §8, cl.17 8

U.S. CONST., art. I, §8, cl.18 ..... *passim*

U.S. CONST., art. II, §2, cl.2 15

U.S. CONST., art. II, §3 10

U.S. CONST., art. III, §2, cl.3 8

U.S. CONST., art. V 10

U.S. CONST., amend. V 8

U.S. CONST., amend. VI 8

U.S. CONST., amend. VII 8

TABLE OF AUTHORITIES – Continued

Page

U.S. CONST., amend. IX 17

U.S. CONST., amend. X.....17

BOOKS

AMES, HERMAN V., THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY (1897).....38

BACON, MATTHEW, A NEW ABRIDGMENT OF THE LAW (5th ed., Dublin, John Exshaw 1786) 21, 24

BLACKSTONE, WILLIAM, COMMENTARIES ON THE LAWS OF ENGLAND (1765-69)..... 11, 24

DE SMITH, STANLEY ET AL., JUDICIAL REVIEW OF ADMINISTRATIVE ACTION (5th ed. 1995).....34

FARRAND, MAX, THE RECORDS OF THE FEDERAL CONVENTION (1937).....13, 14, 31, 38-39

JACOB, GILES, A NEW LAW-DICTIONARY (10th ed., 1782).....21

JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND (Gerald Gunther ed., 1969).....18, 23

JOHNSON, SAMUEL, A DICTIONARY OF THE ENGLISH LANGUAGE (multiple editions) 23

LAWSON, GARY, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE (Cambridge University Press, 2010).....*passim*

RESTATEMENT (SECOND) OF TRUSTS (1995) 36-37

TABLE OF AUTHORITIES – Continued

Page

SHERIDAN, THOMAS, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1789) 23

THE DEBATE IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot ed., 2d ed., 1891) 16

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen *et al.* eds., 1976) 16, 39

THE PAPERS OF THOMAS JEFFERSON (Julian P. Boyd ed., 1958) 38

THE WRITINGS OF THOMAS JEFFERSON (Albert Ellery Bergh ed., 1907) 38

VETO MESSAGES OF THE PRESIDENTS OF THE UNITED STATES, WITH THE ACTION OF CONGRESS THEREON (Benjamin Poore ed., 1886) 8

VINER, CHARLES, A GENERAL ABRIDGMENT OF LAW AND EQUITY (1742) 21-22

WADE, WILLIAM & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW (10th ed., 2009) 33

ARTICLES

Barnett, Randy E., *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003) 6

Barnett, Randy E., *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001) 6

TABLE OF AUTHORITIES – Continued

Page

Grzandziel, Brandon, *A New Argument for Fair Use Under the Digital Millennium Copyright Act*, 16 U. MIAMI BUS. L. REV. 171 (2008).....38

Lawson, Gary & Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).....32

Lawson, Gary, *Discretion As Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005).....31

Natelson, Robert G. & David Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L. REV. FIRST IMPRESSIONS 55 (2010).....6

Natelson, Robert G., *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239 (2007).....10, 15

Natelson, Robert G., *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004).....32

Natelson, Robert G., *The Legal Meaning of "Commerce" In the Commerce Clause*, 80 ST. JOHN'S L. REV. 789 (2006).....6

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

ARTS. OF CONFED., Art. II 12, 20

Resolve Empowering Nathaniel Gorham, Esq., Agent, To Lease Dr. Sylvester Gardiner's Estate By Private Contract For Short Terms Only, ch. 25, 1779 Mass. Acts 17 13

STATEMENT OF AMICI INTERESTS[1]

Amici are experienced constitutional scholars and recognized authorities on the Necessary and Proper Clause. They are coauthors of the only book devoted entirely to the subject, *The Origins of the Necessary and Proper Clause*, published by Cambridge University Press in 2010. Some of their other scholarship on the Clause is cited in the brief.

Gary Lawson is Professor of Law at Boston University. Robert Natelson is retired from his position as Professor of Law at the University of Montana, and is Senior Fellow in Constitutional Studies at the Independence Institute. Guy Seidman is Professor of Law at the Interdisciplinary Center, Herzliya, Israel.

The Independence Institute is a public policy research organization founded in 1984.

SUMMARY OF ARGUMENT

As this Court's precedents demonstrate, the claim that the congressional commerce power authorizes the individual mandate in the Affordable Care Act (ACA) is really a claim that the Necessary

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of *amicus* briefs.

and Proper Clause, rather than the Commerce Clause as such, supports the mandate.

In fact, however, that mandate is outside the scope of the Necessary and Proper Clause.

This brief summarizes the findings of new legal history scholarship on the meaning of the Necessary and Proper Clause. The Clause was one of a family of similar provisions very common in founding-era legal documents, particularly in documents by which one party granted authority to another. Members of this family of clauses followed at least five different formulae, with the Necessary and Proper Clause following the most restrictive formula. As pointed out by the Constitution's advocates during the ratification debates, the Clause is designed to remind the reader of two legal default rules:

> (1) "Necessary" – the express grants of authority to Congress include those implied powers that qualify as *incidental*; and
>
> (2) "Proper" – congressional enactments must comply with *standards of fiduciary obligation*.

According to then-established legal usage, the word "necessary" extended beyond factual necessity; it was a term of art meaning "incidental." An unstated power was incidental if it met BOTH of the following criteria:

- It was inferior to ("less worthy" than) the express power, AND ALSO
- It met at least one of the following three alternatives:
  - indispensable to the express power, *or*
  - required to avoid "great prejudice" to the exercise of the express power; *or*
  - a customary means of exercising the express power.

A power failing to comply with either of these criteria could not be incidental. The criterion of inferiority was *independent* of the second criterion of indispensability, great prejudice, or custom. In other words, the Necessary and Proper Clause does not authorize an unstated power if that power is "as worthy as" the principal power; if the unstated power fails the first criterion (inferiority), it is irrelevant if the unstated power might pass the second criterion by being indispensable, desirable, or customary.

These criteria are very similar to the criteria this Court applies in many contexts today. They serve as a guide for deducing the intent of the parties to the document.

Under the meaning of the Necessary and Proper Clause, the ACA's insurance mandate is not a *necessary* law because authority to impose it does not qualify as "incidental" to the Commerce Clause:

Authority to require private parties to contract with other private parties is at least as significant as the usual power to "regulate Commerce."

Additionally, the mandate does not qualify as a *proper* law because it violates fiduciary limitations embodied in the word "proper."

This conclusion is confirmed not only by eighteenth-century law and practice, but by the drafting and adoption history of the Necessary and Proper Clause; by a complete reading of the Supreme Court's first great case on the subject, McCulloch v. Maryland, 17 U.S. 316 (1819), and by Chief Justice John Marshall's public explanations of *McCulloch*.

To the extent, therefore, that the constitutionality of the individual mandate depends upon the power "To make all Laws which shall be necessary and proper for carrying into Execution . . . the power to regulate Commerce . . . among the several States," the mandate is unconstitutional.

ARGUMENT

I. The government's claim that the individual mandate is supported by the Commerce Power is really a claim that it is supported by the Necessary and Proper Clause rather than by the Commerce Clause alone.

Although it is common to refer loosely to constitutional cases involving congressional economic regulation as "commerce clause cases," this is usually inaccurate as a technical matter. Most cases involve not the core Commerce Clause alone, but also the Necessary and Proper Clause. U.S.CONST. art. I, §8, cl.18. Thus, in Gonzales v. Raich, 545 U.S. 1 (2005), the Court upheld a congressional law based not on the Commerce Clause alone but because the law was within "the power vested in Congress by Article I, §8, of the Constitution '*[t]o make all Laws which shall be necessary and proper for carrying into Execution*' its authority to 'regulate Commerce with foreign Nations, and among the several States.'" *Id.* at 5 (italics added). Similarly, in United States v. Darby, 312 U.S. 100, 118 (1941), the Court distinguished the "regulation of commerce among the states" (that is, the core Commerce Clause) from "those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end" (that is, the Necessary and Proper component, as shown by the immediately-ensuing citation of *McCulloch*). *Id.* at 118-19. *See also* Wickard v. Filburn, 317 U.S. 111, 125 (1942) ("But even if appellee's

activity be local and *though it may not be regarded as commerce*, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.") (italics added); *Raich* at 22 ("as in *Wickard* . . . Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce . . . among the several States.'").

Many economic activities regulated by Congress are based on the Necessary and Proper Clause because those activities are outside the Constitution's core meaning of "regulate Commerce," which is limited primarily to governance of mercantile trade and of certain closely-related activities, such as navigation, commercial paper, and the channels and instrumentalities of commerce. *See* Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L.REV. 101 (2001); Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L.REV. 847 (2003); Natelson, *The Legal Meaning of "Commerce" In the Commerce Clause*, 80 ST. JOHN'S L.REV. 789, 836-39 (2006).[2] As Justice Scalia explained when concurring in *Raich*:

---

[2] Assertions that the Constitution uses "commerce" in the idiosyncratic sense of "all human interaction" are unsupportable textually and have been disproven. *See* Natelson & Kopel, *Commerce in the Commerce Clause: A Response to Jack Balkin*, 109 MICH. L.REV. FIRST IMPRESSIONS 55 (2010), http://www.michiganlawreview.org/articles/commerce-in-the-commerce-clause-a-response-to-jack-balkin (citing contemporaneous dictionaries and numerous founding-era sources).

> [U]nlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, as this Court has acknowledged since at least *United States v. Coombs*, 12 Pet. 72, 9 L.Ed. 1004 (1838), Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause.

545 U.S. at 34 (Scalia, J., concurring).

The Necessary and Proper Clause authorizes regulation of economic activities outside the core meaning of "commerce" when such regulation is *incidental* to the regulation of commerce. McCulloch v. Maryland, 17 U.S. 316, 406 (1819) (discussing "incidental or implied powers"); United States v. Lopez, 514 U.S. 549, 554 (1995) (describing earlier cases regulating activities outside a strict reading of the Commerce Clause as "incidental regulation"). Thus, the validity of the ACA's individual insurance mandate depends on whether the mandate is incidental to Congress's power to regulate interstate commerce, as contemplated by the Necessary and Proper Clause.

Newly-published research into the origins of the Clause has been conducted by four leading scholars of

constitutional law and history with disparate political and jurisprudential views. GARY LAWSON, GEOFFREY MILLER, ROBERT NATELSON & GUY SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE (Cambridge University Press, 2010) (hereinafter "ORIGINS"). That research demonstrates that the Necessary and Proper Clause does not support the ACA's individual mandate. A mandate to citizens to purchase a product from private entities[3] does not qualify as "necessary"

---

[3] The Constitution authorizes some mandates that citizens transact with *government*. These are within Congress's core enumerated powers, and do not depend on the Necessary and Proper Clause. Taxes are authorized directly by U.S.CONST., art. I, §8, cl.1. Jury service is inherent in the power "To constitute tribunals inferior to the supreme Court," art. I, §8, cl.9, a fact confirmed by the Constitution's jury guarantees. Art. III, §2, cl.3; amends. V, VI & VII. Military conscription is embraced by the power to "declare War," art. I, §8, cl.11, and to "raise . . . Armies," art. I, §8, cl.12; Cox v. Wood, 247 U.S. 3 (1918). Eminent domain is inherent in several express powers, including that of erecting "Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." Art. I, §8, cl.17; *see also* amend. V ("nor shall private property be taken for public use, without just compensation.").

There is no founding-era evidence that a mandate requiring citizens to engage in commerce with private parties was encompassed within the power to "regulate Commerce," even if the mandate were designed to finance other regulation. On the contrary, to "regulate" an activity naturally presupposes an activity to regulate. *See, e.g.*, President James K. Polk, Veto message, Dec. 15, 1847, *in* VETO MESSAGES OF THE PRESIDENTS OF THE UNITED STATES 209 (Poore ed., 1886) ("To 'regulate' admits or affirms the pre-existence of the thing to be regulated.") Using the power to "regulate Commerce" to punish persons not in commerce is akin using the power to "establish Post Offices" (art. I, §8, cl.7) to finance the postal service by fining non-users.

(incidental). Moreover, the mandate is not "proper" in the sense the Constitution uses that word.

II. The Necessary and Proper Clause is a recital informing the reader that the doctrine of incidental powers applies to the Constitution's enumerated grants of authority.

A. Under founding-era law and practice, when an instrument granted enumerated powers and then followed the enumeration with a clause authorizing "necessary" actions in furtherance thereof, the clause was a mere recital that the doctrine of incidental powers applied to the instrument.

When promoting the Constitution during the ratification debates, advocates repeatedly explained that the Necessary and Proper Clause was a recital only, that it granted no additional power, and that the Constitution's legal force would have been the same without it. *Infra* Part II(C). Their position was fully consistent with contemporaneous law and legal practice.

During the founding era, both governments and individuals often created instruments by which persons or entities granted authority to other persons or entities. These grants included powers of attorney, trust instruments, corporate charters, commissions,

and other fiduciary documents. ORIGINS at 52-83, 144-76 (citing numerous such instruments).

A fundamental obligation of the eighteenth-century fiduciary[4] was to act only within the scope of delegated authority. In describing the scope of delegated authority, drafters usually followed fixed customs. They might list express powers and specifically limit the grantee to those powers. More commonly, however, they listed express powers and added a general clause informing the reader of any additional authority beyond that explicitly conveyed.

The scope of additional authority depended on the precise language of the general clause. There were at least five common formulae, some of which conveyed more power than others. ORIGINS at 72-78. For example, some formulae gave the grantee almost limitless discretion. *See, e.g.*, U.S.CONST., art. II, §3 (granting the President power to make such recommendations to Congress "*as he shall judge* necessary and expedient") (emphasis added); *id.*, art. V (granting Congress power to propose amendments whenever Congress "shall deem it necessary"). However, for the Necessary and Proper Clause, the Framers adopted *the most restrictive formula* among those

---

[4] The underlying principles of founding-era fiduciary law were generally similar to fiduciary law today. *See generally* Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L.&POL. 239 (2007) (describing eighteenth-century fiduciary principles).

commonly employed. The Clause authorized only laws that were both "proper" (discussed *infra* Parts V & VI) and "necessary." ORIGINS at 77-78.

In this context, the word "necessary" did not always exclusively coincide with factual necessity. *Cf. McCulloch*, 17 U.S. 316, 413 (discussing different meanings of "necessary"). Rather, it was a term of art meaning *incidental*. ORIGINS at 61n.26 (citing many examples). When a legal instrument conveying express authority also authorized actions "necessary" to effectuate that authority, it was referring to the prevailing common law *doctrine of incidental powers*. That doctrine altered the maxim that delegated powers are strictly construed, by widening construction of the instrument to effectuate the intent of the parties. ORIGINS at 66-67. For example, if construed strictly, a grant of authority to "manage my farm" might be limited to on-site activities, thereby excluding crop sales. The doctrine of incidental powers widened that grant to include crop sales, if the parties so intended.

When the Constitution was adopted, the doctrine of incidental powers had become the legal default rule. It was applied to instruments in absence of contrary language. ORIGINS at 64, 76-77; 2WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *347 (1765-69) ("A subject's grant shall be construed to include many things, besides what are expressed, if necessary for the operation of the grant."). Nevertheless, drafters often added a recital to alert readers that incidental powers were included. As Lord Coke

had explained, such recitals "declare and express to laymen . . . what the law requires in such cases." Boroughe's Case (K.B. 1596) 76 Eng.Rep. 1043, 1044-45 (reporter's commentary). The Necessary and Proper Clause is an example of such a recital. Its inclusion was important because the Articles of Confederation had expressly excluded incidental powers.[5]

B. The drafting history of the Necessary and Proper Clause also confirms that it is a recital of the founding-era incidental powers doctrine.

A majority of the delegates to the 1787 federal convention were or had been practicing lawyers. The non-lawyer delegates also were knowledgeable about law as a result of personal study, business and professional experience, and government service. ORIGINS at 85.

The Articles of Confederation had contained a provision excluding incidental powers, thereby explicitly negating the default rule. Most convention delegates, however, wanted the new Constitution to grant incidental as well as express authority. They believed

---

[5] ARTS. OF CONFED., Art. II ("Each state retains . . . every Power, Jurisdiction and right, which is not by this confederation *expressly* delegated to the United States . . . ") (emphasis added).

that the failure of the Articles of Confederation to do so had been a mistake. Among delegates holding this view was John Dickinson of Delaware (a primary drafter of the Articles), who had, in addition to public service, been a highly prominent practicing lawyer. Dickinson's outline for a new Constitution contained a forerunner of the Necessary and Proper Clause. SUPPLEMENT TO MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 86, 89 (Hutson ed., 1987) (authorizing Congress "to pass Acts" for executing certain powers).

Drafting of the Necessary and Proper Clause was undertaken by the Committee of Detail. Like Dickinson, four of the five members of that Committee were distinguished attorneys.[6] The fifth, Nathaniel Gorham, had served as president of Congress[7] and as a business agent.[8]

The first draft of the Clause, extant in Randolph's handwriting, expressly referenced the incidental power doctrine as a tool of judicial interpretation.

---

[6] Edmund Randolph (who would become the first Attorney General of the United States), Oliver Ellsworth (third Chief Justice), John Rutledge (second Chief Justice of this Court), and James Wilson (one of the most eminent lawyers in America, and an original Justice of this Court). ORIGINS at 85-86.

[7] *Id.* at 85.

[8] *See, e.g.*, *Resolve Empowering Nathaniel Gorham, Esq., Agent*, ch.25, 1779 Mass. Acts 17 (noting the state's previous appointment of Gorham as an agent in the same matter). (In 1779 the title "Esquire" did not necessarily mean that the person was a lawyer.)

2MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 144 (1937) ("all incidents without which the general principles cannot be satisfied shall be considered, as involved in the general principle"). The provision was replaced by one in Rutledge's handwriting, which substituted the most common legal label for incidental powers: "necessary." The new provision read: "a right to make all Laws necessary to carry the foregoing Powers into Execu-." *Id.*

Two more additions remained. The first clarified that Congress's incidental legislative authority also applied to powers the Constitution enumerated outside Article I, Section 8 ("and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"). This acknowledged the Constitution's conveyance to Congress of "[a]ll legislative Powers herein granted." U.S.CONST., art. I, §1.[9] The other addition required

---

[9] In the Committee draft, the latter section read: "The legislative power shall be vested in a Congress . . . " 2FARRAND at 163.

While admitting that the "foregoing powers" part of the Clause merely recites the incidental powers doctrine, some have argued that authority "To make all Laws which shall be necessary and proper for carrying into Execution . . . *all other Powers*" bespeaks a further grant of unspecified authority. The argument is irrelevant to the present case, because the Commerce and Taxation Clauses on which the ACA is purportedly based are both among the "foregoing powers."

Even if it were relevant, that interpretation is untenable. It requires applying variant meanings, within the same Clause, to the single specialized phrase "necessary and proper." It also

(Continued on following page)

that incidental legislation be "proper." The Committee and Convention approved the Clause without significant controversy.

C. The ratification history of the Necessary and Proper Clause further demonstrates its role as a recital of the founding-era incidental powers doctrine.

The Necessary and Proper Clause was much-discussed during the ratification debates. The American public seems to have understood and appreciated fiduciary law to a considerable degree – which in the governmental context the founding generation called the rules of "public trust." Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L.& POL. 239, 247-48 (2007) (discussing the

---

contradicts repeated Federalist explanations to the public at the Founding, *infra* Part II(C), and disregards the limiting words "*vested by this Constitution* in the Government of the United States, or in any Department or Officer thereof." (Emphasis added.) Departments and officers are, of course, created by Congress, which even in absence of this language would have incidental authority to delineate their duties. "The Government of the United States" refers to institutions of the federal government other than departments or officers of the United States, such as joint actors or single houses of Congress. *E.g.*, U.S.CONST., art. II, §2, cl.2 (treaty power exercised by President and by one house of Congress). This phrase acknowledges that Congress may exercise any legislative incidents of that authority, such as the power to adopt laws implementing treaties.

fiduciary knowledge of the eighteenth-century general public and some reasons for it). That was why the floor leader of the Federalists at the North Carolina ratifying convention, James Iredell (a future Justice of this Court), could describe the Constitution as "a great power of attorney" and believe the characterization would be persuasive. 4THE DEBATE IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 148 (Elliot ed., 2d ed., 1891).

A leading concern of "Anti-Federalists" opposing the Constitution during those debates was that the document could be construed to grant unlimited authority to the federal government. They cited the Necessary and Proper Clause as an example. However, in the course of their argument, Anti-Federalists persistently misquoted the Clause as if it followed another of the common formulae for such clauses – a formula granting wider power. *E.g.*, 13THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 402 (Jensen *et al.* eds., 1976) (anti-Federalist tract changing "necessary and proper" to "which the *Congress shall think necessary and proper*").

To correct the inaccuracy, Federalists explained to the ratifying public that the Clause as actually worded granted no substantive authority. It was inserted merely from an abundance of caution, to avoid quibbling disputes about the extent of federal authority and to clarify that the express grants in the Constitution (unlike those in the Articles of Confederation) encompassed incidental means.

The representation that the Clause granted no additional power was a core portion of the Federalist argument, repeated by many of the Constitution's advocates. These included James Madison, Alexander Hamilton, James Wilson (future Supreme Court Justice), James Iredell (another future Justice), Oliver Ellsworth (a future Chief Justice), Edmund Pendleton (Virginia's leading lawyer), George Nicholas (law professor, member of Virginia House of Delegates), and several others. ORIGINS at 97-108 (citing *The Federalist* and numerous other sources). The Federalists added that the legal effect of the Constitution's power grants would have been precisely the same if the Necessary and Proper Clause were not included. This was because enumerated powers always encompassed incidental powers unless expressly excluded. *Id.* Several ratifying conventions recommended declaratory amendments to cement this understanding. The declarations were eventually encapsulated in the Ninth and Tenth Amendments. *Id.* at 113-14 (explicating rationale for proposed amendments).

D. Subsequent history confirms that the Necessary and Proper Clause is a recital of the incidental powers doctrine.

During the 1791 congressional debates over chartering a national bank, opponents and advocates disagreed about whether chartering was "incidental" to Congress's principal enumerated powers. However, they generally agreed that the doctrine of incidental powers under the Necessary and Proper Clause

controlled the question. ORIGINS at 114-19 (citing congressional debate). Shortly after the debates, Attorney General Edmund Randolph, who had served on the Convention's Committee of Detail, confirmed in writing that the word "necessary" had been intended as a synonym for "incidental." ORIGINS at 88n.28 (U.S. Attorney General Randolph's opinion on the constitutionality of a proposed national bank).

The same view was expressed by the Supreme Court under the leadership of Chief Justice John Marshall, who had served as a leading advocate of the Constitution at the Virginia ratifying convention. In McCulloch v. Maryland, 17 U.S. 316 (1819), the Court applied the Clause as a recital of the incidental powers doctrine. In public writings explaining *McCulloch*, moreover, Marshall explicitly endorsed that view of the Clause. *See* JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 166-176 (Gunther ed., 1969) (quoting Marshall's language). In keeping with the nearly-uniform Federalist representations during the ratification debates, *supra* Part II(C), Marshall also emphasized that the Clause granted no additional power. *Id.* at 176 ("The third & last proposition . . . is, 'that the insertion of the words necessary and proper in the last part of the 8th section of the 1st article, did not enlarge powers previously given, but were inserted only through abundant caution.' . . . I do not mean to controvert this proposition."), 186 ("[T]he constitution may be construed as if the clause which has been so much discussed, had been entirely omitted.") In subsequent cases, the Supreme Court has

continued to recognize that the Necessary and Proper Clause is a statement of the incidental powers doctrine.[10]

In short, the legal background, drafting history, and ratification history all demonstrate that the Clause did not extend congressional authority beyond the enumerated powers. It merely affirmed the default rule that the Constitution's express grants of power included incidental powers proper to effectuate the express powers.

III. Under the original meaning, for an unstated power to qualify as "necessary" (i.e., incidental) to an express power, the unstated power had to be both (1) inferior to the express power, and (2) so connected to it by custom or need as to justify inferring that the parties intended the inferior power to accompany the express power.

As noted above, during the founding era, the word "necessary" in provisions similar to the Necessary

---

[10] *E.g.*, United States v. Comstock, 130 S.Ct. 1949, 1956 (2010) (quoting *McCulloch*); Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964) ("the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof"); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 214 (1946) ("No constitutional provision forbids Congress to do this. On the contrary, its authority would seem clearly to be comprehended in the 'necessary and proper' clause, as incidental to both its general legislative and its investigative powers.").

and Proper Clause was a synonym for *incidental* – it signified application of the doctrine of incidental powers. That doctrine, in turn, was part of a wider body of jurisprudence by which incidents, appurtenances, appendants, and fixtures were attached to more important "principals." ORIGINS at 60-61. The purpose of the doctrine of principals and incidents in grants was to assist the interpreter in arriving at the probable intent of the parties. ORIGINS at 66-67, 82-83 (citing, inter alia, Chief Justice Marshall's statement that "All instruments are to be construed fairly, so as to give effect to their intention. . . . The object of language is to communicate the intention of him who speaks, and the great duty of a judge who construes an instrument, is to find the intention of its makers.").

In order to deduce the probable intent of the parties, the courts applied a series of tests to determine whether a purportedly-incidental power was, in fact, incident to the principal. As explained below, these tests required that the purported incident be *both* inferior to its principal *and* attached to it either by custom or particular showings of factual need.

A. For an unstated power to qualify as "necessary" (incidental) to an express power, it must be "inferior" to it – less valuable, and subsidiary.

In founding-era jurisprudence, an incident was "a thing necessarily depending upon, appertaining to,

or following another thing *that is more worthy or principal*." GILES JACOB, A NEW LAW-DICTIONARY (10th ed., 1782) (unpaginated) (emphasis added). In other words, an unexpressed power could not be an incident to an express power unless it was essentially inferior to it. To qualify as an incident,

> an interest had to be less important or less valuable than its principal. The term "merely" was often applied to incidents, as was the word "only." An incident was always subordinated to or dependent on the principal. The courts sometimes phrased the latter requirement by stating that an incident could not comprise a subject matter independent of its principal nor could it change the nature of the grant.

ORIGINS at 61-62.

To illustrate, the power to *sell* land was considered independent of, or at least as "worthy" as, the power to *manage* that land. So authority to manage the land could carry incidental power to make short-term leases, but it never included power to sell the fee. 1MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 235-36 (5th ed., 1786); 3CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 538-40 (1742).[11]

---

[11] Bacon's *Abridgment* was a digest first published early in the eighteenth-century and frequently republished. Highly popular during the founding era, it has been cited in 55 Supreme Court cases, most recently in *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Viner's *Abridgment* (written by the man who

(Continued on following page)

Thus, the Necessary and Proper Clause incorporated as incidents only items subsidiary and inferior to their principals.

This was the rule applied in Chief Justice Marshall's opinion in *McCulloch v. Maryland*. *Before* reaching the more famous part of his analysis, Marshall addressed whether power to grant a corporate charter was a power equal to those powers expressly enumerated, or was inferior. He concluded that incorporation was "not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers." 17 U.S. at 417. Instead, incorporation "must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means. . . ." *Id.* at 421.

Of course, once the Court decided that the power to incorporate was truly inferior, the Court then had to address the further criteria of custom and need. *Id.* at 408 ("It can never be pretended, that these vast powers draw after them others of inferior importance, merely because they are inferior").[12] However, the

---

arranged for William Blackstone's academic appointment at the University of Oxford) was the largest digest of the time. Supreme Court Justices have cited it at least a dozen times. *E.g.*, Hawk v. Olson, 326 U.S. 271, 275 (1945).

[12] In examining the portion of *McCulloch* reached after the finding of subsidiarity, modern readers sometimes conclude that the Court applied rather lax criteria because the Court held that

(Continued on following page)

threshold requirement was whether the incorporation power was inferior to those expressly enumerated. If it were not, there would have been no incidental authority to incorporate a bank, no matter how indispensable or useful that institution might be.

In explaining *McCulloch* to the general public, Marshall further affirmed that an incident was always less "worthy" than the enumerated powers it supported. JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND, at 171.

---

a subsidiary means could be incidental if merely "convenient," 17 U.S. at 413, or "appropriate," *id.* at 421, for executing express powers. However, these readers sometimes forget that the finding of subsidiarity had to be met first.

Moreover, when *McCulloch* was issued, *both "convenient" and "appropriate" had distinctly narrower meanings than they do today*. Specifically, "convenient" meant "Fit; suitable; proper; well-adapted." SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (multiple editions, unpaginated); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1789) (unpaginated) ("convenient" means "Fit, suitable, proper"). As Marshall himself observed, MARSHALL, DEFENSE, *supra*, at 106, the contemporaneous meaning of "appropriate" also was fairly narrow: It meant "peculiar," "consigned to some particular use or person," – "belonging peculiarly." *Cf.* SHERIDAN ("appropriate" is "peculiar, consigned to some particular"); JOHNSON ("peculiar" is "appropriate; belonging to anyone with exclusion of others" and "Not common to other things" and "Particular, single").

B. For an inferior power to qualify as "necessary" (incidental), it also had to be so connected to its principal by custom or need as to justify inferring that the parties intended the inferior power to accompany the express power.

Being inferior to a principal was a *precondition* to qualifying as "necessary" (incidental), but was not *sufficient*. *McCulloch*, 17 U.S. at 408 ("It can never be pretended, that these vast powers draw after them others of inferior importance, merely because they are inferior"). In addition, one of three other circumstances was required:

- The inferior power was indispensable to exercise of the principal. *E.g.*, The King v. Richardson (K.B. 1757) 96 Eng.Rep. 1115, 1127.
- The inferior power was so valuable to the principal that without it the principal would have little value – i.e., without the putative incident the principal would suffer "great prejudice." 3MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW *406 (1786). Fish (personal property) are not absolutely necessary to the existence of the pond containing them (real property), but "they are so annexed to and so necessary to the well-being of the [real-property] inheritance, that they shall accompany the land wherever it vests. . . ." 2BLACKSTONE, at *427-28.

- The inferior power was a recognized, customary way of exercising the principal. For example, a broker enjoyed incidental authority to extend credit to customers if a broker of that kind customarily received that authority. Anonymous (K.B. 1701) 88 Eng.Rep. 1487.

Thus, if a power was not inferior, it was not incidental. If the power was inferior, but the power was neither indispensable, nor required to avoid "great prejudice," nor customary, then the interpreter could infer that the parties did not intend that power to accompany the grant.[13]

C. In the years since the Founding, this Court has applied similar tests of incidence in many contexts.

In the years since the Founding, the Supreme Court has applied similar tests of incidence in many contexts. Under the law of this Court, incidents are inferior (or in the word of Justice Brandeis, "subsidiary"[14])

---

[13] *Cf.* Linder v. United States, 268 U.S. 5, 18 (1925) ("Obviously, direct control of medical practice in the states is beyond the power of the federal government. Incidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure.").

[14] New York Life Ins. Co. v. Dodge, 246 U.S. 357, 381 (1918) (Brandeis, J., dissenting) ("It was an act contemplated by the policy and was subsidiary to it, as an incident thereof.").

to their principals,[15] sometimes being referred to as "mere incidents."[16] If subsidiary, an item may qualify as an incident if it is indispensable to the principal.[17]

---

[15] *See, e.g.*, Michaelson v. United States ex rel. Chicago, St.P., M.&O.Ry.Co., 266 U.S. 42, 65 (1924) ("The discretion given the court in this respect is incidental and subordinate to the dominating purpose of the proceeding."); Anderson v. Forty-Two Broadway, 239 U.S. 69, 73 (1915) (stating approvingly that "Congress deemed that corporate indebtedness is an incident only if it does not exceed the corporate capital," and if otherwise, "the carrying of the indebtedness should be considered as a principal object of the corporate activities"). *Cf.* Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1, 36 (1961) (Harlan, J., concurring and dissenting) ("[T]he Commission can properly assert this *more limited power as an incident* of its transportation certificating powers.") (emphasis added); International Union v. Russell, 356 U.S. 634, 642-43 (1958) ("The power to order affirmative relief under § 10(c) is merely incidental to the primary purpose of Congress").

[16] *E.g.*, Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 368 (1968) ("mere incidents"); United States v. Sealy, 388 U.S. 350, 356 (1967) (same).

[17] *E.g.*, Dames & Moore v. Regan, 453 U.S. 654, 682, 688 (1981) (President's power to settle debts is nearly indispensable to recognition of foreign governments, and is long-standing, and therefore is incidental); Nebraska v. Wyoming, 325 U.S. 589, 636 (1945) (approvingly quoting United States v. Haga, 276 F. 41, 43 (D.Idaho 1921) that certain activities are "necessarily incident to practical irrigation"); First National Bank in St. Louis v. State of Missouri, 263 U.S. 640, 656 (1924) (national banks "can rightfully exercise only such [powers] as are expressly granted or such incidental powers as are necessary to carry on the business for which they are established"); Lewis Publishing Co. v. Morgan, 229 U.S. 288, 314 (1913) ("the right to exercise that power carries with it the authority to do those things which are incidental to the power itself, or which are plainly necessary to make effective the principal authority when exerted."); Wood v.

(Continued on following page)

This Court sometimes refers to indispensable incidents as "necessary incidents."[18]

Similarly, a subordinate power may qualify as incidental if the value of the principal would suffer "great prejudice" without it.[19] Finally, a power inferior to a principal power may, under the jurisprudence of this Court, be incidental by reason of pre-existing

---

Chesborough, 228 U.S. 672, 678 (1913) ("To the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right."); Miller v. King, 223 U.S. 505, 510 (1912) (applying statute permitting bank to "exercise all such incidental powers as shall be necessary to carry on banking").

[18] *E.g.*, Dames & Moore, 453 U.S. at 688 ("But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute"); United States v. Barnett, 376 U.S. 681, 699-700 (1964) ("'The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident . . . of a court, without which it could no more exist than without a judge.'"); Chesborough, 228 U.S. at 678 (1913) ("To the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right."); Ex Parte, In the Matter of Duncan N. Hennen, 38 U.S. 230, 259 (1839) ("In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and *necessary* rule, to consider the power of removal as incident to the power of appointment.") (emphasis added).

[19] *See* United States v. Carter, 231 U.S. 492, 494 (1913) (an action was a legitimate incident in the exercise of appellate jurisdiction when "it will prevent a destruction of or *render practically unavailing* the reviewing power.") (italics added). *Cf.* Marin v. Augedahl, 247 U.S. 142, 156 (1918) ("such incidental business as may reasonably be necessary for the purposes of its organization.") (Clarke, J., dissenting).

custom.[20] The Court calls such incidents "customary," "usual," or "ordinary" incidents."[21] Some incidents, of course, are the product of *both* necessity and custom.[22] If, however, both necessity and custom are absent, the item is not an incident.[23]

---

[20] *E.g.*, United States v. Equitable Life Assur. Society, 384 U.S. 323, 331 (1966) ("the established practice of awarding costs in the ordinary sense fairly renders those items an incident"); *see also* sources cited in the following note.

[21] *E.g.*, Crowell v. Benson, 285 U.S. 22, 71 (1932) ("customary incidents of a judicial hearing," and "usual incidents"); Comm'r of Internal Revenue v. Wodehouse, 337 U.S. 369, 418 (1948) ("ordinary incidents"); United States v. Carbone, 327 U.S. 633, 641 (1946); Hawes v. State of Georgia, 258 U.S. 1, 4 (1922) ("Distilling spirits is not an ordinary incident of a farm"); City of Covington v. South Covington & C.St.Ry.Co., 246 U.S. 413, 418-19 (1918) (street railroads, but not steam railroads, are "one of the ordinary incidents of a city street").

[22] *E.g.*, Dames & Moore, 453 U.S. at 682, 688 (President's power to settle debts is necessary to recognition of foreign governments *and* is long-standing, and therefore is incidental); Fort Smith Spelter Co. v. Clear Creek Oil & Gas Co., 267 U.S. 231, 233 (1925) ("Everything in short pointed to a very extensive enterprise *which hardly would be possible* without the power incident to this public service under the laws of the State. *It would be most unusual*, as all know, for such a Company to attempt to work in any other way. It already had franchises in several towns and cities to supply gas.") (emphasis added).

[23] *Cf.* United States v. Pink, 315 U.S. 203, 252-53 (1942) (Stone, J., dissenting) (summarizing and agreeing with a prior holding to the effect that a claimed incident did not qualify as such if neither necessary or customary).

IV. The individual mandate is not authorized by the Necessary and Proper Clause because under the meaning of that Clause, the mandate does not qualify as "incidental" to the regulation of commerce.

The founding-era history of the Necessary and Proper Clause demonstrates that for a power to be incidental to an express grant, the power must be within an intent-based construction of the express grant, standing alone. *Supra* Part III. In other words, the scope of authority is determined by an intent-based construction *in the absence of the Necessary and Proper Clause*. Thus, the individual mandate must be within an intent-based construction of the words, "The Congress shall have Power . . . To regulate . . . Commerce . . . among the several States," U.S.CONST., art. I, §8, cl.3, without further assistance from the Necessary and Proper Clause.

The criteria for deducing intent, and therefore incidence, are set forth in Part III: As a threshold matter, the putative incident must be inferior to (subsidiary to, less "worthy" than) the enumerated power. If the inferiority requirement is met, then the power is incidental only if it accompanies the principal power by virtue of custom or is "indispensable" or is required to avoid "great prejudice."

One might argue that the ACA mandate's unprecedented nature shows that it is not "customary" to the regulation of commerce, and that previous state regulation demonstrates that it is neither

"indispensable" nor required to avoid "great prejudice." There is no need to consider those points, however, because *the mandate does not even meet the threshold test of subsidiarity*.

The authority claimed by the government in this case – to compel private citizens to purchase approved products from other, designated private persons – is certainly not inferior to garden-variety regulations of commerce. It is a power truly awesome in scope, and one that, if granted to Congress, the Constitution surely would have enumerated separately.

Consider an analogy: If one were to grant a power of attorney to a person to manage an apartment building, one would not deduce, in absence of specific language, that the manager also received authority to *sell* the building. The power to sell a fee is not "less worthy than" (in the language of the founding era) the power to manage. If a property owner also wished to grant authority to sell, the authorizing instrument would so specify.

Forcing people to perform a particular activity is not subsidiary to mere regulation. On the contrary, it is greater, more sweeping. It cannot, therefore, be incidental to the power to regulate. Bluntly put, it is inconceivable that those adopting the Constitution intended to grant Congress sweeping authority to compel all private citizens to do business with any other private persons. If they had so intended, they unquestionably would have enumerated the power separately. *Cf. McCulloch*, 17 U.S. at 417, 421.

V. The Necessary and Proper Clause also serves as a recital informing the reader that laws are subject to fiduciary ("public trust") constraints.

A. To be "proper" within the meaning of the Clause, a law must comply with basic fiduciary norms.

In addition to being "necessary" (incidental), congressional enactments under the Necessary and Proper Clause must be "proper." The fact that propriety was a separate requirement from necessity is confirmed by the decision of the federal convention's Committee of Detail to add "proper" separately, and at a later time than when it inserted "necessary." 2FARRAND, RECORDS OF THE FEDERAL CONVENTION, at 144. It is further confirmed by evidence from the text itself. Lawson, *Discretion As Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L.REV. 235, 249-55 (2005) (explaining that the word "proper" could not have been redundant with the word "necessary").

A law is "proper" within the meaning of the Necessary and Proper Clause only if the law conforms with the fiduciary norms of public trust – that is, with such duties as impartiality, good faith, and due care, and the obligation to remain within the scope of granted authority. Several aspects of the historical and legal record confirm this.

First: The generation that wrote and adopted the Constitution believed free government to be

constrained by obligations applying to fiduciaries – the limitations of "public trust." Political discourse was filled with assessments of government rules and actions according to fiduciary standards. ORIGINS at 52-56; Natelson, *The Constitution and the Public Trust*, 52 BUFF. L.REV. 1077 (2004). This was particularly true in the federal and state ratifying conventions and in the public debate over the Constitution. *Id.* at 1083-86 (numerous examples, including formal resolutions from the Virginia and Maryland ratifying conventions).

Second: During the founding era, the words "proper" was often applied to actions that complied with fiduciary norms, and "improper" was often applied to actions that did not. This was particularly true at the 1787 federal convention. ORIGINS at 89-91 (citing numerous examples). Ratification-era discussion exhibited the same characteristic, marked by suggestions that laws violating the fiduciary obligations of Congress would be "improper," and therefore unconstitutional. *Id.* at 108-09. Founding-era speakers frequently employed the term "proper" to refer to actions peculiarly within the jurisdiction of an actor. Lawson & Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993) (citing numerous examples, including, but not limited to, contemporaneous dictionaries, use of the term in state constitutions and in the ratification debates, and in the First Federal Congress).

Third: The founding generation often viewed the Constitution as a kind of corporate charter; the view was unsurprising since corporate charters were also grants of authority and often public or quasi-public instruments. ORIGINS at 147. Such charters very frequently contained language similar to the Necessary and Proper Clause. A recent scholarly survey of founding-era corporate charters has confirmed that the word "proper," particularly when coupled with "necessary," described compliance with fiduciary obligations. *Id.* at 173-74 (survey of 374 contemporaneous charters).

B. The fiduciary rules encapsulated by the requirement that laws be "proper" included well-established limitations on delegated governmental power.

When the Constitution was adopted, a series of judicial holdings already had applied to government authority the fiduciary norms encapsulated in the requirement that laws be "proper." Perhaps the first was Rooke's Case (C.P. 1598) 77 Eng.Rep. 209,[24] which involved a statute giving sewer commissioners power to assess landowners for the costs of repairing water-control projects. The statute authorized the commissioners to assess the landowners as the commissioners "shall deem most convenient to be ordained." The

---

[24] *Rooke's Case* is the foundational authority for the interpretation of delegated powers. WILLIAM WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW 293-94 (10th ed., 2009).

commissioners used this statute to impose the full costs of a repair on a single landowner, even though others also benefitted from the project. The court ruled for the landowner because,

> notwithstanding the Words of the commission give Authority to the commissioners to do according to their Discretions, yet their Proceedings ought to be limited and bound with the Rule of Reason and law. For Discretion is a Science or Understanding to discern between Falsity and Truth, between Wrong and Right, between Shadows and Substance, between Equity and colourable Glosses and Pretences, and not to do according to their Wills and private Affections. . . .

77 Eng.Rep. 210.

In other words, discretion, even when textually unlimited, had to be exercised reasonably – and in a disinterested and *impartial* fashion.

By the end of the seventeenth century, fiduciary-style constraints on delegated power had become firmly established. STANLEY DE SMITH ET AL., JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 297-98 (5th ed. 1995); *see also* Estwick v. City of London (K.B. 1647) 82 Eng.Rep. 515, 516 ("wheresoever a commissioner or other person had power given to do a thing at his discretion, it is to be understood of sound discretion, and according to law").

In the eighteenth century, courts continued to apply those constraints, even to very broadly worded

grants of discretion. *E.g.*, Keighley's Case (C.P. 1709) 77 Eng.Rep. 1136, 1138 (statute authorizing sewer commissioner to make rules "after your own wisdoms and discretions" implicitly required the agent to exercise discretion "according to law and justice"); Leader v. Moxon (C.P. 1773) 96 Eng.Rep. 546. In *Leader*, paving commissioners, under a statute giving them power to pave or repair streets "in such a manner as the commissioners shall think fit," ordered a road repair that effectively buried the doors and windows of plaintiff's house. In awarding damages, the court wrote that the agents

> had grossly exceeded their Powers, which must have a reasonable construction. Their Discretion is not arbitrary, but must be limited by Reason and Law. . . . [H]ad Parliament intended to demolish or render useless some houses for the Benefit or Ornament of the rest, it would have given express Powers for the Purpose, and given an Equivalent for the loss that Individuals might have sustained thereby.

Id. at 546-47.

These constraints on government discretion were inherent in the exercise of delegated governmental power during the founding era. In England, these rules did not apply to Parliament itself because they were inferences about Parliament's intentions in delegating to executive and judicial agents. The American Constitution, however, *did* apply fiduciary rules to Congress, which, unlike Parliament, received only

delegated authority. The Necessary and Proper Clause is the Constitution's vehicle for making this clear.

Prevailing case law had established that discretion in governmental actors must be exercised impartially (*Rooke's Case*; *Keighley's Case*), with attention to causal efficacy (*Keighley's Case*), in a measured and proportionate fashion (*Leader*), and with regard for the rights of affected subjects (*Leader*). *See* ORIGINS at 120, 137-41 (elaborating the substantive requirements contained in the leading cases). These fiduciary-style limitations were encapsulated by a provision stating that laws for executing powers must be "proper."

Thus, the Necessary and Proper Clause affirmed that Congress (1) enjoyed incidental powers, but (2) only to the extent exercised in conformance with the full panoply of fiduciary duties. ORIGINS at 80.

VI. The individual mandate is not a "proper" law for executing the Commerce Power.

As detailed *supra*, the Founders sought to incorporate fiduciary standards into the Constitution. One way they did so was to require that federal laws be "proper." Propriety requires, at the least, compliance with basic fiduciary norms.

One of the most basic fiduciary obligations is the duty of impartiality, i.e., to treat all principals with presumptive equality. RESTATEMENT (SECOND) OF TRUSTS §183 (1995) ("When there are two or more beneficiaries of a trust, the trustee is under a duty to

deal impartially with them."). In *Keighley's Case*, for instance, the sewer commissioners could not impose the full costs of projects or repairs on only some of the affected landowners, even when the governing statutes seemed to provide that discretion. Nor under *Leader* could the paving commissioners repair a road by burying one person's house.

The purpose of the individual mandate is to force people who choose not to buy insurance to enter the market in order to subsidize other people. Although Congress could fund an insurance subsidy program for high-risk individuals through general taxation, the individual mandate is not a tax but is essentially a taking or a form of involuntary servitude. It is analogous to, for example, compelling physicians, under penalty of fine, to devote fifteen hours per week to providing health care to favored individuals. It also is analogous to relieving distress in the automobile industry by compelling citizens to buy cars. Similarly, Congress cannot use the Necessary and Proper Clause to force one group of citizens to buy a product to benefit other groups, even if Congress could assist by resorting to legitimate constitutional powers.

Although the individual mandate is unprecedented, the Founders were familiar with a related commercial regulation: the government-chartered monopoly. When government chartered a monopoly, it limited the market to one provider. All or most monopolies were less intrusive than the individual mandate, because under monopoly conditions citizens

remained free to "go without" – to abstain from purchasing the product altogether. Thus, the citizens of Boston in 1773 abstained from purchasing monopolized tea. But as the Boston Tea Party demonstrated, grants of monopolies were profoundly unpopular.[25] They were seen as violations of the public trust; because they erected a system of commercial favoritism, they violated the government's fiduciary obligation to treat citizens impartially. For this and other reasons they also were held to violate common law. Case of Monopolies (Q.B. 1602) 77 Eng.Rep. 1260.

Leading Founders were split on whether the congressional power to regulate commerce included authority to establish monopolies. *Compare* 2FARRAND, RECORDS OF THE FEDERAL CONVENTION, at 616 (James Wilson claiming such authority), 633 (Elbridge Gerry

---

[25] *See* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 14THE PAPERS OF THOMAS JEFFERSON 21 (Boyd ed., 1958) ("With regard to monopolies they are justly classified among the greatest nuisances in Government."). Jefferson agreed. Letter from Thomas Jefferson to James Madison (July 31, 1788), in 7THE WRITINGS OF THOMAS JEFFERSON 98 (Bergh ed., 1907).

Several state ratifying conventions proposed that the Constitution be amended to prohibit the grant of a commercial monopoly. HERMAN AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY 255 (1897); *see also* Grzandziel, *A New Argument for Fair Use Under the Digital Millennium Copyright Act*, 16 U. MIAMI BUS.L.REV. 171, 177-81 (2008) (discussing requests by Mass., N.H., N.C., and N.Y. for amendments to prohibit Congress from creating monopolies and describing the hostility of the Founders to monopolies, except for copyrights and patents).

to like effect) *with* 616 (George Mason to the contrary). Yet during the ratification debates, the Constitution's advocates asserted that any law creating a monopoly, even if otherwise within congressional power, would be invalid as "improper" under the Necessary and Proper Clause. As a Federalist writer calling himself the "Impartial Citizen" pointed out:

> In this case, the laws which Congress can make . . . must not only be *necessary*, but *proper* – So that if those powers cannot be executed without the aid of a law, granting commercial monopolies . . . such a law would be manifestly *not proper*, it would not be warranted by this clause, without absolutely departing from the usual acceptation of words.

8 DOCUMENTARY HISTORY at 431.

The conclusion is clear: If a commercial monopoly – which citizens may avoid by not purchasing the product monopolized – is constitutionally void as "improper," then far more "improper" is a mandate for the benefit of a favored few that none but a favored few may avoid.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

DAVID B. KOPEL
Counsel of Record
INDEPENDENCE INSTITUTE
727 East 16th Avenue
Denver, Colo. 80203
(303) 279-6536
Counsel for Amici Curiae

AMICUS CURIAE BRIEF

No. 11-398

IN THE

Supreme Court of the United States

DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF AMICUS CURIAE BLUE CROSS AND BLUE SHIELD OF MASSACHUSETTS, INC. IN SUPPORT OF PETITIONERS

(MINIMUM COVERAGE PROVISION)

STEPHANIE LOVELL
JOSEPH HALPERN
BLUE CROSS AND BLUE SHIELD
OF MASSACHUSETTS, INC.
Landmark Center, 401 Park Dr.
Boston, MA 02115
(617) 246-3500
Stephanie.Lovell@bcbsma.com

DEAN RICHLIN
ROBERT E. TOONE
Counsel of Record
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210
(617) 832-1000
rtoone@foleyhoag.com

QUESTION PRESENTED

Amicus curiae Blue Cross and Blue Shield of Massachusetts, Inc. submits this brief in support of this Court's review of Question I in No. 11-398: Whether Congress had the power under Article I of the Constitution to enact the minimum individual insurance coverage mandate, 26 U.S.C. § 5000A, of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

TABLE OF CONTENTS

Question Presented i

Table of Authorities iii

Interest of the Amicus Curiae 1

Summary of the Argument 4

Argument 6

MASSACHUSETTS'S EXPERIENCE WITH HEALTH CARE REFORM DEMONSTRATES THE INTEGRAL NATURE OF THE INDIVIDUAL MANDATE TO THE BROADER REGULATORY SCHEME. 6

A. The ACA's Reform Structure Follows the Massachusetts Model. 7

1. Chapter 58 combined public coverage expansions, private market reforms, employer participation requirements, and an individual mandate. 7

2. The ACA is modeled on Chapter 58. 9

B. The Individual Mandate Is Critical to Massachusetts's Regulatory Scheme. 10

1. Prior to Chapter 58, in the absence of an individual mandate, Massachusetts's insurance market reforms were undermined by adverse selection. 11

2. Chapter 58 has resulted in decreased uninsurance, improved access to care, and improved risk selection. 14

Conclusion 18

TABLE OF AUTHORITIES

Cases

Gonzales v. Raich,
545 U.S. 1 (2005) 5,18

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932) 6

Thomas More Law Center v. Obama,
651 F.3d 529 (6th Cir. 2011) 5

United States v. Lopez,
514 U.S. 549 (1995) 5

Statutes

26 U.S.C. § 5000A 10

26 U.S.C. § 4980H 9

42 U.S.C. § 1396a 9

42 U.S.C. § 18031 9

42 U.S.C. § 18091 14

42 U.S.C. § 300gg 10

42 U.S.C. § 300gg-1 10

42 U.S.C. § 300gg-3 10

42 U.S.C. § 300gg-14 9

Other Authorities

American Academy of Actuaries, *Critical Issues in Health Reform: Individual Mandate* (May 2009), http://www.actuary.org/pdf/health/individual_mandate_may09.pdf 13-14

Blue Cross Blue Shield of Massachusetts Foundation, *Life on the Edge of the Health Care System: The Growing Problem of the Uninsured in Massachusetts* (Jan. 2002), http://bluecrossfoundation.org/~/media/Files/Policy/Roadmap%20to%20Coverage/020101RTCLifeOnTheEdgeWielawski.pdf 2

Amitabh Chandra et al., *The Importance of the Individual Mandate – Evidence From Massachusetts*, 364 New Eng. J. Med. 293 (2011), http://www.nejm.org/doi/pdf/10.1056/NEJMp1013067 12,16-17

Congressional Budget Office, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* (June 16, 2010), http://www.cbo.gov/ftpdocs/113xx/doc11379/Eliminate_Individual_Mandate_06_16.pdf 14

David M. Cutler & Richard J. Zeckhauser, *Adverse Selection in Health Insurance*, NBER Working Paper No. 6107, National Bureau of Economic Research (1997)..... 13

Jonathan Gruber, *Massachusetts Points the Way to Successful Health Care Reform*, 30 J.

Pol'y Analysis & Mgmt. 184 (2011), http://econ-www.mit.edu/files/6408 12

John Holahan et al., Blue Cross Blue Shield of Massachusetts Foundation, *Roadmap to Coverage: Synthesis of Findings* (Oct. 2005), http://www.urban.org/uploadedPDF/411327_roadmap_synthesis.pdf 2

Kaiser Family Foundation, *2011 Employer Health Benefits Survey* (2011), http://ehbs.kff.org/pdf/2011/8225.pdf 15-16

Genevieve M. Kenney et al., *Health Reform in Massachusetts Cut the Uninsurance Rate Among Children in Half*, 29 Health Aff., June 2010, at 1242-47 15

Jonathan T. Kolstad & Amanda E. Kowalski, *The Impact of Health Care Reform on Hospital and Preventative Care: Evidence from Massachusetts*, NBER Working Paper No. 16012, National Bureau of Economic Research (2010), http://hc.wharton.upenn.edu/jkolstad/w16012.pdf 15

Sharon K. Long, Urban Inst., *What Is the Evidence on Health Reform in Massachusetts and How Might the Lessons from Massachusetts Apply to National Health Reform?* (June 2010), http://www.urban.org/UploadedPDF/412118-massachusetts-national-health-reform.pdf 16

Massachusetts Health Connector and Department of Revenue, *Data on the Individual Mandate: Tax Year 2009* (Nov. 2011), http://www.mass.gov/dor/docs/dor/health-care/2011/2009-health-care-report.pdf 17

John E. McDonough et al., *The Third Wave of Massachusetts Health Care Access Reform*, 25 Health Aff., Sept. 14, 2006, at w420-w431, http://content.healthaffairs.org/content/25/6/w420.full.pdf+html 6

Kavita Patel & John McDonough, *From Massachusetts to 1600 Pennsylvania Avenue: Aboard the Health Reform Express*, 29 Health Aff., June 2010, at 1106 14

Alan G. Raymond, Blue Cross Blue Shield of Massachusetts Foundation, *Massachusetts Health Reform: A Five Year Progress Report* (Nov. 2011), http://bluecrossfoundation.org/Health-Reform/~/media/0FF9BF33E14E4E089335AD12E8DEB77E.pdf .....*passim*

Sara Rosenbaum, *A "Broader Regulatory Scheme" – The Constitutionality of HealthCare Reform*, 363 N. Eng. J. Med. 1881 (2010), http://www.nejm.org/doi/pdf/10.1056/NEJMp1010850 13

Nancy C. Turnbull et al., *Insuring the Healthy or Insuring the Sick? The Dilemma of Regulating the Individual Health Insurance Market: Short Case Studies of Six States* (2005), http://www.cshp.rutgers.edu/DOWNLOADS/4990.PDF 11-12

Nancy C. Turnbull & Nancy M. Kane, *Insuring the Healthy or Insuring the Sick? The Dilemma of Regulating the Individual Health Insurance Market: Findings from a Study of Seven States* (2005), http://www.commonwealthfund.org/usr_doc/771_Turnbull_insuring_healthy_or_sick_findings.pdf 12

INTEREST OF THE AMICUS CURIAE

Blue Cross and Blue Shield of Massachusetts, Inc. ("BCBSMA") is a not-for-profit organization that was founded 70 years ago by a group of community-minded business leaders.[1] A licensee of the national Blue Cross and Blue Shield Association trademark and the only Blue Cross plan in Massachusetts, BCBSMA provides health care insurance to approximately three million members in Massachusetts and across the nation.

BCBSMA is committed to making quality health care affordable. It has long supported enhanced access to health care and health care reform. Notably, BCBSMA, together with a broad array of employers, providers, other health insurers, and citizens, supported the enactment by the Commonwealth of Massachusetts in 2006 of *An Act Providing Access to Affordable, Quality, Accountable Health Care*, Chapter 58 of the Acts of 2006 ("Chapter 58"). Among its many interrelated provisions, Chapter 58 includes the requirement that all Massachusetts residents 18 and older obtain health insurance, if affordable coverage is available, or else be subject to a state income tax penalty.

---

[1] In accordance with Supreme Court Rule 37.3(a), counsel for all parties have consented to the filing of amicus briefs, and copies of the letters of general consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, BCBSMA states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than BCBSMA or its counsel.

It is widely recognized that Chapter 58 has served as a model for the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("ACA" or the "Act"). For the past five years, BCBSMA has operated and provided insurance under Chapter 58 and related laws and regulations, and it will be subject to the analogous provisions of ACA.

BCBSMA's support for health care reform has also included the creation, initial funding, and continued support of the Blue Cross and Blue Shield of Massachusetts Foundation (the "Foundation" or the "BCBSMA Foundation"). The mission of the Foundation is to expand access to health care for low-income and vulnerable residents of Massachusetts. In furtherance of this mission, it played a critical role in the 2006 health care reform effort. In 2002 the Foundation issued a report that acted as a primer on the uninsured for policymakers, lawmakers, advocates, and other health care access leaders. *See* Blue Cross Blue Shield of Massachusetts Foundation, *Life on the Edge of the Health Care System: The Growing Problem of the Uninsured in Massachusetts* (Jan. 2002). In 2004, the Foundation launched the "Roadmap to Coverage," a multi-year policy initiative to study options for expanding coverage to the uninsured in Massachusetts. *See, e.g.*, John Holahan et al., Blue Cross Blue Shield of Massachusetts Foundation, *Roadmap to Coverage: Synthesis of Findings* (Oct. 2005). This initiative provided the framework for

the discussion, advocacy, and policymaking that eventually led to Chapter 58.

Since 2006, the Foundation has closely followed the implementation of Chapter 58 in Massachusetts and produced research and reports on the reform's impact on access to health care, access to health insurance, and other outcomes. BCBSMA's familiarity with this material and its extensive experience within the Massachusetts insurance market give it the unique opportunity to provide information to the Court about the individual mandate's essential importance to an analogous statutory scheme that has been in effect for more than five years. Because under Supreme Court Rule 37.1 amicus briefs should address relevant matter not already brought to the Court's attention, this brief does not repeat legal arguments presented in the brief filed by the Solicitor General in No. 11-398 on January 6, 2012.

In view of the Massachusetts experience, BCBSMA remains firmly committed to the 2006 health care reform and the individual mandate, and believes that the closely related reforms enacted by Congress in 2010 will further advance important economic and social goals.

SUMMARY OF THE ARGUMENT

In enacting the ACA, Congress intended that the individual mandate or "minimum coverage" provision, 26 U.S.C. § 5000A, in coordination with the Act's other reforms, would work to reduce barriers to insurance coverage, improve access to health care, and lower premiums by minimizing adverse selection and broadening insurance risk pools to include healthy individuals. The structure of the ACA closely follows that of Chapter 58, Massachusetts's pioneering 2006 health reform law, and Massachusetts's experience over the last several decades confirms that Congress had a rational basis for finding that the individual mandate would advance these important goals.

The overarching objective of Chapter 58 was to achieve nearly universal health insurance coverage for the Commonwealth's 6.5 million residents. In the five years since the law's enactment, that objective has been effectively realized. Guided by the principle of shared responsibility, Chapter 58's public programs and private requirements and incentives have overcome the primary barriers to coverage, especially the inability of many low- and moderate-income individuals to afford adequate health insurance and the willingness of some people to forgo coverage even when they can afford it. This achievement has been accompanied by improved overall access to care, a significant reduction in racial and ethnic disparities in access to and use of health care, and improved risk selection achieved by bringing healthier people into the risk pool. *See generally* Alan G. Raymond,

Blue Cross Blue Shield of Massachusetts Foundation, *Massachusetts Health Reform: A Five Year Progress Report* (Nov. 2011).

The individual mandate is an integral part of Massachusetts's broader regulatory scheme and essential to the positive outcomes that have resulted from it. This Court has held that Congress has authority to regulate even local noneconomic behavior when such regulation is an "essential part[] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gonzales v. Raich*, 545 U.S. 1, 24-25 (2005) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).[2] Massachusetts's experience demonstrates the centrality of the individual mandate to Congress's regulation of the larger interstate markets in health care delivery and health insurance.

---

[2] Although this brief focuses on the essential nature of the individual mandate to Congress's broader economic regulatory scheme, BCBSMA also believes that the provision is "a valid exercise of the Commerce Power because Congress had a rational basis for concluding that, in the aggregate, the practice of self-insuring for the cost of health care substantially affects interstate commerce." *See Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 545 (6th Cir. 2011).

ARGUMENT

MASSACHUSETTS'S EXPERIENCE WITH HEALTH CARE REFORM DEMONSTRATES THE INTEGRAL NATURE OF THE INDIVIDUAL MANDATE TO THE BROADER REGULATORY SCHEME.

Health reform in Massachusetts has been "more evolutionary than revolutionary." Alan G. Raymond, Blue Cross Blue Shield of Massachusetts Foundation, *Massachusetts Health Reform: A Five Year Progress Report* 5 (Nov. 2011) ("*2011 Progress Report*"). Consistent with the vision of states as "laboratories of democracy" willing to experiment with approaches to meeting the needs of society, *see New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), two decades of legislative and regulatory innovation preceded Massachusetts's enactment of Chapter 58 in 2006. *See* John E. McDonough et al., *The Third Wave of Massachusetts Health Care Access Reform*, 25 Health Aff., Sept. 14, 2006, at w420-w431. The Massachusetts Legislature continues to pursue reforms designed to contain costs, improve quality, and meet other health care challenges.

Chapter 58 built upon the then-existing hybrid system of private, employer-based insurance combined with public coverage for the elderly, the poor and the disabled, and children. Using as a framework the concept of "shared responsibility" among government payers, employers, and individuals, the Legislature established a comprehensive and interrelated package of reforms,

including subsidies for low- and moderate-income individual purchasers of health insurance, employer penalties, a state-operated insurance exchange, and – to provide for the broad sharing of risk necessary for near-universal coverage – a mandate imposed on those individuals able to purchase affordable health insurance.

A. The ACA's Reform Structure Follows the Massachusetts Model.

Massachusetts's 2006 health reform law has been frequently described as a model for the insurance coverage provisions of the ACA. Although the scope of the ACA is broader, Chapter 58 and the ACA share a similar structure.

1. Chapter 58 combined public coverage expansions, private market reforms, employer participation requirements, and an individual mandate.

Chapter 58 included an array of interrelated public and private initiatives to achieve the goal of near-universal health coverage for Massachusetts's residents.

Chapter 58 expanded subsidized coverage for lower-income adults through a new program called Commonwealth Care. The law also expanded eligibility for MassHealth (Massachusetts's combined program for Medicaid and the Children's Health Insurance Program) and restored programs

and benefits that had been suspended several years earlier.

To make employers financially accountable for failing to participate in their employees' health coverage, Chapter 58 requires employers with 11 or more full-time equivalent employees to make a "fair and reasonable contribution" to employee coverage or pay a "fair share assessment" of $295 per worker per year.

The law restructured the private insurance market by requiring insurance carriers to merge their individual and small-group memberships into a single pool, using the same rating methodologies for the entire population. By spreading the financial risk of insuring the individual and small-group populations over a larger pool of insured, this reform was intended to make individual insurance more affordable. Chapter 58 also extended dependent care through private health insurance and created a new government mechanism – the Commonwealth Health Insurance Connector Authority ("Health Connector") – through which individuals and small businesses may purchase private insurance plans that meet state standards for adequacy of coverage, affordability, and overall value.

Finally, the law requires all Massachusetts residents 18 and older to obtain health insurance if affordable coverage is available, or else be subject to a state income tax penalty. The goals of the mandate are, among other things, to create the largest possible pool of insured people in order to spread the financial risk among healthy and sick

residents, to encourage more workers to accept employers' offer of coverage, and to increase enrollment by lower-income individuals in public programs for which they are eligible. The mandate went into effect in July 2007.

2. The ACA is modeled on Chapter 58.

The structure of the ACA closely follows the Massachusetts model. First, like Chapter 58, the ACA expands Medicaid eligibility and subsidies for low-income individuals and families. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII). Second, the Act imposes penalties on large employers that do not offer adequate health insurance to their employees. *See* 26 U.S.C. § 4980H.

Third, the ACA provides for the creation of health insurance exchanges like Massachusetts's Health Connector, marketplaces that will help facilitate the purchase of insurance for individuals and small employers. 42 U.S.C. § 18031. Fourth, as with Chapter 58, the ACA requires plans and issuers that offer dependent coverage to make the coverage available until the adult child reaches the age of 26. 42 U.S.C. §§ 300gg-14.

Fifth, the ACA institutes insurance market reforms that Massachusetts had implemented prior to Chapter 58: *guaranteed issue*, which requires insurers to issue insurance to any eligible applicant without regard to health status; and *modified community rating*, which limits those demographic factors that insurers may use to determine rates, including prohibiting insurers from considering an

individual's health or medical claims history. *See* 42 U.S.C. §§ 300gg-1(a), 300gg-3(a); 42 U.S.C. § 300gg.

Finally, the ACA provides that a non-exempted individual who fails to maintain a minimum level of health insurance must pay a tax penalty. 26 U.S.C. § 5000A. Like Chapter 58, the Act allows for exemptions from the individual mandate based on affordability, religious beliefs, or personal hardship. *See* 26 U.S.C. § 5000A(d)–(e). Both the insurance-market reforms discussed above and the individual mandate will take effect in 2014.

B. The Individual Mandate Is Critical to Massachusetts's Regulatory Scheme.

Chapter 58 has now been in effect for five years, and popular support for the law remains high. *2011 Progress Report* at 3. Because Chapter 58 entails a comprehensive package of interrelated reforms reflecting the principle of shared responsibility, it is difficult to assess the impact of any particular reform in isolation. Nevertheless, initial data gathered by the BCBSMA Foundation and others indicate that, both directly and in coordination with other reforms, the individual mandate has helped to achieve key legislative objectives, including reduced barriers to coverage, improved access to care, improved risk selection, and lower cost for coverage in the non-group market (*i.e.*, where individuals and families purchase policies not as part of a group).

1. Prior to Chapter 58, in the absence of an individual mandate, Massachusetts's insurance market reforms were undermined by adverse selection.

Congress has described the individual mandate as critical to the ACA's insurance market reforms because "[b]y significantly increasing health insurance coverage, the [mandate], together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums." 42 U.S.C. § 18091(2)(I). This finding is confirmed by what occurred in Massachusetts prior to implementation of Chapter 58's individual mandate.

Before 1996, BCBSMA was the insurer of last resort for individuals in Massachusetts. Unlike other carriers, BCBSMA was required to use community rating and to have its rates receive prior regulatory approval. Nancy C. Turnbull et al., *Insuring the Healthy or Insuring the Sick? The Dilemma of Regulating the Individual Health Insurance Market: Short Case Studies of Six States* 11 (2005).[3] In 1996, the Legislature enacted a number of reforms to the non-group market in an effort to make insurance coverage more accessible and affordable. These reforms included mandatory participation in the non-group market for carriers

[3] BCBSMA was allowed to impose a three-year waiting period for applicants with preexisting medical conditions. Turnbull, *supra*, at 11.

that covered more than 5,000 people in the small-group market; guaranteed issue and guaranteed renewability; and modified community rating, which "permitted the use of age and geography for rating purposes subject to certain rating bands." *Id.* Following implementation of these reforms, prices rose enormously in the non-group and small-group insurance markets, so that "by 2006 Massachusetts had a tiny non-group market and the highest non-group premiums in the nation." Jonathan Gruber, *Massachusetts Points the Way to Successful Health Care Reform*, 30 J. Pol'y Analysis & Mgmt. 184, 185 (2011); *see also* Turnbull, *supra*, at 13 (showing decline in enrollment in Massachusetts non-group market from 135,363 in 1996 to 55,268 in 2000); Nancy C. Turnbull & Nancy M. Kane, *Insuring the Healthy or Insuring the Sick? The Dilemma of Regulating the Individual Health Insurance Market: Findings from a Study of Seven States* xiii (2005) (concluding that "[i]n a system where purchasing health insurance continues to be voluntary, insurers and consumers are locked into a dance of avoiding the high-risk population").

This result was attributable in part to the problem of adverse selection, which occurs "when a larger fraction of relatively unhealthy people than healthy people purchase health insurance." Amitabh Chandra et al., *The Importance of the Individual Mandate – Evidence From Massachusetts*, 364 New Eng. J. Med. 293, 293 (2011). In the absence of an individual mandate or other reforms designed to reduce adverse selection, guaranteed issue and community rating provisions require insurers to accept all enrollees and not differentiate premiums

based on health status, which results in higher premiums across the board. Higher premiums lead some healthy people to opt out of the market (by dropping coverage or not signing up in the first place), which in turn worsens the pool of risk for those who remain insured and leads to even higher premiums to cover the resulting higher costs – leading to what economists call an adverse selection "death spiral." *See* David M. Cutler & Richard J. Zeckhauser, *Adverse Selection in Health Insurance*, NBER Working Paper No. 6107, National Bureau of Economic Research (1997).

A related issue is the problem of so-called "free riders": healthy individuals who, in the absence of a mandate, choose not to buy insurance coverage. When some of these individuals become ill and receive treatment without paying for it, the costs of their care are shifted to insured persons through higher premiums. *See* Sara Rosenbaum, *A "Broader Regulatory Scheme" – The Constitutionality of HealthCare Reform*, 363 N. Eng. J. Med. 1881, 1882 (2010) (describing "rampant shifting of costs onto millions of other Americans who have chosen to be insured" as threat to survival of functional health care system).

Massachusetts legislators included the individual mandate in Chapter 58 in part to prevent the problems of adverse selection, so-called free riders, and associated cost-shifting from defeating the goal of comprehensive health reform. *See also* American Academy of Actuaries, *Critical Issues in Health Reform: Individual Mandate* 1 (May 2009) (stating that "an effective and enforceable individual

mandate" is most effective tool to increase overall participation in health insurance plans, thereby minimizing adverse selection).

2. Chapter 58 has resulted in decreased uninsurance, improved access to care, and improved risk selection.

In its findings, Congress observed that the ACA's individual mandate regulates "economic and financial decisions about how and when health care is paid for, and when health insurance is purchased," 42 U.S.C. § 18091(2)(A), and anticipated that the Act's reforms will significantly reduce the number of uninsured and lower health insurance premiums, *id.* § 18091(2)(F).[4] The impact of Massachusetts's individual mandate and related reforms in Chapter 58 can now be measured in several of these areas.

First, "Chapter 58's three-legged stool of insurance market reform, an individual mandate, and coverage subsidies has dramatically decreased uninsurance in Massachusetts." Kavita Patel & John McDonough, *From Massachusetts to 1600 Pennsylvania Avenue: Aboard the Health Reform Express*, 29 Health Aff., June 2010, at 1106, 1109. The Commonwealth now has the highest rate of health insurance coverage in the nation, with 98.1

---

[4] The Congressional Budget Office has estimated that elimination of the ACA's individual mandate would increase the number of uninsured by 16 million and, as a result of adverse selection, increase premiums for new non-group policies by 15 to 20%. Congressional Budget Office, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* (June 16, 2010).

percent of residents insured, including 99.8 percent of children. *2011 Progress Report* at 3, 25. Overall, an estimated 411,000 more Massachusetts residents have health insurance than before implementation of Chapter 58 began in fall 2006. *Id.* at 25. *See also* Jonathan T. Kolstad & Amanda E. Kowalski, *The Impact of Health Care Reform on Hospital and Preventative Care: Evidence from Massachusetts* 33, NBER Working Paper No. 16012, National Bureau of Economic Research (2010) (finding that "the Massachusetts health insurance reform expanded coverage among the inpatient hospital population by approximately 36 percent relative to its pre-reform level"); Genevieve M. Kenney et al., *Health Reform in Massachusetts Cut the Uninsurance Rate Among Children in Half*, 29 Health Aff., June 2010, at 1242-47.

While most of the coverage gains that occurred during the first two years of the law were in Commonwealth Care, membership in employer-sponsored and non-group insurance rose during this period as well. *2011 Progress Report* at 25. Almost 78 percent of insured residents receive their coverage through an employer and, although the number of enrollees in employer-based coverage has fallen since the start of the economic downturn in 2008, employer participation in offering health insurance has risen. *Id.* at 3. Seventy-seven percent of Massachusetts employers with three or more employees offered insurance coverage to their employees in 2010, an increase of seven percentage points since 2005. *Id.* This compares with approximately 60 percent of employers offering health coverage to their workers nationwide. *See*

Kaiser Family Foundation, *2011 Employer Health Benefits Survey* 4-5 (2011).

Second, Chapter 58's reforms have resulted in significant increases in access to health care for all Massachusetts adults, including increased use of doctors, preventative care, and dental services and a higher percentage of adults with a usual source of care. *2011 Progress Report* at 25. More adults report visits to doctors and other health care providers, and fewer adults report going without needed care. Sharon K. Long, Urban Inst., *What Is the Evidence on Health Reform in Massachusetts and How Might the Lessons from Massachusetts Apply to National Health Reform?* 1 (June 2010). The incidence of residents not having their health care needs met because of cost has declined between 30 and 40 percent among low-income adults and adults with chronic health conditions. *2011 Progress Report* at 25. In addition, racial and ethnic disparities in access to and use of health care have decreased significantly. *Id.*

Third, initial evidence indicates that the individual mandate in Massachusetts is having its intended effect of improving risk selection by bringing healthier people into the risk pool. A recent article in the New England Journal of Medicine reports that at the start of the mandate's phase-in in mid-2007 there was a greater increase in healthy enrollees in Commonwealth Care than in enrollees with chronic illness. Chandra, *supra*, at 294-95. At the end of 2007, "there was an enormous increase in the number of healthy enrollees and a far smaller bump in the enrollment of people with chronic

illness." *Id.* at 295. "[C]learly the mandate brought many more healthy people than nonhealthy ones into the risk pool," the authors conclude. "The large jump in healthy enrollees that occurred when the program became fully effective suggests that . . . the mandate had a causal role in improving risk selection." *Id.*[5]

Finally, Chapter 58 has led to lower prices for coverage in the individual insurance market. The BCBSMA Foundation reports that prior to reform, residents who bought non-group coverage were, on average, significantly older and less healthy than the population at large, and, as a result, the average claims cost for non-group members was 40 percent higher than for small-group members. *2011 Progress Report* at 16. On July 1, 2007, the non-group and small-group markets were merged, and the six-month phase-in period for the individual mandate began. Coverage for non-group members thereafter became significantly more affordable. On average, premiums per member in the individual merged market were 33 percent lower in 2008 than premiums in the pre-reform, non-group market. *Id.*[6]

---

[5] Massachusetts has seen a high rate of compliance with the individual mandate, with only one percent of the approximately 4.7 million adult tax filers in 2009 being assessed a penalty for failing to obtain insurance coverage. Massachusetts Health Connector and Department of Revenue, *Data on the Individual Mandate: Tax Year 2009* at 7, 24 (Nov. 2011).

[6] Affordability remains a priority in Massachusetts even after enactment of Chapter 58. In 2008, Massachusetts enacted a broad array of measures related to health care costs and quality, and the Legislature is now considering legislation, including a proposal filed by Governor Deval Patrick, to

In sum, evidence shows that Massachusetts's individual mandate has functioned as an integral part of the Commonwealth's broader regulatory statutory scheme and is essential to the positive outcomes that have resulted from health reform to date. In consequence, this Court should determine that Congress had a rational basis for concluding that the individual mandate provision of the ACA is "necessary and proper for the regulation of interstate commerce." *Raich*, 545 U.S. at 36 (Scalia, J., concurring).

CONCLUSION

For the foregoing reasons, BCBSMA urges this Court to affirm the constitutionality of the minimum individual insurance coverage mandate, 26 U.S.C. § 5000A.

Respectfully submitted,

STEPHANIE LOVELL
JOSEPH HALPERN
BLUE CROSS AND BLUE SHIELD OF MASSACHUSETTS, INC.
Landmark Center
401 Park Drive
Boston, MA 02115
(617) 246-3500
Stephanie.Lovell@bcbsma.com

DEAN RICHLIN
ROBERT E. TOONE
Counsel of Record
FOLEY HOAG LLP
155 Seaport Blvd.
Boston, MA 02210
(617) 832-1000
rtoone@foleyhoag.co

JANUARY 2012

---

restructure the Commonwealth's health care payment system to improve quality of care and reduce costs.

AMICUS CURIAE BRIEF

No. 11-398

In The
Supreme Court of the United States

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

BRIEF OF SPEAKER OF THE HOUSE JOHN BOEHNER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS ON THE MINIMUM COVERAGE PROVISION ISSUE

CARRIE SEVERINO
Counsel of Record
AMMON SIMON
JUDICIAL CRISIS NETWORK
1413 K St. NW, Suite 1000
Washington, DC 20533
(616) 915-8180
carrie@judicialnetwork.com

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. The Necessary and Proper Clause Does Not Support the Individual Mandate 4

A. The Mandate Does Not Implement PPACA Provisions that are Valid Under the Commerce Clause; Instead it Cancels the Negative Effects of the Legitimate Provisions of the PPACA 7

B. Adopting Petitioners' Flawed Reasoning Would Have Negative Long-Term Effects on the Legislative Process 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Gonzales v. Raich, 545 U.S. 1 (2005) 5, 10

Kansas v. *Colorado*, 206 U.S. 46 (1907) 4

Kinsella v. *United States*, 361 U.S. 234 (1960).....4

McCulloch v. Maryland, 17 U.S. (Wheat.) 316 (1819).....5

New York v. United States, 505 U.S. 144 (1992).....5

Printz v. United States, 521 U.S. 898 (1997).....5

Seven-Sky v. *Holder*, 661 F.3d 1 (D.C. Cir. 2011).....6

Thomas More Law Ctr. v. *Obama*, 651 F.3d 529, 567 (6th Cir. Mich. 2011) 6

United States v. Comstock, 130 S. Ct. 1949 (2010).....*passim*

United States v. Darby, 321 U.S. 100 (1941) 9

United States v. S.E. Underwriters Ass'n, 322 U.S. 533 (1944).....8

Wickard v. Filburn, 317 U.S. 111 (1942).....10

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. I, § 8, cl. 18.....4

STATUTES

321 U.S. 100 (1941) 9

42 U.S.C.A. 18091(a)(2)(I) 8

Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010).....*passim*

TABLE OF AUTHORITIES – Continued

Page

RULES

H.R. R. XII, cl. 7, par. (c)(1), 112th Cong. (2011) 1

OTHER AUTHORITIES

Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, at 1 (Aug. 1994) 6

Making Health Care Work for American Families: Hearing Before the Subcomm. On Health of the House Comm. On Energy & Commerce, 111th Cong., 1st Sess. 10 (Mar. 17, 2009) 9

Stephen G. Breyer, *Making Our Democracy Work: A Judge's View* 83 (Knopf 2010) 14

THE FEDERALIST No. 10 (James Madison) 13

INTEREST OF *AMICUS*[1]

Amicus Curiae John Boehner is the Speaker of the House of Representatives of the 112th Congress. As such, he is acutely interested in the constitutional issues at stake in this litigation independent of any opposition he voiced, and has continued to voice, to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010) (hereinafter "PPACA" or "Act") on policy grounds.

Members of Congress must solemnly swear under oath to uphold the Constitution of the United States. Therefore, they bear an independent responsibility to uphold the Constitution of the United States by ensuring that the Legislative Branch stays within its constitutionally enumerated powers. To that end, Speaker Boehner oversaw the adoption of a new rule by the 112th Congress requiring every piece of legislation be accompanied by a statement citing 'the power or powers granted to Congress in the Constitution to enact the bill or joint resolution.' H.R. R. XII, cl. 7, par. (c)(1), 112th Cong. (2011).

Amicus believes his perspective as the House's sole elected leadership officer will assist the Court in understanding how the Individual Mandate falls

---

[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus* or his counsel has made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

outside the scope of Congressional power under the Necessary and Proper Clause. He is especially attuned to the negative impact that Petitioners' position on this issue would have on the legislative process.

Put simply, Congress acted without constitutional authority in enacting the Individual Mandate of the PPACA. In so doing, Congress has damaged its institutional legitimacy and has triggered severe conflicts between state and federal governments that the Constitution was carefully designed to avert. *Amicus*' interest, therefore, is in preventing the long-term damage to our governmental institutions that will result from the *ultra vires* nature of the PPACA.

SUMMARY OF THE ARGUMENT

The Necessary and Proper Clause serves an important but limited function in our constitutional scheme. Rather than simply giving Congress the means to implement one or more of its enumerated powers, Petitioners' interpretation would give Congress an *all-purpose* power to fill the gaps left by other legislation. Under this interpretation, a law would need only be predicated upon a Congressional finding that it is "necessary" to alleviate the supposed negative effects of other legislation, effectively doing away with the requirement that Congressional action be "legitimately predicated on an enumerated power." *United States v. Comstock*, 130 S. Ct. 1949, 1963 (2010). That would be a significant departure

from settled law, eliminating one of the key limits on federal power.

The understanding of the Necessary and Proper Clause advanced by Petitioners invites poorly-conceived or poorly-drafted statutes. Congress could routinely enact statutes which, like the health insurance industry reforms of the PPACA, are defective or otherwise insufficient to actually meet Congress' goals. By doing so, Congress could render the use of extra-constitutional fixes "essential." Thus, Congress could use the Necessary and Proper Clause to circumvent the limits on its powers. The more frequently Congress passes defective or contradictory statutes, and the more harmful or insufficient those statutes are, the greater the power that Congress could assume for itself under the Necessary and Proper Clause.

Petitioners' position, if accepted, would also diminish Congress' accountability to the electorate. The more convoluted the legislation passed by Congress, the more likely it will be that Members of Congress will not be able to understand or articulate the full scope of the legislation that has been considered and enacted. Consequently, Members will be less able to explain the impact of the legislation to their constituents, reducing the ability of voters to hold Members accountable for voting for clearly defined policies and making not only the legislative, but also the electoral process effectively dysfunctional.

In short, Petitioners' interpretation of the Necessary and Proper Clause is incorrect, would cause

significant long-term harm to the Constitution, and would encourage future Congresses to pass ill-conceived or poorly-drafted laws.

ARGUMENT

I. The Necessary and Proper Clause Does Not Support the Individual Mandate

By giving Congress the authority to "make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers, the Necessary and Proper Clause allows Congress to select the means by which to implement those powers. *See* U.S. CONST. art. I, § 8, cl. 18. Nevertheless, Congress must rely on a specified enumerated power; the Necessary and Proper Clause is not an independent grant of authority. *See United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) ("we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power"); *see also Kinsella* v. *United States*, 361 U.S. 234, 247 (1960) (the Necessary and Proper Clause "is not itself a grant of power, but a *caveat* that the Congress possesses all the means necessary to carry out the specifically granted foregoing powers of § 8 and all other powers vested by this Constitution) (internal quotation marks and citation omitted; emphasis in original); *Kansas* v. *Colorado*, 206 U.S. 46, 88 (1907) (the Necessary and Proper Clause "is not the delegation of a new and independent power, but

simply provision for making effective the powers theretofore mentioned.").

As Chief Justice Marshall explained in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." 17 U.S. (Wheat.) 316, 421 (1819), *Comstock*, 130 S. Ct. at 1956 (quoting *McCulloch*, 17 U.S. at 421). This classic statement of the Necessary and Proper Clause sets clear limits on Congressional power which "are not merely hortatory." *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring) (*citing Printz v. United* States, 521 U.S. 898 (1997) (a law is not '*proper* for carrying into Execution the *Commerce Clause* '[w]hen [it] violates [a constitutional] principle of state sovereignty'") (emphasis in original); *New York v. United States*, 505 U.S. 144 (1992) (same). Regardless of how "necessary" Congress may deem a provision to be to a particular regulatory scheme, the Necessary and Proper Clause may not be stretched to include illegitimate ends, inappropriate means, or laws inconsistent with the letter or spirit of the Constitution.

Petitioners' reliance on the Necessary and Proper Clause is only required because the Individual Mandate is not authorized by any enumerated power. If the Individual Mandate were an exercise of Congress' authority under the Commerce Clause, no recourse to another clause would be necessary. But, as has been

shown in the other briefs in this case and in the decisions of several lower courts, Congress' commerce power does not allow it to *compel* passive individuals to engage in economic activity. Throughout all of American history, Congress has never even attempted to claim such broad powers until now. *See* Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, at 1 (Aug. 1994) (Congress has "never required people to buy any good or service as a condition of lawful residence in the United States"); *see also Seven-Sky* v. *Holder*, 661 F.3d 1, 14-15 (D.C. Cir. 2011) (noting that "[t]he Government concedes the novelty of the mandate and the lack of any doctrinal limiting principles."); *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 567 (6th Cir. Mich. 2011) ("The mandate is a novel exercise of Commerce Clause power. No prior exercise of that power has required individuals to purchase a good or service.")

Nonetheless, the Necessary and Proper Clause cannot be invoked without reference to an enumerated power. This Court has stated clearly that the Necessary and Proper Clause can only authorize legislation when "the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Comstock*, 130 S. Ct. at 1956. This "rational relation" standard is particularly stringent in the Necessary and Proper Clause context, "at least as exacting as it has been in the Commerce Clause cases, if not more so." *Id.* at 1966 (Kennedy, J., concurring). Thus, the standard

requires "a demonstrated link in fact, based on empirical demonstration" beyond "a mere conceivable rational relation" to the enumerated power. *Id.* at 1967 (Kennedy, J., concurring). Furthermore, for the Necessary and Proper Clause to apply, the relationship between the statute and the enumerated power must not be "too attenuated," and the provision must not be "too sweeping in its scope." *Id.* at 1963.

A. The Mandate Does Not Implement PPACA Provisions that are Valid Under the Commerce Clause; Instead it Cancels the Negative Effects of the Legitimate Provisions of the PPACA

Petitioners' major rationale for why the Individual Mandate was a "necessary and proper" means to implement PPACA's legitimate regulations of the health insurance market is that without the Individual Mandate, the other insurance regulations standing alone would create an untenable situation.

The PPACA's insurance market reforms include, *inter alia*, ending lifetime benefit limits and pre-existing condition exclusions (PPACA §§ 1001, 1201); mandating coverage of certain preventive care (PPACA § 1001); extending parental health coverage to unmarried adult children up to age 26 (PPACA § 1001); and various other measures designed to control costs (PPACA § 1001).

These market regulations do fall within the scope Congress' Commerce Clause power to regulate

the interstate health insurance market. *See United States v. S.E. Underwriters Ass'n*, 322 U.S. 533, 553 (1944). However, the Individual Mandate does not regulate the insurance market – instead it compels individuals who are not yet part of that market to enter it. It also neither implements nor enforces the PPACA's other provisions. Moreover, Petitioners have made no claims to suggest that these regulations would become *legally* ineffective without the Mandate. Instead, Petitioners have made a number of remarkable admissions about the *practical* consequences of the PPACA's other reforms and claim the Individual Mandate is necessary *to avert the harmful consequences of the PPACA itself.*

Petitioners' arguments for the Individual Mandate's legitimacy under the Necessary and Proper Clause constitute a string of stunning concessions about the harsh consequences of the PPACA without the Individual Mandate. Petitioners acknowledge that "guaranteed-issue and community-rating enacted in isolation [*i.e.*, without a mandate] create a spiral of higher costs and reduced coverage because individuals can wait to enroll until they are sick." Petrs. Br. at 18. They explain that "Congress found that without a minimum coverage provision, 'many individuals would wait to purchase health insurance until they needed care,' taking advantage of the Act's guaranteed-issue and community-rating provisions' 42 U.S.C.A. 18091(a)(2)(I), thereby driving up costs in the non-group market . . . " Petrs' Br. at 29. Petitioners elaborate that the absence of an individual mandate

threatens the health insurance market's viability, *id.*, and would likely "lead to a death spiral of individual insurance," *id.* at 30 (quoting *Making Health Care Work for American Families: Hearing Before the Subcomm. On Health of the House Comm. On Energy & Commerce*, 111th Cong., 1st Sess. 10 (Mar. 17, 2009). Petitioners' grim predictions are intended to demonstrate that "the minimum coverage provision 'is "necessary" to the end of regulating insurers' underwriting practices without running insurers out of business.'" Petrs' Br. at 30 (quoting Pet. App. 231a)

Yet this line of argument reflects a fundamentally flawed view of both the Necessary and Proper Clause and the limits of Congressional power generally. *Amicus* agrees with Petitioners that these pernicious outcomes will result from the Act; that is one reason he opposed the legislation in Congress. However, the fact that the Act will otherwise have devastating effects does not legitimize the Individual Mandate as an acceptable exercise of Congress' power under the Necessary and Proper Clause.

All parties and *Amicus* agree that the Necessary and Proper Clause grants Congress power to legislate the means to implement a proper exercise of its other, enumerated powers. For instance, in *United States v. Darby* the Supreme Court upheld recordkeeping requirements that eased enforcement of federal fair labor standards. *See* 321 U.S. 100 (1941). The Court explained that the recordkeeping requirements were "incidental to those for the prescribed wages and hours." *Id.* at 125. It reasoned that, "since Congress

may require production for interstate Commerce to conform to those conditions, it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it." *Id.* Similarly, the Court has upheld federal legislation which prevents evasion or obstruction of legitimate federal regulations. *See, e.g.*, *Raich*, 545 U.S. 1; *Wickard v. Filburn*, 317 U.S. 111 (1942).

In a very real and important way, the Individual Mandate is different from the laws previously upheld by the Supreme Court as valid exercises of the Necessary and Proper Clause power. The Individual Mandate does not implement the PPACA's other health insurance reforms. It does not facilitate or support the enforcement of these reforms, in contrast to the recordkeeping regulations in *Darby*. Unlike the statutes at issue in *Raich* and *Wickard*, the Individual Mandate does not combat the evasion or obstruction of the valid provisions of the PPACA. Each of the other sections of the PPACA can be independently justified as an exercise of Congress' commerce power, and not one needs the Individual Mandate to be legally effective or enforceable.

This much, then, is clear: the Individual Mandate is not necessary to implement or enforce the PPACA's reforms of the health insurance industry. Petitioners instead argue that the Mandate is "essential" to support their regulatory scheme, Petrs. Br. at 27, because they say the Mandate's policy effects will be to ameliorate the *consequences* of the Act's other reforms: misaligned incentives, higher premiums, and even

the demise of the insurance industry itself. *See* Petrs. Br. 18, 29-31.

Petitioners' argument relies on a fundamentally flawed conception of the Necessary and Proper Clause's purpose and scope. The Clause is not a blanket grant of Congressional power to be invoked by Congress whenever constitutionally-permissible provisions have negative real-world results that can only be mitigated by otherwise unconstitutional provisions. In Petitioners' view, Congress would be free to act without regard to the constitutional limits on its role whenever Congress believes a legitimate statute's policy implications require it. By extension, the more damaging a statute's valid provisions, the more power Congress has to pass "essential" or "necessary" "fixes" that would be otherwise unconstitutional.

Petitioners' argument is specious logically as well as constitutionally. Congress cannot circumvent constitutional limitations on its power by enacting ill-conceived legislation and then invoking the shortcomings of the legislation's policies as the basis for adopting other provisions which exceed Congress' powers under Article I. Such action could hardly be "legitimately predicated on an enumerated power."[2] *Comstock*, 130 S. Ct. 1963.

---

[2] The Individual Mandate also is vulnerable under the Supreme Court's dictate that provisions authorized by the Necessary and Proper Clause not be "too sweeping in its scope." *See Comstock*, 130 S. Ct. 1963. The Individual Mandate is the most

(Continued on following page)

B. Adopting Petitioners' Flawed Reasoning Would Have Negative Long-Term Effects on the Legislative Process

If permitted to stand, Petitioners' distortion of the Necessary and Proper Clause would cause serious, widespread, and long-lasting damage to the Constitution. Moreover, it would provide a tantalizing method by which future Congresses could enact ill-conceived and poorly-drafted laws. Under Petitioners' interpretation, a law would be upheld as constitutional whenever Congress asserted that it was "necessary" to remedy the negative ramifications of other provisions. This would effectively nullify the requirement that federal legislation be "legitimately predicated on an enumerated power." *Comstock*, 130 S. Ct. 1963. Such a departure from settled law would mark the end of a vital limitation on federal power.

Petitioners' interpretation invites poorly-conceived and sloppily-drafted statutes. Congress might easily succumb to the use of extra-constitutional fixes to remedy the negative effects of constitutional provisions merely by labeling such fixes "essential." The worse the consequences of a piece of legislation, the more power Congress could appropriate to fix them.

---

sweeping sort of provision imaginable – it touches every single American, regardless of any choices they make, in one of the most personal and intimate areas of life. This Mandate is unlike any other Congressional provision in the past two centuries of American history; it is not merely sweeping, but entirely unprecedented.

Certainly Congress does not need any incentives to create bad legislation.

If adopted by the Court, Petitioners' argument will also inevitably lead to less accountability between Congress and the American people. It would reward legislators for finding complicated work-arounds: if there is no constitutional authority to directly take a certain action, legislators could simply use what authority they do have to create a problem, thereby giving themselves a blank check to "fix" the problem. As Congress passes increasingly complex and convoluted legislation, the various working parts of which are only held together by otherwise unconstitutional "fixes," it will become ever harder for Members of Congress to understand and articulate the full effect of the legislation to their constituents. Statutes will become even more impenetrable for concerned citizens, and voters will lose their opportunity to evaluate their representatives based on clearly defined policy choices. The risk recognized by the Founders that legal complexities may undermine the rule of law and the authority of the citizenry remains significant today.[3]

---

[3] *See* THE FEDERALIST No. 10 (James Madison):

> It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the

(Continued on following page)

The PPACA itself illustrates this danger. The Act is, quite simply, a monstrosity. It consists of thousands of pages and hundreds of provisions, many in tension with one another. The result is a complex statutory scheme which, stripped of the Individual Mandate, is calculated to *decrease* the number of insured individuals, *increase costs* for those who are insured, and destroy the national health care market. *See* Petrs. Br. at 29-30. Petitioners misread the relevant case law in a way that threatens to undermine our legislative process. This Court should reject an interpretation which undercuts the Constitution's wise limits on congressional power.

> law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?

Justice Breyer makes the parallel argument that the transparency of judicial opinions fosters governmental accountability. *See* Stephen G. Breyer, *Making Our Democracy Work: A Judge's View* 83 (Knopf 2010).

CONCLUSION

The judgment of the Court of Appeals on the constitutionality of the individual mandate should be affirmed.

Respectfully submitted,

CARRIE SEVERINO
Counsel of Record
AMMON SIMON
JUDICIAL CRISIS NETWORK
1413 K St. NW, Suite 1000
Washington, DC 20533
(616) 915-8180
carrie@judicialnetwork.com

Counsel for Amicus Curiae

February 13, 2012

AMICUS CURIAE BRIEF

No. 11-398

In The Supreme Court of the United States

DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* CAESAR RODNEY INSTITUTE IN SUPPORT OF RESPONDENTS (MINIMUM COVERAGE PROVISION)

DEBORAH N. MISIR
GRANT M. LALLY
Counsel of Record
Lally & Misir LLP
220 Old Country Road
Mineola, NY 11501
(516) 741-2666
dmisir@lallymisir.com

Counsel for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond VA 23219 (800) 847-0477

QUESTIONS PRESENTED

I. Whether the activity regulated by the Patient Protection and Affordable Care Act lacks a limiting jurisdictional element, or explicit nexus with interstate commerce?

II. Whether the Congressional findings fail to provide a rational basis for the imposition of a minimum coverage requirement on all Americans under the authority of the Commerce Clause?

III. Whether the use of the Commerce Clause to compel Americans to purchase products from favored merchants is inconsistent with the Constitution's structure of limited, enumerated Federal power?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... i

TABLE OF AUTHORITIES..... iv

INTEREST OF THE AMICUS CURIAE..... 1

SUMMARY OF ARGUMENT..... 3

ARGUMENT..... 5

I. INTRODUCTION..... 5

II. THE LACK OF A LIMITING JURISDICTIONAL ELEMENT TENDS TO SHOW THAT THE MINIMUM COVERAGE REQUIREMENT EXCEEDS THE COMMERCE CLAUSE POWER. 8

A. Activity Regulated by the Commerce Clause should have a Concrete Nexus with Interstate Commerce..... 8

B. The PPACA Does Not Contain an Express Jurisdictional Element..... 11

III. THE CONGRESSIONAL FINDINGS OF THE PPACA DO NOT PROVIDE A RATIONAL BASIS FOR THE IMPOSITION OF A MINIMUM COVERAGE PROVISION ON ALL AMERICANS..... 14

A. When Congress Piles Inference Upon Inference to Establish a Nexus with Interstate Commerce, the Court is not Required to Give those Findings Deference..... 14

B. The PPACA's Congressional Findings Utilize Circular Logic and Prohibited "But-for" Causal Analysis to bring Every American within the Reach of the PPACA..... 16

IV. USE OF THE COMMERCE CLAUSE TO COMPEL AMERICANS TO PURCHASE PRIVATE PRODUCTS FROM FAVORED MERCHANTS IS UNPRECEDENTED, AND INCONSISTENT WITH THE CONSTITUTION'S STRUCTURE OF LIMITED, ENUMERATED FEDERAL POWER. 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES

A.L.A. Schechter Poultry Corp. v. U.S.,
295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935) 15

Brecht v. Abrahamson,
507 U.S. 619, 113 S.Ct. 1710 (1993) 20

Darcy *v. Allein (Allen)* 11 Co. 84b, 77 *Eng. Rep.* 1260 (K.B. 1603) 24

Gibbons v. Ogden,
22 U.S. (9 Wheat.) 1 (1824) 17

Gonzales v. Raich
545 U.S. 1, 125 S.Ct. 2195 (2005) 14, 15

Florida ex rel. Atty. Gen. v. U.S. Dept. of Health and Human Services,
648 F.3d 1235 (11th Cir. 2011) ..... *passim*

Florida ex rel. Bondi v. U.S. Dept. of Health and Human Services,
780 F.Supp.2d 1256 (N.D. Fla. 2011) 6

Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) 6

Thomas More Law Center v. Obama,
651 F.3d 529 (6th Cir. 2011) 7

U.S. v. Bass,
404 U.S. 336, 92 S.Ct. 515 (1971) 10, 12, 21

U.S. v. Lopez,
514 U.S. 549, 115 S.Ct. 1624 (1995) ..... *passim*

TABLE OF AUTHORITIES- CONTINUED

U.S. v. Morrison,
529 U.S. 598, 120 S.Ct. 1740 (2000).....*passim*

U.S. v. South-Eastern Underwriters Association,
32 U.S. 533 (1944).....20

CONSTITUTIONAL PROVISIONS

Commerce Clause of the U.S. Constitution ....*passim*

Necessary and Proper Clause of the U.S. Constitution 6

STATUTES

The Gun Free School Zones Act of 1990, 18 U.S.C. § 922 (q)(2)(A).....10,12

McCarran-Ferguson Act of 1945, 15 U.S.C. §§ 1011 *et seq.* (2010) 24

Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.App. §1202(a) 10

PPACA §1501(b), 26 U.S.C. § 5000A(a) .....*passim*

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 42 U.S.C. §18001 *et. seq.* (2010) ("PPACA") ...*passim*

PPACA § 1501(a)(1) 14, 16, 17

PPACA §1501(a)(2) 14, 17

PPACA §1501(a)(2)(I).....20

PPACA §1501(a)(2)(A) 17

TABLE OF AUTHORITIES- CONTINUED

PPACA §1501(a)(2)(B) 18
PPACA §1501(a)(2)(C) 19
PPACA §1501(a)(2)(D) 19
PPACA §1501(a)(2)(E) 19
PPACA §1501(a)(2)(F) 20
PPACA §1501(a)(2)(G) 20
PPACA §1501(a)(2)(H) 20
PPACA §1501(a)(2)(J) 20
PPACA §1501(a)(3) 14, 20
The Violence Against Women Act of 1994, § 40302, 108 Stat. 1941-1942, 42 U.S.C. § 13981(b) 10, 13

OTHER AUTHORITIES

Letters of Agrippa, 1 B. Schwartz, The Bill of Rights, A Documentary History 512, (1971) 22
The Federalist No. 22, (Alexander Hamilton) (C. Rossiter ed., 1961) 22
The Federalist No. 42, (James Madison) (C. Rossiter ed.,1961) 22
The Federalist No. 45, (James Madison) (C. Rossiter ed., 1961) 23
H.R.Conf. Rep. No. 103-711 at 385, U.S. Code Cong. & Admin. News 1994 1

TABLE OF AUTHORITIES- CONTINUED

James Madison, *Writings* 756 (J.N. Rakove ed., 1999) 23

The Magna Carta (1215) 23

George Mason, *The Anti-Federalist Papers and the Constitutional Convention Debates* (R. Ketcham ed., 1986) 22

The Statue of Monopolies (1624) 23

Tyler Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause* 49 J. COPY. SOC. 675, (2002) 23

Jennifer Stamen & Cynthia Broughter Cong. Research Serv., R 40725, *Requiring Individuals To Obtain Health Insurance: A Constitutional Analysis* 7 (2009) 13

Frank R. Strong, *Unraveling the Tangled Threads of Substantive Due Process, in Power and Policy in Quest of Law* (Myres S. McDougal & W. Michael Reisman eds., 1985) 23

INTEREST OF THE *AMICUS CURIAE*

The Caesar Rodney Institute (CRI) is a Delaware-based non-for-profit research and educational organization that focuses on promoting individual liberty, property rights, rule of law, and transparent and limited government for all Delawareans.

Delaware has for many years been a leading domicile for U.S. corporations (over fifty percent (50%) of all publicly traded companies in the U.S. and 63% of the Fortune 500) because of the singular competence and proficiency of its courts in business law. As Delawareans, CRI and its members have great interest in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 42 U.S.C. §18001 *et. seq.* (2010) ("PPACA") because it requires all U.S. citizens and legal residents to purchase or otherwise obtain qualifying health insurance, imposes significant new requirements on corporate employers, and establishes new rules in the private insurance market.

In particular, CRI is concerned that the PPACA extended Congressional power under the Commerce Clause without any explicit jurisdictional limit. CRI's expertise on issues of rule of law, transparency and the free market in the U.S. corporate context make it uniquely situated to contribute to this litigation as *amicus curiae*. CRI previously briefed the issues of jurisdictional element and congressional findings before the U.S. Court of Appeals for the Eleventh Circuit, and the

U.S. Court of Appeals for the D.C. Circuit because they had not been briefed by the parties or other *amici*. We now respectfully raise these issues for the Court's consideration.

SUMMARY OF THE ARGUMENT

This case is about the limits of Federal Government power under the Commerce Clause and Taxation Clause. Without meaningful limits, the Federal Government's power descends the slippery slope to a general welfare power which is reserved to the States under the U.S. Constitution.

This *amicus* focuses on three issues. First, the Patient Protection and Affordable Care Act ("PPACA") fails the Supreme Court's test under *United States v. Lopez*, 514 U.S. 549, 562-63, 115 S.Ct. 1624 (1995), because the mandate does not contain an express jurisdictional element which would limit its reach to activities in interstate commerce. *See id.*

Second, the Congressional findings of the PPACA do not provide a rational basis for the minimum coverage requirement because the findings employ circular logic and "but-for" causal reasoning that has been discouraged by this Court in *U.S. v. Morrison*, 529 U.S. 598, 615-20, 120 S.Ct. 1740, 1752-55 (2000).

Third, the Commerce Clause, a limited, enumerated power of the Federal Government was not intended to force all Americans to purchase private products from a favored set of merchants or businesses. Such a use of the interstate commerce power effectively grants the Federal Government a general welfare power that is incompatible with the federalist structure of enumerated federal power.

The minimum coverage provision of the PPACA is unconstitutionally broad, and the decision of the U.S. Court of Appeals for the Eleventh Circuit finding the minimum coverage provision unconstitutional should be affirmed.

ARGUMENT

I. Introduction

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, 42 U.S.C. §18001 *et. seq.* (2010) (collectively, the "Act" or "PPACA") provides that, "...an individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual...is covered under minimum essential coverage for such month." PPACA §1501(b), 26 U.S.C. § 5000A(a). An individual who does not comply, and is not otherwise exempt from the requirement, must pay a monetary penalty to the Federal Government. *See id.*

Accordingly, under the Act, individuals, including those who are not consuming any health care at all, those who would rather not receive medical care for personal or philosophical reasons other than religious convictions, those who are only consuming health care intrastate, and those who prefer to directly pay their doctors or other providers rather than use health insurance, are all compelled by the Federal Government to purchase health insurance products.

This case was initially heard in the Northern District of Florida. The Respondents challenged, among other things, the individual mandate of

Section 1501(b) of the Act, arguing that Congress lacked the power to require individual minimum coverage under the Commerce Clause and the Necessary and Proper Clause of the U.S. Constitution. The District Court held that the individual mandate was unconstitutional and not severable from the Act. *Florida ex rel. Bondi v. U.S. Dept. of Health and Human Services*, 780 F.Supp.2d 1256, (N.D. Fla. 2011).

On appeal, the U.S. Court of Appeals for the Eleventh Circuit affirmed the decision of the lower court with regard to the unconstitutionality of the individual mandate, holding that the individual mandate exceeds Congress' enumerated commerce power, but that the mandate is severable from the rest of the Act. *Florida ex rel. Atty. Gen. v. U.S. Dept. of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011).

Specifically, the Eleventh Circuit pointed to the unprecedented nature of the mandate requiring an individual to enter into a compulsory contract with a private company for the duration of their lifetime, the expansion of the substantial effects doctrine to justify invocation of the Commerce Clause, the lack of an adequate jurisdictional element in the Act, the highly attenuated link between the Congressional findings related to cost shifting and the activity to be regulated, and the individual mandate's intrusion into areas of traditional state concern. *Id.* at 1282-1313.

Two other U.S. Courts of Appeal have considered this issue, and have found that the individual mandate is constitutional. *See Seven-Sky*

v. Holder, 661 F.3d 1, 18-19 (D.C. Cir. 2011) (upholding the individual mandate but expressing discomfort with the lack of a limiting principle); *Thomas More Law Center v. Obama*, 651 F.3d 529, (6th Cir. 2011).

This brief focuses on two elements of constitutional review that the Court has applied in the past to Commerce Clause cases, and that the Eleventh Circuit identified as factors in its conclusion that the individual mandate is unconstitutional, but which have not otherwise received much attention in the briefing of this matter. The first issue is whether the activity regulated by the PPACA lacks an adequate jurisdictional element, or explicit nexus with interstate commerce, as required by *United States v. Lopez*, 514 U.S. 549, 562-63, 115 S.Ct. 1624, 1631-32 (1995). The second issue is whether the Congressional findings of the PPACA provide a rational basis for the imposition of the minimum coverage provision on all Americans under the authority of the Commerce Clause. *See U.S. v. Morrison*, 529 U.S. 598, 615-20, 120 S.Ct. 1740, 1752-55 (2000).

Neither issue standing alone is necessarily fatal to the Act. However, when viewed together with the unprecedented scope of the Act, and the PPACA's infringement in the areas of health and welfare which are traditionally the concern of the States, these questions collectively point to the constitutional infirmity of the Act. *See generally, Florida*, 648 F.3d 1235. Finally, this brief concludes by considering the constitutionality of the minimum

coverage requirement against the Anglo-American tradition of limiting state sanctioned monopoly.

II. The Lack of a Limiting Jurisdictional Element Tends to Show that the Minimum Coverage Requirement Exceeds the Commerce Clause Power.

Currently, individuals who do not obtain health insurance from an employer or public health insurance program, either purchase individual health insurance, or directly pay a health provider for service. In particular, young people often choose to forego the purchase of health insurance in favor of paying off student loans, or saving for their first home simply because they tend to be healthier than older members of the population.

Starting in 2013, the Act's individual mandate requires U.S. citizens and legal residents to purchase a health insurance product if they do not otherwise have health insurance or fall into an exception. PPACA §1501, 26 U.S.C. § 5000A(a). American Indians, illegal aliens, incarcerated individuals, and persons with financial hardship, or religious objections, or a gap in health insurance for less than three months, or incomes below a certain level are exempt from the requirement to purchase health insurance. *Id.*

There is no identifiable jurisdictional element in the text of the mandate that ties the minimum coverage requirement to interstate commerce. The

lack of an express jurisdictional element does not by itself render the requirement unconstitutional, but does tend to show that the enactment was not made in accordance with Congress' regulation of interstate commerce. *See Morrison*, 529 U.S. at 614.

A. Activity Regulated by the Commerce Clause should have a Concrete Nexus with Interstate Commerce.

The Court has stated that an important factor in determining whether a statute affects interstate commerce is the presence of a jurisdictional element which concretely ties the activity to be regulated to interstate commerce.[1] *Lopez*, 514 U.S. at 561-62; *Morrison*, 529 U.S. at 611-12.

In *Lopez*, the Court determined that the Gun-Free School Zones Act of 1990 ("GFSZA"), 18 U.S.C. § 922(q)(1)(A), which made it a federal offense to possess a firearm near a school zone, exceeded Congress' authority under the Commerce Clause because the statute did not contain an express jurisdictional element which, "ensure[d] through

---

[1] It is well established that under its Commerce Clause powers, Congress may regulate three types of activities. Namely, "the use of the channels of interstate commerce....the instrumentalities of interstate commerce or persons or things in interstate commerce...[and] activities that substantially affect interstate commerce." *See generally, Lopez* 514 U.S. 549. The case at bar concerns the "substantially affects" class of activities regulated under the Commerce power.

case-by-case inquiry that the firearm possession in question affects interstate commerce." *Id.* Similarly in *Morrison*, the Court, relying upon *Lopez*, struck down the Violence Against Women Act of 1994 ("VAWA"), § 40302, 108 Stat. 1941-1942, 42 U.S.C. § 13981(b), because it failed to contain an adequate jurisdictional element tying the statute's federal civil remedy for acts of violence motivated by gender to interstate commerce. *See Morrison*, 529 U.S. at 611-12.

A jurisdictional element is a section in the statute itself that ties the activity in question, on a case-by-case basis to interstate commerce. For example, in *Bass*, the Court affirmed the reversal of a conviction under a firearms statute, the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.App. §1202(a) because the Government had failed to demonstrate that the particular allegation involved possession of the weapon in commerce or affecting commerce. *U.S. v. Bass*, 404 U.S. 336, 347, 92 S.Ct. 515, 522 (1971). In that case, the Court confirmed that the elements of the crime included a jurisdictional element. " 'Any person who... receives, possesses or transports in commerce or affecting commerce... any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.'" *See id.* at 337.

Another example of a jurisdictional element is the language Congress subsequently added to the GFSZA after the Court determined that the statute was unconstitutional in the *Lopez* decision. Congress explicitly added a jurisdictional element. "'It shall be unlawful for any individual knowingly to

possess a firearm that has moved in or that otherwise affects interstate or foreign commerce...."' 18 U.S.C. § 922 (q)(2)(A). Again, the conduct to be regulated was concretely tied on an individualized basis to interstate commerce. A case by case analysis could be performed by determining whether the particular firearm in question had been moved or procured in interstate commerce.

B. The PPACA does not contain an Express Jurisdictional Element.

The PPACA does not contain a jurisdictional element which limits the statute's reach to activities conducted in interstate commerce. *See Florida*, 648 F. 3d at 1293-95. Rather, the statute sweeps all Americans into a class that is compelled to purchase private health insurance products, whether or not the individual is consuming health care, or has consumed health care in the past without payment.

As a threshold matter, it is not entirely clear from the text of the statute what activity is being regulated by this statute. The PPACA provides that "an individual" shall obtain health insurance for herself and her dependents for life. *See* PPACA §1501(b). The activity to be regulated appears to be the act of living and breathing in lawful status in the United States. Based upon the text of the mandate, neither the individual, nor the health care provided, nor the health insurance purchased has to have a nexus with interstate commerce. *See id.*

Moreover, the categories of individuals who are exempt from having to get health insurance

(American Indians, illegal aliens, incarcerated individuals, and persons with financial hardship, or religious objections, or a gap in health insurance for less than three months, or incomes below a certain level) are not differentiated from the group subject to the minimum coverage provision by factors related to interstate commerce. *See id.* These individuals appear to have been excluded merely as a matter of policy preference. As the *Florida* court noted, the minimum coverage requirement, "... is not even tied to those who consume health care. Rather, the language of the mandate is unlimited, and covers even those who do not enter the health care market at all. " 648 F.3d at 1293-94. This Court has never held that merely existing suffices to bring an individual in the United States under the purview of the Commerce Clause.

As the Act is currently written, there is no statutory text for the Court to perform the type of case by case analysis it required in *Bass, Lopez* and *Morrison*. In those cases, the Court assessed whether the regulated activity had an interstate nexus.

In *Bass*, the Court determined that the Government needed to demonstrate that the defendant had possessed a firearm in interstate commerce because Congress had passed the statute using its Commerce Clause authority. 404 U.S. at 347. In *Lopez*, the GFSZA forbade, "'...any individual knowingly to possess a firearm at a place that [he] knows ...is a school zone,'" 514 U.S. at 549 (*citing* 18 U.S.C. § 922(q)(1)(A)). Like the PPACA, the GFSZA applied to any individual engaged in the

activity to be regulated with no reference to interstate commerce, and the Court found the statute deficient from a Commerce Clause perspective.

Finally, the issue in *Morrison* was the VAWA civil liability provisions declaring that, "' [a] person ... who commits a crime of violence motivated by gender... shall be liable to the party injured...." 529 U.S. at 605-06 (citing 42 U.S.C. § 13981(c)). VAWA also defined a "crime of violence" without reference to whether or not it involved interstate commerce. *Id.* Thus similar to the PPACA, neither the regulated individual nor the predicate act expressly required a nexus with interstate commerce, and the Court found a jurisdictional element lacking in the statutory provision. *Id.* at 611-12.

In the case at bar, the Court should also examine the presence of an express jurisdictional element in the course of weighing whether or not the minimum coverage provision is a proper exercise of the Commerce Clause. Congress could have provided that a person who utilizes health care in interstate commerce shall obtain health insurance. *See e.g.* Jennifer Staman & Cynthia Broughter, Cong. Research Serv., R. 40725, Requiring Individuals To Obtain Health Insurance: A Constitutional Analysis 7 (2009). Congress chose not to. It is not enough to assert that the health insurance industry is interstate in nature in the Congressional findings or in the Government's arguments. As this Court determined in *Lopez* and *Morrison*, the text of the regulatory provision should itself articulate the jurisdictional limits of the

statute. Without a jurisdictional limit to Federal laws passed under the auspices of the Commerce Clause, the federalist structure of enumerated powers underpinning the Constitution is eviscerated, and the federal –state balance of power rests on the political whims of Congress.

III. The Congressional Findings of the PPACA Do Not Provide a Rational Basis for the Imposition of a Minimum Coverage Provision on All Americans.

The PPACA contains several findings by Congress. *See* PPACA § 1501(a)(1)-(3), 42 U.S.C. § 18091(a)(1)-(3). In past cases, this Court has examined Congressional findings to analyze Congress' assertion that the regulated activity in the statute at issue substantially affects interstate commerce. *See e.g. Lopez*, 514 U.S. 549, *Morrison*, 529 U.S. 598, *and Gonzales v. Raich* 545 U.S. 1, 22, 125 S.Ct. 2195, 2208 (2005). The Congressional findings in this case do not provide a rational basis for the individual mandate.

A. When Congress Piles Inference Upon Inference to Establish a Nexus with Interstate Commerce, the Court is not Required to Give those Findings Deference.

When acting under color of the Commerce Clause authority, Congress makes findings which identify the factual predicate or activity that impacts

interstate commerce. *See e.g. Lopez*, 514 U.S. 549, *Morrison*, 529 U.S. 598, *and Raich* 545 U.S. 1. However, the Court does not indiscriminately defer to those findings. *See Morrison*, 529 U.S. at 614 ("[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." (citing *Lopez*, 514 U.S. at 557, n.2)). Rather, the Court analyzes the findings to determine whether a rational basis exists for Congress' conclusions. *Raich* 545 U.S. at 22 (citing *Lopez* 514 U.S. at 557).

While a rational basis review is admittedly deferential, if the findings reflect a "but-for" causal logic that brings highly attenuated effects into the ambit of the Commerce Clause, this Court has historically rejected those findings. *See Morrison*, 529 U.S. at 616, n.6 (citing *Lopez*, 514 U.S. at 567 and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935)).

In *Morrison*, Congress made numerous findings in the VAWA regarding the serious impact of gender-motivated violence on victims and their families. *Id.* at 614-15. Among other things, Congress found that gender-motivated violence affects interstate commerce, " '...by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; ...increasing medical and other costs, and decreasing the supply of and the demand for interstate products." *Id.* at 615 (citing H.R. Conf. Rep. No. 103-711 at 385, U.S. Code Cong. & Admin. News 1994, pp. 1803, 1853).

Despite this plethora of findings linking the regulated act – gender based violence – to interstate commerce, the Court rejected the logic of Congress' findings, holding that a "but-for" causal chain from the initial occurrence of violent crime to every attenuated effect upon interstate commerce was not permissible under the Commerce Clause power. *Id.* The Court reasoned that accepting such a premise would allow Congress to reach and regulate any type of violent crime nationwide. *Id.* In addition, the Court went on to express concern that under a "but-for" causal logic, Congress could regulate any activity that it found was related to the economic productivity of individual citizens, including family law and other areas of traditional state regulation. *Id.* at 615-16.

B. The PPACA's Congressional Findings Utilize Circular Logic and Prohibited "But-for" Causal Analysis to bring Every American within the Reach of the Statue.

In the PPACA, Congress found, as the primary, general cause for the legislation, that, " [t]he individual responsibility requirement provided for in this section,... is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2)." PPACA § 1501(a)(1). Effectively, Congress stated that it was invoking the Commerce Clause power because its proposed regulation would substantially affect interstate commerce.

This circular logic does not withstand the most deferential level of judicial scrutiny. Congress cannot create the activity to be regulated, by offering up the regulatory means (the individual mandate) as itself the activity to be regulated under the Commerce Clause. *See Florida*, 648 F. 3d at 1298. If the Court were to accept such Orwellian reasoning, there would effectively be no substantive limits to the Commerce Clause. *See generally, Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Congress may not exercise its authority under the Commerce Clause simply because its proposed regulation would affect interstate commerce. The cart cannot come before the horse.

The Act also lists several secondary findings, described as, "Effects on the national economy and interstate commerce." PPACA §1501(a)(2). The first of those secondary findings, Finding (A) states in part that, "[t]he requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased." PPACA §1501(a)(2)(A). The Government now argues that this secondary finding is in fact the primary rationale for regulation. *See* Br. For Pet'rs on Minimum Coverage Provision p. 41. Even accepting this as true and ignoring the declared primary finding in the text of the Act, *see* PPACA § 1501(a)(1), Finding (A) does not indicate *why* every American's decisions on how to pay for their health care should be regulated by the Commerce Clause power.

Other findings in section (2) attempt to link an individual's decision of how to pay for her health care with interstate commerce concerns. For example, in Finding (B), Congress states, "Health insurance and health care services are a significant part of the national economy.... Since most health insurance is sold by national or regional health insurance companies, health insurance is sold in interstate commerce and claims payments flow through interstate commerce." PPACA §1501(a)(2)(B).

Here, Congress is conflating the health insurance market with the health care market. In fact, there is a distinction between health care and health insurance. An individual does not need to possess health insurance in order to purchase health care. Health care services are provided by doctors and other health professionals. In contrast, health insurance is a financial product; a risk management device that hedges against the costs associated with potential future medical care.

The Government now argues before this Court that is proper to treat the health insurance and health care markets as the same market because the majority of health care is financed through health insurance, *see* Br. For Pet'rs on Minimum Coverage Provision p. 35, and that Congress is entitled to define the market it is regulating as broadly as it wishes. Br. For Pet'rs on Minimum Coverage Provision p. 41. In other words, the Government is reasoning that because most Americans pay for their health care using health insurance, and health insurance is a significant part of the national

economy, the Federal Government can regulate how all Americans pay for their health care. Congress did not explicitly make such assertions in the Act, and even if it had, such reasoning epitomizes the "but-for" causal logic this Court rejected in *Morrison*. 529 U.S. at 614.

In another example of this type of reasoning, in Finding (E), Congress asserts that the economy loses up to $207 billion dollars a year because of the poorer health and shorter lifespan of the uninsured. PPACA §1501(a)(2)(E). In other words, an individual should be forced to carry health insurance because without health insurance, she might not seek as much medical care as she would if she had health insurance, therefore her health might be poorer and she might have a shortened lifespan, therefore her productivity would be reduced, and when this effect is multiplied, in the aggregate it would affect the size of the national economy.

Under this logic, it would be perfectly appropriate for Congress to legislate that every American buy a certain amount of fruits, vegetables, vitamins and supplements every day, and purchase a gym membership because, like the purchase of health insurance, such purchases would likely increase the health and lengthen the lifespan of more Americans, thereby increasing their productivity and the size of the national economy.

In other findings of the Act, Congress does not even bother to tie the individual mandate requirement to interstate commerce. For example, in Findings (C) and (D), Congress asserts that the

minimum coverage provision will increase the number of Americans who are insured and strengthen the private employer-based health insurance system. PPACA §1501(a)(2)(C)-(D). In Finding (F), Congress indicates that the cost of uncompensated medical care is passed on by health care providers to health insurance companies who then raise the premiums of families. PPACA §1501(a)(2)(F). In Finding (G), it is asserted that the financial security of families will be enhanced because increased health insurance coverage will lessen the number of personal bankruptcies. PPACA §1501(a)(2)(G). In Finding (I), the Act states that the requirement will enable the coverage of pre-existing conditions by increasing the pool of health insurance purchasers. PPACA §1501(a)(2)(I). In Finding (J), Congress concludes that a larger pool of health insurance purchasers will increase economies of scale thereby reducing the administrative costs and thus the premiums in the individual and small group insurance markets. PPACA §1501(a)(2)(J). None of these effects, however laudable are alleged to affect interstate commerce.

Lastly, the remaining two findings – that the requirement is part of a larger regulatory scheme, PPACA §1501(a)(2)(H), and that *United States v. South-Eastern Underwriters Association*, 32 U.S. 533 (1944) held that insurance is interstate commerce, PPACA §1501(a)(3) – also do not answer the question of why every American's decision of how to pay for their health care affects interstate commerce.

It is particularly troubling that Congress failed to make a more explicit statement in its findings underlying the Act because historically, health care and welfare is the domain of the States, not the Federal Government. *See Brecht v. Abrahamson*, 507 U.S. 619, 635, 113 S.Ct. 1710 (1993).

Writing for the Court in *Bass*, Justice Marshall explained that in traditionally sensitive areas such as those involving the balance of power between the Federal Government and the States, Congress must make a clear statement that it has faced and intends to bring that particularly sensitive area into issue. 404 U.S. at 349-50. In that case, the Court chose a narrower reading of the statute at issue in order to limit the reach to the Federal Government under the Commerce Clause into state criminal jurisdiction because Congress had not made a clear statement that it intended to regulate in that area. *Id.*

In this case, the circular reasoning and "but-for" causal logic in the PPACA's underlying findings do not provide a rational basis for the minimum coverage requirement, particularly in light of the traditionally sensitive area (health care) at issue here. Given these defects, and the lack of jurisdictional element in the text of the mandate itself, the Court should find the minimum coverage requirement unconstitutional.

IV. Use of the Commerce Clause to Compel Americans to Purchase Private Products from Favored Merchants is Unprecedented, and Inconsistent with the Constitution's Structure of Limited, Enumerated Federal Power.

The Act requires that every covered American purchase or otherwise obtain private health insurance products. As the Eleventh Circuit observed in the case below, "[f]ew powers, if any, could be more attractive to Congress than compelling the purchase of certain products." *Florida*, 648 F.3d at 1289. Yet historically, Congress has never used the Commerce Clause to force Americans to buy private goods.

Indeed, it is clear from commentary contemporaneous with the drafting of the Constitution, that the Founding Fathers did not envision that the national Federal Government could ever compel Americans to purchase products from private companies under the commerce power. The Commerce Clause was originally envisioned as a means of forming beneficial treaties with foreign powers, and stopping interstate taxes and tariffs which impeded the commerce between the States. *The Federalist No. 22*, at 139 (Alexander Hamilton), *and The Federalist No. 42*, at 263-64 (James Madison) (C. Rossiter ed., 1961).

When concerns were raised at the Constitutional Convention that the Commerce Clause together with the Necessary and Proper Clause could lead to Congress granting monopolies in trade and commerce, *see e.g.* George Mason,

Papers of George Mason, *in The Anti-Federalist Papers and the Constitutional Convention Debates*, 171, 175 (R. Ketcham ed., 1986); Letters of Agrippa, *in* 1 B. Schwartz, *The Bill of Rights: A Documentary History* 512, n. 200 (1971), such fears were allayed in large part by pointing to the enumerated nature of Federal power. "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *The Federalist No. 45* at 289 (James Madison); *see also*, Schwartz, *supra*, at 451-52. In addition, it was emphasized that any grant of monopoly by the new government would be limited to copyrights and patents for new inventions. *See* James Madison, *Writings* 756 (J.N. Rakove ed., 1999); *see generally*, Tyler Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 49 J. COPY. SOC. 675, 685 (2002).

Indeed, in light of the ancient struggle against monopolies in the English and American legal tradition it would have been inconceivable that delegates to the Constitutional Convention would have approved of a construction of the Commerce Clause that would allow the Federal Government to grant monopolies. Beginning in 1215 with Chapter 39 of the Magna Carta, protecting substantive property rights, to the enactment of the Statute of Monopolies in 1624 declaring most monopoly rights invalid, to the American colonies adoption of their own anti-monopoly statutes, the development of the law has been towards curbing the power of the State or in the English example, the Sovereign to force its citizens or subjects to purchase products from

favored businesses or merchants. *See generally*, Ochoa & Rose, *supra* at 677-85; Frank R. Strong, *Unraveling the Tangled Threads of Substantive Due Process*, *in Power and Policy in Quest of Law*, 73, 73-89 (Myres S. McDougal & W. Michael Reisman eds., 1985).

In particular, the Statute of Monopolies, which was part of the *corpus juris* of the newly independent American States at the time of the ratification of the Constitution, was enacted to halt the royal abuse of "letters patent," merchant monopolies, such as those granted by Queen Elizabeth, in salt, playing cards and wine to reward her political favorites. In the *Case of Monopolies*, the King's Bench rejected (after the Queen's death) her monopoly grant to a favored subject for playing cards, holding that monopolies were against the common law. Strong, *supra* at 73-80 (citing Darcy *v. Allein (Allen)* 11 Co. 84b, 77 *Eng. Rep.* 1260 (K.B. 1603)).

Despite this common law heritage, Americans are now mandated by the Act to purchase health insurance from a private company to solve the "unique" health care cost crisis. In addition, the health insurance industry is legally exempt from federal anti-trust laws. *See* The McCarran-Ferguson Act of 1945, 15 U.S.C. §§ 1011 *et seq.* (2010). The minimum coverage provision starts to look rather like the monopolies of old.

The Commerce Clause does not empower the Federal Government to compel Americans to purchase products from a favored set of merchants

or businesses under the guise that a particular industry is particularly important to the national economy. Such a use of the interstate commerce power effectively grants the Federal Government a general welfare power that would utterly eviscerate the federalist Federal-State balance of power. The minimum coverage provision is unconstitutional and should be struck down.

CONCLUSION

For all the foregoing reasons, the Eleventh Circuit's decision should be affirmed with regard to the unconstitutionality of the minimum coverage requirement.

Respectfully submitted,

Deborah N. Misir
Grant M. Lally
Counsel of Record
Lally & Misir, LLP
220 Old Country Road
Mineola, NY 11501
(516) 741-2666
dmisir@lallymisir.com

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

No. 11-398

IN THE

Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners,

v.

FLORIDA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* THE CALIFORNIA ENDOWMENT IN SUPPORT OF PETITIONERS AND IN FAVOR OF REVERSAL ON THE MINIMUM COVERAGE PROVISION

KATHLEEN M. SULLIVAN
Counsel of Record
WILLIAM B. ADAMS
CRYSTAL NIX HINES
DAVID B. SCHWARTZ
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue
22nd Floor
New York, NY 10010
(212) 849-7000
kathleensullivan@quinnemanuel.com

Counsel for Amicus Curiae

January 13, 2012

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE MINIMUM COVERAGE REQUIREMENT FALLS WELL WITHIN CONGRESS'S COMMERCE CLAUSE AUTHORITY	5
A. The Commerce Clause Permits Congress To Act To Prevent Market Failures Substantially Burdening Interstate Commerce	7
B. Pervasive Lack Of Health Insurance, Together With Mandatory Provision Of Health Care, Causes Market Failures Substantially Burdening Interstate Commerce	9
C. The MCR Demonstrably Helps To Correct These Health Care Market Failures	14
II. THE MINIMUM COVERAGE REQUIREMENT IS WITHIN CONGRESS'S AUTHORITY UNDER THE NECESSARY AND PROPER CLAUSE AS AN ESSENTIAL PART OF THE ACA	17
CONCLUSION	21

TABLE OF AUTHORITIES

CASES Page

Eberhardt v. City of Los Angeles,
62 F.3d 1253 (9th Cir. 1995)..... 12

Florida v. United States Dep't of Health & Human Services,
648 F.3d 1235 (11th Cir. 2011).....2, 6, 9, 13

Gonzalez v. Raich,
545 U.S. 1 (2005).....3, 4, 6, 7, 10, 17, 18, 20

Maryland v. Wirtz,
392 U.S. 183 (1968)..... 8

McCulloch v. Maryland,
17 U.S. (4 Wheat) 316 (1819)..... 4, 18

Roberts v. Galen of Va., Inc.,
525 U.S. 249 (1999) (per curiam) 12

Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011).....7, 9, 12, 16

Thomas More Law Ctr. v. Obama,
651 F.3d 529 (6th Cir. 2011)..... 10

United States v. Comstock,
130 S. Ct. 1949 (2010).....4, 6, 7, 18

United States v. Darby,
312 U.S. 100 (1941).....7, 8, 10, 16

United States v. Lopez,
514 U.S. 549 (1995).....3, 7, 18

United States v. Morrison,
529 U.S. 598 (2000)..... 3, 7

TABLE OF AUTHORITIES—Continued

Page

Westfall v. United States,
274 U.S. 256 (1927) 8

Wickard v. Filburn,
317 U.S. 111 (1942) 8, 9

STATUTES/RULES

26 U.S.C.
§ 5000A 2

42 U.S.C.
§ 291c(e) 10
§ 1395dd 11, 12
§ 18091(a)(2)(A) 11
§ 18091(a)(2)(B) 3
§ 18091(a)(2)(C) 4
§ 18091(a)(2)(E) 4
§ 18091(a)(2)(F) 2, 5, 13, 15, 17
§ 18091(a)(2)(I) 2, 3, 4, 5, 18, 19
§ 18091(a)(2)(J) 13, 19

Emergency Medical Treatment and Active Labor Act, Pub. L. No. 99-272, 100 Stat. 82, 164 (1986) 11

Health Care & Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) 1

Hospital Survey and Construction Act, Pub. L. No. 79-725, 60 Stat. 1040 (1946) ... 10

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) 1

TABLE OF AUTHORITIES—Continued

Page

Cal. Health & Safety Code
§ 1371.4 12

Cal. Welf. & Inst. Code
§ 17000 11

Fla. Stat.
§ 395.1041 12

La. Rev. Stat.
§ 40:2113.4 12

LEGISLATIVE MATERIALS

H.R. Rep. No. 241, 99th Cong., 1st Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 726-27 12

OTHER AUTHORITIES

Amicus Brief of the Governor of Washington Christine Gregoire in Support of Defendants/Appellants, *Florida v. U.S. Dep't of Health & Human Services*, 648 F.3d 1235 (11th Cir. 2011) (No. 11-11021) 19

California Hospital Ass'n, *Report on California Hospitals, the Economy, and Health Care Reform* (Aug. 2009) 11, 14

Amitabh Chandra, Jonathan Gruber, and Robin McKnight, *The Importance of the Individual Mandate—Evidence from Massachusetts*, 364 NEW ENG. J. MED. 293 (2011) 19

TABLE OF AUTHORITIES—Continued

Page

Congressional Budget Office, HOW MANY PEOPLE LACK HEALTH INSURANCE AND FOR HOW LONG (May 2003) 12

Families USA, *Hidden Health Tax: Americans Pay a Premium* (May 2009).... 15, 16

Ben Furnas & Peter Harbage, *The Cost Shift from the Uninsured* (Center for American Progress), Mar. 24, 2009..... 16

Jonathan Gruber, *Health Care Reform Is A "Three-Legged Stool"* (Center for American Progress), Aug. 2010..... 17, 20

Peter Harbage & Len M. Nichols, *A Premium Price: The Hidden Costs All Californians Pay in Our Fragmented Health Care System*, NEW AMERICA FOUNDATION HEALTH POLICY PROGRAM ISSUE BRIEF #3 (Dec. 2006).....11, 14, 15, 16

G.F. Kominski, D.H. Roby, K. Jacobs, G. Watson, D. Graham-Squire, C.M. Kinane, D. Gans, and J. Needleman, *Newly Insured Californians Would Fall by More Than 1 Million Under the Affordable Care Act Without the Requirement to Purchase Insurance*, UCLA CENTER FOR HEALTH POLICY RESEARCH (2012).....6, 16, 18, 19, 20

TABLE OF AUTHORITIES—Continued

Page

Shana Alex Lavarreda & Livier Cabezas, *Two Thirds of California's Seven Million Uninsured May Obtain Coverage Under Health Care Reform*, UCLA HEALTH POLICY RESEARCH BRIEF (Feb. 2011)..... 13

Medical Expenditure Panel Survey Data (2009)..... 14

Elizabeth Mendez, *State of the States: Texas and Mass. Still at Health Coverage Extremes in U.S.*, GALLUP, Sept. 6, 2011..... 13, 14

Elizabeth Mendez, *State of the States: Texans Most Likely to Be Uninsured, Mass. Residents Least*, GALLUP, Mar. 11, 2011..... 13

Danilo Trisi *et al.*, *Poverty Rate Second-Highest in 45 Years; Record Numbers Lacked Health Insurance, Lived in Deep Poverty*, CENTER ON BUDGET AND POLICY PRIORITIES (Sept. 14, 2011)..... 5, 12

BRIEF OF *AMICUS CURIAE* THE CALIFORNIA ENDOWMENT IN SUPPORT OF PETITIONERS AND IN FAVOR OF REVERSAL ON THE MINIMUM COVERAGE PROVISION ISSUE

INTEREST OF *AMICUS CURIAE*[1]

The California Endowment ("TCE") has an important interest in the constitutionality of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010).[2] TCE is a private foundation committed to the expansion of affordable, quality health care for all Californians, particularly those in underserved and low income communities. As part of this goal, TCE sponsors a variety of social science and public policy research in an effort to show both policymakers and health care consumers the benefits of expanding the scope of health insurance.

TCE supports the implementation of the ACA, a comprehensive, multifaceted legislative scheme aimed at achieving near-universal and affordable health care coverage for every American citizen. Petitioners' Brief ("Pet'rs Br.") 9-12. A cornerstone of the Act is its reform of market failures in the health care delivery system resulting from the fact that 50 million Americans lack health insurance. The ACA

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution toward the preparation or submission of this brief. On November 15, 16, and 22, 2011, all parties filed letters with the Clerk of Court reflecting their blanket consent to the filing of *amicus* briefs.

[2] As amended by the Health Care & Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

addresses these market failures in the health care delivery system by requiring uninsured persons to purchase basic health insurance to cover their care. This minimum coverage requirement ("MCR"), 26 U.S.C. § 5000A, will reduce the amount of uncompensated care and expand the insurance risk pool, thereby lowering insurance premiums overall. *See* 42 U.S.C. § 18091(a)(2)(I).

TCE submits this brief to provide the Court with additional justifications and empirical support for Petitioners' arguments that the MCR is within Congress's powers under the Commerce Clause and the Necessary and Proper Clause. TCE believes that the Eleventh Circuit's decision in *Florida v. United States Department of Health & Human Services*, 648 F.3d 1235 (11th Cir. 2011), if left intact, would deny Congress the power to use the most effective means available to correct heretofore intractable problems in the efficient delivery and distribution of health care services.

SUMMARY OF ARGUMENT

In enacting the ACA, Congress recognized that one of the key drivers of spiraling health care expenditures is the uncompensated medical costs of uninsured persons, totaling $43 billion in 2008. 42 U.S.C. § 18091(a)(2)(F). Such "uncompensated care," *id.*, results from the fact that individuals who lack health insurance regularly consume health care services they cannot afford. The costs of such care are transferred throughout the interstate economy through private insurers, who raise insured individuals' premiums, creating an ongoing "free-rider" problem. *Id.* Nor can the problem be solved simply by allowing anyone to purchase insurance at any time: doing so

creates an "adverse selection" problem whereby only those individuals who are currently ill newly purchase insurance, again driving up health insurance premiums for all. *See id.* § 18091(a)(2)(I).

Congress sought to correct these market failures in the health care delivery system by enacting the MCR, the crucial feature of the ACA that requires uninsured persons to purchase basic health insurance to cover their care. Evidence from the State of California provides particularly strong confirmation of Congress's judgment that the MCR will reduce the amount of uncompensated care and expand the insurance risk pool, thereby lowering insurance premiums overall. In California alone, one recent TCE-sponsored study shows, the MCR will expand the pool of the newly insured by nearly 2 million California citizens, while without the MCR, that number drops by more than 50 percent.

The MCR is well within Congress's authority under the Commerce Clause. While Congress's powers under the Commerce Clause are not unlimited, *see United States v. Morrison*, 529 U.S. 598, 608 (2000); *United States v. Lopez*, 514 U.S. 549, 557 (1995), this Court has reaffirmed that Congress has broad authority to regulate even seemingly intrastate economic activities that, "viewed in the aggregate, substantially affect[ ] interstate commerce," *id.* at 561, especially where it does so as part of a comprehensive regulatory scheme, *see Gonzalez v. Raich*, 545 U.S. 1, 25 (2005).

The ACA's regulation of the distribution, purchase, and consumption of health services—economic activities that devour 17.6 percent of GDP, 42 U.S.C. § 18091(a)(2)(B)—falls squarely within Commerce Clause authority. And recent national and Califor-

nia-specific data support Congress's finding that the MCR is an essential part of that overall regulatory scheme. Specifically, the MCR is a uniquely effective means of remedying the failures in the interstate market for health services that Congress identified in the ACA. This data provides a "demonstrated link in fact, based on empirical demonstration" that there is "a tangible link to commerce, not a mere conceivable rational relation." *United States v. Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring in the judgment) (describing the standard of review for Congress's exercise of authority under the Commerce Clause).

Moreover, the MCR falls within Congress's powers under the Necessary and Proper Clause to "enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation." *Raich*, 545 U.S. at 39 (Scalia, J., concurring in the judgment) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 421-22 (1819)); *accord Comstock*, 130 S. Ct. at 1956-57. Because the MCR is an "essential part of a larger regulation of economic activity," *Raich*, 545 U.S. at 24, it is a fully justified exercise of Congress's powers. Specifically, the MCR is a core component of Congress's broader reform efforts to require insurers to accept all applicants regardless of health conditions, thus expanding access to health care while simultaneously lowering health care costs. *See* 42 U.S.C. § 18091(a)(2)(C), (E), (I).

Because the Eleventh Circuit provided no tenable basis to invalidate Congress's effort to address identified market failures substantially burdening interstate commerce, the decision below should be reversed.

ARGUMENT

I. THE MINIMUM COVERAGE REQUIREMENT FALLS WELL WITHIN CONGRESS'S COMMERCE CLAUSE AUTHORITY

Nearly 50 million Americans lack health insurance,[3] resulting in "uncompensated care" of uninsured persons in the Nation's medical and health care system that totaled $43 billion in 2008. 42 U.S.C. § 18091(a)(2)(F). When individuals who lack health insurance regularly consume health care services they cannot afford, the costs of their care are transferred to others as private insurers raise insured individuals' premiums. This "free-rider" problem cannot be solved by allowing anyone to purchase insurance at any time. Allowing uninsured individuals to wait until they are ill or injured before buying health insurance creates an "adverse selection" problem, driving up health insurance premiums for all. *See id.* § 18091(a)(2)(I).

In enacting the ACA, Congress appropriately recognized the need to address these market failures in the health care delivery system. A cornerstone of that law is the MCR, which requires uninsured persons to purchase basic health insurance to cover their care. Congress expressly found in enacting the ACA that the MCR would serve its goals of reducing the amount of uncompensated care and expanding the insurance risk pool, thereby lowering insurance premiums overall. *See id.*

---

[3] *See* Danilo Trisi *et al.*, *Poverty Rate Second-Highest in 45 Years; Record Numbers Lacked Health Insurance, Lived in Deep Poverty*, CENTER ON BUDGET AND POLICY PRIORITIES (Sept. 14, 2011), http://www.cbpp.org/cms/index.cfm?fa=view&id=3580.

Recent TCE-sponsored empirical research confirms these congressional findings. Specifically, this empirical data demonstrates that the MCR will achieve significant results: in California alone, the absence of the MCR would reduce the number of newly insured California citizens by 54 percent in 2019, such that 1 million fewer Californians will have health insurance.[4] With the MCR, the ACA would expand the pool of newly insured by nearly 2 million Californians, a 41 percent decrease in the number of uninsured California citizens and a 22 percent increase in uninsured California citizens obtaining health insurance.[5]

Such important empirical data helps to refute the Eleventh Circuit's assumption, in invalidating the MCR as beyond Congress's authority, that the MCR "forces healthy and voluntarily uninsured individuals" who are "outside the stream of commerce" to purchase insurance. *Florida*, 648 F.3d at 1293, 1300. Such uninsured individuals in fact are not "outside the stream of commerce"; to the contrary, their pervasive lack of health insurance creates free rider and adverse selection problems with a direct and "tangible link to commerce." *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring in the judgment); *see Raich*, 545 U.S. at 25 ("'Where economic activity substantially affects interstate commerce, legislation

---

[4] G.F. Kominski, D.H. Roby, K. Jacobs, G. Watson, D. Graham-Squire, C.M. Kinane, D. Gans, and J. Needleman, *Newly Insured Californians Would Fall by More Than 1 Million Under the Affordable Care Act Without the Requirement to Purchase Insurance* ("Kominski & Roby *et al.*"), at 2 & ex.1, UCLA CENTER FOR HEALTH POLICY RESEARCH (2012), http://www.healthpolicy.ucla.edu/pubs/files/calsim_mandate.pdf.

[5] *Id.*

regulating that activity will be sustained.'" (quoting *Morrison*, 529 U.S. at 610)). Whether considered "activity" or "inactivity," "[t]he aggregate effect of that behavior ... is just as injurious to interstate commerce." *Seven-Sky v. Holder*, 661 F.3d 1, 19 (D.C. Cir. 2011) (Silberman, J.).

A. The Commerce Clause Permits Congress To Act To Prevent Market Failures Substantially Burdening Interstate Commerce

This Court has long embraced a pragmatic and flexible approach to the Commerce Clause. *See Lopez*, 514 U.S. at 573 (Kennedy, J., concurring) (noting the "Court's definitive commitment to the practical conception of the commerce power"), *quoted in Raich*, 545 U.S. at 25 n.35. As recounted in *Lopez*, 514 U.S. at 553-59, this common-sense understanding of Congress's Commerce Clause authority is the result of the "imprecision of content-based boundaries used without more to define the limits of the Commerce Clause," *id.* at 574 (Kennedy, J., concurring). Regardless of the label attached, this Court's "practical conception" of the Commerce Clause allows Congress to regulate economic behavior whenever there is "a tangible link to commerce," "based on empirical demonstration." *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring in the judgment); *accord Raich*, 545 U.S. at 22.

This Court has recognized that market failures in the interstate economy present a paradigmatic example of a "substantial effect" on interstate commerce. For example, in *United States v. Darby*, 312 U.S. 100, 115 (1941), the Court upheld Congress's

exercise of Commerce Clause authority to cure a market failure involving "the distribution of goods provided under substandard labor conditions." As this Court later recounted, in *Darby*, "Congress had found that substandard wages and excessive hours, when imposed on employees of a company shipping goods into other States, gave the exporting company an advantage over companies in the importing States." *Maryland v. Wirtz*, 392 U.S. 183, 189 (1968). Congress's purpose in enacting a national wage floor "was not only to prevent the interstate transportation of the proscribed product, but to stop the *initial step* toward transportation, production with the purpose of so transporting it." *Darby*, 312 U.S. at 117 (emphasis added). The Court thus acknowledged Congress's power to address *prophylactically* the harms to interstate commerce caused by the violation of fair labor standards that, if left unregulated, would create a race to the bottom among the several States. *See id.* at 117-18; *see also Westfall v. United States*, 274 U.S. 256, 259 (1927) ("[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented [Congress] may do so.").

Likewise, in *Wickard v. Filburn*, 317 U.S. 111 (1942), this Court upheld Congress's restriction on the amount of wheat individual farmers were permitted to grow, even if, like the farmer in *Wickard*, the wheat was solely for home consumption and thus "outside" the stream of commerce. *See id.* at 114-15. *Wickard* found it permissible for Congress to "lay[] a restraining hand on the self interest of the regulated," even if this would result in "*forcing* some farmers into the market to buy what they could provide for themselves." *Id.* at 129 (emphasis added). As recognized by the D.C. Circuit, "the logic of

[*Wickard*] would apply to force any farmer, no matter how small, into buying wheat in the open market." *Seven-Sky*, 661 F.3d at 17 (Silberman, J.). Such government action was nonetheless upheld because failure in the wheat market was a "substantial effect" on commerce that Congress was authorized to address. *Wickard*, 317 U.S. at 129.

B. Pervasive Lack Of Health Insurance, Together With Mandatory Provision Of Health Care, Causes Market Failures Substantially Burdening Interstate Commerce

As the Commerce Clause authorized Congress to ameliorate the market failures in *Darby* and *Wickard*, so too does it empower Congress to regulate the market failures caused by a pervasive lack of health insurance. Here, the Commerce Clause enables Congress to require individuals to spend funds in order to prevent the free-rider and adverse-selection problems that currently result in spiraling costs of uncompensated care and health insurance premiums for the insured. The mere fact that a law would "compel Americans *outside the insurance market*" to purchase health insurance, *Florida*, 648 F.3d at 1300, is not an impediment to Congress acting when "the aggregate effect" of individuals failing to purchase insurance "is just as injurious to interstate commerce," *Seven-Sky*, 661 F.3d at 119.

Equally unproblematic is the fact that Congress is regulating conduct at a time prior to when "uninsured individuals actually enter the stream of commerce and consume health care," *Florida*, 648 U.S. at 1295. As *Darby* and *Wickard* illustrate, this Court has long understood the Commerce Clause to

empower Congress to act prophylactically to stop the "initial step" of a market failure, *Darby*, 312 U.S. at 118. The MCR is thus consistent with this Court's Commerce Clause jurisprudence, which empowers Congress to regulate market failures that "substantially affect interstate commerce." *Raich*, 545 U.S. at 17.

The pervasive health care market failures that Congress addressed with the MCR are in significant part the result of prior legislative action, including efforts by both state and federal governments to require the provision of health care even to those who cannot afford health insurance, cannot obtain it, or choose to go without it. As one court of appeals opinion accurately described the problem, to forego health insurance "is to save nothing and to rely on something else—good fortune or the good graces of others—when the need arises." *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 557 (6th Cir. 2011) (Sutton, J., concurring in part). When neither good fortune nor good grace is available, however, federal and state laws still "require hospitals to accept many of these patients without regard to their capacity to pay." *Id.* at 562.

Specifically, more than half a century ago, Congress enacted the Hospital Survey and Construction Act, Pub. L. No. 79-725, 60 Stat. 1040 (1946), which requires hospitals receiving federal funds for construction or renovation to provide care to "all persons residing in the territorial area" and to provide a "reasonable volume" of free care to indigent patients. *See* 42 U.S.C. § 291c(e). In subsequent years, this "reasonable volume" ballooned into virtually unlimited access to free care when Congress in 1986 enacted the Emergency Medical Treatment and Active Labor

Act ("EMTALA") as part of COBRA, Pub. L. No. 99-272, § 9121, 100 Stat. 82, 164 (1986).

Under EMTALA, all hospitals that receive Medicare funds are required to screen and stabilize, if possible, "any patient" with an "emergency medical condition." 42 U.S.C. § 1395dd(a), (b). Many States, including California, have replicated EMTALA by imposing on hospitals similar requirements for treating uninsured patients.[6]

What constitutes an "emergency" under these federal and state statutes has been ill-defined; indeed, many uninsured persons have used hospitals as "doctors of first resort," seeking care for routine illnesses that insured persons would have treated by a private family doctor or specialist.[7] Hospitals, charged with both an external duty of care and often an internal policy not to turn away needy patients,[8]

---

[6] *See, e.g.*, Cal. Welf. & Inst. Code § 17000 ("Every county and every city and county shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions.").

[7] *See* California Hospital Ass'n, *Report on California Hospitals, the Economy, and Health Care Reform*, at 3 (Aug. 2009), http://www.calhospital.org/sites/main/files/file-attachments/CHA SpecialRprtHCR-809.pdf ("Individuals without a routine source of health care often use hospital emergency departments as the entry point to primary and other health care services."); *cf.* 42 U.S.C. § 18091(a)(2)(A) (finding that some individuals "make an economic and financial decision to forego health insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers").

[8] *See* Peter Harbage & Len M. Nichols, *A Premium Price: The Hidden Costs All Californians Pay in Our Fragmented Health*

have been loath to challenge a condition as a "non-emergency" since EMTALA and state laws generally restrict transfers of unstabilized patients and authorize civil fines and private causes of action for statutory violations. *See, e.g.*, *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 250-51 (1999) (per curiam) (discussing 42 U.S.C. § 1395dd(c), (d)); Cal. Health & Safety Code § 1371.4; Fla. Stat. § 395.1041; La. Rev. Stat. § 40:2113.4.

Though EMTALA may reflect a laudable desire to provide "adequate emergency room medical services to individuals who seek care, particularly as to the indigent and uninsured," *Eberhardt v. City of Los Angeles*, 62 F.3d 1253, 1255 (9th Cir. 1995) (quoting H.R. Rep. No. 241, 99th Cong., 1st Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 726-27), in the 25 years since EMTALA's passage uncompensated care and its attendant costs have burgeoned. To begin with, the sheer growth in the number of uninsured persons has expanded the scope of the market failure. Nationally, the number of uninsured persons has ballooned from between 21 and 31 million in 1998 to nearly 50 million today.[9] These figures include both those individuals who have chosen to "self-insure," an illusory concept, *see Seven-Sky*, 661 F.3d at 19, as

---

Care System, at 2, NEW AMERICA FOUNDATION HEALTH POLICY PROGRAM ISSUE BRIEF #3 (Dec. 2006), http://www.newamerica.net/files/nafmigration/HealthIBNo3.pdf ("Many hospitals—especially public hospitals and some non-profit hospitals—have long traditions of providing all the care their patients need, regardless of ability to pay.").

[9] *See* Trisi *et al.*, *supra* n.3; Congressional Budget Office, HOW MANY PEOPLE LACK HEALTH INSURANCE AND FOR HOW LONG, at 2 (May 2003), http://www.cbo.gov/ftpdocs/42xx/doc4210/05-12-Uninsured.pdf.

well as those individuals denied coverage as a result of pre-existing conditions and other factors.[10] These individuals consume spiraling amounts of "uncompensated care," which Congress found to total $43 billion in 2008, 42 U.S.C. § 18091(a)(2)(F), and are transferred throughout the entire economy through higher insurance premiums, which are on average over $1,000 a year, *id.*

States like California have experienced a similar growth. TCE-sponsored research found that over 5.9 million California citizens lacked health insurance for all or part of 2009.[11] In the wake of the recent recession, the number of uninsured persons in California has swelled from 18.9 percent of the State's population in 2008 to 21.9 percent of its population in 2011,[12] making California the sixth highest in the

---

[10] As the Eleventh Circuit recognized, Congress found that "many of the uninsured desire insurance but have been denied coverage or cannot afford it" as they were hindered by private insurers "try[ing] to protect themselves against unhealthy entrants through medical underwriting, especially in the individual market." *Florida*, 648 F.3d at 1245 (citing 42 U.S.C. § 18091(a)(2)(J)). Those individuals who were denied insurance, were charged higher premiums, or were offered only limited insurance due to preexisting conditions range from 9 million to 12.6 million. *Id.*

[11] *See* Shana Alex Lavarreda & Livier Cabezas, *Two Thirds of California's Seven Million Uninsured May Obtain Coverage Under Health Care Reform*, at 2 ex. 1, UCLA HEALTH POLICY RESEARCH BRIEF (Feb. 2011), http://www.healthpolicy.ucla.edu/pubs/Publication.aspx?pubID=478.

[12] Elizabeth Mendez, *State of the States: Texas and Mass. Still at Health Coverage Extremes in U.S.*, GALLUP, Sept. 6, 2011, http://www.gallup.com/poll/149321/texas-mass-health-coverage-extremes.aspx; Elizabeth Mendez, *State of the States: Texans Most Likely to Be Uninsured, Mass. Residents Least*, GALLUP,

Nation in terms of percentage of uninsured residents.[13] These massive numbers of individuals who lack health insurance have concomitantly produced large quantities of uncompensated care: In California alone, uncompensated care totaled $9.6 billion in 2006.[14]

Nor are these individuals "outside" the health care system. Rather, these uninsured persons regularly utilize the free "emergency" care guaranteed by EMTALA: In 2009, more than 80 percent of individuals with no insurance for part of the year, and over 55.5 percent of individuals with no insurance at all, sought medical services and/or prescription drugs.[15] These visits—many unanticipated and exigent—include hospital emergency departments, as well as in-patient and out-patient hospital care,[16] which "are the most expensive and often the least efficient point of entry into the system when primary and preventive care would have helped the patient if they had been available."[17]

C. The MCR Demonstrably Helps To Correct These Health Care Market Failures

The MCR falls well within Congress's authority under the Commerce Clause because, as the em-

---

Mar. 11, 2011, http://www.gallup.com/poll/146579/Texans-Likely-Uninsured-Mass-Residents-Least.aspx.

[13] Mendez, *supra* n.12.

[14] Harbage & Nichols, *supra*, n.8, at 2.

[15] UCLA Analysis of Medical Expenditure Panel Survey Data (2009), meps.ahrq.gov/mepsweb.

[16] *Id.*

[17] Cal. Hosp. Ass'n, *supra* n.8, at 3.

pirical data demonstrates, it will help to correct the identified failures in the health care market. Most uninsured or underinsured individuals lack adequate safeguards to cover their medical costs, resulting in more than one out of every three dollars spent on care for the uninsured to be uncompensated. Nationally, uninsured individuals pay for only approximately 37 percent of their care; third-party sources, such as government programs and charities, pick up another 26 percent; and the remaining 37 percent, nearly $43 billion in 2008, consists of uncompensated care.[18]

Congress found that health care providers and insurance companies spread these costs to insured individuals through elevated rate structures for medical procedures and/or higher insurance premiums. *See* 42 U.S.C. § 18091(a)(2)(F). Since "[p]roviders do not have unlimited pockets to secretly finance the health care provided to millions of uninsured (and underinsured) patients,"[19] they recover these missing billions "primarily by increasing charges for those with private insurance."[20] Nationwide, "this translated into a surcharge of $368 for

---

[18] Families USA, *Hidden Health Tax: Americans Pay a Premium*, at 2 (May 2009), http://familiesusa2.org/assets/pdfs/hidden-health-tax.pdf.

[19] Harbage & Nichols, *supra* n.8, at 2.

[20] Families USA, *supra* n.18, at 6; *see also* Harbage & Nichols, *supra* n.8, at 2 ("Hospitals and physicians anticipate the fact that the uninsured will seek care each year. They prepare for this reality by: [s]etting prices for the insured that are higher than expected costs."). Health care providers cannot turn to state and federal government programs to cover the cost, since those programs use regulations and contracts to set provider payments in advance. Families USA, *supra* n.18, at 6.

individual premiums and a surcharge of $1,017 for family premiums in 2008 due to uncompensated care."[21] In California, in 2006, this "cost-shift" resulted in an additional $455 in average annual premiums for individuals and an additional $1,186 for families.[22] By 2009, those costs had risen to $500 and $1,400, respectively.[23]

The ACA and the MCR address these "aggregate effect[s]" that are "injurious to interstate commerce," *Seven-Sky*, 661 F.3d at 19, at their "initial step," *Darby*, 312 U.S. at 117. Using a California-specific database, TCE-sponsored research demonstrates that, with the MCR, the ACA will allow an additional 1.91 million non-elderly California citizens to have health insurance coverage in 2019, a 41 percent reduction in the number of uninsured California citizens.[24] Yet without the MCR, the ACA would add 1 million fewer California citizens, reducing the number of uninsured California citizens by less than 20 percent.[25] And those who would be insured under the ACA without the MCR would be more expensive to cover, as the individuals who purchase health insurance without the MCR tend to be sicker.[26] The MCR thus "significantly reduc[es] the number

---

[21] *Id.* at 7.

[22] Harbage & Nichols, *supra* n.8, at 2.

[23] Ben Furnas & Peter Harbage, *The Cost Shift from the Uninsured*, at 2 (Center for American Progress), Mar. 24, 2009, http://www.americanprogressaction.org/issues/2009/03/pdf/cost_shift.pdf.

[24] Kominski & Roby *et al.*, *supra* n.4, at 2 & ex.1.

[25] *Id.*

[26] *Id.* at 2.

of the uninsured," both nationally and in California. 42 U.S.C. § 18091(a)(2)(F).

And, as Congress predicted, because the MCR, "together with the other provisions of the [ACA], significantly reduces the number of uninsured, it also "lower[s] health insurance premiums" for all as the costs of uncompensated care drop. *Id.* One analysis, for example, estimates that the MCR will reduce premiums by over 20 percent for individuals and over 10 percent for families.[27]

Thus, the MCR addresses the fundamental market failures created in part by laudable governmental efforts to care for those who cannot afford to care for themselves. This empirical demonstration brings the MCR well within Congress's authority under the Commerce Clause.

II. THE MINIMUM COVERAGE REQUIREMENT IS WITHIN CONGRESS'S AUTHORITY UNDER THE NECESSARY AND PROPER CLAUSE AS AN ESSENTIAL PART OF THE ACA

Recent California-specific data further supports Congress's authority to enact the MCR under the Necessary and Proper Clause, in conjunction with its authority under the Commerce Clause. Congress is authorized to "regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Raich*, 545 U.S. at 37 (Scalia, J., concurring in the

---

[27] *See* Jonathan Gruber, *Health Care Reform Is A "Three-Legged Stool"*, at 4 (Center for American Progress), Aug. 2010, http://www.americanprogress.org/issues/2010/08/pdf/repealing_reform.pdf.

judgment) (citing *Lopez*, 514 U.S. at 561); *accord Comstock*, 130 S. Ct. at 1956 ("[T]he Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" (quoting *McCulloch*, 17 U.S. at 413, 418)).

The MCR is necessary to implement Congress's authority to remedy the failures in the interstate health care market because it is the key means of resolving the free-rider and cost-shifting problems associated with those individuals who refrain from purchasing health insurance. As Petitioners explain (Pet'rs Br. 32) and the data confirms, the MCR provides an "extra incentive" for individuals to obtain health insurance: without the MCR, the number of newly insured California citizens would be 54 percent lower in 2019.[28]

The MCR, moreover, is an "essential part[] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the [activity at issue] were regulated." *Raich*, 545 U.S. at 24-25 (quoting *Lopez*, 514 U.S. at 561). Without the MCR, the "adverse selection" problem, in which "individuals ... wait to purchase health insurance until they need[] care," 42 U.S.C. § 18091(a)(2)(I), would rapidly increase insurance premiums for all Americans. By requiring those individuals who are cheaper to insure to purchase insurance, the MCR protects against uncompensated care while expanding the overall risk pool and lowering administrative costs, *id.* making it feasible for insurance companies

---

[28] *See* Kominski & Roby *et al.*, *supra* n.4, at 2-3 & ex.1.

to discontinue their practice of reducing costs by excluding those with pre-existing conditions, *see id.* § 18091(a)(2)(J).

By contrast, enforcing a prohibition on discrimination against pre-existing conditions *without* requiring that individuals obtain health insurance would permit individuals to wait until they become sick to purchase insurance. As Congress discovered from observing States that experimented with just such a regulatory regime, allowing individuals to obtain insurance "on their way to the hospital" creates a "death spiral" of skyrocketing insurance premiums and plummeting insurance coverage.[29]

California-specific empirical data robustly supports Congress's prediction that the MCR "will minimize this adverse selection and broaden the health insurance risk pool." 42 U.S.C § 18091(a)(2)(I). In the absence of the MCR, by 2019 over 1 million California citizens will forego health insurance coverage, leaving 3.76 million California citizens without health insurance.[30] Furthermore, the California

---

[29] *See* Amitabh Chandra, Jonathan Gruber, and Robin McKnight, *The Importance of the Individual Mandate—Evidence from Massachusetts,* at 1, 364 New Eng. J. Med. 293 (2011), *available at* http://www.nejm.org/doi/full/10.1056/NEJMp1013067 (noting that "the five U.S. states with such regulations (known as 'community rating') are among the states with the highest nongroup insurance premiums"); Amicus Brief of the Governor of Washington Christine Gregoire in Support of Defendants/ Appellants 11-12, *Florida v. U.S. Dep't of Health & Human Services*, 648 F.3d 1235 (11th Cir. 2011) (No. 11-11021) (describing how "Washington actually experienced the 'death spiral' that can occur in the private insurance market when coverage for preexisting conditions is required without universal coverage").

[30] Kominski & Roby *et al.*, *supra* n.4, at 2 & ex.1. Massachusetts' experience with a requirement to purchase insurance

citizens who do purchase health insurance will be more likely to have chronic illnesses and pay more for their insurance coverage.[31] If these dynamic effects occur, further raising premiums and driving healthy individuals from the insurance pool, the feedback will only further hamper the ACA, limiting its expansion of insurance in California to only 13 percent.[32] The MCR's absence thus "will critically undercut gains from reform."[33]

The MCR is therefore not just conducive but "essential to a comprehensive regulation of interstate commerce." *Raich*, 545 U.S. at 37 (Scalia, J., concurring the judgment). And because the MCR is a "measure[] necessary to make the interstate regulation [of commerce] effective," Congress was authorized to pass it "in conjunction with [its] regulation of an interstate market." *Id.* at 38.

---

provides additional empirical support, as there, once the requirement came into effect, there was "an enormous increase in the number of healthy enrollees" in Massachusetts' health insurance program for low-income Massachusetts residents. Chandra *et al.*, *supra* n.29, at 3.

[31] Kominski & Roby *et al.*, *supra* n.4, at 3.

[32] *Id.*

[33] Gruber, *supra* n.27, at 3.

CONCLUSION

For the foregoing reasons, and for those stated by the Petitioners, the Court should reverse the decision below and uphold the constitutionality of the MCR.

Respectfully submitted,

KATHLEEN M. SULLIVAN
Counsel of Record
WILLIAM B. ADAMS
CRYSTAL NIX HINES
DAVID B. SCHWARTZ
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
51 Madison Avenue
22nd Floor
New York, NY 10010
(212) 849-7000
kathleensullivan@
quinnemanuel.com

January 13, 2012

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

No. 11-398

IN THE SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR AMICUS CURIAE CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM IN SUPPORT OF PETITIONER, DEPARTMENT OF HEALTH AND HUMAN SERVICES

(MINIMUM COVERAGE PROVISION)

PETER H. MIXON
General Counsel

California Public Employees' Retirement System
400 Q Street, Rm 3340
Sacramento, CA 95811
peter_mixon@calpers.ca.gov
(916) 795-9675

QUESTIONS PRESENTED

The minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, provides that, beginning in 2014, non-exempted federal income taxpayers who fail to maintain a minimum level of health insurance for themselves or their dependents will owe a penalty, calculated in part on the basis of the taxpayer's household income and reported on the taxpayer's federal income tax return, for each month in which coverage is not maintained in the taxable year. 26 U.S.C.A. 5000A.

The question presented is whether the minimum coverage provision (individual mandate) is a valid exercise of Congress' powers under Article I of the Constitution.

TABLE OF CONTENTS

QUESTIONS PRESENTED ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
OPINIONS BELOW 1
JURISDICTION 1
STATEMENT OF INTEREST 2
SUMMARY OF ARGUMENT 4
ARGUMENT .....

I. THE AFFORDABLE CARE ACT CREATES A NATIONAL SOLUTION TO THE HEALTH CARE CRISIS 5

A. CalPERS Role as a Purchasing Agent of Health Care Benefits 6

B. Early Retiree Reinsurance Program 8

C. Increase in Dependent Coverage Age 10

D. Increased Service Levels to Members 11

E. Federal Regulatory Implementation 11

F. CalPERS Implementation Of The Affordable Care Act Demonstrates The Principle of Cooperative Federalism To Expand and Enhance Health Insurance Coverage 12

II. THE INDIVIDUAL MANDATE IS ONE OF MANY "ESSENTIAL PARTS" OF CONGRESS' CONSTITUTIONAL REGULATION OF THE HEALTH CARE SERVICES MARKET 12

A. The Decision Not to Purchase Health Insurance Substantially Affects Interstate Commerce 13

B. The Individual Mandate Constitutionally Regulates an Economic Activity and is a Rational Means of Regulating Interstate Commerce in Health Insurance and Services 18
CONCLUSION 23
APPENDIX 1a

TABLE OF AUTHORITIES

Cases

Gonzales v. Raich,
545 U.S. 1 (2005) 12, 13, 18, 19, 20, 21

Madden v. Kaiser Found. Hosps., 17
Cal.3d 699, 705 (1976) 3, 7

Schaeffer v. Weast, 546 U.S. 49 (2005) 5

Thomas More Law Ctr. v. Obama, 651
F.3d 529 (6th. Cir. 2011) 21

U.S. v. Lopez, 514 U.S. 549 (1995) 5, 19, 20

U.S. v. Morrison, 529 U.S. 598 (2000) 19, 20

Wickard v. Filburn,
317 U.S. 111 (1942) 13, 14, 15, 18, 20

Statutes and Regulations

Affordable Care Act, Pub. L. No. 111 –
148, 124 Stat. 119 (2010) 6, 12, 13

Affordable Care Act, Pub. L. No. 111-
148, §1102(a)(1), 124 Stat. 143 (2010). 9

Affordable Care Act, Pub. L. No. 111-
148, §1501(a), 124 Stat. 242 (2010). 21

Affordable Care Act, Pub. L. No. 111-
148, §2711(a), 124 Stat. 131 (2010). 11

Affordable Care Act, Pub. L. No. 111-
148, §2714(a), 124 Stat. 132 (2010). 10

26 U.S.C. § 5000A 3

42 U.S.C. § 1395dd 16

45 C.F.R. § 149.100 9

45 C.F.R. § 149.40 9

Cal. Govt. Code § 22750 6

Cal. Govt. Code § 22751 2

Cal. Govt. Code, § 22775 6

Cal. Govt. Code, § 22800 6

Cal. Govt. Code § 22850 7

Miscellaneous

California's Uninsured, Cal. Health Care Almanac, Cal. Health Care Found., p. 3-4 (December 2011) 22

CalPERS drops 38 Hospitals from Health Network to Trim Spending, Associated Press (LexisNexis, May 19, 2004) 8

CalPERS Facts At a Glance, (December 2011), http://www.calpers.ca.gov/eip-docs/about/facts/health.pdf 2, 7

Susan A. Channick, *Can State Health Reform Initiatives Achieve Universal Coverage?* 6 (Jan. 2, 2011, 6:45 a.m.) http://works.bepress.com/susan_channick/1 13

"Coverage Matters," America's Uninsured Crisis, The Nat'l Academies Press, (2009), http://www.nap.edu/openbook.php?record_id=12511&page=49 15

Fast Facts About Medicare, National Committee to Preserve Social Security and Medicare, (Jan. 12, 2012, 10:42) http://www.ncpssm.org/fasfactm. 22

Annette Gardner, Ph.D., *Addressing California's Health Coverage Gaps 15 Berkeley Center on Health,* Economic & Family Security (2009) 4

Peter Harbage and Len M. Nichols, Ph.D., *A Premium Price: The Hidden Costs All Californians Pay in Our Fragmented Health Care System,* New

America Foundation (December 2006) 17

Historical Inflation Rates: 1914 – 2011, US Inflation Calculator, (Jan. 11, 2012, 11:30 a.m.), http://www.usinflationcalculator.com/inflation/historical-inflation-rates/ 17

Stephen Huth, *Availability of Early Retiree Reinsurance Program Ends in May 2011*, Health Reform Talk (April 1, 2011) 10

Income, Poverty, and Health Insurance Coverage in the United States: 2010, (September 2011), http://www.census.gov/prod/2011pubs/p60-239.pdf..... 22

Doug McKeever, *Health Benefits Committee Agenda Item 4a* (June 14, 2011), http://www.calpers.ca.gov/eip-docs/about/board-cal-agenda/agendas/hbc/201106/item-4a.pdf. 8

National Health Expenditure Data Fact Sheet, Centers for Medicare and Medicaid Services (CMS), (January 6, 2012), https://www.cms.gov/NationalHealthExpendData/25_NHE_Fact_Sheet.asp..... 21

New data: Affordable Care Act helps 2.5 million additional young adults get health insurance, U.S. Dept. of Health and Human Services, HHS.gov, (December 14, 2011), http://www.hhs.gov/news/press/2011pres/12/20111214d.html 10

Paying a Premium: The Added Cost of Care for the Uninsured in California, A Report by Families USA, (June 2005)..... 17

Update on ERRP Payment Processing and Announcement of End Date for Newly Incurred Claims, ERRP.gov, (December 9, 2011), http://www.errp.gov/newspages/20111209-updated-payment-processing-new-incurred-date.shtml 9

IN THE SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
ET AL., PETITIONERS
v.
STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR AMICUS CURIAE CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM IN SUPPORT OF PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a273a) is reported at 648 F.3d 1235. The district court's opinion on petitioners' motion to dismiss (Pet. App. 394a-475a) is reported at 716 F. Supp. 2d 1120. The district court's opinion on cross-motions for summary judgment (Pet. App. 274a-368a) is reported at 780 F. Supp. 2d 1256.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2011. The petition for a writ of certiorari was filed on September 28, 2011, and was granted on November 14, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT OF INTEREST[1]

Amicus, the California Public Employees' Retirement System (CalPERS) provides health benefits to 1.3 million state, public agency, and school employees and annuitants and their families under the Public Employees' Hospital and Medical Care Act (PEMHCA). The purpose of PEMHCA is to:

> promote increased economy and efficiency in state service, enable the state to attract and retain qualified employees by providing health benefit plans similar to those commonly provided in private industry, and to recognize and protect the state's investment in each permanent employee by promoting and preserving good health among state employees.

Cal. Govt. Code § 22751 (LexisNexis 2011). CalPERS is the largest purchaser of health benefits in California. After the federal government, CalPERS is the second largest purchaser of health benefits in the nation. In 2011, CalPERS spent a total of $6.67 billion in premiums to provide health benefits to its members. *CalPERS Facts at a Glance*, (December 2011) http://www.calpers.ca.gov/eip-docs/about/facts/health.pdf. CalPERS contracts with health insurers, including Kaiser Permanente, Blue

---

[1] This Amicus Brief was authored in whole by CalPERS in-house counsel employed by CalPERS and the State of California. No monetary contributions were made in support of its creation or submission.

Shield of California, Anthem Blue Cross, and CVS Caremark, to provide members and their families with access to a variety of health service plan options. In negotiating health plan agreements, CalPERS acts as the agent or representative of its members. *Madden v. Kaiser Found. Hosps.*, 17 Cal.3d 699, 705 (1976.) CalPERS currently offers three health maintenance organization (HMO) plans, three self-funded preferred provider organization (PPO) plans, and three plans for association members.

Since the enactment of the Patient Protection and Affordable Care Act (ACA or Act) CalPERS has committed to implementing the provisions of the Act, including the adoption of regulations necessary for compliance with the ACA, and the negotiation of contractual amendments with CalPERS health plans and third party administrators to bring contracts into compliance with ACA provisions. As a result of the enactment of the ACA, CalPERS has also received federal funding to assist with the cost of early retiree insurance, enrolled thousands of additional family members, and eliminated lifetime benefit caps for certain benefits.

CalPERS submits this Amicus Curiae brief in support of the ACA and the Solicitor General based on the integral role CalPERS plays in setting health policy and purchasing health benefits for 1.3 million members. CalPERS asks this Court to uphold the ACA in its entirety, and in particular to find the "minimum essential coverage" or "individual mandate" provision at 26 U.S.C. § 5000A to be a constitutional exercise of the powers of Congress under the Commerce Clause.

SUMMARY OF ARGUMENT

The cost of providing health care in this country continues to rise. Attempts to control these costs on a local or state basis have fallen short. Each year, the State of California and local governments are forced to spend an increasing percentage of scarce public resources to provide these benefits. Rising costs increase premiums borne by employers and their employees who participate in the CalPERS health plans. The notion that runaway health care costs are a local phenomenon is simply untrue – CalPERS and countless similar organizations are unable to make systemic changes in the health care market to control these costs.

Through the ACA, Congress addressed the health care crisis on numerous fronts by developing a comprehensive framework designed to reduce the cost of health care and increase individual access to the health care system. Insurance reform, health care delivery, and the creation of the Health Benefit Exchange system are being applied to make health care more affordable for and accessible by the uninsured and underinsured. Annette Gardner, Ph.D., *Addressing California's Health Coverage Gaps*, 15 (Berkeley Center on Health, Economic & Family Security, 2009), http://www.law.berkeley.edu/files/chefs/Effect_of_Reform_on_Gap_Groups.pdf.).

Many of the provisions of the ACA quickly added value to CalPERS members' health benefits and reduced the costs of care. Absent a minimum essential coverage requirement, the "individual mandate," Congress' attempt to control the cost of

care will be severely undermined. Without this requirement, the real costs of health care services used by uninsured individuals will continue to be borne by health care providers, insurers and to a great extent their insureds – including CalPERS employers and members. These costs will be passed on through higher premiums and other costs of care ultimately paid through commercial insurance. As an essential part of the ACA, the individual mandate will support other reforms in the Act by requiring individuals to obtain health coverage, which will increase preventive care and therefore lower the overall cost of health care.

ARGUMENT

I. THE AFFORDABLE CARE ACT CREATES A NATIONAL SOLUTION TO THE HEALTH CARE CRISIS

The ACA is built upon the principle of cooperative federalism. This principle "leaves to the States the primary responsibility for developing and executing" programs, but sets "requirements to be followed in the discharge of that responsibility." *Schaeffer v. Weast*, 546 U.S. 49, 52 (2005). Thus, Congress encourages rather than prevents "the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise." *U.S. v. Lopez*, 514 U.S. 549, 583 (1995).

The ACA is part of a long history of cooperative federalism in the field of health insurance and health care, starting with the creation of Medicare and Medicaid in 1965 and more recently

with the enactment of the Health Insurance Portability and Accountability Act (HIPAA) in 1996. Key features of the ACA include the following: (i) granting states the authority to establish and design health insurance exchanges, where individuals and small businesses can purchase coverage in lieu of a federal health exchange; (ii) granting states the authority to establish basic health programs for low-income individuals who are Medicaid eligible; and (iii) expanding Medicaid funding and awarding grants to states to develop *innovative* approaches to insure their residents. Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (emphasis added).

These changes are designed to improve and stabilize the health care insurance market, where CalPERS purchases insurance coverage on behalf of participating employers and members.

A. CalPERS Role as a Purchasing Agent of Health Care Benefits

In 1961, the California Legislature enacted PEMHCA, entrusting the administration of the program to the CalPERS Board of Administration (Board).[2] Under PEMHCA, CalPERS provides health benefits to state, contracting public agency, and school district employees, annuitants and family members, including the employee's or retiree's spouse or domestic partner, and natural, step, and adopted children. Cal. Gov't Code, §§22800 and 22775 (LexisNexis 2011). Today, CalPERS health

---

[2] At the time of enactment, PEMHCA was titled the Meyers-Geddes Employees' Medical and Hospital Care Act. See Cal. Gov't. Code, § 22750.

plans insure 1.3 million members. In 2011, CalPERS spent more than $ 6.67 billion to purchase health benefits for those members. *CalPERS Facts at a Glance*, (December 2011) http://www.calpers.ca.gov/eip-docs/about/facts/health.pdf.

As part of its responsibilities under PEMHCA, CalPERS enters into contracts with carriers offering health benefit plans and with entities offering services relating to the administration of health benefit plans. *Id.,* at §22850(a). CalPERS plans include hospital, surgical, inpatient medical, outpatient, and obstetrical benefits. Cal. Gov't Code § 22850(b). Additionally, the Board has authority to contract for or implement employee cost containment and reduction incentive programs. *Id.,* at §22850(e).

Since the enactment of PEMHCA, CalPERS has worked with contracted health plans to implement benefit plan designs that offer appropriate health care services at low cost to employers, employees, and annuitants receiving benefits under PEMHCA. Each year, the Board negotiates with contracted health plans to set premium rates for the upcoming calendar year. In negotiating these agreements, the Board acts as the agent or representative of the employees. *Madden v. Kaiser Found. Hosps.*, 17 Cal.3d at 705. Benefit design components aimed at curbing the cost of care in recent years include incentivizing members to utilize certain "value based purchasing centers" through favorable co-pays and co-insurance fees, requiring members to pay the difference between a brand name drug and its generic alternative, and encouraging the use of ambulatory care centers over outpatient hospital settings for particular surgeries through increased co-pays for non-optimal settings.

See Doug McKeever, *Health Benefits Committee Agenda Item 4a,* (June 14, 2011), http://www.calpers.ca.gov/eip-docs/about/board-cal-agenda/agendas/hbc/201106/item-4a.pdf.

CalPERS also plays a signficant role in the development of health policy throughout the State of California. CalPERS works with health plans to encourage hospitals to lower costs, and uses its contracting power to exclude providers and hospitals that refuse to lower overhead and other variable costs. See *CalPERS drops 38 Hospitals from Health Network to Trim Spending,* Associated Press (LexisNexis, May 19, 2004). Additionally, the CalPERS Government Affairs Unit monitors health care legislation and represents CalPERS before the California Legislature.

Prior to enactment of the ACA, CalPERS supported implementation of federal health care reform. Once the ACA became law, CalPERS began to implement the new requirements through contract negotiation, statutory and regulatory changes, and updates to member materials and changes to internal policies and practices.

B. Early Retiree Reinsurance Program

Congress recognized that rising costs have made it difficult for employers to provide quality, affordable health insurance for workers and retirees while also remaining competitive in the global marketplace. *The Affordable Care Act's Early Retiree Reinsurance Program,* HealthCare.gov (October 4, 2010),http://www.healthcare.gov/news/factsheets /2010/10/early-retiree-reinsurance-program.html. Many Americans who retire without employer-

sponsored insurance and before they are eligible for Medicare have experienced severe financial pressures in obtaining health insurance in the individual market. Id. The Early Retiree Reinsurance Program (ERRP) was enacted to provide financial relief for employers. Affordable Care Act, Pub. L. No. 111-148, §1102(a)(1), 124 Stat. 143 (2010). Under ERRP, for each early retiree enrolled in a certified plan in a plan year, the ERRP plan sponsor receives reimbursement in the amount of 80 percent of the costs for health benefits for claims incurred during the plan year, and paid by the employment-based plan, and by the early retiree. 45 CFR 149.100 (2010).

As of December 2, 2011, the federal government has disbursed over $4.5 billion in ERRP funding to a variety of businesses, including for-profit companies, schools and educational institutions, unions, state and local governments, religious organizations and other nonprofit Plan Sponsors, to help reduce their health plan benefit costs and those of their plan participants. *Update on ERRP Payment Processing and Announcement of End Date for Newly Incurred Claims*, ERRP.gov, (December 9, 2011), http://www.errp.gov/newspages/20111209-updated-payment-processing-new-incurred-date.shtml. To request reimbursement funding, CalPERS was required to participate in an extensive application process. 45 CFR 149.40 (2010). As part of this process, CalPERS worked with each health plan to put in place the required information sharing agreements, gather claims data for early retirees and their dependents, and to ascertain accurate Social Security numbers for each individual. To date, CalPERS has received over $98 million in

ERRP funds. This money was used to offset premium increases for plan years 2011 and 2012 across all CalPERS health plans, reducing premiums by two to three percent. Stephen Huth, *Availability of Early Retiree Reinsurance Program Ends In May 2011*, CCH Aspen Publishers Tech. Answer (April 2011),http://healthcarelegislation.blogspot.com/2011/04/availability-of-early-retiree.html.

C. Increase in Dependent Coverage Age

The ACA also requires private insurers that offer dependent coverage to children to allow young adults up to age 26 to remain on their parent's insurance plan. Affordable Care Act, Pub. L. No. 111-148, §2714(a), 124 Stat. 132 (2010). To date, it has been estimated that as a result of this change in the law, 2.5 million young adults between the ages of 19 and 25 have gained health insurance coverage. *New data: Affordable Care Act helps 2.5 million Add'l Young Adults Get Health Ins.*, U.S. Dep't. of Health and Human Servs,, HHS.gov, (December 14, 2011), http://www.hhs.gov/news/press/2011pres/12/20111214d.html

Prior to the enactment of the ACA, CalPERS health plans covered unmarried dependents up to age 23 under a parent's health plan. In February 2011, CalPERS filed amended regulations with the California Secretary of State that increased the dependent coverage age limit to 26, and removed any additional eligibility requirements, other than parental status, consistent with new federal requirements. Beginning with open enrollment in Fall 2010, CalPERS members enrolled approximately 28,000 young adults as a result of

these changes for coverage in plan year 2011. CalPERS also worked with other California agencies, including the State Controller's Office and Franchise Tax Board, to implement conforming state tax laws to exempt these benefits from a parent's stated income.

D. Increased Service Levels to Members

In accordance with the ACA, CalPERS also eliminated lifetime limits for speech therapy and hospice care for self-funded plans effective January 1, 2011. This has resulted in increased service levels for CalPERS members. Affordable Care Act, Pub. L. No. 111-148, §2711(a), 124 Stat. 131 (2010).

E. Federal Regulatory Implementation

CalPERS routinely tracks the various proposed federal regulations implementing the provisions of the ACA, assesses the impact of these regulations on CalPERS health plans and benefit design, and provides comments to the appropriate implementing agency when warranted. As a result of the ACA, CalPERS has changed many policies and procedures to comply with these regulations. Notable among these new regulations is the requirement that all health benefit plans, including self-funded plans, provide an independent, external review of denied claims involving medical judgment. This required CalPERS to amend its contractual arrangements with the third party administrators of its PPO plan and pharmacy benefits, as well as amend explanatory documents provided to members.

F. Implementation of the Affordable Care Act Demonstrates Cooperative Federalism

The ACA continues the model of joint participation of the state and federal governments to address critical issues facing the nation as a whole. The ACA explicitly provides the states with opportunities to be innovative to address the critical issue of ensuring that every citizen has health insurance coverage. Through its implementation efforts, CalPERS has made substantial changes in the health benefits provided to its membership through changes in state statutes and regulations and through changes in the relationships with its contracting health care providers.

II. THE INDIVIDUAL MANDATE IS ONE OF MANY "ESSENTIAL PARTS" OF CONGRESS' CONSTITUTIONAL REGULATION OF THE HEALTH CARE SERVICES MARKET

"Case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). By passing the ACA, Congress sought to regulate an ever-increasing segment of the United States economy by encouraging participation in the system, increasing accessibility, and lowering the overall cost of health care. See Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). An integral part of this regulatory scheme is the "individual mandate," by

which Congress seeks to regulate economic and financial decisions about how and when health care is paid for, and when health insurance is purchased. *Id.,* at 119 Stat. 242. Incremental attempts to solve the uninsured crisis on a state-by-state basis have been largely unsuccessful, as illustrated by California's numerous legislative efforts to lower the uninsured rate of 21%. Gardner, *supra*, at 1. Trying to achieve the large scale funding required for health care reform at the state level has been a losing proposition: "The single biggest problem for states to overcome with respect to any expensive wholesale reform is the perpetual boom-bust fiscal cycle from surplus to deficit and back again that derails large scale funding . . .." Susan A. Channick, *Can State Health Reform Initiatives Achieve Universal Coverage?* 6 (Jan. 2, 2011, 6:45 a.m.) http://works.bepress.com/susan_channick/1. The individual mandate is an essential part of the overall scheme developed by Congress to mitigate impacts of rising health care costs to the national economy.

A. The Decision Not to Purchase Health Insurance Substantially Affects Interstate Commerce

In *Wickard v. Filburn*, this Court held that whatever its nature, Congress may reach an intrastate activity if it exerts a substantial economic effect on interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 63 (1942) (cited in *Gonzales v. Raich*, 545 U.S. at 18, as being of "particular relevance" in assessing "Congress' power to regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate

commerce."). Filburn, a farmer in Ohio, planted 23 acres of wheat in 1941 -- 11.9 acres over the limit imposed by Congress by way of the Agriculture Adjustment Act of 1938. He challenged the regulation on the ground that Congress overstepped its Commerce Clause authority when it interfered with his strictly intrastate activity – producing additional wheat for consumption on his own farm. *Id.,* at 114-115 (italics added). The Court denied his challenge and held that Filburn's decision to use home-grown wheat, rather than participate in the interstate market for wheat, had a substantial effect on the ability of Congress to control the price and supply of wheat in an extremely volatile market. *Id.,* at 127. The Court reasoned that stimulation of commerce was an appropriate use of Congress' regulatory power, as was the power to regulate prices at which commodities are dealt. The variable nature of a farmer's actions in regard to home-grown wheat interfered with the efforts of Congress to control the supply and market price of wheat. *Id.,* at 128-129. The Court reasoned that while Filburn's own contribution to the demand for wheat "may be trivial by itself, it is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many other similarly situated, is far from trivial." *Id.,* at 127-128.

Like Filburn's decision to use home-grown wheat rather than to purchase it on the open market, an individual's decision not to participate in the health insurance market, taken in the aggregate with other individuals making similar decisions, substantially affects Congressional attempts to control the cost of health care. The ACA's individual mandate is aimed at individuals who make a

deliberate choice not to purchase health insurance. This decision, or "activity," is analogous to Filburn's decision to grow and use 11.9 additional acres of wheat for his own consumption. Similar to Filburn's decision not to buy additional wheat on the open market, the uninsured's decision to access the health care system without paying for the cost of health services through insurance is a factor of volume and variability that wields a substantial influence on the price and market conditions of health care services. Compare *Wickard*, 317 U.S. at 128. The Court in *Wickard* understood that while Filburn's decision in 1941 was to forego participation in interstate commerce, in other years he may decide to introduce the additional wheat into the market, if high prices induced him to sell instead of consume the wheat. *Id.*, at 128. Similarly, uninsured individuals enter the market in an unpredictable and irregular fashion – accessing the system only at the point of acute need (for example, through emergency room visits). This variability substantially affects the health insurance and services market and makes it difficult for Congress to control the price and volume of services.

CalPERS benefit designs, as well as the ACA, also include provisions that encourage individuals to access health care services on a preventive basis, thus lowering the cost-of-care over the long term. Conversely, because they are required to pay on a fee-for-service basis, uninsured individuals often forego routine preventive medical services, and access the health care system only when they have a more costly medical need. See *"Coverage Matters," America's Uninsured Crisis*, The Nat'l Academies Press, (2009), http://www.nap.edu/openbook.php?record_id=12511&page=49.

An example of this higher cost care is the uninsured accessing health care services through the emergency room. In 1986, Congress enacted the Emergency Medical Treatment and Active Labor Act ("EMTALA"), which requires all participating hospitals to provide care to anyone needing emergency health care services regardless of citizenship, legal status or ability to pay. 42 U.S.C. § 1395dd. Participating hospitals are those that accept payment from the Department of Health and Human Services and the Centers for Medicare and Medicaid Services (CMS) under the Medicare program. Practically speaking, EMTALA applies to virtually all hospitals in the United States. There are no reimbursement provisions in EMTALA to cover the cost for emergency care that participating hospitals are obligated to provide. Accessing care on an emergency basis increases costs because the individual may not be able to afford the immediate expense, because emergency care is typically more expensive than routine provider care, and because of the higher cost of caring for more advanced stages of illness. Costs that go unpaid by uninsured individuals get passed on to the insured by hospitals and providers through increased costs for services, and ultimately through premium increases and other cost-sharing plan designs.

As a purchaser, CalPERS is impacted by the substantial effect of the uninsured on the health care market by way of increased premiums and out-of-pocket expenses for CalPERS members. In 2006, it was estimated health insurance premiums in California for a family with private, employer-sponsored coverage were $1,186 higher due to the unpaid cost of health care for the uninsured. This figure was $455 higher for individual health

insurance coverage in the state. Peter Harbage and Len M. Nichols, Ph.D., *A Premium Price: The Hidden Costs All Californians Pay in Our Fragmented Health Care System*, New America Foundation (December 2006). These figures were estimated to rise to $1,792 and $521 respectively by 2010. Paying a Premium: The Added Cost of Care for the Uninsured, A Report by Families USA (June 2005). Cost-shifting due to uncompensated costs of the uninsured exerts a substantial economic effect on interstate commerce as evidenced by increased premiums for all health insurance plans offered by CalPERS. CalPERS premiums for all plans increased by an average of 9.64% each year from 1998 to 2010. See CalPERS Health Benefits Program Total Plan Changes, 1998-2012, (June 2011), Appendix p. 7a. During this same period, general inflation averaged just 2.38% per year. *Historical Inflation Rates: 1914 – 2011, US Inflation Calculator*, (Jan. 11, 2012, 11:30 a.m.), http://www.usinflationcalculator.com/inflation/historical-inflation-rates/

In addition, 55,619 CalPERS members reside outside California and receive health benefits provided under CalPERS self-funded health plan. CalPERS HMO members access health care services when traveling out-of-state under the provisions of their particular plan. Claims submitted by these members are based on the cost of care in the states in which they live or visit. As uninsured individuals access care in any given state, those costs are shifted to paying consumers through increased premiums as well as increased costs of services from providers and hospitals. Even if CalPERS can to some extent control the more immediate shifting of these costs to the State of California and agency employers by way

of coverage limitations and co-pays, CalPERS out-of-state members bear the impact of cost-shifting.

The attempt by Congress through the ACA to control the manner in which individuals access the health care market – by spreading the cost of an individual's access over time – is a legitimate use of Congressional power to regulate the interstate commerce of health care services. The individual mandate requires uninsured individuals to enter the market earlier than they chose to under the current system, at the time they are in acute need of care. In this respect, the individual mandate allows Congress to control a variable factor of health care cost that substantially impacts its ability to regulate the health care market.

B. The Individual Mandate Constitutionally Regulates an Economic Activity and is a Rational Means of Regulating Interstate Commerce in Health Insurance and Services.

As an essential part of a larger regulation of economic activity, the individual mandate provision in the ACA is rationally related to the objectives of that broader statutory scheme. In *Gonzales v. Raich*, the Court held Congress acted within its Commerce Clause authority when it regulated the intrastate production and sale of marijuana through the Controlled Substances Act (CSA). 545 U.S. 1 (2005). The Court reasoned that, as in *Wickard*, the primary purpose of the CSA was to control the supply and demand of a product, and that Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions. *Id.*, at

19. "In assessing the scope of Congress' authority under the Commerce Clause...[w]e need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Id.,* at 22.

The *Raich* Court distinguished both *U.S. v. Lopez* and *U.S. v. Morrison*, earlier cases that invalidated Congressional regulations on the grounds the intrastate activities subject to regulation had nothing to do with "any sort of economic enterprise, however broadly one might define those terms." *Id.,* at 24, (quoting *U.S. v. Lopez*, 514 U.S., at 561.)

In *U.S. v. Lopez*, the Court held the Gun Free School Zones Act, which assigned criminal penalties for possessing a gun in a school zone, was an unconstitutional expansion of Congressional power under the Commerce Clause because possession of a gun in a local school zone was "in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *U.S. v. Lopez*, 514 U.S. at 567. The Court stated that to uphold the law, it would have to "pile inference upon inference" to find a nexus with interstate commerce, where the government cited the potential increase in insurance premiums resulting from "violent crime" and the inhibition of interstate travel when citizens feel a particular location is overly dangerous as impacts of the activity on interstate commerce. *Id.,* at 567. The majority reasoned that if this attenuated connection were permitted to justify Congress' action, there was no limit to Congress' powers under the Commerce Clause. *Id.,* at 564.

Similarly, in *U.S. v. Morrison*, the Supreme Court held the Violence Against Women Act of 1994 was unconstitutional because Congressional reasoning linking violence against women to interstate commerce via travel deterrence and impacts to national productivity posed a "but-for causal chain from the initial occurrence of a violent crime to every attenuated effect upon interstate commerce." 529 U.S. 598, 615 (2000). Allowing Congress to use such attenuated reasoning, the Court held, would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. *Id.,* at 615.

Unlike those activities at issue in *Lopez* and *Morrison*, the activities regulated by the CSA were quintessentially economic. *Raich*, 545 US at 25. While respondents in *Raich* argued the decisions in *Lopez* and *Morrison* required that the CSA be held unconstitutional, the Court compared the statutes at issue in the three cases and determined the *Lopez* and *Morrison* regulations were "markedly different." *Id.,* at 23. "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances of the class." *Id.,* at 23, (citations omitted). Because the CSA was a statute that directly regulated economic, commercial activity, the Court stated that its opinion in *Morrison* cast no doubt as to its constitutionality." *Id.,* at 26.

Like wheat production and consumption in *Wickard*, and marijuana production and possession in *Raich*, the decision not to purchase health care insurance is a "quintessentially economic" decision. First, the uninsured as a class are active in the

market for health care, which they regularly access through different means. The minimum coverage provision merely regulates how individuals finance and pay for that active participation—requiring that they do so through insurance, rather than through attempted cost-shifting. See *Thomas More Law Center v. Obama*, 651 F.3d 557, 561 (Sutton, J.) ("No one is inactive when deciding how to pay for health care, as self-insurance and private insurance are two forms of action addressing the same risk."). Therefore, Congress had a rational basis for believing that failure to regulate the uninsured would "leave a gaping hole" in the ACA. See *Raich*, 545 U.S. at 22.

The connection between the uninsured population and the national cost of health care to the U.S. economy has been well-established by Congressional findings and national data. See Affordable Care Act, Pub. L. No. 111-148, §1501(a), 124 Stat. 242 (2010). In 2008, health care providers absorbed $43 billion in uncompensated care costs for providing care for the uninsured. *Id.* Congress found overall health care spending in 2009 was approximately $2.5 trillion, or 17.6% of the national economy. *Id.* Private health insurance accounted for 32% of this spending, which involved private employer-based insurance plans and the private individual health insurance market. *National Health Expenditure Data Fact Sheet*, Centers for Medicare and Medicaid Services (CMS), (January 6, 2012), https://www.cms.gov/NationalHealthExpendData/25_NHE_Fact_Sheet.asp.

Approximately 200 million people in the U.S. are covered under the private health insurance system. *Income, Poverty, and Health Insurance*

Coverage in the United States: 2010, (September 2011), http://www.census.gov/prod/2011pubs/p60-239.pdf. Moreover, in 2010 an additional 47.5 million individuals obtained health insurance coverage through the Medicare program. As of 2009, 47.8 million people in the country were covered under the Medicaid program. *Fast Facts About Medicare*, National Committee to Preserve Social Security and Medicare, (Jan. 12, 2012, 10:42 a.m.), http://www.ncpssm.org/fasfactm and *Income, Poverty, and Health Insurance Coverage in the United States: 2010*, (September 2011), http://www.census.gov/prod/2011pubs/p60-239.pdf. In California an estimated 6.7 million individuals, or 21.5% of the California population, are uninsured. *California's Uninsured, Cal. Health Care Almanac*, Cal. Health Care Found., p. 3-4 (December 2011). This includes individuals who could but do not access safety net programs such as Medicaid and Healthy Families, (up to 76% of California's uninsured children) and 23.7% of employed individuals. *Id.*, at 8, 16.

For the reasons outlined above, Congress rationally determined that regulation of the uninsured population was a required part of the overall regulatory scheme to lower health care costs and increase individual access to care.

CONCLUSION

This Court should uphold the Patient Protection and Affordable Care Act as a constitutional exercise of Congressional power under the Commerce Clause. The judgment of the Eleventh Circuit Court of Appeals invalidating the minimum coverage provision should be reversed.

RESPECTFULLY SUBMITTED,

PETER H. MIXON
General Counsel,
California Public
Employees'
Retirement System

January 13, 2012

APPENDIX

1. Cal. Gov't Code, § 22750 provides:

   This part may be cited as the Public Employees' Medical and Hospital Care Act. As used in any contract or statute, the term "Meyers–Geddes State Employees' Medical and Hospital Care Act" shall be construed to refer to and mean the Public Employees' Medical and Hospital Care Act.

2. Cal. Gov't Code, § 22751 provides:

   It is the purpose of this part to do all of the following:

   (a) Promote increased economy and efficiency in state service.
   (b) Enable the state to attract and retain qualified employees by providing health benefit plans similar to those commonly provided in private industry.

   (c) Recognize and protect the state's investment in each permanent employee by promoting and preserving good health among state employees.

3. Cal. Gov't Code, § 22775 provides:

   "Family member" means an employee's or annuitant's spouse or domestic partner and any child, including an adopted child, a stepchild, or recognized natural child. The board shall, by regulation, prescribe age limits

and other conditions and limitations pertaining to children.

4. Cal. Gov't Code, § 22800 provides:

Enrollment of employee or annuitant; Exclusion of certain employees

(a) An employee or annuitant is eligible to enroll in an approved health benefit plan, in accordance with this part and the regulations of the board.

(b) Regulations may provide for the exclusion of employees on the basis of the nature, conditions, and type of their employment, including, but not limited to, short–term appointments, seasonal or intermittent employment, and employment of a like nature. However, no employee may be excluded solely on the basis of the hazardous nature of the employment.

5. Cal. Gov't Code, § 22850 provides:

Contracts for health benefit plans not subject to competitive bidding; Powers of board; Services offered; Cost containment and cost reduction incentive programs; Approval of certain preexisting plans

(a) The board may, without compliance with any provision of law relating to competitive bidding, enter into contracts with carriers offering health benefit plans or with entities offering services

relating to the administration of health benefit plans.

(b) The board may contract with carriers for health benefit plans or approve health benefit plans offered by employee organizations, provided that the carriers have operated successfully in the hospital and medical care fields prior to the contracting for or approval thereof. The plans may include hospital benefits, surgical benefits, inpatient medical benefits, outpatient benefits, obstetrical benefits, and benefits offered by a bona fide church, sect, denomination, or organization whose principles include healing entirely by prayer or spiritual means.

(c) Notwithstanding any other provision of this part, the board may contract with health benefit plans offering unique or specialized health services.

(d) The board may administer self–funded or minimum premium health benefit plans.

(e) The board may contract for or implement employee cost containment and cost reduction incentive programs that involve the employee, the annuitant, and family members as active participants, along with the carrier and the provider, in a joint effort toward containing and reducing the cost of providing medical and hospital health care services to public employees. In developing these plans, the board, in cooperation with the Department of Personnel

Administration, may request proposals from carriers and certified public employee representatives.

(f) Notwithstanding any other provision of this part, the board may do any of the following:

(1) Contract for, or approve, health benefit plans that charge a contracting agency and its employees and annuitants rates based on regional variations in the costs of health care services.

(2) Contract for, or approve, health benefit plans exclusively for the employees and annuitants of contracting agencies. State employees and annuitants may not enroll in these plans. The board may offer health benefit plans exclusively for employees and annuitants of contracting agencies in addition to or in lieu of other health benefit plans offered under this part. The governing body of a contracting agency may elect, upon filing a resolution with the board, to provide those health benefit plans to its employees and annuitants. The resolution shall be subject to mutual agreement between the contracting agency and the recognized employee organization, if any.

(g) The board shall approve any employee association health benefit plan that was approved by the board in the 1987–88 contract year or prior, provided the plan continues to meet the minimum standards prescribed by the board. The trustees of an employee association health benefit plan are responsible for providing health benefit plan administration and services to its enrollees. Notwithstanding any other provision of this part, the California Correctional Peace Officer Association Health Benefits Trust may offer different health benefit plan designs with varying premiums in different areas of the state.

(h) Irrespective of any other provision of law, the sponsors of a health benefit plan approved under this section may reinsure the operation of the plan with an admitted insurer authorized to write disability insurance, if the premium includes the entire prepayment fee.

6. Title 2, California Code of Regulations § 599.500, states in pertinent part:

(n) A "child," as described in Government Code section 22775, means an adopted, step, or recognized natural child until attainment of age 26, unless the child is disabled as described in section 599.500, subdivision (p).

(o) In addition to a "child" as described in Government Code section 22775, "family

member" also includes any child for whom the employee or annuitant has assumed a parent-child relationship, in lieu of a parent-child relationship described in subdivision (n), as indicated by intentional assumption of parental status, or assumption of parental duties by the employee or annuitant, as certified by the employee or annuitant at the time of enrollment of the child, and annually thereafter up to the age of 26 unless the child is disabled as described in section 599.500, subdivision (p). This section should not be construed to include foster children.

(p) "Disabled child," means a child, as described in Government Code section 22775 and section 599.500, subdivision (n) or (o), who at the time of attaining age 26, is incapable of self-support because of a physical or mental disability which existed continuously from a date prior to attainment of age 26 and who is enrolled pursuant to section 599.501, subdivisions (f) and (g), until termination of such incapacity.

CalPERS Health Benefits Program

Health Plan Type Category	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Overall Basic	3.2%	6.1%	9.2%	11.8%	9.8%	24.1%	16.42%	9.93%	8.88%	11.91%	6.78%	4.84%	3.24%	9.94%	4.61%
HMOs	2.7%	7.3%	9.7%	9.2%	8.0%	25.0%	17.97%	11.39%	8.70%	11.60%	7.39%	6.57%	3.43%	10.61%	5.30%
Self-Funded PPOs	5.3%	1.3%	8.0%	21.7%	19.6%	19.8%	13.18%	5.40%	9.48%	12.61%	4.15%	0.04%	3.28%	6.70%	3.04%
Association Plans	3.5%	2.6%	4.0%	12.8%	14.4%	20.8%	11.82%	8.75%	8.27%	12.76%	10.81%	4.68%	0.83%	7.19%	2.66%

Health Plan Type Category	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Overall Medicare	6.6%	11.1%	20.7%	26.4%	16.0%	17.8%	10.04%	-11.32%	6.96%	13.49%	3.03%	0.73%	1.11%	3.38%	0.05%
HMOs	6.2%	16.6%	70.1%	31.7%	18.5%	40.6%	26.75%	-10.74%	-7.01%	24.98%	-1.61%	1.64%	0.27%	0.16%	-0.94%
Self-Funded PPOs	7.2%	9.3%	13.8%	22.7%	15.9%	5.8%	-1.21%	-12.62%	18.63%	8.77%	6.67%	0.00%	1.68%	6.56%	0.73%
Association Plans	1.8%	2.3%	20.7%	13.5%	10.5%	16.8%	14.98%	0.63%	0.00%	0.23%	-2.27%	1.31%	2.50%	4.22%	0.66%

Health Plan Type Category	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Combined Overall	3.5%	6.8%	11.0%	13.4%	10.5%	23.3%	15.59%	7.14%	8.65%	12.10%	6.32%	4.34%	2.89%	9.13%	4.05%
Combined HMOs	3.0%	8.5%	11.7%	10.4%	8.7%	26.9%	18.65%	9.48%	7.63%	12.50%	6.69%	6.21%	3.20%	9.82%	4.84%
Combined PPOs	6.5%	2.1%	9.9%	22.0%	18.7%	18.1%	9.56%	1.78%	11.51%	11.18%	4.74%	-0.03%	2.80%	7.91%	2.46%
Combined Assoc. Plans	3.3%	2.6%	5.0%	12.8%	14.1%	20.6%	11.84%	6.32%	7.72%	11.97%	10.08%	4.79%	1.01%	7.03%	2.56%

AMICUS CURIAE BRIEF

No. 11-398

IN THE

Supreme Court of the United States

DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.,

PETITIONERS,

v.

STATE OF FLORIDA, ET AL.,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR *AMICI CURIAE* MORTIMER CAPLIN AND SHELDON COHEN URGING VACATUR ON THE ANTI-INJUNCTION ACT ISSUE IN SUPPORT OF NEITHER SIDE

ALAN B. MORRISON
(COUNSEL OF RECORD)
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
2000 H STREET NW
Washington, D.C. 20052
(202) 994-7120
abmorrison@law.gwu.edu

BRIAN WOLFMAN
600 NEW JERSEY AVE. NW
Washington D.C. 20001
(202) 661-6582
wolfmanb@law.georgetown.edu

Counsel for Amici Curiae Mortimer Caplin & Sheldon Cohen

January 2012

QUESTION PRESENTED

The only question that amici Mortimer Caplin and Sheldon Cohen will address is whether respondents' suit challenging the minimum coverage provisions of the Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A, is barred by 26 U.S.C. §7421 or fails to meet the jurisdictional requirements of Article III of the Constitution because respondents lack standing and/or their claims are not ripe for review.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 5

THE FEDERAL COURTS LACK JURISDICTION TO DECIDE THE CONSTITUTIONAL QUESTIONS REGARDING SECTION 5000A PRESENTED IN THIS CASE. 9

A. THIS CASE MUST BE DISMISSED FOR LACK OF AN ARTICLE III CASE OR CONTROVERSY. 9

B. SECTION 7421 IS A JURISDICTIONAL BAR TO SUITS CHALLENGING SECTION 5000A. 13

1..Section 7421 Applies to All Lawsuits Involving the Tax Code Unless Expressly Excluded by Law. 13

2..Subsection 5000A(g) Does Not Exclude Section 7421, but Reinforces Its Applicability to Suits Involving Section 5000A. 28

CONCLUSION 37

STATUTORY APPENDIX 1A

TABLE OF AUTHORITIES

CASES

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967) 12

Alexander v. "Americans United" Inc.,
416 U.S. 752 (1974) 23, 24

Allen v. Wright, 468 U.S. 737 (1984) 26

Babbitt v. United Farm Workers,
442 U.S. 289 (1979) 12

Bob Jones University v. Simon,
416 U.S. 725 (1984) 14, 20, 23, 24

Botta v. Scanlon, 314 F.2d 392 (2d Cir. 1963) 16

Bowsher v. Synar, 478 U.S. 714 (1986) 26

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 11

Crouch v. Commissioner of Internal Revenue, 447 F.
Supp. 385 (N.D. Cal 1978) 16

Enochs v. Williams Packing & Navigation Co.,
370 U.S. 1 (1962) 6, 14, 22, 23

Herring v. Moore, 735 F.2d 797 (5th Cir. 1984) 16

Liberty University v. Geithner, 2011 WL 3962915
(4th Cir. Sept. 8, 2011) 2, 5, 26, 27

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 10, 13

McConnell v. Federal Election Commission,
540 U.S. 93 (2003) 26

Mobile Republican Assembly v. United States,
353 F.3d 1357 (11th Cir. 2003) 17

National Commodity & Barter Ass'n v United States,
625 F. Supp. 920 (D. Col. 1986) 17

National Park Hospitality Association v. Department of Interior, 538 U.S. 803 (2003) 11

Ohio Forestry Association, Inc. v. Sierra Club,
523 U.S. 726 (1998) 11

Professional Engineers, Inc., v. United States,
527 F.2d 597 (4th Cir. 1975) 16

Raines v. Byrd, 521 U.S. 811 (1997) 13, 26

Shaw v. United States, 331 F.2d 493
(9th Cir. 1964) 16

South Carolina v. Regan, 465 U.S. 367
(1984) 6, 14, 23

Spencer v. Brady, 700 F. Supp. 601 (D.D.C. 1988) .. 17

Susan Seven-Sky v. Holder, 661 F. 3d 1
(D.C. Cir. 2011) ..... passim

Thomas More Law Center v. Obama, 651 F. 3d 529 (6th Cir. 2011) 5

Transport Manufacturing & Equipment Co. v. Trainor, 382 F.2d 793 (8th Cir. 1967) 16

United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1 (2008) 27

United States v. Muskrat, 219 U.S. 346 (1911) 12

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 25

Whitman v. American Trucking Associations, 531 U.S. 457 (2001) 35

Whitmore v. Arkansas, 495 U.S. 149 (1990) 10

Younger v. Harris, 401 U.S. 37 (1971) 12

Statutes

26 U.S.C. § 4980H 8, 32-36

26 U.S.C. § 4980H(a) 33

26 U.S.C. § 4980H(b)(1)(B) 34

26 U.S.C. § 4980H(b)(2) 33, 34

26 U.S.C. § 4980H(c)(1) 3, 33

26 U.S.C. § 4980H(c)(2)(D) 34

26 U.S.C. § 4980H(d) 34

26 U.S.C. § 4980H(d)(1) 33

26 U.S.C. § 4980I 35, 36
26 U.S.C. § 5000A ..... passim
26 U.S.C. § 5000A(f)(2) 33
26 U.S.C. § 5000A(g) 7, 8, 28, 29
26 U.S.C. § 5000A(g)(1) 7, 29-33
26 U.S.C. § 5000A(g)(2) 7, 29
26 U.S.C. § 5114(c) 30, 31
26 U.S.C. § 5684 ..... 30, 31
26 U.S.C. § 5761 ..... 30, 31
26 U.S.C. § 6201 ..... 15, 21
26 U.S.C. § 6202 ..... 15, 21
26 U.S.C. § 6203 21
26 U.S.C. § 6212 20
26 U.S.C. § 6213 ..... 20, 21
26 U.S.C. § 6213(a) 20
26 U.S.C. § 6532 21
26 U.S.C. § 6665(a)(1) 31
26 U.S.C. § 6665(a)(2) 31
26 U.S.C. § 6671(a) 18, 29, 30, 31
26 U.S.C. § 6672 ..... 15, 16, 25
26 U.S.C. § 6685 17
26 U.S.C. § 6711 17

26 U.S.C. § 6718 17

26 U.S.C. § 6720A 17

26 U.S.C. § 7421 ..... passim

26 U.S.C. § 7422 ..... 21, 28

26 U.S.C. § 7428 ..... 6, 24, 26

26 U.S.C. § 7482(b) 21

26 U.S.C. § 7483 21

28 U.S.C. § 1340 21

28 U.S.C. § 1341 ..... 2, 13

28 U.S.C. § 1346(a)(1) 21

28 U.S.C. § 2283 2

Pub.L. 94-455, § 1306(a), 90 Stat. 1717 (1976) 24

Other Authorities

http://acalitigation.wikispaces.com/file/view/U.S.+supplemental+%2805.31.11%29.pdf 30

Constitutional Provisions

Article III ..... passim

INTEREST OF AMICI[1]

This brief is filed under the parties' blanket consents filed with the Court.

Amici Mortimer Caplin and Sheldon Cohen are lawyers who have been tax practitioners for their entire careers. Both are former Commissioners of the Internal Revenue Service ("IRS"). They know that the functioning of the IRS with respect to the 140 million individual returns filed annually depends on an orderly system for the assessment, payment, collection, and contesting of determinations made under the Internal Revenue Code (the "Code").

This case challenges the constitutionality of the provision of the Code that, with significant exceptions, requires taxpayers who do not have minimum health insurance, beginning in 2014, to pay an additional amount with their federal income taxes. The applicable provision, known as the individual mandate, is contained in section 1501 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA"), and is found at 26 U.S.C. § 5000A ("section 5000A").

None of the respondents in this case owes any money under section 5000A, and it is far from certain whether any individual respondent will not have qualifying health insurance by 2014 or, because of the statutory exemptions, will owe any money under section 5000A. Initially, the Government raised

---

[1] No person other than the named amici or their counsel authored this brief or provided financial support for it.

standing and ripeness objections, as well as the jurisdictional defense based on 26 U.S.C. § 7421 ("section 7421"), referred to as the Anti-Injunction Act, which forbids federal courts from maintaining any suit "for the purpose of restraining the assessment or collection of any tax." Because two other statutes that perform similar functions, 28 U.S.C. § 1341 and 28 U.S.C. § 2283, have had similar labels applied to them, this brief will refer to the statute at issue here as section 7421.

After this case and others challenging section 5000A were decided by the district courts, the Government abandoned the jurisdictional arguments, including the one under section 7421. Because section 7421 literally had no friend in court, amici filed a brief in *Susan Seven-Sky v. Holder*, 661 F. 3d 1 (D.C. Cir. 2011), arguing that section 7421 barred that suit. Their brief was cited twice by the majority in *Liberty University v. Geithner*, 2011 WL 3962915, *9, *14 (4th Cir. Sept. 8, 2011), and its contribution acknowledged by both the majority and dissent in *Seven-Sky*, 661 F.3d at 5 n.5, 26 n.4. Although the Court has appointed an amicus to argue that section 7421 applies, amici believe that their extensive experience in tax administration will further assist the Court. Moreover, this brief will also argue that, in addition to the objections based on section 7421, respondents' claims do not satisfy Article III because respondents lack standing and their claims will only be ripe if respondents are ever obligated to make payments under section 5000A, which cannot occur before 2015.

STATUTES INVOLVED

With the exception of 26 U.S.C. § 4980H, which is set forth in the Statutory Appendix to this brief, the relevant statutes are contained in the Statutory Appendix to the brief for the court-appointed amicus curiae.

STATEMENT OF THE CASE

Under the individual mandate contained in section 5000A of the Code, individuals who are not exempt (generally because they have insufficient income), and who fail to maintain a minimum level of health insurance beginning in 2014, must pay, with their federal income taxes, an amount labeled a "penalty." The health insurance requirement may be satisfied by enrollment in employer plans, government plans, or individual plans meeting certain specifications. Section 5000A(f).

The amount of the tax penalty is calculated as a percentage of household income, subject to a floor, with a ceiling based on the price of the forgone insurance coverage. The only reporting under section 5000A is on an individual's federal income tax return, which for 2014 would not be due until April 15, 2015. Individuals not required to file federal income tax returns make no payments under section 5000A. Subparagraphs 5000A(b)(2), (c)(1) & (2), & (e)(2). Subsection 5000A(g) provides that the amounts owed shall be assessed and collected in the

same manner as other penalties under the Code, with specific exceptions discussed below.

As this case came to this Court, there was a single individual, Mary Brown, who had been found to have standing to challenge the individual mandate. Pet. App. 8a-10a. The district court found that she could maintain this action, even though she would not owe any amounts under section 5000A until 2015, if then. The court ruled that her claim was ripe and that she had standing because she does not currently have qualifying insurance and she needed "to take investigatory steps and must make financial arrangements now to ensure compliance" with section 5000A when it becomes effective. *Id.* 292a.

In the district court, the Government moved to dismiss this challenge on the ground that section 7421 barred that claim. That contention was rejected for two principal reasons: The payment under section 5000A was designated by Congress as a penalty, not a tax (*id.* 401a-404a), and the court believed that section 7421 only applies to "true revenue-raising exactions." *Id.* 425a, 424a. On appeal, the Government abandoned reliance on section 7421, and the court of appeals did not address it.

Those respondents who are employers also challenged the constitutionality of 26 U.S.C. § 4980H, which is set forth in the Statutory Appendix to this brief. Section 4980H is also part of the ACA, and it performs a function similar to section 5000A, by requiring that certain employers provide health

insurance for their employees that would satisfy the individual mandate. The Government raised section 7421 as a jurisdictional bar to the section 4980H claim in both lower courts, although neither court addressed it. In its Consolidated Brief in Nos. 11-393 & 11-400 (at 9, 18-19), the Government maintained its position that section 7421 barred challenges to section 4980H, even though it still argues that section 7421 does not apply to lawsuits involving section 5000A (*id.* at 19 n.9).

Although the Eleventh Circuit did not address section 7421, other courts of appeals have. The court in *Thomas More Law Center v. Obama,* 651 F. 3d 529 (6th Cir. 2011) found it inapplicable to section 5000A, whereas a Fourth Circuit majority in *Liberty University v. Geithner,* 2011 WL 3962915, concluded that section 7421 barred the claims there. And in *Seven-Sky, supra,* the majority rejected section 7421, but the dissent found it applicable.

SUMMARY OF ARGUMENT

Subject to certain significant exceptions, the individual mandate in section 5000A requires that individuals who do not have health insurance meeting federal standards must pay – with their federal income taxes – an amount estimated to be no more than $300 a year for 2014, when section 5000A first becomes effective. No individual currently owes any money under section 5000A. Nor is it possible to know whether any particular individual challenging section 5000A will have the required health

insurance in 2014, or whether that person will be obligated to make any payment under section 5000A because individuals with low incomes are exempt from making such payments. For those reasons, the claims of the individual respondents must be dismissed because they lack standing and/or their claims are not ripe.

Section 7421 effectively decides the standing and ripeness issues in most federal tax cases, by requiring that the specific Code procedures for litigating disputes with the IRS, and only those procedures, be followed to the exclusion of lawsuits such as this. Thus, even if individual challengers met the Article III tests for standing and ripeness – which they do not – section 7421 would prevent them from going forward because it is also a specific limitation on federal court jurisdiction.

Section 7421 has been broadly construed to include a wide range of payments under the Code, including those labeled penalties, like section 5000A. Section 7421(a) contains fourteen express exceptions, and this Court has found two implied exceptions. *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962); *South Carolina v. Regan*, 465 U.S. 367 (1984). Moreover, Congress has provided a limited declaratory judgment exception in 26 U.S.C. § 7428 that was enacted in response to decisions of this Court requiring the use of the refund route even for claims that provisions of the Code violated the First Amendment and Equal Protection rights of organizations claiming tax-exempt status. Section 7421 was held to bar those cases even though the

actual taxes that might be owed, if any, were incidental to the constitutional principles at stake. None of the express statutory or implied exceptions applies to this case. Nor did Congress create a judicial review provision in the ACA, as it has regularly done in other important laws that were certain to undergo constitutional challenges, such as the Gramm-Rudman-Hollings Act, the Line Item Veto Act, and the Bipartisan Campaign Reform Act.

As a result, the default position regarding section 7421 is that it applies to all cases under the Code, unless the particular provision at issue – here, section 5000A – overrides section 7421 and makes it inapplicable. Nothing in section 5000A or any other provision of the ACA mentions, let alone excludes, section 7421, and subsection 5000A(g) reinforces its applicability. Thus, subparagraph (g)(1) provides that section 5000A penalties "shall be assessed and collected in the same manner" as other assessable penalties, which are subject to section 7421. Subparagraph (g)(2) then excludes criminal liabilities and two specific collection methods, the use of liens and levies, suggesting that all the other rules of tax procedure, such as section 7421, continue to apply.

Two other factors support section 7421's application to this case. First, if the ACA renders section 7421 inapplicable to cases involving section 5000A, the exception would not be limited to constitutional challenges: It would apply to any claim of fact or law that would defeat all or part of any amount otherwise due under section 5000A.

Moreover, it would not only exclude cases brought now, but would override section 7421 forever, and it would enable taxpayers to evade the Code's carefully constructed procedures for the exhaustion of administrative remedies and the time limits for filing suit.

Second, the employer mandate in section 4980H operates in conjunction with the individual mandate in section 5000A. Section 4980H contains virtually identical assessment and collection language as does subsection 5000A(g), yet the Government insists that section 7421 applies to challenges brought to section 4980H, but not to those involving section 5000A. The fact that Congress described the payment under section 4980H as a "tax" in two subsections, but used other terms – including "penalties" – for the same payment elsewhere in section 4980H, cannot sustain the Government's disparate positions regarding sections 5000A and 4980H. There is not a shred of evidence in the ACA, its legislative history, or the rationale behind both provisions and section 7421 that would support such a distinction.

ARGUMENT

THE FEDERAL COURTS LACK JURISDICTION TO DECIDE THE CONSTITUTIONAL QUESTIONS REGARDING SECTION 5000A PRESENTED IN THIS CASE.

A. THIS CASE MUST BE DISMISSED FOR LACK OF AN ARTICLE III CASE OR CONTROVERSY.

In addition to the jurisdictional bar under section 7421, respondent Brown's individual claim is not sufficiently concrete to give rise to an Article III case or controversy. Section 5000A's individual mandate does not apply to anyone until 2014, and no one has to make any payments under it until 2015. Although respondent does not currently have health insurance, her situation may change in the next three years. Thus, she or a family member may take a job that provides qualifying health insurance; she may become eligible for Medicaid, Medicare, or other government health insurance; or she may change her mind for any number of reasons and obtain health insurance. Furthermore, even if she does not have the requisite insurance, she may not have to make any payments under section 5000A because her adjusted gross income may fall below the minimum amount that triggers a payment. There is also the possibility, as Judge Kavanaugh noted (661 F. 3d at 53-54), that, as a result of the 2012 election, section 5000A will be amended or the ACA will be repealed. Accordingly, Brown is not injured now by section

5000A, and any future injury is not "certainly impending" as required by Article III. *See, e.g., Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

Recent developments confirm that concerns about whether any individual plaintiff can meet the requirements of Article III are not just hypothetical. The Government's brief on the merits of section 5000A (at 16 n.5) reveals that respondent Brown has now filed for bankruptcy and that respondents therefore have moved to add individual respondents who are similarly situated to her. As the Governments observes (at 44), her bankruptcy was in part the not-unexpected result of medical bills. More importantly, her change in circumstances confirms that the necessary injury in fact required by Article III is not "certainly impending" for Brown or for any of the additional plaintiffs whose situation is no different from hers when her standing was (erroneously) upheld.

The Article III question can be viewed either as a lack of ripeness, because it is highly uncertain whether a particular plaintiff will ever have a claim about section 5000A, or a lack of standing, because there is too much uncertainty as to whether that plaintiff will have to make payments under section 5000A and for that reason has not sustained an injury in fact. This Court in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 564 (1992), dismissed the complaint for lack of standing because it was far from certain that the plaintiffs would actually suffer the injury that they claimed under the Endangered Species Act. Other cases reached the same result

through a ripeness analysis. In *Ohio Forestry Association, Inc. v. Sierra Club,* 523 U.S. 726 (1998), this Court held unripe a statutory dispute regarding a resource management plan because additional steps had to be taken before the harms to which the plaintiff objected would occur. *See also National Park Hospitality Association v. Department of Interior,* 538 U.S. 803, 811 (2003) (raising ripeness *sua sponte,* declining to decide the statutory question, and rejecting claim that "mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis"); *see also id.* at 813-17 (Stevens, J., concurring) (coming to the same conclusion based on lack of standing because no plaintiff had yet suffered an injury in fact).[2]

In one respect, this case is like *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983), where this Court dismissed a claim for injunctive relief by a person who had been victimized by a police chokehold during an arrest because of a lack of a case or controversy, even though it was quite likely that *someone* would be subject to the allegedly unconstitutional practices because the police had not discontinued their use. Assuming the ACA remains unchanged, there is little doubt that *someone at some time* will actually be required to make payments under section 5000A, and no one disputes that those individuals will have their claims heard, after

---

[2]Admittedly, there is no need here for further factual development on the legal issue, as there was in *National Park Hospitality*. *See* 538 U.S. at 812.

exhausting their administrative remedies, using the express remedies provided by the Code (discussed below at 19-21). As this Court explained in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967), one consideration in a ripeness inquiry is whether a statute other than the one challenged precludes the action. That there are express alternative avenues for judicial review is not dispositive, so long as the alternative does not directly or impliedly preclude other types of non-statutory review. But given the Code's alternative remedies, coupled with section 7421's mandate, this Court should be especially reluctant to find ripeness when no plaintiff will have to make any payments under section 5000A until 2015, if then.[3]

Finally, this Court has been properly reluctant to decide constitutional questions unless it is necessary to do so. *United States v. Muskrat,* 219 U.S. 346, 361 (1911) (power to declare a law unconstitutional is "the most important and delicate duty of this Court [but] is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in a justiciable controversy require the court" to decide the case.); *see also Seven-Sky,* 661 F. 3d at 45-47 (Kavanaugh, J., dissenting) (cautioning against premature decision on the merits). Such a course is particularly

---

[3] This case is unlike *Babbitt v. United Farm Workers,* 442 U.S. 289 (1979), where a plaintiff who is denied the right to sue in federal court under 42 U.S.C. § 1983 would be forced to litigate federal claims in state court under *Younger v. Harris,* 401 U.S. 37 (1971).

appropriate here because Congress has not specifically authorized this litigation. *See, e.g., Lujan,* 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment) (congressional authorization entitled to weight in determining justiciability); *see also Raines v. Byrd,* 521 U.S. 811 (1997) (specific authorization for members of Congress to challenge line-item veto removed prudential barriers, but still violated Article III). Indeed, the existence of section 7421 is at least an expression of congressional caution against premature litigation of claims under the Code, and relying on it would enable the Court to avoid deciding the constitutional question whether respondents' complaint satisfies Article III.

B. SECTION 7421 IS A JURISDICTIONAL BAR TO SUITS CHALLENGING SECTION 5000A.

1. Section 7421 Applies to All Lawsuits Involving the Tax Code Unless Expressly Excluded by Law.

a. Section 7421 is an essential foundation of our federal tax laws, whose purpose is to assure that federal taxes are assessed and collected in an orderly fashion. It shares that purpose with 28 U.S.C. § 1341, which protects states from federal court interference with the collection of their taxes where there is "a plain, speedy and efficient remedy" under state law. Under federal law, there are two remedies

under the Code to challenge section 5000A, both of which will be available and adequate once section 5000A is in effect. One is to pay the tax and sue for a refund, and the other is to wait for the IRS to sue to collect and then defend on the ground that the law is unconstitutional. Although section 7421 bars only injunctions, tax cases are expressly excepted from the Declaratory Judgment Act, 28 U.S.C. § 2201, and this Court has ruled that sections 2201 and 7421 are co-extensive. *See Bob Jones University v. Simon*, 416 U.S. 725, 732 n.7 (1984).

The complaint in this case seeks an order that would prevent the federal government from carrying out the individual mandate of section 5000A. Amended Complaint, Count 2, Relief, ¶ C. To obtain such relief, respondent must surmount section 7421(a), which provides in pertinent part:

> Except as provided in [14 enumerated sections], no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

None of the listed exceptions applies to this case, nor are the implied exceptions previously recognized in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), or *South Carolina v. Regan*, 465 U.S. 367, 378 (1984), available. Thus, if the complaint seeks to enjoin the assessment or collection of "any tax," section 7421 bars this suit unless subsection 5000A(g) itself creates an implied exception to

section 7421, a contention addressed below in Part B.2.

b. The district court here and the majority in *Seven-Sky* maintained that because the amounts due under section 5000A are designated "penalties," they are not a "tax" under section 7421. This purported distinction overlooks section 6201(a), under which the IRS is required to make "assessments of all taxes (including interest, additional amounts, additions to the tax and assessable penalties) imposed by this title," and section 6202 that provides for assessing "any internal revenue tax (including ... assessable penalties"). Those provisions make it clear that, at least as a general matter, taxes include, rather than exclude, penalties. Moreover, the proper question is not whether, for all (or even some) purposes, a tax and a penalty are identical. Rather, the question is whether there is anything about section 5000A that supports the conclusion that Congress excluded it from section 7421.

Perhaps the best illustration of section 7421's breadth is its uniform application to efforts to enjoin assessment of "penalties" under section 6672. Section 6672 deals with the frequent problem of employers withholding taxes (including income, social security, and Medicare taxes) from their employees and then not turning them over to the IRS as the law requires. In many cases, the employer is a corporation, and the corporation is no longer in business or is unable to pay its debts when the IRS catches up with it for failure to pay the amounts withheld. Section 6672 creates a special remedy that

entitles the IRS to collect personally from the corporate officers who were responsible for not paying the amounts withheld from their employees. The remedy is a "penalty" equal to 100% of the amounts withheld but not paid. Penalties under section 6672 are never direct obligations of the responsible officers, unlike amounts due under section 5000A, which are solely the obligation of the uninsured taxpayer. Nonetheless, the courts have always applied section 7421 to section 6672 penalties and have required responsible corporate officers to use the specific procedures provided by the Code for contesting those liabilities. *See, e.g., Shaw v. United States*, 331 F.2d 493 (9th Cir. 1964); *Botta v. Scanlon*, 314 F.2d 392 (2d Cir. 1963).

Section 7421 has been applied in a wide variety of other similar circumstances, including efforts to block the collection of interest due on interest from a transferee, *Transport Manufacturing & Equipment Co. v. Trainor*, 382 F.2d 793 (8th Cir. 1967); penalties for late tax returns, *Professional Engineers, Inc., v. United States*, 527 F.2d 597 (4th Cir. 1975); $500 penalties for false filings on withholding, *Herring v. Moore*, 735 F.2d 797 (5th Cir. 1984); a $25 penalty for a tax preparer who did not include social security numbers on returns he prepared for others, *Crouch v. Commissioner of Internal Revenue*, 447 F. Supp. 385 (N.D. Cal 1978); penalties for promoting abusive tax shelters for others, *National Commodity & Barter Ass'n v United States*, 625 F. Supp. 920 (D. Col. 1986); and a penalty of as little as $5 for parents who refused to obtain a

social security number for their dependent children because it would require them to participate in a "mandatory universal numbering system for all American citizens and residents" in claimed violation of the First and Fifth Amendment. *Spencer v. Brady*, 700 F. Supp. 601, 602 (D.D.C. 1988). It was even applied in *Mobile Republican Assembly v. United States*, 353 F.3d 1357 (11th Cir. 2003), to bar a constitutional challenge to disclosure provisions regarding the names of contributors of more than $200 and of recipients of expenditures of more than $500 imposed on certain organizations as a condition of obtaining an exemption under section 527. Failure to make those disclosures resulted in the entity having to pay a penalty unrelated to any tax liability, yet the court found that the effort to enjoin that penalty was subject to section 7421.

The majority in *Seven-Sky* maintained that these penalty cases "merely stand for the proposition that the Act bars suits that interfere with ancillary functions to tax collection." 661 F. 3d at 10; *see also id.* at 9 (section 7421 inapplicable to "regulatory requirements that bear no relation to tax revenues or enforcement"); *id.* at 8 (section 5000A "produces no revenues for the Government"). However, a number of penalties in chapter 68, some significant and others trivial, exclusively enforce non-tax regulatory requirements. *See* 26 U.S.C. §§ 6685, 6711, 6718, & 6720A; *see also* 661 F. 3d at 40 n. 27 (Kavanaugh, J., dissenting) (rejecting majority's distinction based on regulatory vs. revenue-raising penalties). But all of them plainly are covered by section 7421 because

section 6671(a) makes all of the penalties in chapter 68 "taxes," which brings them under section 7421. All of them are unrelated to tax enforcement, and they, like many other provisions in chapter 68, are no more, and probably less, designed to raise revenue than is section 5000A.[4] There is no reason to suppose that Congress would not have wanted to assure the same orderly assessment, collection, and litigation of amounts due under section 5000A as under those provisions, whether they are designed to produce revenue or serve some other governmental function.

c. The Government attempts to explain away section 7421's applicability to the penalties in chapter 68, such as those in section 6672, by pointing to section 6671(a), which makes all penalties in chapter 68 "taxes" under the Code. But that does not justify the treatment under section 7421 of other penalties not in chapter 68, such as in the cases cited above (at 16-17). Moreover, nothing in section 7421 limits it to penalties in chapter 68, and nothing in the Code makes section 6671(a) or any other provision, such as section 6665(a), the exclusive means by which a penalty becomes subject to section 7421. Nor is there any reason why Congress would want the courts to create an exemption for *any* penalty from section 7421, let alone for section 5000A.

---

[4] According to the Congressional Budget Office, section 5000A is expected to produce $4 billion per year from the 34 million remaining uninsured. *See* 2011 WL 3962915, *14.

After all, the payments required by section 5000A are made to the IRS, are based in part on the taxpayer's income, are deposited into the Treasury, and are used to fund government programs. Far more significant than the label used is the choice that Congress made to include the section 5000A mandate in the Code and make it enforceable by the IRS, using the procedures for exhausting administrative remedies and other practices applicable to the resolution of tax disputes, as well as the filing of annual tax returns to report whether the taxpayer has health insurance. In that way, Congress assured that the money would be collected and, if necessary, contested, in a timely and efficient way, subject only to the express exceptions contained in subsection 5000A(g). Had Congress not chosen to use the Tax Code and the IRS for these purposes, it would have had to establish a new mechanism, including a new or different agency, to assure that the payments were made by those who did not have adequate health insurance. Had Congress gone that route, individuals who objected to the mandate would not have been barred by section 7421, although their claims would still be subject to dismissal at this time for failure to meet the requirements of standing and ripeness under Article III.

d. Section 7421's broad sweep is supported by a very sensible purpose: "the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference." *Bob Jones*, 416 U.S. at 736. To serve that need, section 7421

requires taxpayers to use the mechanisms expressly created by Congress to contest amounts claimed to be owed to the IRS, which both assures due process for taxpayers and enables the IRS to avoid being sued in inconvenient places and before it has finished its review of the taxpayer's return.

Examining the options available to taxpayers to contest the collection of money owed under the Code illustrates both their fairness and why Congress would not want to have the regular processes of tax administration interrupted by having to respond to suits by taxpayers who want to challenge the IRS at times and places of their choosing. For ordinary income taxes, many taxpayers either cannot afford to pay the amounts that the IRS claims are due or would prefer to keep their money until there has been a final determination of what they owe. They also do not want the IRS to start collection actions while the merits of their case are being decided. Before the IRS can begin collection efforts, it must send the taxpayer a formal notice of deficiency that spells out what is owed and why. Section 6212. That notice triggers the 90 days that the taxpayer has to file a petition with the Tax Court contesting the IRS's position. Section 6213(a). If that is done, the IRS is forbidden, with certain limited exceptions mainly applicable where the taxpayer may be dissipating his assets, from starting collection efforts while the case is pending, *id.*, including during an appeal to the circuit in which the taxpayer resides. Sections 7482(b) & 7483.

The Tax Court route is unavailable for challenges to section 5000A because section 6213 does not apply to section 5000A, which is in chapter 48, which is not one of the chapters to which section 6213 is applicable. Instead, the assessment would be made under sections 6201, 6202, and/or 6203 that apply to other taxes, including "assessable penalties," with notice within 60 days provided under section 6303. Taxpayers contesting the constitutionality of section 5000A would have the option of not paying the assessment and waiting for the IRS to file a collection action, pursuant to sections 6502 and 7401 and 28 U.S.C. § 1340, when they can raise the constitutional claim in defense. And, because subparagraph 5000A(g)(2)(B) forbids the IRS from using liens and levies to collect amounts owed under section 5000A, a taxpayer can avoid paying amounts asserted under section 5000A until the case is decided, making this avenue very similar to the Tax Court route.

Alternatively, taxpayers may pay the tax and sue for a refund, either in the Court of Federal Claims or in the district court for the district where they reside. 28 U.S.C. § 1346(a)(1). Another feature of refund actions confirms Congress's desire to assure that tax disputes are resolved in an orderly manner: Taxpayers cannot simply pay the tax alleged to be due and then sue. Rather, sections 6532 and 7422 require that the taxpayer first file a claim for a refund, telling the IRS why he is not liable for the tax, and then wait at least six months to give the IRS the opportunity to agree (or disagree).

Congress's carefully crafted methods for resolving disputes with the IRS provide fairness to the taxpayer and assure that the IRS can complete its liability determination and gather necessary information before litigation begins. The contrast with the preemptive constitutional challenges here could hardly be greater. It is because Congress has set these pre-litigation rules for contesting IRS determinations that this Court has held that the bar in section 7421 is jurisdictional. *Enochs*, 370 U.S. at 5 ("object of section 7421 is to withdraw jurisdiction" from federal courts). And because section 7421 is jurisdictional, the *Seven-Sky* majority's suggestion that the courts should "defer" to the Government on its applicability – 661 F. 3d at 13 – lacks merit.

In addition to preserving the orderly administration of the tax laws, section 7421 incorporates the same concerns as do the doctrines of ripeness and standing, by absolutely forbidding speculation about whether a tax is owed until the taxpayer has either paid the tax and sued for a refund or is defending an enforcement proceeding. The question here is not whether someone, someday, will not have insurance and will object to paying the amount due under section 5000A. Rather, the question is whether any individual respondent will be among that group and hence can sue now. Section 7421 provides a direct answer, which is that all taxpayers must wait until 2015, the first time that the IRS could either assert a deficiency, or an individual could pay the tax and sue for a refund.

e. Another feature of section 7421 demonstrates its expansive reach. Through a series

of amendments to section 7421(a), Congress has created fourteen specific exceptions to the ban on injunctions. Many of them assure that other procedures designed to protect taxpayers from overreaching by the IRS are followed, with the injunction remedy restored if the IRS disobeys them. The existence of these exceptions underscores that Congress did not intend the courts to create new exceptions for whatever reason, but, instead, to follow the command of section 7421.

Despite section 7421's breadth, this Court has allowed two implied exceptions, neither of which any court (and surely not the Government) has claimed applies here. The first arises where it is "apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim." *Enochs*, 370 U.S. at 7. The second applies where a person with standing literally has no alternative remedy under the Code. *Regan*, 465 U.S. at 378. Neither of these exceptions applies simply because the putative taxpayer (and the Government) would prefer to have the merits decided now and by a route other than a refund or collection action.

To avoid section 7421, some have argued that this is not a tax case, but a constitutional law case, which, they suggest, means that the carefully designed routes are not applicable. That kind of argument was made to this Court in *Alexander v. "Americans United" Inc.*, 416 U.S. 752 (1974), and *Bob Jones*, 416 U.S. 725, where the plaintiffs raised only constitutional objections to their denial of tax-exempt status under section 501(c)(3) of the Code. Indeed, in *Americans United*, the claim was that the

applicable statute violated the First and Fifth Amendments, a facial challenge similar to those made to section 5000A here. No income taxes were at stake in *Americans United* because the organization was exempt from them under section 501(c)(4). However, under the applicable law, the plaintiff would not have owed small amounts of unemployment taxes if it had qualified under section 501(c)(3). Nonetheless, the Court held that only by paying those taxes and suing for a refund could the organization have its constitutional claims adjudicated.

Equally significant here is Congress's response. Two years after *Americans United* and *Bob Jones*, it enacted Pub.L. 94-455, § 1306(a), 90 Stat. 1717 (1976), which left section 7421 unchanged. Instead, Congress created a declaratory judgment remedy in section 7428 to allow challenges to adverse tax status determinations, not limited to constitutional claims, but only for certain categories of tax-exempt organizations. Like other tax dispute provisions, section 7428 requires the taxpayer to exhaust administrative remedies with the IRS before suing, provides time limits within which suit must be brought, and gives the taxpayer forum choices similar to those available in other tax disputes, none of which would exist if the Government's implied exception to section 7421 were upheld.

f. The majority in *Seven-Sky* found an additional reason why section 7421 was inapplicable. It concluded that the challenge there was only to the requirement of having health insurance and not to what it saw as the separate penalty provision. 661

F.3d at 10, 12-13. That contention is thoroughly answered by Judge Kavanaugh's dissent, *id.* at 41-45, to which we have only a few additions.

First, the first amended complaint here does in fact challenge the penalty, by seeking to enjoin defendants "from enforcing the [entire] Act against NFIB members and small business owners and the Individual Plaintiffs." Count 2, Relief ¶ C. Second, if the penalty is not being challenged, there is no other enforcement mechanism, which means that there would be no injury to any individual (now or in the future), as the *Seven-Sky* majority virtually conceded. 661 F.3d at 13. Surely, no one could sue if Congress passed a law saying that everyone "shall floss their teeth daily," but included no enforcement mechanism, which is what section 5000A would be without a penalty. Nor could any reasonable person think of herself as a law violator for not having insurance, unlike corporate officers who withhold taxes and then don't pay them to the IRS, which everyone knows is "unlawful" because of the consequences of that conduct to the IRS and others, even if the only penalties under section 6672 are monetary. Third, who would be a proper defendant in a suit that challenged only the mandate and not the penalty? Aside from the lack of injury in fact, there would be no government official to whom any injury would be "fairly traceable," *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977), and none to whom an order could be issued that would "redress" it. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

g. The Government argued to the Fourth Circuit that Congress could not possibly have intended to require taxpayers to wait until 2015 to challenge section 5000A. *See Liberty,* 2011 WL 3962915, *12. That misstates the appropriate inquiry. Given how expansively section 7421 has been applied, no new intent to make it apply was required when Congress enacted the ACA. Rather, it is Congress's failure to include a special judicial review provision for challenges to section 5000A that seriously undermines the Government's position. Indeed, Congress has often included such provisions to assure prompt judicial review, generally before three-judge district courts in the District of Columbia, to accomplish exactly what Congress did not do here. Three prominent examples of special judicial review provisions in wide-ranging new laws with potentially significant constitutional issues are the Gramm-Rudman-Hollings Act, *see Bowsher v. Synar*, 478 U.S. 714 (1986); the Line Item Veto Act, *see Raines v. Byrd*, 521 U.S. 811 (1997), which was also applicable to certain Tax Code provisions; and the Bipartisan Campaign Reform Act, *see McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). These examples, combined with the provisions for adjudicating denials of tax-exempt status in section 7428, show that Congress knows how to create special judicial review provisions when it wants to do so. It did not do so here, and, thus, there is no basis for the Government's creation of an implied exception to section 7421 for challenges to section 5000A and every reason to believe that Congress did not want one established by judicial fiat.

h. Moreover, there is a very practical reason why Congress would not have wanted to create an exception from section 5000A of the kind found by some lower courts. The specific and implied exceptions to section 7421 are all narrowly tailored and available only in limited circumstances. By contrast, an implied exception for suits involving section 5000A would be entirely open-ended, both in terms of the timing of any lawsuit and the issues that could be raised. Furthermore, as an implied exception, it would not be limited to constitutional challenges, but would include any suit involving any legal or factual issue, including technical issues relating to the taxpayer's taxable income, which is used to compute the amount owed under section 5000A. There would also be no time limits for bringing such suits, unlike all other suits under the Code, and there would be no requirement for exhaustion of administrative remedies. With no legislative history to support such a broad exemption from section 7421, and with the flood of litigation that might arise from the estimated 34 million individuals who will still not have adequate insurance after 2014 (*see supra* note 4), there is every reason to believe that Congress did not silently create one.

i. Finally, in its brief in *Liberty* in this Court (No. 11-438, at 17-18), the Government argued that *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008), supports the creation of an implied exemption here. That argument is mistaken for at least three reasons. First, *Clintwood* held that the attempt there to avoid the procedures set forth in the

Code for contesting taxes could not be circumvented, which is what would happen here if the Government's arguments regarding section 5000A are upheld. Second, if the portion of the Court's discussion of the differing reaches of section 7421 and of the refund provision in section 7422 were read as the Government urges, most of the cases broadly applying section 7421 would be overturned. Third, the Government's approach would not lead to an exception limited to this constitutional challenge, but would, as discussed above, open the doors to avoiding all of the Code's requirements for timing and exhaustion. The result would enable taxpayers to avoid the exhaustion and other procedures for all lawsuits involving section 5000A, an outcome that would turn the anti-avoidance rationale of *Clintwood* on its head.

2. Subsection 5000A(g) Does Not Exclude Section 7421, but Reinforces Its Applicability to Suits Involving Section 5000A.

a. The courts that have found section 7421 inapplicable to challenges to section 5000A have relied on subsection 5000A(g), but that reliance is misplaced. First and most significant, section 7421 is not mentioned in subsection (g), nor does the ACA create an independent cause of action for this challenge, as other exceptions both in the Code and elsewhere have done. Given the background principle that section 7421 applies unless there is an exception, that should end the inquiry. Thus, when

the majority in *Seven-Sky* rejected the suggestion that "Congress affirmatively intended" section 7421 to apply, 661 F. 3d at 10, it started from the wrong premise: Section 7421 applies "unless" Congress affirmatively says it does not, not the other way around. Moreover, the heading of subsection (g) — "Administration and procedure" — and its specific content demonstrate that it is directed at the IRS, telling it what it can and cannot do regarding liabilities under section 5000A. It specifically applies the general rules on assessment and collection, and it creates certain exceptions to those rules. As for litigation, it is silent, which means that section 7421 remains in place as a jurisdictional bar to this litigation.

b. The Government and the courts that have agreed with it have found language in subsection (g) that they conclude creates an implied exception to section 7421. But that conclusion cannot be sustained by a fair reading of subsection (g) and two related sections of the Code enacted as part of the ACA. To begin with, what Congress *did* include in subsection (g) supports section 7421's application to this case. Paragraph (g)(1), subject to the limited exceptions in paragraph (g)(2), provides that section 5000A penalties "shall be assessed and collected in the same manner" as penalties under chapter 68. To be sure, section 5000A is not a penalty "provided by this subchapter [68]," which is the language of subsection 6671(a). But that is irrelevant because paragraph (g)(1) specifically directs that section 5000A be treated as part of chapter 68 for assessment and collection purposes.

In response, the Government relies on section 6671(a), which applies to all penalties in chapter 68. Section 6671(a) has two sentences. The first mirrors paragraph 5000A(g)(1), providing that "[t]he penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes." The second contains the following statement: "Except as otherwise provided, any reference in this title to 'taxes' imposed by this title [which includes section 7421] shall also be deemed to refer to the penalties and liabilities provided by this subchapter." Because section 5000A is not in "this subchapter," the Government contends that section 7421 is inapplicable.

The first problem with this argument is that this sentence in section 6671(a) does not purport to make inclusion in chapter 68 the touchstone for determining whether section 7421 applies to any provision labeled a penalty. It does not mention section 7421, and it does not use words like "only", "solely," or "exclusively." It is solely a statement of inclusion, not exclusion.

Second, in the Fourth Circuit, the Government acknowledged that the penalties imposed by sections 5114(c), 5684, and 5761 of the Code, which are not part of subchapter B of chapter 68, are subject to section 7421. *See* http://acalitigation.wikispaces.com/file/view/U.S.+supplemental+%2805.31.11%29.pdf at 4. However, all three sections contain virtually identical language to subsection 5000A(g)(1), except that the cross-reference in them is to section 6665(a), not section

6671(a). All three refer to assessment, collection, and payment of taxes, which is the language of subsection 6665(a)(1). But none of these three sections refers to the language in subsection 6665(a)(2)—"any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this chapter"—which is virtually identical to the second sentence in subsection 6671(a), quoted above. Thus, the Government's argument based on the second sentence in subsection 6671(a) provides no way to distinguish section 5000A from sections 5114(c), 5684, and 5761 for purposes of applying section 7421. In our view, Congress intended that the three sections cited by the Government *and* section 5000A be subject to section 7421, because there is no sensible reason why Congress would have wanted any of those penalties to be treated like taxes for assessment, collection, and payment purposes, but to exclude them categorically from section 7421 and allow taxpayers to sue, now and forever, at the time and location of their choosing, on any ground available, all without exhausting administrative remedies.

In addition to the assessment and collection language, Congress also included in subsection (g)(2) three specific exceptions from the normal rules on administration and procedure for penalties under section 5000A: It waived criminal prosecutions; it barred the use of notices of liens on a taxpayer's property for failure to pay; and it prohibited levies for such a failure. These exceptions support two

related arguments: (1) the inclusions of specific exceptions to the ordinary rules on assessment and collection show that Congress expected those ordinary rules to apply, other than where it created a specific exception; and (2) the failure to include an express exception for section 7421, while creating other exceptions, means that section 7421 applies. As demonstrated above, these inferences are not necessary for section 7421 to apply because the default position is that section 7421 applies. In any event, as Judge Kavanaugh said in his dissent in *Seven-Sky,* even if the case were to be decided based on congressional intent focused solely on section 5000A, the most logical conclusion is "that Congress acted knowingly in not creating an exception to the Anti–Injunction Act for pre-enforcement constitutional challenges to the individual mandate provision." 661 F. 3d at 33 n.15.

c. One of the claims by the States in No. 11-400, on which this Court did not grant review, bears on section 7421's application to section 5000A. The States contend that 26 U.S.C. § 4980H, which was enacted as section 1513 of the ACA, violates the Tenth Amendment. That provision, entitled "Shared Responsibility for Employers," requires large employers (including States), which do not provide what the ACA defines as adequate health coverage, to make payments to the Treasury to compensate for their inadequate health insurance coverage, effectively creating an employer mandate. *See* Statutory Appendix. Those payments are determined based on the number of employees who do not have adequate coverage, multiplied by a fixed

amount for each month in which the coverage was inadequate. Subparagraphs 4980H(b)(2) & (c)(1). Both sections 4980H and 5000A have the same goal: to encourage everyone to have adequate health insurance by imposing additional costs on those who do not. The close connection between the two provisions is made clear by the cross references in subparagraphs 4980H(a)(1) and (b)(1)(A) to subsection 5000A(f)(2), the provision defining adequate employer health coverage. Both sections impose a mandate to make payments to the IRS, under the Tax Code, if the taxpayers do not provide it (employers) or do not have it (individuals), which the Government can use to pay for health care costs for the under or uninsured.

The relevance of section 4980H is that, despite its similarity in purpose and operation to section 5000A, the Government has consistently maintained — including in this Court (Consolidated Brief at 9) — that section 7421 *is* a bar to the States' claim that section 4980H is invalid, but *not* to the claim by the individual plaintiffs in No. 11-398 that section 5000A is invalid (*id.* at 5-6, n.5). The Government has never suggested any reason why Congress would have insisted on the orderly resolution of controversies under one, but not the other. Moreover, the most significant language in both sections dealing with "Administration and procedure" — paragraphs 4980H(d)(1) and 5000A(g)(1) — provides that the amounts due "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." There are, to be sure, differences between those

sections, but none of them remotely supports the conclusion that Congress wanted section 7421 to apply to section 4980H but not to section 5000A.

The Government's Consolidated Brief (at 19, n. 9) distinguishes section 4980H from section 5000A, on the ground that the former uses the word "tax" in two places — paragraphs (b)(2) & (c)(7) — while "tax" does not appear in section 5000A. That argument fails to take into account four facts: (1) section 4980H's operative provisions describe what is owed in subparagraphs (a), (b)(1)(B), and (d) as an "assessable payment"; (2) the word "tax" in subparagraph (b)(2) is used as a shorthand for that term; (3) subparagraph (c)(2)(D) uses the term "assessable penalties" to describe the operative terms "assessable payment" and "applicable additional amount"; and (4) the exactments under section 4980H are no more or less penalties than those under section 5000A. Moreover, although the Government's brief on the merits (at 20-21) urges the Court to focus on the "practical operation" of section 5000A, and argues that labels are "immaterial" on the constitutional question, it still insists (at 58) that labels are dispositive regarding section 7421. But it offers no reason for that distinction, nor does it explain why Congress would want collection of "penalties" under section 5000A interrupted, while keeping all taxes and other payments under the Code subject to the established rules for litigation.

More fundamentally, in a law of more than 700 pages, making so much depend on this word choice makes no sense because those words appear in a context in which sections 4980H, 4980I (discussed

below), and 5000A all impose obligations that are similar in operation, purpose, and effect. There is no hint in the ACA's legislative history that Congress wanted to treat these provisions differently for purposes of section 7421. Nor is there any reason why a rational Congress would have wanted to exclude the section 5000A "penalty" from section 7421's reach, while including every other penalty under the Code. Indeed, given the broad reach of section 7421, it is difficult to imagine *any* reason why Congress would have wanted to exclude *any* of these provisions from section 7421, why it would have wanted *only* section 5000A to be excluded, or why it would have chosen to include the word "tax" in section 4980H (while also using other terms to describe the same payments) as the means of conveying that intention. As this Court observed in *Whitman v. American Trucking Associations*, 531 U.S. 457, 468 (2001), Congress does not ordinarily "hide elephants in mouseholes."

e. In addition, 26 U.S.C. § 4980I, which has not been challenged to date, also bears on whether section 7421 applies to section 5000A. Section 4980I deals with the problem of high cost, excess benefit health plans, rather than the low-cost, poor benefit plans covered by section 4980H or inadequate insurance governed by section 5000A. All three sections use the Code to impose additional costs on those who do not comply with the ACA's insurance rules, and all three are integral to Congress's goal of providing adequate health insurance at reasonable costs for all Americans. The payment under section 4980I is labeled a tax in subsection (a), but its price

tag of "40 percent of the excess benefit" is a penalty in all but name because it is unrelated to any lost revenue by the Treasury. Although section 4980I has no subsection on administration and procedure, as do both sections 4980H and 5000A, there is no reason to think that Congress intended to exclude what are plainly penalties under section 4980I from section 7421 or any other section relating to the assessment or collection of taxes.

f. Finally, as noted above, the effect of holding that section 7421 does not apply would not be limited to these constitutional challenges, but would exclude from section 7421 *any* claim of *any* kind — both factual and legal, statutory and constitutional — at *any* time in the future involving section 5000A. It is nonsensical to ascribe that intent to Congress without a word to that effect, based almost entirely on its selection of the term "penalty" in section 5000A, in as extensive and far-reaching a law as the ACA. The more sensible understanding is that Congress either did not specifically consider the application of section 7421 (which, after all, is the way in which 7421 is expected to operate), or considered it and wanted it to apply without expressly saying so. In either event, section 7421, properly read against the background principle that it applies broadly unless expressly excluded, requires that this challenge to section 5000A be dismissed for want of subject matter jurisdiction.

CONCLUSION

The Court should vacate the decision below and order that the complaint be dismissed for want of subject matter jurisdiction under section 7421 or lack of an Article III case or controversy.

Respectfully submitted,

Alan B. Morrison
(Counsel of Record)
GEORGE WASHINGTON UNIVERSITY
LAW SCHOOL
2000 H STREET, NW
Washington, D.C. 20052
(202) 994-7120
(202) 994-5157 (fax)
abmorrison@law.gwu.edu

Brian Wolfman
600 NEW JERSEY AVE. NW
Washington, D.C. 20001
(202) 661-6582
wolfmanb@law.georgetown.edu

Attorneys for the Amici Curiae Mortimer Caplin & Sheldon Cohen

January 2012

STATUTORY APPENDIX

Shared responsibility for employers regarding health coverage
Section 1513(a) of Public Law 111-148

(a) Large employers not offering health coverage– If–

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee, then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

(b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.—

(1) In general— If—

(A) an applicable large employer offers to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee, then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to 1/12 of $3,000.

(2) Overall limitation— The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

(c) Definitions and special rules— For purposes of this section—

(1) Applicable payment amount—The term "applicable payment amount" means, with respect to any month, 1/12 of $2,000.
(2) Applicable large employer—

(A) In general— The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year.

(B) Exemption for certain employers—

(i) In general– An employer shall not be considered to employ more than 50 full-time employees if—

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) Definition of seasonal workers— The term "seasonal worker" means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including workers covered by section 500.20(s)(1) of title 29, Code of Federal Regulations and retail workers employed exclusively during holiday seasons.

(C) Rules for determining employer size— For purposes of this paragraph—

(i) Application of aggregation rule for employers— All persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

(ii) Employers not in existence in preceding year— In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(iii) Predecessors— Any reference in this subsection to an employer shall include a reference to any predecessor of such employer.

(D) Application of employer size to assessable penalties—

(i) In general— The number of individuals employed by an applicable large employer as full-time employees during any month shall be reduced by 30 solely for purposes of calculating—

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).
(ii) Aggregation— In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be allowed with

respect to such persons and such reduction shall be allocated among such persons ratably on the basis of the number of full-time employees employed by each such person.

(E) Full-time equivalents treated as full-time employees— Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

(3) Applicable premium tax credit and cost-sharing reduction— The term "applicable premium tax credit and cost-sharing reduction" means—

(A) any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

(4) Full-time employee—

(A) In general— The term "full-time employee" means, with respect to any month, an employee who

is employed on average at least 30 hours of service per week.

(B) Hours of service— The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) Inflation adjustment—

(A) In general— In the case of any calendar year after 2014, each of the dollar amounts in subsection (b) and paragraph (1) shall be increased by an amount equal to the product of—
(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

(B) Rounding— If the amount of any increase under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the next lowest multiple of $10.

(6) Other definitions— Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act.

(7) Tax nondeductible— For denial of deduction for the tax imposed by this section, see section 275(a)(6).

(d) Administration and procedure—

(1) In general— Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Time for payment— The Secretary may provide for the payment of any assessable payment provided by this section on an annual, monthly, or other periodic basis as the Secretary may prescribe.

(3) Coordination with credits, etc— The Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or cost-sharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

AMICUS CURIAE BRIEF

No. 11-398

In The
Supreme Court of the United States

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, et al.,

Petitioners,

v.

STATE OF FLORIDA, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

BRIEF OF *AMICI CURIAE* CATHOLIC VOTE AND STEVEN J. WILLIS IN SUPPORT OF RESPONDENTS AND URGING AFFIRMANCE ON THE MINIMUM COVERAGE PROVISION

STEVEN J. WILLIS
UNIVERSITY OF FLORIDA
COLLEGE OF LAW
8318 S.W. 103d Ave.
Gainesville, FL 32608
(352) 514-1394

PATRICK T. GILLEN
Counsel of Record
AVE MARIA SCHOOL OF LAW
1025 Commons Circle
Naples, FL 34119
(734) 355-4728
ptgillen@avemarialaw.edu
Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Interest of Amicus Curiae	1
Summary of Argument	2
Argument	4
I. The Commerce Clause Does Not Authorize The Mandate	5
II. The Taxing Power Does Not Authorize The Mandate	5
III. The Penalty Is Contrary To The Necessary And Proper Clause	10
IV. The Penalty Is Contrary To The Limited Taxing Power	17
A. The Constitution Does Not Allow a Sixth Type of Tax	18
B. The Penalty Is Neither a Duty Nor an Impost	18
C. The Penalty Is Not an Excise	18
D. The Penalty Is Not a Sixteenth Amendment Income Tax	20
i. The penalty does not have a proper trigger	21
ii. The penalty does not tax income	21
iii. The wealth allegedly taxed has not been derived	23
iv. The alleged wealth did not derive "from" anywhere	23

TABLE OF CONTENTS – Continued

Page

v. The "source" of the alleged wealth is the individual's own personal actions, which is insufficient 24

E. The Penalty Is Not an Apportioned Direct Tax or Capitation 25

V. The Penalty Violates Procedural Due Process 27

A. Traditional Tax Cases 27

B. Other Tax Cases (*Except* for the Healthcare Penalty) 27

C. Procedures for the Healthcare Penalty 30

D. Analysis of the Procedures (or Lack Thereof) 32

i. How can the service "collect" the penalty? 32

ii. Offset 33

iii. Re-application of tax "payments" 34

iv. Refunds 34

v. Estimated tax "payments" 36

CONCLUSION 40

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bob Jones Univ. v. Simon, 460 U.S. 370 (1983) 6

Brushaber v. Union Pacific, 240 U.S. 1 (1916).....39

Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955).....9, 15, 20, 21, 24

Commissioner v. Indianapolis Power and Light, 493 U.S. 203 (1990).....22

Eisner v. Macomber, 252 U.S. 189 (1920) 20, 23

Fuentes v. Shevin, 407 U.S. 67 (1983).....39

Hampton & Co. v. United States, 276 U.S. 394 (1928).....5, 6

Helvering v. Indep. Life Ins. Co., 292 U.S. 371 (1934).....24

Hylton v. United States, 3 U.S. 1 (3 Dall.) 171 (1796).....19, 20

Magnano v. Hamilton, 292 U.S. 40 (1934) 6, 39

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).....11, 12, 14

Mead v. Holder, 766 F. Supp. 2d 16 (D.D.C. 2011) 19, 22

Murphy v. Commissioner, 493 F.3d 170 (D.C. Cir. 2007).....15, 19, 20, 26

Nicol v. Ames, 173 U.S. 509 (1899) 14

TABLE OF AUTHORITIES – Continued

Page

Sonzinsky v. United States, 300 U.S. 506 (1937).....5, 6

United States v. Butler, 297 U.S. 1 (1936) 15, 17

United States v. Comstock, 130 S.Ct. 1949 (2010).....10, 12, 14

United States v. Sanchez, 340 U.S. 42 (1950).....6

FEDERAL STATUTES

26 U.S.C. §61 22

26 U.S.C. §509 9

26 U.S.C. §3101 7

26 U.S.C. §3401(a).....28

26 U.S.C. §4071 7

26 U.S.C. §4943 .....9, 19

26 U.S.C. §4945 16

26 U.S.C. §5000A.....*passim*

26 U.S.C. §6211.....36

26 U.S.C. §6212 27

26 U.S.C. §6320 .....28, 32, 36

26 U.S.C. §6321 32

26 U.S.C. §6330 .....28, 32, 33, 36

26 U.S.C. §6331 .....27, 31, 32

26 U.S.C. §6402 33

26 U.S.C. §6511.....35

TABLE OF AUTHORITIES – Continued

Page

26 U.S.C. §6651 35

26 U.S.C. §6851 27

26 U.S.C. §7203 25

26 U.S.C. §7421(a) 31

26 U.S.C. §7429 27

26 U.S.C. §7806 18

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 11, 30, 31, 39, 40

U.S. Const. amend. XIV 25, 39

U.S. Const. amend. XVI ..... *passim*

U.S. Const., art. I, §2 13

U.S. Const., art. I, §8 ..... 5, 13

U.S. Const., art. I, §8, cl. 18 10

U.S. Const., art. I, §9 ..... 13, 15

LEGISLATIVE MATERIALS

Senator Kerry and Representative Portman, *A Vision for a New IRS*, http://www.house.gov/natcommirs/report1.pdf 28

TABLE OF AUTHORITIES – Continued

Page

JCT, "Technical Explanation of the Revenue Provisions of the 'Reconciliation Act of 2010,' as Amended, in Combination with the 'Patient Protection and Affordable Care Act,'" 33 (Mar. 21, 2010), Doc. 2010-6147, 2010 TNT 55-23 16

MISCELLANEOUS

James A. Madison, *Vices of the Political System of the United States*, THE PAPERS OF JAMES MADISON (1787) (Ed. by William T. Hutchinson, *et al.* University of Chicago Press 1977) 13

Kleinbard, "*Constitutional Kreplach*," 128 TAX NOTES 755 (Aug. 16, 2010) 21

Letter, *George Washington to John Jay* (Aug. 1, 1786) 13

Letter, *Thomas Jefferson to Edward Carrington* (Aug. 4, 1787) 13

Letter, *Alexander Hamilton to James Duane* (Sept. 13, 1780) 13

Daniel L. Mellor, *The Individual Mandate Tax: Healthcare's Toothless Watchdog*, 130 TAX NOTES 105 (Jan. 3, 2011) 32

Burgess J.W. Raby and William L. Raby, *The Tax Court's Offset Jurisdiction – Or Lack Thereof*, 113 TAX NOTES 833 (Nov. 27, 2006) 36

TABLE OF AUTHORITIES – Continued

Page

Ryan J. Donmoyer and Jacqueline Rieschick, *It's (Almost) Unanimous: IRS Reform Bill Passes House*, 77 TAX NOTES 639 (Nov. 10, 1997) 28

Ryan J. Donmoyer, *Roth Outlines 'Deficiencies' in IRS Reform Bill*, 77 TAX NOTES 764 (Nov. 17, 1997) 29

Ryan J. Donmoyer, *Chairman Roth and the Politics of Reform,* 77 TAX NOTES 1296 (Dec. 22, 1997) 29

Steven J. Willis and Nakku Chung, *Of Constitutional Decapitation and Healthcare*, 128 TAX NOTES 169 (July 12, 2010) 19, 21, 23

Steven J. Willis and Nakku Chung, *Oy Yes, the Healthcare Penalty is Unconstitutional*, 129 TAX NOTES 725 (Nov. 8, 2010) 20, 21, 23

Steven J. Willis and Nakku Chung, *Credits vs. Taxes: the Constitutional Effects on the Healthcare Reform Debate,* Washington Legal Foundation Critical Legal Studies WORKING PAPER SERIES, No. 176 (May 2011) 15, 23

Steven J. Willis and Nakku Chung, *No Healthcare Penalty? No Problem: No Due Process*, forthcoming 38 Am. J. L. Medicine (2012), http://ssrn.com/abstract=1998821 32

INTERESTS OF *AMICUS CURIAE*[1]

CatholicVote.org, is a nonpartisan voter education project whose members seek to serve this great nation by supporting educational activities designed to promote an authentic understanding of ordered liberty and the common good as seen in light of the Roman Catholic religion. Members of *CatholicVote* believe that Catholic teaching illuminates the first principles of the American experiment set forth in the Declaration of Independence and the Constitution of the United States by situating those principles in the broader context from which they were derived, the Judeo-Christian tradition. Committed to individual liberty, minimal government, federalism, and the doctrine of subsidiarity, *CatholicVote.org* believes that the Patient Protection and Affordable Care Act is a pernicious expansion of federal power that undermines individual liberty and responsibility, diminishes the sphere of private charitable activity, and arrogates to the federal government totalitarian control of a vitally important and deeply personal matter. Members of *CatholicVote.org* will be subject to the provisions of the act which purport to dictate

---

[1] Pursuant to Federal Rule of Appellate Procedure 29(c), *amicus* states that no counsel for any party authored this brief in whole or in part; and that no person or entity, other than *amicus*, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief. *Amicus Curiae* gratefully acknowledges the work of Steven J. Willis, the principal author of this brief.

their personal healthcare decisions and which will also adversely affect the healthcare market in which they participate. Furthermore, they are well aware of the way that the federal intrusion into the healthcare field will result in the imposition of tyrannical requirements which require action inconsistent with their religious liberty. Accordingly, *CatholicVote.org* files this brief in support of the Respondent and urges affirmance of the decision striking down the individual mandate.

SUMMARY OF ARGUMENT

Incorporated into Internal Revenue Code (IRC) §5000A, the PPACA §1501 does two separate things:

1. It mandates the purchase of health insurance by individuals.

2. It imposes a "penalty" upon individuals who violate the Mandate.

Upholding either the mandate or the penalty under the Commerce Clause would amount to an unlimited extension of federal power to regulate inactivity. In addition, it would approve a virtually unlimited federal power to exact money from individuals, ignoring the most important limited enumerated power: the power to tax. Article I Sections 2, 8 and 9 sharply limit that power, as does the Sixteenth Amendment.

This Court should find the Mandate unconstitutional under the Commerce Clause because it forces

individuals to engage in commerce, something heretofore never approved. Even if this Court were to approve the Mandate, however, it should find the penalty unconstitutional as exceeding Congress' limited power to exact money from individuals, both substantively and procedurally. The Commerce Clause does not itself provide for enforcement; instead, Congress must resort to the Necessary and Proper Clause. For an enforcement provision to be proper, it must be *consistent with* the remainder of the Constitution and must not violate other provisions or prohibitions – particularly the limited Taxing Power (the primary motivation for the Constitution) as well as the Fifth Amendment due process limitations.

The §5000A(b) Penalty is not a duty, impost, or excise. It is not a tax on derived income permitted by the Sixteenth Amendment. Instead, it is at best an un-apportioned Direct Tax on individuals. It is thus unconstitutional. Further, the Act grants the Treasury Secretary authority to assess and to collect monies without any required mechanism for prior administrative hearings or any mechanism whatsoever for prior judicial review. Indeed, it specifically precludes access to normal "Collection Due Process" [CDP] hearings. It thus violates procedural due process.

Hence the government has *three* heavy burdens. *First*, it must justify the Mandate under the Commerce Clause because the Taxing Power authorizes no such Mandates. *Second*, it must justify the Penalty under the Taxing Power: no other enumerated power can justify taking monies from individuals who

mind their own affairs. Third, the penalty assessment and collection mechanisms fail the procedural Fifth Amendment Due Process requirements. Because the government cannot carry any of the three burdens, let alone all of them, this Court must find IRC §5000A unconstitutional.

ARGUMENT

This court faces five issues:

1. Whether the Mandate violates the Commerce Clause.
2. Whether the Mandate violates the Taxing Power.
3. Whether the Penalty violates the Necessary and Proper Clause.
4. Whether the Penalty, if it is a tax, violates the Taxing Power.
5. Whether the Penalty violates Due Process.

To consider these issues, the Court should separate the Mandate from the Penalty. IRC §5000A includes both aspects of the law; however, the subsections implicate different constitutional provisions. Subsection 5000A(a) imposes the Mandate without regard to income or activity. It is not itself a tax. Subsection 5000A(b) imposes the Penalty on persons who violate the Mandate, without regard to whether each is a wage earner or income producer; instead, it

applies – with exceptions – to all individuals who exist in the natural state of being uninsured.

I. The Commerce Clause Does Not Authorize The Mandate

Others adequately explain how the Mandate violates the Commerce Clause. This Brief will not repeat that issue other than to state the Court should strike the Mandate, if not the entire statute, on those grounds.

II. The Taxing Power Does Not Authorize The Mandate

This Court should separate the Mandate from the Penalty in analyzing their separate constitutional bases. Congress has various powers to *regulate behavior*, such as the Commerce Clause. Separately, Congress has various powers to *enforce regulations*, *e.g.*, taxing, spending, limited police power, moral suasion, raising and supporting armies, and eminent domain. Even if a regulation is constitutional, its enforcement may not be. The opposite is also true: an enforcement method may be constitutional, while the underlying regulation is not. Hence, the Court must examine them separately.

Article I, §8 grants Congress the power to levy and collect taxes. Uses of the taxing power may have regulatory aims, so long as they also raise revenue. *Sonzinsky v. United States*, 300 U.S. 506, 513-14 (1937); *Hampton & Co. v. United States*, 276 U.S. 394,

413 (1928). No court, however, has found the initial prong of a Taxing Power use to be regulatory. Indeed, for all "regulatory" taxes, the tax effectively precedes the regulatory effect, unlike the §5000A(a) Mandate. More precisely, with one exception, all permissible regulatory taxes apply to some activity or transaction of the taxpayer – they do not first mandate the activity or transaction. The one exception is of no help to the government: Congress may exact a direct tax, which could have regulatory effects, but which would tax an individual's mere existence or possession of property such as land. Such a tax need not involve a pre-existing activity. It must, however, be apportioned. Congress has rarely, if ever, used this enumerated power: the Founders made it very difficult to use.

Consistent with the Article I, sections 8 and 9 limitations, all previously existing "regulatory taxes" tax the pre-existing activity. In so doing, they may discourage, encourage, or "regulate" aspects of the activity. They may even discourage the taxpayer from entering the activity. But critically, the activity comes first; then the tax applies, and only then does the regulatory effect ensue; or, the taxpayer is dissuaded by the potential tax, does not engage in the activity and no tax applies. *Cf. U.S. v. Sanchez*, 340 U.S. 42 (1950) (taxing possession of marihuana); *Sonzinsky, supra* (taxing firearms dealing); *Hampton, supra* (taxing various products importation); *Magnano v. Hamilton,* 292 U.S. 40 (1934) (taxing oleomargarine differently from butter); *Bob Jones Univ. v. Simon*, 460

U.S. 370 (1983) (taxing racially discriminatory schools). Section 5000A differs dramatically. It first imposes the Mandate and then imposes a penalty on the failure to comply. No other regulatory use of the Taxing Power operates in this manner.

For example, IRC §4071 imposes an excise on tires, presumably to raise revenue and to regulate the purchase of tires. Rationally, tire users should pay a portion of the cost of highways or other government services. The tax applies only if they engage in the *activity* of purchasing tires (it applies to the sale rather than the purchase, but as is typical of excises, it is indirect and passed-on to the consumer). Because of the tax's regulatory effect, ultimate users may purchase particular tires or some other product taxed differently; or, they may decide not to purchase tires, rely on public transportation, and thus escape the tax. Similarly, §3101 imposes a tax on wages; in return, it implicitly promises the taxpayer participation in the Social Security program. The section raises revenue, but also regulates the underlying *activity* of how wage earners provide for retirement or disability – specifically by providing retirement or disability insurance. The tax does not mandate the earning of wages. Some taxpayers may be encouraged to work more because of the related benefits. Others may be discouraged from working because of the tax. In any event, the underlying activity/choice occurs (which may involve choosing not to work or choosing not to purchase tires), the tax applies (or not) and the regulatory effect ensues.

The §5000A(b) penalty taxes – or penalizes – no event, transaction, property use, privilege exercise, or income derived; instead, it exacts a penalty or tax without any of those traditional predicates. Indeed, the Mandate imposes the predicate. That is unlike all regulatory taxes, which apply to taxpayers' choices *to do something* as opposed to *not to do* something. The government argues the decision *not to purchase* health insurance is an *activity* for purposes of the commerce clause. It does not, however, discuss whether the *mental decision* not to purchase insurance and the "arrangement of one's affairs" as a consequence constitutes sufficient activity for the imposition *of a tax*. Indeed nothing in the power to lay and collect taxes authorizes the mandate of anything other than the maintenance of records, preparation of forms and transmission of funds.

Congress might impose an excise on persons who self-pay for medical services. That would be a constitutional excise so long as it was uniform. Or, Congress could tax persons who fail to pay for medical services. Such a tax could be styled as a uniform excise on the *activity* of receiving healthcare without paying for it; or, it could be a Sixteenth Amendment income tax on the accession to wealth created by the passing-on of costs to others: obtaining services without paying. But very limited authority exists for Congress to tax something which has neither occurred nor accrued, which involves no "undeniable

accession to wealth clearly realized"[2] and which involves no event, transaction, property use, or privilege exercise other than the taxpayer simply being alive. That limited authority is the power to exact a Direct or Capitation tax – a tax which must be apportioned – a constitutional requirement failed by §5000A.

Most importantly, no Taxing Power authority exists to mandate activity by an individual. Some tax provisions appear – at first blush – to tax specific failures to act. All, however, are distinguishable. Section 4943 imposes a tax on Private Foundations which fail to distribute specified income. The provision, however, is a valid excise on the activity and privilege of being a Private Foundation, a disfavored form of charity – hence, the harsh regulatory effect. It does not apply to individuals (humans); instead, it applies to entities which have affirmatively chosen to exist as Private Foundations under §509, as opposed to public charities. Thus, it is *not* a failure-to-act-tax; instead, it is a tax on the affirmative accumulation of wealth in a chosen format. An individual's lack of insurance – whether by *choice* or happenstance – is different in that it involves no affirmative action, no specific accumulation, and no overt election (*e.g.*, private foundation status rather than public charity status). Hence, if the Court finds the Mandate

---

[2] *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431, 433 n. 11 (1955).

unconstitutional under the Commerce Clause, it cannot appropriately, in the alternative, find it constitutional under the Taxing Power, which does not permit the Mandate of activity.

The government relies on four IRC sections: 4974, 4980B, 4980H, and 9707.[3] Each is an excise; none are direct taxes. Hence, they are each irrelevant.

III. The Penalty Is Contrary To The Necessary and Proper Clause

Even if this Court finds the Mandate consistent with the Commerce Clause, it must nevertheless strike the Penalty as unconstitutional under the Necessary and Proper Clause. U.S. Constitution Article I, Section 8, Clause 18. The Commerce Clause provides no enforcement mechanism; instead, Congress must use the Necessary and Proper Clause to enforce commercial regulations. Hence, enforcement measures must be both necessary and proper.

To be proper, an enforcement provision must be *consistent* with the remainder of the Constitution; otherwise, the power to do what is "proper" to enforce one enumerated power could eviscerate the limited nature of other specifically enumerated powers granted Congress. *See United States v. Comstock,* 130 S.Ct.

---

[3] Brief for Petitioners (minimum coverage provisions), *HHS v. Florida*, page 9, page 56, n. 10.

1949, 1956 (2010) ("Let the end be legitimate, let it be within *the scope of* the constitution, and all means which are *appropriate*, which are plainly adapted to that end, *which are not prohibited*, but *consist with* the *letter and spirit* of the constitution, are constitutional.") (emphasis added); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). Possible enforcement mechanisms are many. For example, Congress may exercise limited police powers to criminalize regulated commercial behaviors, to provide for incarceration, for the mental health of prisoners, and for civil commitment in fulfillment of those powers. The executive may seize property for public use, consistent with the Fifth Amendment just compensation obligation. Congress, through the executive, may use militia powers to force or to impede actions violative of commercial regulations. Congress – generally through the executive – may enter commerce by selling a product: specifically, it may do so with postage and impliedly it may do so with other products and services, such as those involving museums, parks, or flood insurance. Or, as is common, Congress may use its Spending Power to entice commercial behaviors. Critically, Congress chose *none* of those enforcement mechanisms for the Mandate; instead, Congress chose to penalize individuals who violate its Mandate. Hence, whether some other form of Mandate enforcement mechanism would be "proper" is irrelevant. Even if this Court approves the Mandate, this Court must decide the limits of Congress' power to command individuals to pay money, even though those individuals engage in no activity other than

minding their own business. Whether minding one's own business – including self-insurance for potential medical or other needs – constitutes activity for purposes of the commerce clause is a very different question than whether it constitutes sufficient activity for purposes of the taxing power.

Much has been written regarding whether the penalty is regulatory or whether it is a tax. The Taxing Power, however, is the *only* enumerated power to exact money from individuals (putting aside the "proper" powers to exact criminal fines or to charge a price in the actual conduct of commerce by the government, issues not involved in this matter because Congress *expressly* chose for them not to be involved). Even if the Penalty is not a tax, it must be consistent with and within the "letter and spirit" of the Taxing Power limitations and *prohibitions*; otherwise, it would not be "*appropriate*" or proper, as required as early as *McCullough* in 1819 and as recently as *Comstock* in 2010. Hence, the Mandate must satisfy the Commerce Clause and the Penalty must satisfy the Commerce Clause, the Necessary and Proper Clause, the limited Taxing Power, as well as the Fifth Amendment procedural due process requirements.

Of all the Constitutional provisions, the Taxing Power was the primary goal of the Constitutional Convention: without money, the weak government under the Articles of Confederation could not provide for defense, regulate commerce or do much of anything. The Constitution mentions the limited Taxing

Power four times (Article I, §2; Article I, §8; Article I, §9; and the Sixteenth Amendment), while it mentions the regulation of Commerce merely once (Article I, §8). Indeed the Taxing Power limitations bracket the Commerce Clause, appearing both before and after it.

Our nation's founders were particularly concerned about taxes. That was a primary prompt for the American Revolution: unfair taxes. Central to the later Constitutional debate was how to treat exactions of money from the people. James Madison listed eleven Deficiencies of the Confederation. James A. Madison, *Vices of the Political System of the United States*, THE PAPERS OF JAMES MADISON (1787) (Ed. by William Hutchinson, *et al.* University of Chicago Press 1977). First on his list was the lack of a *Taxing Power*:

> 1. Failure of the States to comply with the Constitutional requisitions.
>
> This evil has been so fully experienced both during the war and since the peace, results so naturally from the number and independent authority of the States and has been so uniformly exemplified in every similar Confederacy, that it may be considered as not less radically and permanently inherent in, than it is fatal to the object of, the present System.

Similarly, Washington, *Letter, George Washington to John Jay (Aug. 1, 1786)*, Jefferson, *Letter, Thomas Jefferson to Edward Carrington (Aug. 4, 1787)*, and Hamilton, *Letter, Alexander Hamilton to James*

Duane (Sept. 13, 1780), each described the Taxing Power as either central to the Constitution or as a defect in the Confederation. The Supreme Court poetically described the Taxing Power as the most essential: "The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive." *Nicol v. Ames*, 173 U.S. 509, 515 (1899).

Because the power to tax is the power to destroy, the Constitution sharply limits that power. Congress cannot legitimately, consistent with *Comstock* and *McCullough*, *evade* those limitations by asserting the power to exact money from individuals under an *un*-enumerated power when the sole enumerated power for exacting money is so clearly limited by uniformity, apportionment, and derived requirements; hence, to be constitutional the Penalty must be *consistent with* the Taxing Power, *even if* it does not directly arise from that power. *Comstock*, *supra*; *McCullough*, *supra*.

Under Article I, §8, Congress can levy and collect taxes for the general welfare; however, the "general welfare" limitation is the *least* important of the Taxing Power limitations. Indeed, the "general welfare" language primarily exists to limit what Congress may do with monies raised: it may use them to "pay the Debts and provide for the common Defense and general Welfare of the United States. . . ." Grammatically, the phrase does not specifically limit the

Taxing Power; instead, it creates and limits the Spending Power. *See* Willis & Chung, *Credits vs. Taxes: The Constitutional Effects on The Healthcare Reform Debate*, WORKING PAPER (Washington Legal Foundation), No. 176 (May 2011), at 4-6 (WILLIS & CHUNG III). The Supreme Court consistently explained: "The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare." *United States v. Butler*, 297 U.S. 1, 11 (1936).

Article I, §8 creates and limits the Taxing Power. Article I, §9 further limits the power, and the Sixteenth Amendment expands the power with further limitations. Per these provisions, taxes must be either Direct or Indirect. Indirect taxes must be uniform. Direct taxes must be apportioned. Congress may levy excises, duties, imposts, direct taxes (including Capitations), and income taxes on "gross income" "derived" "from" a "source," the last four limitations appearing in the Sixteenth Amendment.[4] These many restrictions are not trifles. Indeed, they are powerful limitations on the Taxing Power, as recognized by the D.C. Circuit in *Murphy*, at 180-85.

---

[4] "[W]e cannot but ascribe content to the catchall provision of §22(a), 'gains or profits and income derived from any source whatever.' The importance of that phrase has been too frequently recognized since its first appearance in the Revenue Act of 1913 to say now that it adds nothing to the meaning of 'gross income.'" *Glenshaw Glass*, *supra* at 430 (footnote omitted).

If Congress can evade those limitations by imposing non-criminal "penalties" exacting money directly from individuals, those essential limitations lose all meaning. Any exaction now considered a "tax" could be re-labeled a commercial regulation enforcement penalty. Other than a capitation or other Direct Tax, almost all taxes involve commerce: income, transfers (such as gifts and descent), imports, the use of property, or the conduct of business. The few exceptions involve questionable issues extraneous to this case. *E.g.,* IRC §4945 (The section imposes an excise on private foundations' political and lobbying *activities*. While much lobbying and political activity involves commerce, arguably some has no commercial impact.). If a non-criminal "penalty" were exempt from the alternative requirements of "uniformity," "apportionment," or "income derived from a source," those important words would essentially be repealed. That cannot be the proper result for this important case. How the Constitution limits criminal penalties is irrelevant to this matter, as the Act penalty is non-criminal. *See* JCT, "Technical Explanation of the Revenue Provisions of the 'Reconciliation Act of 2010,' as Amended, in Combination with the 'Patient Protection and Affordable Care Act,'" 33 (Mar. 21, 2010), Doc. 2010-6147, 2010 TNT 55-23.

Thus, regardless whether the Court denominates the enforcement Penalty a "penalty" or a "tax," it must subject it to the powerful limitations imposed upon the collection of monies from people, in addition to whatever limitations exist under the Commerce

Clause. Anything else would not be proper. As the Court explained in *Butler*, "The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible." *Butler*, *supra*, at 18.

"*Necessary* and *Proper*" must not eviscerate other important Constitutional limitations; indeed, it must not eviscerate the most important Constitutional limitations – those on Congress' power to tax individuals. As explained below, if this Court finds the "penalty" is a tax, it must find it unconstitutional. Similarly, if this Court finds the "penalty" is merely a "penalty," it should nevertheless find it subject to the Taxing Power limitations. In either case, this Court must also find the penalty/tax subject to the procedural due process limitations, which it fails. Thus, in any event, this Court must find the penalty unconstitutional.

IV. The Penalty Is Contrary To The Limited Taxing Power

To satisfy the Taxing Power, the penalty must fit one of five groups:

1. Duty
2. Impost
3. Excise

4. Direct Tax (including a Capitation)
5. Income Tax under the Sixteenth Amendment

A. The Constitution Does Not Allow a Sixth Type of Tax

Although some have occasionally argued another form of money exaction power exists, no one has ever discovered it, let alone explained it. No Court has recognized it. This would be an odd case to discover and then to allow such a power never before discovered in over 225 years.

B. The Penalty Is Neither a Duty Nor an Impost

No one claims the penalty is either a duty or an impost.

C. The Penalty Is Not an Excise

The penalty is not an excise, albeit listed within the IRC excise provisions. As the Code provides, the placement of a provision within Title 26 has no independent significance. IRC §7806. Excises apply to:

1. Property Use.
2. Services
3. Privilege Exercises.
4. Entity Behavior.

Never has a United States excise applied to an individual's *inactivity*. Much has been argued regarding whether Congress' power to regulate commerce can reach *inactivity*. One District Court partially finessed this issue by labeling the matter being regulated as involving "economic decisions" and thereby partially avoided the activity versus inactivity issue. *Mead v. Holder*, 766 F. Supp. 2d 16, 35-37 (D.D.C. 2011). While that is questionable Commerce Clause analysis, the denomination is irrelevant for analyzing the penalty under the Necessary and Proper Clause, inter-twined with the limited Taxing Power. Whatever the reach of the Commerce Clause to regulate *inactivity or mere decisions*, no Court or commentator has ever argued the power to impose an *excise* reaches individuals' mere economic decisions, let alone inaction. Excises on individuals apply to actions: services, property use, and privilege exercises. If this Court were to define an individual's inactivity as the permissible subject of a uniform excise, it would eliminate an important distinction between taxes required to be uniform and those required to be apportioned. The *Hylton* Court made this point, if not in the most artful manner. *See* the discussion of historical excises in Steven J. Willis and Nakku Chung, *Of Constitutional Decapitation and Healthcare*, 128 TAX NOTES 169 (July 12, 2010) (WILLIS & CHUNG I) at 181-85. *See also Murphy*, *supra*, at 180-85. While some *entity* excises have applied to the accumulation of monies, *e.g.*, IRC §4943, the legitimacy of such indirect taxes is irrelevant to this matter, as *all* such examples apply to *entities* rather

than to *individuals*. Entity excises apply at least in part because entities have chosen to be entities, which involves *activity*. Excises on humans do not apply to mere decisions not to do something. If they did, they would be direct taxes, which must be apportioned. Apportionment is a critical limitation on Direct Taxes – a limitation which can indeed be failed, as it is by §5000A. *See* Steven J. Willis and Nakku Chung, *Oy Yes, the Healthcare Penalty is Unconstitutional*, 129 TAX NOTES 725 (Nov. 8, 2010) (WILLIS & CHUNG II) at 727-28 (discussing the common misunderstanding of *Hylton v. United States*, 3 U.S. 1 (3 Dall.) 171, 176 (1796) (Patterson, J.)).

D. The Penalty Is Not a Sixteenth Amendment Income Tax

The Sixteenth Amendment authorizes, without apportionment, a tax on "incomes, from whatever source derived." That phrase includes several limitations:

1. The item taxed must be income.
2. The income must be derived.
3. It must be "from" somewhere.
4. The somewhere must be a "source."

Many cases elucidate the meaning of these provisions. *Glenshaw Glass, supra* at 429-31; *Eisner v. Macomber*, 252 U.S. 189, 225-27, 237 (1920); *Murphy, supra* at 172, 203, 206.

i. The penalty does not have a proper trigger

Some have argued the Penalty is an income tax because it is a percentage of income. Kleinbard, "*Constitutional Kreplach*," 128 TAX NOTES 755 (Aug. 16, 2010). That alone, however, does not cause §5000A to tax income; instead, it merely measures the amount of the penalty. A proper trigger for an income tax would involve an "accession to wealth clearly realized over which the taxpayer has complete dominion." *Glenshaw Glass, supra* at 431. Not having health insurance is not a proper trigger for a taxpayer's income from *other* sources. For a fuller explanation, *see* WILLIS & CHUNG II at 729-30; WILLIS & CHUNG I at 191, 193.

ii. The penalty does not tax income

Some suggest cost-shifting is a "significant" cause for the penalty. Indeed, the shifting of costs to another produces income; however, the cost-shifting the government decries – and the penalty attempts to reach – will not have occurred with regard to anyone at the time the penalty accrues. It is merely *potential*, as noted by the District Court:

> In choosing not to purchase health insurance, Plaintiffs are actively arranging their circumstances (whether to save for their children's education or buy a new car) so that they must, **in the future**, rely on **either their own resources** or on federal law

> requiring medical providers to care for the sick and injured.

Mead v. Holder, 766 F. Supp. 2d 16, 49 (D.D.C. 2011) (emphasis added). Because *at the point of penalty imposition*, the cost-shifting will not have occurred, it cannot be the subject of an excise, nor can it be the subject of an income tax. Excises may apply to activity, but not to potential activity. Likewise, activity may generate derived income; however, potential activity cannot. *Commissioner v. Indianapolis Power and Light*, 493 U.S. 203, 210-12 (1990).

If this Court upholds the Act, some individuals may indeed purchase health insurance with pre-existing conditions and thereby shift costs to others, or they may seek medical services without the ability to pay for them. They may game the system and may plan to do so. But that potential is not the proper subject of an excise and it does not produce any income because it is not inevitable. Some individuals will die without ever benefitting from the pre-existing conditions provision. Others will move to another country, and still others will be neglectful and never obtain medical care or insurance. As this Court explained, the mere *possibility* of an accession to wealth is insufficient to produce income taxable under IRC §61 (which follows the Sixteenth Amendment verbatim in all important aspects). *Indianapolis Power, supra.* For an item to involve "gross income," it must be certain – and the alleged wealth allegedly taxed by the penalty is not. Plaintiffs are not "inevitable" participants in the healthcare market for two

reasons. *First*, some such persons will not participate for reasons mentioned above: death, travel abroad, and personal choice. *Second*, many such persons will not participate within a given month – the time period chosen for application of the penalty. For the penalty to tax income within a given month, the taxpayer would have to receive or accrue the income being taxed within that month – something which is not inevitable (cost-shifting would often occur later, if ever).

iii. The wealth allegedly taxed has not been derived

Being derived is an essential aspect of income under the Sixteenth Amendment. *Eisner v. Macomber*, 252 U.S. 189, 207 (1920). Although *Macomber* has been severely limited, it nevertheless continues to be relevant on this important issue. Even if some individuals are currently wealthier because they *plan* to defer purchasing insurance until they become ill, they have nevertheless not yet "derived" that income in a constitutional sense. For a fuller explanation, *see* WILLIS & CHUNG III at 8, 11, 20; WILLIS & CHUNG II at 728; WILLIS & CHUNG I at 172-74, 186-92.

iv. The alleged wealth did not derive "from" anywhere

To be income constitutionally subject to tax, an item must not only amount to an accession to wealth which has been "derived," but it also must have been

derived "from" somewhere. The mere performance of tasks for oneself – such as mowing the lawn or living in one's own home – do not derive from anywhere other than oneself. They do not produce income in a constitutional sense. *Helvering v. Independent Life Insurance Company,* 292 U.S. 371, 379 (1934). ("The rental value of the building used by the owner does not constitute income within the meaning of the Sixteenth Amendment.") Similarly, "economic decisions" and "self-insurance" are not items of income derived "from" anywhere but the individual's own mind. Even if such economic decisions amount to sufficient Commerce Clause activity, they do not amount to sufficient Taxing Power activity.

v. The "source" of the alleged wealth is the individual's own personal actions, which is insufficient

The "source" test essentially re-enforces the "from" test of income taxation. To be "derived," the item must come "from" a "source." Never has a Court approved an income tax on wealth produced by an individual's decisions or actions for himself. A common example is well-known to tax students: if a person mows his lawn, he has no income despite having an accession to wealth, a nicer lawn. However, if that person mows the neighbor's lawn in exchange for the neighbor mowing his lawn, they each have *Glenshaw Glass* income: an undeniable accession to wealth, clearly realized, over which the taxpayer has complete dominion and control. Self-insurance – not the

self-payment of expenses incurred, but the *mere acceptance of future risks* – is not the proper subject of an income tax, just as it is not the proper subject of an excise. It is simply what people do throughout their lives: they accept the risks of living. At most, a tax or levy on such a thing is a Direct Tax on an individual. Any other view would render the concept of a Direct Tax meaningless. Yet, Direct Taxes – and the need for their apportionment – appear three times in the Constitution and were a hugely important part of the Constitutional Convention debate. To ignore the direct tax apportionment requirement is to ignore a central part of the Constitution. Not only was apportionment a hotly debated issue in 1789, it was also a central issue in 1875 in relation to adoption of the Fourteenth Amendment (which alters the apportionment requirement in relation to the counting of persons, but does nothing to change the apportionment requirement for taxes). Further, apportionment was a central issue in 1913 with the adoption of the Sixteenth Amendment, which eliminates apportionment for taxes on income derived from a source.

E. The Penalty Is Not an Apportioned Direct Tax or Capitation

Article I requires Apportionment of Direct Taxes. The "penalty" is not, however, apportioned by population, as the amount paid per State *per capita* will not be the same. For example, the *per capita* amount owed by Floridians will never be the identical *per capita* amount owed by Alaskans, let alone the *per*

capita amount owed by residents of every other state. Because it cannot satisfy any other of the limited Taxing Powers, the penalty is, at best, a Direct Tax. Because it is not apportioned, it is unconstitutional. *Murphy, supra* at 180-85 (D.C. Circuit upholding a tax on non-physical personal injury awards as a uniform excise rather than striking it as an unapportioned Direct Tax, but also rejecting common attacks on the apportionment requirement). Of note, *Murphy* refused to accept the government's contention that direct taxes include only those which may be fairly apportioned:

> [N]either need we adopt the Government's position that direct taxes are only those capable of satisfying the constraint of apportionment. In the abstract, such a constraint is no constraint at all; virtually any tax may be apportioned by establishing different rates in different states. *See Pollock II*, 158 U.S. at 632-33. If the Government's position is instead that by "capable of apportionment" it means "capable of apportionment in a manner that does not unfairly tax some individuals more than others," then it is difficult to see how a land tax, which is widely understood to be a direct tax, could be apportioned by population without similarly imposing significantly non-uniform rates.

Murphy, supra at 184.

V. The Penalty Violates Procedural Due Process

Traditionally, one who asserts an action must proceed and must carry the burden of proof. Tax law is different. For most taxes – particularly for income taxes and most excises – the taxpayer has a limited opportunity for pre-judgment review.

A. Traditional Tax Cases

Typically,[5] the government initiates an audit. If the government and taxpayer disagree the IRS issues a "Notice of Deficiency."[6] A taxpayer then has 90 days to file a Tax Court petition. If the taxpayer fails to file timely, the IRS has the power to assess the tax. An assessment acts as a judgment. Other than tax protestors, no one seriously suggests they deny due process.

B. Other Tax Cases (*Except* for the Health-care Penalty)

For some taxes – most commonly *trust fund* taxes – the procedural protections are more limited. For these, the government has no power to issue a Notice of Deficiency. Instead, it may assess and collect the tax. It may entertain a taxpayer protest; however, no

---

[5] The government may proceed with §6331 "jeopardy assessments" or §6851 "termination assessments." For each, the taxpayer has the opportunity for quick post levy review. I.R.C. §7429.

[6] I.R.C. §6212.

statute requires such a procedure. Until 2005,[7] Taxpayers who objected had to pay the tax and then seek an administrative refund. If denied, they could sue in District or Claims Court, where they had the burdens of going forward, of notice, and of proof.

This extraordinarily limited procedural protection existed for many years. Some authorities questioned it on due process grounds. Indeed, the issue prompted considerable controversy among members of Congress. On June 25, 1997, a national commission chaired by Senator Kerry and Representative Portman issued "A Vision for a New IRS."[8] The report, which was critical of many IRS practices, resulted in the *Internal Revenue Service Restructuring and Reform Act of 1997*,[9] also known as the Taxpayer Bill of Rights III. While the act passed the House,[10] it failed in the Senate because Senate Finance Committee Chairman Roth refused to cooperate in bringing the

---

[7] Section 3401(a) of the Internal Revenue Service Restructuring and Reform Act of 1998 (Pub. L. No. 105-206, title III, July 22, 1998, 112 Stat. 746) amends Subchapter C of chapter 64 by adding new sections 6320 and 6330.

[8] A copy of the Report is available at: http://www.house.gov/natcommirs/report1.pdf.

[9] The proposed act, which passed the House of Representatives appears at: http://services.taxanalysts.com/taxbase/leghist.nsf/f8514175e9ec0e5c852570690054e4bf/41cf1546e8912279852573d8006df731?OpenDocument.

[10] Ryan J. Donmoyer and Jacqueline Rieschick, "It's (Almost) Unanimous: IRS Reform Bill Passes House," Tax Notes, November 10, 1997, at 639.

proposal to the floor.[11] He refused because he questioned the "due process" protections provided in IRS collection proceedings. The issue became political and was the subject of many discussions in tax circles. Others wanted to move the bill through to the President. Roth, however, prevailed. After further 1998 Finance Committee Hearings, the bill passed, but with substantial new provisions for "Collection Due Process" procedures.[12] While legislative history is often of limited use, this particular history is helpful. Senator Roth specifically questioned whether existing collection procedures satisfied due process. The Senate Finance Committee held hearings on the issue. The Senate amended the bill to provide for additional taxpayer protections and entitled them "Collection Due Process" ("CDP") hearings. The House passed the bill containing that language and President Clinton signed it. This was not a case, such as with the Healthcare Act, in which few, if any, members of Congress read the bill prior to voting on it; instead, many members of Congress openly debated the Service's collection processes, the bill, and the amendment in the press. A logical conclusion is that Senator Roth and a majority of Congress actually believed that existing procedures violated due process.

---

[11] Ryan J. Donmoyer, "Chairman Roth and the Politics of Reform," TAX NOTES, Dec. 22, 1997, at 1296; Ryan J. Donmoyer, "Roth Outlines 'Deficiencies' in IRS Reform Bill," TAX NOTES, Nov. 17, 1997, at 764.

[12] Internal Revenue Service Restructuring and Reform Act of 1998 (P.L. 105-206).

To summarize, a taxpayer must have a reasonable and meaningful opportunity to dispute a tax or penalty prior to collection by the IRS. While that opportunity may be administrative rather than judicial, the taxpayer must also have an opportunity to dispute the sufficiency of the original opportunity to dispute. Critically, the second opportunity *must be judicial*. These minimal requirements are statutory; however, they have significant constitutional implications. Prior to 1998, the government did not guarantee these minimal opportunities. Senator Roth – and ultimately Congress and the President – created them specifically to address what they saw as widespread due process violations. Congress, with the ultimate Presidential signature, labeled the procedures as "Collection Due Process." The label is important. It illustrates critical Congressional belief: collection without such minimal opportunities to be heard is unconstitutional as violative of the Fifth Amendment Due Process clause.

C. Procedures for the Healthcare Penalty

If the IRS believes an individual has violated the Mandate to have adequate health insurance, it must notify him or her of the penalty and demand that he or she pay it. It can then collect the alleged amount due.

That is it. No audit. No opportunity to respond. No need for *actual* notice. No administrative hearing.

No court hearing. No court judgment: mere perfunctory notice and demand followed by collection.

Perhaps the Treasury will adopt regulations providing for a hearing. Perhaps the IRS will adopt internal hearing procedures. Such opportunities existed prior to 1998 for various taxes; however, they were widely abused; indeed, they prompted the Taxpayer Bill of Rights III in 1998. They were not reviewable by any court . . . certainly not prior to collection or lien. They prompted the CDP process precisely because they were insufficient to guarantee due process: a meaningful right to be heard.

Since 1998, Taxpayers have a judicially reviewable right to a fair hearing, even if the hearing is administrative; at least they have a right to *judicial* review of the fairness. For the §5000A Penalty, however, no such right exists. Even if the Treasury adopts protest or appeal procedures, they cannot satisfy the Fifth Amendment Due Process guarantee because they cannot be *judicially* reviewable. The Tax Court lacks jurisdiction to hear such matters, and neither the Treasury nor the Service has the authority to grant such jurisdiction. District Courts would be barred by the Anti-injunction Act[13] from hearing such matters.

---

[13] I.R.C. §7421(a).

D. Analysis of the Procedures (or Lack Thereof)

i. How can the service "collect" the penalty?

The IRS may not use the §6331[14] levy process; nor may it file a notice of lien under §6321.[15] Also, it may not seek criminal sanctions for a taxpayer's failure to pay.[16]

On first view, subsection (g) appears taxpayer friendly: no criminal[17] sanctions, no levy and no lien. Arguably, the penalty appears essentially unenforceable.[18] A closer reading, however, eliminates the folly of such a viewpoint.

Clause 5000A(g)(2)(B)(ii) prohibits the Secretary from levying on taxpayer property. What that provision omits is the limited definition of a levy. The

---

[14] I.R.C. §6331.

[15] I.R.C. §6321 provides for an automatic or "silent lien." For the lien to be effective against third parties, the Service must file a notice of lien, consistent with the CDP protection of sections 6330 and 6320.

[16] I.R.C. §5000A(g).

[17] For a fuller explanation of the due process issue, as well as how the Act may indeed trigger criminal liability, *see* Steven J. Willis and Nakku Chung, *No Healthcare Penalty? No Problem: No Due Process* (WILLIS & CHUNG IV), forthcoming 38 Am. J. L. Medicine (2012), http://ssrn.com/abstract=1998821

[18] Mellor, *"The Individual Mandate Tax: Healthcare's Toothless Watchdog,"* 130 TAX NOTES 105 (Jan. 3, 2011) (opining that the penalty is a constitutional tax, but also noting its limited enforceability).

government has two substantial methods to collect the penalty.

ii. Offset

Per §6402(a) the service may retain an "overpayment" to satisfy other obligations: they keep a refund. This process, however, does not constitute a "levy" and thus is not prohibited by §5000A(g)(2)(B)(ii). Because it is not a levy, it cannot prompt a CDP hearing. Without the CDP hearing, no hearing officer determination is possible. With the determination, no Tax Court jurisdiction is possible.

Hence, if the government believes a taxpayer owes the penalty, it may seize any past, current, or future overpayment of any tax. The only limitation on this is the §5000A(g)(1) requirement that the Secretary provide "notice and demand." That notice, however, can be very much unlike notices for other taxes and penalties. It will not be a notice of deficiency prompting the right to seek Tax Court review. It will not be a §6330 notice of intent to levy prompting a CDC hearing followed by Tax Court review. It will be simple notice and demand. Nothing precludes the government from seizing a refund immediately following the notice. Nothing requires the government to listen to taxpayer disputes, let alone grant a sufficient hearing. Even if the government promulgates rules providing for such disputes, nothing grants any court jurisdiction to review the sufficiency of the hearing. Indeed, the Tax Court specifically lacks such

jurisdiction on collection matters except through the CDP process, which will be unavailable. The Anti-injunction Act precludes District and Claims Court review.

iii. Re-application of tax "payments"

Arguably, the government's ability to seize refunds is of little concern because taxpayers have the ability to ensure no refund is due. With the aid of a tax attorney or accountant one can project annual tax liability and thus adjust periodic "payments" through employer withholding and estimated tax returns. Two problems exist with that argument.

iv. Refunds

First, many taxpayers lack the skill or the resources to adjust withholding amounts. Many people rely on tax refunds as a type of short-term savings. Surely many taxpayers are capable of adjusting forms W-4 and 1040ES to eliminate the significant refunds. That all taxpayers have that skill or foresight is not credible. Hence, many taxpayers will lose refunds otherwise due through a collection process that is not a levy. Why is this so problematic? Consider the following scenario:

> Suppose Sally Taxpayer does not pay the penalty for lacking proper health insurance. Never-mind whether she is actually insured or whether she is exempt. Suppose the IRS, in searching various data bases of the

> "insured," does not find her name. What happens? The IRS sends her a Notice and Demand letter. That letter need not include any information about her right to a hearing before an administrative or judicial body because she has none. It will simply demand, assess, and collect. No Hearing. No Court. No Judgment. Just Demand and Collection.

But, what if Sally really *does* have insurance? Perhaps her insurance company misspelled her name Sallie. Or, perhaps she had a religious exemption. Or, she was imprisoned and thus not subject to the penalty. None of that would matter because Congress provided no *pre*-collection remedy. *After* Sally pays the *full* tax, including interest and a failure-to-pay penalty[19] equal to the failure-to-have-insurance penalty, she may seek a refund by filing an IRS Form 1040X. *After* exhausting her administrative rights, she can sue in District or Claims Court, assuming she knows how and can afford to do so. If she loses she may be assessed the government's litigation costs. And, *she* would have the burden of proof, not the government.

Yes, the executive may adopt procedures for a "protest letter" and an administrative hearing. But Congress specifically precluded the possibility of any

---

[19] I.R.C. §6651 imposes a penalty for failure to pay a tax, which would include the §5000A penalty. Per §7203, such a failure to pay the penalty for failing to have insurance could be criminal.

judicial review of the sufficiency of such a hearing. That is contrary to the fundamental purpose behind sections 6330 and 6320: a mere administrative hearing and administrative determination of the hearing's due process sufficiency violates due process. A taxpayer must have the opportunity for pre-collection *judicial* review. But, for the Healthcare Penalty, no such judicial review is possible.

v. Estimated tax "payments"

Estimated tax "payments" made with Form 1040ES vouchers are not "payments." Instead they are deposits.[20] The government has no obligation to apply them to the current year's income tax liability – even though the taxpayer deposits them for that purpose. "Clients need to understand that the offset power of the IRS operates relatively unchecked." Raby and Raby, *The Tax Court's Offset Jurisdiction – Or Lack Thereof*, TAX NOTES, November 27, 2006, 833, at 836 (discussing, inter alia, re-application of estimated taxes). Because they do not become a "payment" of the current year's tax until the return is filed (typically April 15th of the following year), the government may apply them to another debt.

Consider Sally taxpayer again. She has adequate health insurance and checks the "Yes"

---

[20] I.R.C. §6211 refers to them as "payments"; however, it disregards estimated "payments," as well as amounts withheld for purposes of determining a deficiency. Essentially, the amounts are deposits subject to re-application.

> box on her Form 1040 in response to the question about health coverage. She does not pay the penalty because she believes she does not owe it. She is not due a refund because she properly adjusted her W-4 and 1040ES voucher "payments" to preclude it. The government, however, disagrees. It does not find her name on a list of the insured or it "determines" a particular health insurance policy – the one Sally has – is inadequate.

The government will likely create a ruling process by which health insurance companies secure a determination regarding the adequacy of policies. It may require something akin to a Form 1099 be issued to all insureds. Mistakes happen, however. Can anyone believe such lists will be perfect and problem-free? While insurance companies will surely be able to litigate the denial of a favorable determination – or the withdrawal of one – taxpayers should also be able to raise such defenses.

Also, people change names: they marry, they divorce. Many use one name professionally and another socially. Some people spell their names differently for different purposes. Birth certificates can use one spelling and the person another. The population of the United States is approximately 350,000,000. Mistakes will occur with regard to some of those people. And what will be their remedy? It will be to pay the penalty and sue for a refund: their burden of going forward, of notice, and of proof. Even if the government grants administrative review, the taxpayer will have no ability to challenge the sufficiency

of that review in court, at least not until after payment.

Recall Sallie Taxpayer. Perhaps the government makes a mistake regarding her penalty liability. It owes her no tax refund, so how does it make her pay? It can re-apply future estimated tax "payments," – probably also including future employer withholding to satisfy the penalty from a prior year. It need not even notify her of that . . . at least not until it determines an income tax deficiency for the year to which Sallie thought the estimated tax "payments" applied. Sallie probably cannot challenge that deficiency because she will likely admit it. She cannot challenge the re-application of her "payments" because they were not payments . . . just deposits. Several years may potentially go by before she is even aware of the deficiency. Potentially, the statute of limitations on the penalty refund could run before she even knows of the penalty payment through subsequent re-application.

Further, suing for a refund is costly. Sallie would likely need an attorney or accountant to handle the refund claim – if the year remains open. She will need an attorney to handle the refund suit in District Court or the Claims Court. The amount of the mistaken penalty may be relatively small – perhaps a few thousand dollars. That it would be worth the cost years after the re-application of estimated taxes or of an overpayment is a serious issue. That issue itself goes to the sufficiency of the process – whether it amounts to "fair play and substantial justice."

In 1934, this Court *suggested* Fifth Amendment Due Process limitations do not restrict the Taxing Power. *Magnano v. Hamilton,* 292 U.S. 40, 44 (1934) (dealing with a Fourteenth Amendment challenge to a tax excessive in amount, as opposed to collection procedures); *relying on, Brushaber v. Union Pacific,* 240 U.S. 1, 20 (1916) (*stating* the inapplicability of due process to the Taxing Power, but actually *dealing with* issues of equal protection). The Court should distinguish those decisions (or reject their *dicta*) and adopt the view of its co-equal branches – Congress and the Executive. Those branches adopted the CDP process in 1998 precisely because they determined unreviewable administrative procedures were inadequate. Except in extraordinary circumstances,[21] Taxpayers must have a meaningful opportunity to dispute an obligation asserted by the government prior to the government taking their money. They must also have a meaningful pre-taking opportunity for judicial review of at least the sufficiency of that original dispute opportunity. *Cf. Fuentes v. Shevin,* 407 U.S. 67, 82 (1983) ("If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented."). For the §5000A penalty, such review is impossible. This Court should overrule any existing contrary authority exempting the Taxing

---

[21] Jeopardy and termination assessments, as noted *supra*.

Power from due process limitations and thereby strike §5000A of the Internal Revenue Code.

CONCLUSION

For the foregoing reasons, *amicus curiae* CatholicVote.org and Steven J. Willis respectfully request that this Supreme Court of the United States affirm the judgment of the Court of Appeals for the Eleventh Circuit. In so doing, the Court should find, *inter alia*, that the Mandate is unconstitutional because it violates limitations on the Taxing Power as well as the Due Process Clause of the Fifth Amendment.

Respectfully submitted,

PATRICK T. GILLEN
Counsel of Record
AVE MARIA SCHOOL OF LAW
1025 Commons Circle
Naples, Florida 34119
(734) 355-4728
ptgillen@avemarialaw.edu
Counsel for Amicus Curiae

STEVEN J. WILLIS
UNIVERSITY OF FLORIDA
COLLEGE OF LAW
8318 S.W. 103d Ave.
Gainesville, FL 32608
(352) 514-1394

AMICUS CURIAE BRIEF

No. 11-398

In the Supreme Court of the United States

DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.,
PETITIONERS,

v.

STATE OF FLORIDA, ET AL.,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE SUPPORTING RESPONDENTS (ANTI-INJUNCTION ACT ISSUE)

ILYA SHAPIRO
Counsel of Record
CHAIM GORDON
ANASTASIA KILLIAN
Cato Institute
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether the majority of the courts of appeal to have considered the issue correctly determined that the Anti-Injunction Act does not bar pre-enforcement judicial review of the penalty for failing to comply with the individual health insurance mandate because that penalty has not been expressly defined as a tax for these purposes and does not enforce a substantive tax provision.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

STATEMENT 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

The Argument That the Individual Mandate Penalty is Subject to the Anti-Injunction Act Simply Because It Appears in the Internal Revenue Code Fundamentally Departs From How Courts Have Long Applied the AIA 6

A. "Taxes" and "Penalties" Are Not Interchangeable for AIA Purposes 8

B. Courts Have Only Applied the AIA to Penalties That Are Expressly Defined as Taxes for AIA Purposes and to Penalties That Enforce Substantive Tax Provisions 11

1. With the Exception of *Mobile Republican*, All the Cases Cited by Former Commissioners Caplin and Cohen Concerned Penalties That Were Expressly Defined as Taxes 11

a. Shaw v. U.S. and Botta v. Scanlon 13

b. Transport Manufacturing v. Trainor... 13

c. Professional Engineers v. U.S. 14

d. Herring v. Moore 14

e. Crouch v. Commissioner 15

f. National Commodity v. U.S. 15

g. Spencer v. Brady 16

h. Mobile Republican v. U.S. 16

2. *Mobile Republican* and *Reams* Only Applied the AIA to Penalties That Enforce Substantive Tax Provisions..... 17

a. The Fourth Circuit Misread *Mobile Republican* as Supporting Its Position That All Penalties under the Code Are Subject to the AIA 18

b. When Congress Defined Chapter 68 Penalties as Taxes, the *Reams* Exception Would Have Applied to Those Penalties Because They All Enforced Substantive Tax Provisions. 19

3. *Amici* Cite No Cases Applying the AIA to Penalties That Are Neither Statutorily Defined as Taxes Nor Enforce Substantive Tax Provisions..... 21

C. The AIA Is Inapplicable to Suits Seeking to Enjoin the Individual Mandate Penalty Because That Penalty Has Not Been Statutorily Defined as a Tax and Does Not Enforce a Substantive Tax Provision.....22

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Bailey v. George, 259 U.S. 16 (1922) 9

Bob Jones Univ. v. Simon,
416 U.S. 725 (1974) 9, 18-19

Botta v. Scanlon,
314 F.2d 392 (2d Cir. 1963)..... 8, 13, 23

Crouch v. Comm'r,
447 F. Supp. 385 (N.D. Cal. 1978)..... 15, 20

Fed. Energy Admin. v. Algonquin SNG, Inc.,
426 U.S. 548 (1976) 7

Florida ex rel. McCollum v. H.H.S.,
716 F. Supp. 2d 1120 (N.D. Fla. 2010) 22

Goudy-Bachman v. H.H.S.,
764 F. Supp. 2d 684 (M.D. Pa. 2011)..... 22

Herring v. Moore, 735 F.2d 797 (5th Cir. 1984)..... 14

Liberty Univ., Inc. v. Geithner, __ F.3d __,
2011 WL 3962915 (4th Cir. Sept. 8, 2011) ... *passim*

Liberty Univ., Inc. v. Geithner,
753 F. Supp. 2d 611 (W.D. Va. 2010)..... 22

Lipke v. Lederer, 259 U.S. 557 (1922) 3, 6, 10

Mobile Republican Assembly v. United States,
353 F.3d 1357 (11th Cir. 2003) ..... *passim*

Nat'l Commodity & Barter Ass'n v. United States,
625 F. Supp. 920 (D. Colo. 1986) 15

Phillips v. Comm'r, 283 U.S. 589 (1931)..... 8

Prof'l Eng'rs, Inc. v. United States,
527 F.2d 597 (4th Cir. 1975) 14

Reams v. Vrooman–Fehn Printing Co.,
140 F.2d 237 (6th Cir. 1944) ..... *passim*

Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) ..... *passim*

Shaw v. United States,
331 F.2d 493 (9th Cir. 1964) 8, 13, 23

Snyder v. Marks, 109 U.S. 189 (1883)..... 9

Souther v. Mihlbachler,
701 F.2d 131 (10th Cir. 1983) 8, 15, 23

Spencer v. Brady, 700 F. Supp. 601 (D.D.C. 1988).. 16

Thomas More Law Center v. Obama,
651 F.3d 529 (6th Cir. 2011) 17, 22

Thomas More Law Center v. Obama,
720 F. Supp. 2d 882 (E.D. Mich. 2010)..... 23

Transp. Mfg. & Equip. Co. v. Trainor,
382 F.2d 793 (8th Cir. 1967) 13, 21

U.S. Citizens Ass'n v. Sebelius,
754 F. Supp. 2d 903 (N.D. Ohio 2010) 22

United States v. La Franca,
282 U.S. 568 (1931) 3, 5, 8, 23

United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213 (1996) 8

Virginia ex rel. Cuccinelli v. Sebelius,
702 F. Supp. 2d 598 (E.D. Va. 2010) 23

Voss v. Hinds,
111 F. Supp. 679 (W.D. Okla. 1953) 14

Statutes

26 U.S.C. § 294(b) (1952) 13

26 U.S.C. § 527(j) 18, 19

26 U.S.C.A. § 5000A(b)(1) 5, 22, 23

26 U.S.C. § 5114(c)(3) 17

26 U.S.C. § 5684(b) 17

26 U.S.C. § 5761(e) 17

26 U.S.C. § 6201 ..... 3, 7

26 U.S.C. § 6601(e)(1) 17

26 U.S.C. § 6651 14

26 U.S.C. § 6665(a)(2) ..... *passim*

26 U.S.C. § 6671(a) ..... *passim*

26 U.S.C. § 6672 13

26 U.S.C. § 6676(e) (1988) 16

26 U.S.C. § 6682 14

26 U.S.C. § 6695(c) 15, 20

26 U.S.C. § 6700 15

26 U.S.C. § 6711 20

26 U.S.C. § 6713 20

26 U.S.C. § 6720A 20

26 U.S.C.A. § 6720C 20

Anti-Injunction Act,
26 U.S.C. § 7421(a) ..... *passim*

Other Authorities

H.R. Rep. No. 83-1337 (1954). 19

Office of Tax Policy, Dep't of the Treasury, *Report to the Congress on Penalty & Interest Provisions of the Internal Revenue Code* (1999) 19, 20

S. Rep. No. 83-1622 (1954). 19

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs. This case is of central concern to Cato because it involves the federal government's most egregious attempt to exceed its constitutional power to regulate commerce—and the issue that is the subject of this brief concerns the ability to timely challenge that *ultra vires* action.

STATEMENT

Although most of the courts to consider the issue have held that the AIA is inapplicable to the individual mandate penalty, a divided Fourth Circuit concluded that the AIA bars consideration of suits challenging the individual mandate, reasoning that the AIA is jurisdictional and applies to all exactions assessed under the Internal Revenue Code ("the Code"). *See Liberty Univ., Inc. v. Geithner*, __ F.3d __, 2011

---

[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

WL 3962915, at *5 (4th Cir. Sept. 8, 2011); *see also Seven-Sky v. Holder*, 661 F.3d 1, 22, 38 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (similar). Accordingly, when the Court granted certiorari, it appointed an *amicus curiae* ("*Amicus* Long") to defend the position that the AIA bars pre-enforcement consideration of the constitutionality of the individual mandate.

Private and state respondents contend that the AIA is inapplicable to suits challenging the constitutionality of the individual mandate for several reasons. *See* Cert. Pet. at 15, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, No. 11-393 (U.S. Sept. 28, 2011) (contending that there is considerable doubt as to whether the AIA is jurisdictional and, thus, not subject to waiver by petitioners; that the individual mandate penalty is not a "tax" for AIA purposes; that the challenge is to the mandate, which has legal force even without the penalty; and that some plaintiffs will have no other way of challenging the individual mandate because they will be subject to the mandate but not the penalty); Cert. Pet. at 37 n.3, *Florida v. H.H.S.*, No. 11-400 (U.S. Sept. 27, 2011) (contending that the AIA should not bar suits brought by states). Although the Court can find the AIA inapplicable for any of these reasons, this brief only addresses whether the penalty for failing to comply with the individual mandate is a "tax" for AIA purposes.

SUMMARY OF ARGUMENT

The argument that all penalties assessed under the Internal Revenue Code are subject to the AIA fundamentally departs from the traditional analysis of penalties under the Code. Federal courts have long understood that "penalties" are not interchangeable with "taxes" for AIA purposes. Moreover, before this litigation, no court has ever relied on the alternative argument that the Code's grant of penalty assessment authority to the Secretary of the Treasury, 26 U.S.C. § 6201, is sufficient to make the AIA apply to penalties.

This Court has acknowledged that the terms "tax" and "penalty" "are not interchangeable one for the other." *United States v. La Franca*, 282 U.S. 568, 572 (1931). Acknowledging this, *Lipke v. Lederer*, 259 U.S. 557 (1922), held that the AIA did not bar a suit to enjoin the enforcement of a "tax" for violating the Prohibition Act because the exaction there was a penalty and not a tax. *See id.* at 562.

Lipke's holding cannot be distinguished as applying only to criminal penalties because *Lipke* did not purport to create a narrow "due process" exception to the AIA. Rather, *Lipke* construed the AIA as not applying to penalties in part to avoid this "due process" violation. Further, at least two courts of appeal have recognized that *Lipke*'s core AIA holding applies to both criminal and civil penalties. *See Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1362 n.5 (11th Cir. 2003) (distinguishing *Lipke* on other grounds); *Reams v. Vrooman–Fehn Printing Co.*, 140 F.2d 237, 240–41 (6th Cir. 1944) (same).

Before this litigation, and with the exception of cases applying the AIA to suits to enjoin penalties

that enforce substantive tax provisions, courts have only applied the AIA to penalties that were expressly defined as taxes for AIA purposes by specific statutory provisions. The most prominent of these provisions are § 6665(a)(2) and the second sentence of § 6671(a), which together provide that penalties in chapter 68 of the Code are defined as taxes.

With the sole exception of *Mobile Republican*, all of the cases cited by former Commissioners Caplin and Cohen applied the AIA to penalties that were expressly defined as taxes. The commissioners' contrary claim—that the penalties were not statutorily defined as taxes—is erroneous. Moreover, almost all of the cases cited by the former commissioners explicitly rely on provisions that define the penalties or other payments at issue in those cases as taxes for AIA purposes.

Mobile Republican is also unavailing because that case, and *Reams* before it, merely held the AIA applicable to suits seeking to enjoin penalties that enforce substantive tax provisions. The Fourth Circuit thus misread *Mobile Republican* as supporting its position that all Code penalties are subject to the AIA. *See Liberty Univ.*, 2011 WL 3962915, at *10 (citing *Mobile Republican*, 353 F.3d at 1362 n.5).

Reams also shows how the Fourth Circuit misinterpreted the legislative history of what is now § 6665(a)(2) and the second sentence of § 6671(a), and thus incorrectly inferred that the AIA applies to all Code penalties. That is, when Congress enacted those provisions—which define chapter 68 penalties as taxes for AIA purposes—the *Reams* exception would have likely applied to all penalties then codified in chapter 68 *because those penalties all enforced sub-*

stantive tax provisions. It is, therefore, not surprising that Congress did not think that it was changing the law as to any then-existing penalty—and did not anticipate that chapter 68 would ever include penalties that did not enforce substantive tax provisions.

Tellingly, *Amicus* Long cites no cases applying the AIA to suits to enjoin exactions denominated as penalties that have not been statutorily defined as taxes. Instead, *Amicus* Long resorts to statutory arguments that have not been considered before this litigation. This Court should not abandon the reasoned analysis that courts have traditionally used in applying the AIA to penalties under the Code in favor of novel arguments that are neither sound nor prudent.

As the overwhelming majority of courts to consider the issue have concluded, the AIA is inapplicable to suits to enjoin the § 5000A(b)(1) individual mandate penalty because that penalty is not expressly defined as a tax by any Code provision and it does not enforce a substantive tax provision. The individual mandate itself is not a substantive tax provision because it is not "an enforced contribution to provide for the support of government." *La Franca*, 282 U.S. at 572.

Amici have been unable to find *any* case that *ever* applied the AIA to penalties that are neither expressly defined as taxes nor enforce substantive tax provisions. The implication for AIA jurisprudence is clear: The AIA is inapplicable to suits to enjoin penalties that are neither expressly defined as taxes nor enforce substantive tax provisions. The § 5000A(b)(1) penalty for failing to comply with the individual mandate is such a provision, and thus the AIA is inapplicable to suits seeking to enjoin it.

ARGUMENT

THE ARGUMENT THAT THE INDIVIDUAL MANDATE PENALTY IS SUBJECT TO THE ANTI-INJUNCTION ACT SIMPLY BECAUSE IT APPEARS IN THE INTERNAL REVENUE CODE FUNDAMENTALLY DEPARTS FROM HOW COURTS HAVE LONG APPLIED THE AIA

The argument that all penalties assessed under the Internal Revenue Code are subject to the AIA, as the Fourth Circuit held in *Liberty University, Inc. v. Geithner*, 2011 WL 3962915, Judge Kavanaugh concluded in *Seven-Sky v. Holder*, 661 F.3d at 21, and *Amicus* Long urges, *see* Br. for Court-Appointed *Amicus Curiae* Supporting Vacatur (Anti-Injunction Act), *H.H.S. v. Florida*, No. 11-398 (U.S. Jan. 6, 2012) [hereinafter Br. for *Amicus* Long], fundamentally departs from the traditional analysis of penalties under the Code for AIA purposes.

The argument at issue has been articulated in two ways: First, the Fourth Circuit and *Amicus* Long have said that the AIA's use of the term "any tax," 26 U.S.C. § 7421(a), "forbids actions that seek to restrain the Secretary from exercising his statutory authority to assess exactions imposed by the Internal Revenue Code," *Liberty Univ.*, 2011 WL 3962915, at *6; *see* Br. for *Amicus* Long at 36, including exactions labeled as penalties.[2] Second, the Fourth Circuit, Judge Kava-

---

[2] Neither the Fourth Circuit nor *Amicus* Long have explained why their broad construction of the term "any tax" would not subject *every* civil penalty to the AIA. After all, the AIA was enacted well before the codification of the Code and does not reference the Code itself, but rather to "any tax." 26 U.S.C. § 7421(a). *Compare Lipke*, 259 U.S. at 561–62 (discussing whether a provision in the Prohibition Act was a tax for AIA purposes) *with Fed.*

naugh, and *Amicus* Long have said that the AIA applies to penalties under the Internal Revenue Code because such penalties are "taxes," "as defined in the Code's assessment provisions." *Liberty Univ.*, 2011 WL 3962915, at *6 (citing 26 U.S.C. § 6201); *Seven-Sky*, 661 F.3d at 22, 38 (same); Br. for *Amicus* Long at 39 (same). Both of these articulations fundamentally depart from the analysis that federal courts have traditionally employed when considering whether the AIA applies to penalties under the Code.

Contrary to the Fourth Circuit and *Amicus* Long's assertion that the AIA's use of the term "any tax" includes all penalties included in the Code, courts have long understood—based, in part, on this Court's precedents—that "penalties" are not interchangeable with "taxes" for AIA purposes. Moreover, before this litigation, no court had ever relied on the alternative argument advanced by the Fourth Circuit, Judge Kavanaugh, and *Amicus* Long that the Code's grant of penalty assessment authority to the Secretary of the Treasury, 26 U.S.C. § 6201, is sufficient to make the AIA applicable to penalties notwithstanding this Court's previous conclusion to the contrary.

Instead, courts have only found the AIA applicable to suits to enjoin penalties under the Code in two distinct—though at times overlapping—circumstances. First, courts have applied the AIA to suits seeking to enjoin penalties that have been expressly defined as "taxes" for AIA purposes by specific statutory provisions. In almost all of these cases, courts have explicitly relied on those express statutory provisions. *See,*

Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 558 n.9 (1976) (fee imposed by the Trade Expansion Act of 1962 was not a tax for AIA purposes because it was not in the Code).

e.g., *Souther v. Mihlbachler*, 701 F.2d 131, 132 (10th Cir. 1983) (citing 26 U.S.C. § 6671(a)); *Shaw v. United States*, 331 F.2d 493, 496 (9th Cir. 1964) (citing former 26 U.S.C. § 6659(a)(2) (now codified at 26 U.S.C. § 6665(a)(2))); *Botta v. Scanlon*, 314 F.2d 392, 393 (2d Cir. 1963) (citing 26 U.S.C. § 6671(a)). Second, some courts have held that suits to enjoin penalties that enforce substantive tax provisions are barred by the AIA. *See, e.g.*, *Mobile Republican*, 353 F.3d at 1362 n.5; *Reams*, 140 F.2d at 240–41.

A. "Taxes" and "Penalties" Are Not Interchangeable for AIA Purposes

This Court has acknowledged that the terms "tax" and "penalty" "are not interchangeable." *La Franca*, 282 U.S. at 572. As this Court has repeatedly explained, the distinction between "tax" and "penalty," is that "[a] 'tax' is an enforced contribution to provide for the support of government; a 'penalty,' . . . is an exaction imposed by statute as punishment for an unlawful act." *See, e.g.*, *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (quoting *La Franca*, 282 U.S. at 572). Further, this distinction between taxes and penalties is entirely consistent with the definition of the word "tax" put forth by *Amicus* Long. *See* Br. for *Amicus* Long at 37 (citing Noah Webster, *An American Dictionary of the English Language* 1132 (rev. by Chauncy A. Goodrich) (1860) (the term tax "include[es] almost every species of imposition on persons or property *for supplying the public treasury*") (emphasis added)).

The Fourth Circuit and *Amicus* Long cite *Phillips v. Commissioner*, 283 U.S. 589 (1931), for the proposition that the "any tax" includes any "exaction [that] is made under color of their offices by revenue officers

charged with the general authority to assess and collect the revenue." *Liberty Univ.*, 2011 WL 3962915, at *5 (quoting *id.* at 596 (alteration in original) (citing *Snyder v. Marks*, 109 U.S. 189 (1883))); Br. for *Amicus* Long at 37 (same). But the exactions at issue in *Phillips* and *Snyder* were ordinary taxes, not penalties. *See Phillips*, 283 U.S. at 591 (concerning a tax on transferee of liquidated corporation's assets); *Snyder*, 109 U.S. at 189 (concerning a tax on sale of tobacco). Similarly, *Bailey v. George*, 259 U.S. 16 (1922), which *Amicus* Long also cites to demonstrate "the broad scope of the [AIA]," Br. for *Amicus* Long at 38 (citing *id.*), concerned an exaction that was formally a tax, and not a penalty. *See Bailey*, 259 U.S. at 19 (concerning a tax on businesses that employed child labor).[3] Accordingly, these cases do not in any way undermine the longstanding distinction between "taxes" and "penalties" for AIA purposes.

Recognizing this distinction, this Court, in *Lipke v. Lederer*, held that the AIA did not bar a suit to enjoin the enforcement of a "tax" for manufacturing or selling liquor in violation of the Prohibition Act because the exaction at issue was a penalty and not a tax. *See Lipke*, 259 U.S. at 562 ("The collector de-

---

[3] *Bailey v. George* did not hold, therefore, that the AIA "reaches a *broader* range of exactions than does the term 'tax' in the Constitution." *Liberty Univ.*, 2011 WL 3962915, at *9. Rather, as this Court explained in *Bob Jones University v. Simon*, *Bailey v. George* merely held that the AIA barred a suit to enjoin a *tax* even when "the tax was challenged as a regulatory measure beyond the taxing power of Congress." 416 U.S. 725, 740 (1974). Indeed, notwithstanding *Bailey v. George*, even a statute that is formally a tax can be considered a penalty for AIA purposes under certain circumstances. *See Seven-Sky*, 661 F.3d at 7 n.12 (majority opinion) (citing *Lipke*, 259 U.S. 557).

manded payment of a penalty, and section 3224 [of the Revised Statutes], which prohibits suits to restrain assessment or collection of any tax, is without application."); *see also Liberty Univ.*, 2011 WL 3962915, at *28–29 (Davis, J., dissenting) (explaining why the Fourth Circuit majority opinion is in conflict with *Lipke*). Indeed, as *Lipke* is in apparent conflict with *Amicus* Long's argument, it is somewhat surprising that *Amicus* Long neither cites *Lipke* nor makes any attempt to distinguish the case.

The Fourth Circuit, meanwhile, tried to distinguish *Lipke* by reasoning that the case's AIA holding only applies to criminal penalties, not civil ones. *See Liberty Univ.*, 2011 WL 3962915, at *8–9 (majority opinion). But *Lipke* did not purport to create a narrow "due process" exception to the AIA. Rather, it construed the AIA as not applicable to penalties both because a "penalty" is not a "tax," *see Lipke*, 259 U.S. at 562, and because this construction avoided a "due process" violation, *see id.*; *Liberty Univ.*, 2011 WL 3962915, at *28–29 (Davis, J., dissenting).

Moreover, at least two courts of appeal have previously recognized that *Lipke*'s core AIA holding applies to both criminal and civil penalties. *See Mobile Republican*, 353 F.3d at 1362 n.5 (distinguishing *Lipke* on other grounds); *Reams*, 140 F.2d at 240–41 (same). Significantly, neither *Reams* nor *Mobile Republican* distinguished *Lipke* as a due process case that only applies to criminal penalties. Indeed, as the D.C. Circuit majority observed, "aside from the Fourth Circuit's recent decision, no court has ever held that 'any tax' under the Anti–Injunction Act includes exactions that Congress deliberately called 'penalties.'" *Seven-Sky*, 661 F.3d at 7.

B. Courts Have Only Applied the AIA to Penalties That Are Expressly Defined as Taxes for AIA Purposes and to Penalties That Enforce Substantive Tax Provisions

With the exception of cases that applied the AIA to suits to enjoin penalties that enforce substantive tax provisions, courts, prior to this litigation, have only applied the AIA to penalties that have been expressly defined as taxes for AIA purposes by specific statutory provisions. Moreover, in almost all of those cases, courts have explicitly relied on these specific statutory provisions and do not rely, as two former IRS commissioners disingenuously suggest, on the argument that the AIA applies to all Code penalties.

1. With the Exception of *Mobile Republican*, All of the Cases Cited by Former Commissioners Caplin and Cohen Concerned Penalties That Were Expressly Defined as Taxes

Two former IRS Commissioners, Mortimer Caplin and Sheldon Cohen, filed an *amicus* brief here—building on the one they filed in the D.C. Circuit—asserting that the AIA bars suits to enjoin the assessment and collection of all Code penalties. *See Amici* Br. of Mortimer Caplin and Sheldon Cohen Urging Vacatur on the Anti-Injunction Act Issue in Supp. of Neither Side, *H.H.S. v. Florida*, No. 11-398 (U.S. Jan. 12, 2012) [hereinafter Caplin & Cohen *Amici* Br.]; Br. for Mortimer Caplin & Sheldon Cohen as *Amici Curiae* in Supp. of Appellees, *Seven–Sky v. Holder*, No. 11–5047 (D.C. Cir. July 1, 2011). *Amici* Caplin & Cohen's *Seven-Sky* brief has proven influential, being cited twice by the Fourth Circuit and by both the D.C. Circuit majority and dissent. *See Lib-*

erty Univ., 2011 WL 3962915, at *9, *14; *Seven–Sky*, 661 F.3d at 5 n.5; *id.* at 26 n.4 (Kavanaugh, J., dissenting). As demonstrated below, however, the influence of *Amici* Caplin & Cohen's *Seven-Sky* brief is surpassed only by its misdirection. *Amici* Caplin & Cohen have compounded their error by submitting an even more misleading brief here.

With the sole exception of *Mobile Republican Assembly v. United States*, 353 F.3d 1357—which will be explained below as holding the AIA applicable to penalties that enforce substantive tax provisions—all the cases cited by *Amici* Caplin & Cohen applied the AIA to penalties that have been expressly defined as taxes by specific statutory provisions, most notably § 6665(a)(2) and the second sentence of § 6671(a). Further, almost all of those cases explicitly rely on those particular provisions.

Amici Caplin & Cohen erroneously state that these cases concern penalties not in the Code's chapter 68, and are thus not easily distinguished as cases applying the express command of §§ 6665(a)(2) and 6671(a). *See* Caplin & Cohen *Amici* Br. at 18 ("But that does not justify the treatment under section 7421 of other penalties not in chapter 68, such as in the cases cited above (at 16–17)."). Their analysis is wrong because, with the sole exception of *Mobile Republican*, the penalties in those cases are expressly defined as taxes—either because they are, in fact, in chapter 68 and are defined as taxes by § 6665(a)(2) or the second sentence of § 6671(a), or because an analogous provision defines the penalty or other payment at issue as a tax for AIA purposes.

a. ***Shaw v. United States* and *Botta v. Scanlon***

The first two cases cited by *Amici* Caplin & Cohen as "[p]erhaps the best illustration of section 7421's breadth" concern the application of the AIA to suits to enjoin penalties on corporate officers, under § 6672, for the failure of a discontinued business to pay over its employee's withheld taxes to the IRS. Caplin & Cohen *Amici* Br. at 15–16 (citing *Shaw v. United States*, 331 F.2d 493; *Botta v. Scanlon*, 314 F.2d 392). But both *Shaw* and *Botta* grounded their decisions in express statutory provisions defining § 6672 penalties as taxes. *See Shaw*, 331 F.2d at 496 (citing former 26 U.S.C. § 6659(a)(2) (now codified at 26 U.S.C. § 6665(a)(2))); *Botta*, 314 F.2d at 393 (citing 26 U.S.C. § 6671(a)). To their credit, *Amici* Caplin & Cohen belatedly concede that *Shaw* and *Botta* might be distinguishable, *see* Caplin & Cohen *Amici* Br. at 18 (conceding that § 6671(a) defines § 6672 penalties as taxes), but this does not excuse their misrepresentation of *Shaw* and *Botta* in the first instance.

b. ***Transport Manufacturing v. Trainor***

The third case cited by *Amici* Caplin & Cohen concerns the application of the AIA to suits to enjoin interest due on interest. *See* Caplin & Cohen *Amici* Br. at 16 (citing *Transp. Mfg. & Equip. Co. v. Trainor*, 382 F.2d 793 (8th Cir. 1967)). Although interest due on interest is not in chapter 68, *Transport Manufacturing* explicitly relies on another provision, § 294(b) of the 1939 Internal Revenue Code, which expressly provides that interest due on interest is considered part of the tax due. *See Transp. Mfg.*, 382 F.2d at 797 n.8 (citing 26 U.S.C. § 294(b) (1952) ("Where the amount determined . . . as the tax imposed by this

chapter . . . is not paid on or before the date prescribed for its payment, there shall be collected as a part of the tax, interest upon such unpaid amount . . . ."));; *see also* 26 U.S.C. § 6601(e)(1) (deeming interest to be a tax under the current Code).[4]

c. ***Professional Engineers v. United States***

The fourth case cited by *Amici* Caplin & Cohen concerns the application of the AIA to suits to enjoin penalties for failure to file tax returns. *See* Caplin & Cohen *Amici* Br. at 16 (citing *Prof'l Eng'rs, Inc. v. United States*, 527 F.2d 597 (4th Cir. 1975)). But that penalty is in chapter 68, 26 U.S.C. § 6651—and *Professional Engineers* explicitly relies on the provision that defines § 6651 penalties as taxes for AIA purposes. *See Prof'l Eng'rs*, 527 F.2d at 599 (citing former 26 U.S.C. § 6659 (now codified at 26 U.S.C. § 6665)).

d. ***Herring v. Moore***

The fifth case cited by *Amici* Caplin & Cohen concerns the application of the AIA to suits to enjoin penalties for filing fraudulent W-4 withholding forms. *See* Caplin & Cohen *Amici* Br. at 16 (citing *Herring v. Moore*, 735 F.2d 797 (5th Cir. 1984)). But the penalty for false statements with respect to withholding taxes

---

[4] Even had interest due on interest not been expressly defined as part of the tax due, the *Reams–Mobile Republican* exception, which is discussed below, would have applied. *See Reams*, 140 F.2d at 240–41 (holding that suits to enjoin penalties and interest on tax due for failing to pay over Social Security taxes were AIA-barred because they were interwoven with the underlying tax); *Voss v. Hinds*, 111 F. Supp. 679, 681 (W.D. Okla. 1953) (citing *Reams*, 140 F.2d 237).

is also in chapter 68, 26 U.S.C. § 6682—and although *Herring* does not discuss its reasoning, it does explicitly rely on *Souther v. Mihlbachler*. *See Herring*, 735 F.2d at 798 (citing *Souther v. Mihlbachler*, 701 F.2d 131). *Souther*, in turn, explicitly relies on the provision that defines § 6682 penalties as taxes for AIA purposes. *See Souther*, 701 F.2d at 132 (citing 26 U.S.C. § 6671(a)).

e. *Crouch v. Commissioner*

The sixth case cited by *Amici* Caplin & Cohen concerns the application of the AIA to suits to enjoin penalties on return preparers that fail to include their Social Security numbers on returns. *See* Caplin & Cohen *Amici* Br. at 16 (citing *Crouch v. Comm'r*, 447 F. Supp. 385 (N.D. Cal. 1978)). That penalty is also in chapter 68, 26 U.S.C. § 6695(c)—and *Crouch* explicitly relies on the provision that defines § 6695(c) penalties as taxes for AIA purposes. *See Crouch*, 447 F. Supp. at 386 (citing 26 U.S.C. § 6671(a)).

f. *National Commodity v. United States*

The seventh case cited by *Amici* Caplin & Cohen concerns the application of the AIA to suits to enjoin penalties for promoting abusive tax shelters. *See* Caplin & Cohen *Amici* Br. at 16 (citing *Nat'l Commodity & Barter Ass'n v. United States*, 625 F. Supp. 920 (D. Colo. 1986)). But the penalty for promoting abusive tax shelters is also in chapter 68, 26 U.S.C. § 6700—and *National Commodity* explicitly relies on the provision that defines § 6700 penalties as taxes for AIA purposes. *See Nat'l Commodity*, 625 F. Supp. at 921 (citing 26 U.S.C. § 6671).

g. *Spencer v. Brady*

The eighth case cited by *Amici* Caplin & Cohen concerns the application of the AIA to suits to enjoin penalties on parents who fail to provide Social Security numbers for their claimed dependants. *See* Caplin & Cohen *Amicus* Br. at 16–17 (citing *Spencer v. Brady*, 700 F. Supp. 601 (D.D.C. 1988)). But the (former) penalty for failing to supply the "TIN" (Taxpayer Identification Number) of any dependant was in subchapter B of chapter 68, 26 U.S.C. § 6676(e) (1988), and is thus defined as a tax for the purposes of the AIA. *See* 26 U.S.C. § 6671(a). *Spencer* does not discuss the distinction between penalties and taxes, but that is mostly because the taxpayers in *Spencer* were challenging much more than the $5 penalty for failing to include their children's Social Security numbers on their tax returns. Rather, the *Spencer* taxpayers were challenging the potential denial of deductions for failing to supply those numbers—and the court rightly recognized that this was really a suit to enjoin the assessment and collection of actual taxes because enjoining the denial of deductions is the equivalent of enjoining the tax itself. *See Spencer*, 700 F. Supp. at 603.

h. *Mobile Republican v. United States*

The final case cited by *Amici* Caplin & Cohen is *Mobile Republican*, *see* Caplin & Cohen *Amici* Br. at 16–17, which will be explained below as applying the AIA to suits to enjoin penalties that enforce substantive tax provisions.

2. *Mobile Republican* and *Reams* Only Applied the AIA to Penalties That Enforce Substantive Tax Provisions

Amici Caplin & Cohen's reliance on *Mobile Republican* is similarly unavailing because *Mobile Republican* did not hold that all penalties under the Code are taxes for AIA purposes. Rather, *Mobile Republican* simply held that the AIA bars suits to enjoin penalties that enforce substantive tax provisions. That is, by recognizing *Lipke v. Lederer* as a case in which a penalty enforced a non-tax provision, *Mobile Republican*, and *Reams* before it, both observe the rule that the AIA does not bar suits to enjoin civil penalties under the Code and also establish an exception to that rule: that the AIA bars suits to enjoin penalties that enforce substantive tax provisions. *See Mobile Republican*, 353 F.3d at 1362 n.5; *Reams*, 140 F.2d at 240–41; *see also Thomas More Law Center v. Obama*, 651 F.3d 529, 540 (6th Cir. 2011) (similarly explaining *Mobile Republican*'s reasoning); *Seven–Sky*, 661 F.3d at 7 (same).[5]

---

[5] The penalties found in §§ 5114(c)(3) (penalty for failure to comply with requirements of nonbeverage domestic drawback claimant provisions), 5684(b) (penalty for failure to pay or collect liquor taxes), and 5761(e) (penalties for failure to pay tobacco taxes and for buying and for selling tobacco products marked for export within the United States) enforce substantive tax provisions and would, thus, be subject to the AIA under the *Reams–Mobile Republican* line of cases. In addition, as the government has argued, *see* Appellee's Supp. Br. at 4, *Liberty Univ.*, 2011 WL 3962915 (No. 10-2347), these provisions could be subject to the AIA because these provisions explicitly provide that these penalties should be paid, assessed, and collected, "as provided in 6665(a)." This otherwise superfluous cross-reference to the entire § 6665(a) could conceivably be construed as defining these penalties as taxes, as provided in § 6665(a)(2).

In *Reams*, the Sixth Circuit distinguished a civil penalty, under the 1939 Internal Revenue Code, for failing to pay over Social Security taxes from the penalty at issue in *Lipke* on the grounds that the Social Security penalty is "an integral part of the tax and interwoven into it." *Reams*, 140 F.2d at 240–41. Similarly, in *Mobile Republican*, the Eleventh Circuit distinguished the civil penalty for failing to meet the § 527 disclosure requirements, *see* 26 U.S.C. § 527(j), from the penalty at issue in *Lipke* on the grounds that the penalty in *Lipke* "involve[d] tax penalties imposed for substantive violations of laws not directly related to the tax code," whereas the § 527(j) penalty enforced the § 527 disclosure requirements that "form part of the overall tax subsidy scheme." *Mobile Republican*, 353 F.3d at 1362 n.5.

a. The Fourth Circuit Misread *Mobile Republican* as Supporting Its Position That All Penalties under the Code Are Subject to the AIA

The Fourth Circuit thus misread *Mobile Republican* as supporting its position that all penalties under the Code are subject to the AIA. *See Liberty Univ.*, 2011 WL 3962915, at *10 ("The Eleventh Circuit agreed and dismissed the suit because the exaction was based 'squarely upon the explicit language of the Internal Revenue Code' and 'form[ed] part of the overall tax subsidy scheme.'" (quoting *Mobile Republican*, 353 F.3d at 1362 n.5)). What *Mobile Republican* meant when it observed that the exaction was based "squarely upon the explicit language of the Internal Revenue Code," *Mobile Republican*, 353 F.3d at 1362 n.5, was simply its conclusion that, as in *Bob Jones*, the IRS's position in that case was a "good-

faith effort to enforce the technical requirements of the tax laws." *Id.* (quoting *Bob Jones*, 416 U.S. at 739–40). This point was only important because, presumably, had the position of the IRS been in "bad-faith," the AIA would have been inapplicable for the simple reason that the IRS would not have been trying to assess or collect "any tax." 26 U.S.C. § 7421(a). Thus, the crucial factor in *Mobile Republican*—and how it distinguished *Lipke*—was the fact that the § 527(j) penalty enforced the § 527 disclosure requirements, which "form part of the overall tax subsidy scheme." *Mobile Republican*, 353 F.3d at 1362 n.5.

b. When Congress Defined Chapter 68 Penalties as Taxes, the *Reams* Exception Would Have Applied to Those Penalties Because They All Enforced Substantive Tax Provisions

When Congress first added what is now § 6665(a)(2) and the second sentence of § 6671(a)—which define chapter 68 penalties as taxes for the purposes of the entire Code, including the AIA—the *Reams* exception would have likely applied to all penalties then codified in chapter 68 *because those penalties all enforced substantive tax provisions. See* Office of Tax Policy, Dep't of the Treasury, *Report to the Congress on Penalty & Interest Provisions of the Internal Revenue Code* 19–21 (1999) [hereinafter *Penalty Report*], *available at* http://www.treasury.gov/resource-center/tax-policy/Documents/intpenal.pdf (noting that there were only 13 penalties in the original 1954 Code and describing how those penalties functioned). It is therefore unsurprising that when it added those provisions, Congress did not think that it

had changed existing law as to any then-existing penalty. *See* H.R. Rep. No. 83-1337, at A420 (1954); S. Rep. No. 83-1622, at 595–96 (1954). Nor could Congress have contemplated that at some future time, chapter 68 would include penalties enforcing anything other than substantive tax provisions. Thus, no inference can be drawn that Congress thought that all Code penalties were to be automatically treated as taxes for AIA purposes. *Cf. Liberty Univ.*, 2011 WL 3962915, at *11 (drawing such an inference).

With time, however, Congress enacted dozens of new civil penalties in the Code, some of which relate weakly, if at all, to underlying substantive tax provisions. *See Penalty Report* at 21–32.[6] Accordingly, the *Reams–Mobile Republican* exception would likely not have made the AIA applicable to some of these penalties. Still, because Congress almost invariably placed such provisions in chapter 68—and they are thus defined as taxes for AIA purposes, *see* 26 U.S.C. §§ 6665(a)(2), 6671(a)—courts continued to hold that the AIA barred suits to enjoin such penalties, even when they may not have enforced an underlying substantive tax provision. *See Crouch*, 447 F. Supp. 385 (applying the AIA to a § 6695(c) penalty on a return preparer for failing to include his Social Security number on a return he prepared because the penalty was codified in subchapter B of chapter 68 despite the fact

---

[6] *See, e.g.*, 26 U.S.C. §§ 6695(c) (penalty on return preparer for not including identification number), 6711 (penalty for failure of tax-exempt organization to disclose that information or services it sells can be obtained for free from federal government), 6713 (penalty on return preparers for disclosing or using taxpayer information), 6720A (penalty for selling fuels that do not meet EPA standards), & 6720C (penalty for failing to notify health plan of cessation of eligibility for COBRA premium assistance).

that the "penalty [was] against the tax preparer, not the taxpayer, and the penalty [was] imposed for the failure to supply a Social Security number, not the failure to pay a tax").

3. *Amici* Cite No Cases Applying the AIA to Penalties That Are Neither Statutorily Defined as Taxes Nor Enforce Substantive Tax Provisions

Neither *Amici* Caplin & Cohen nor *Amicus* Long have cited *any* case applying the AIA to penalties that are not defined as taxes and that do not enforce substantive tax provisions. Of the nine cases cited by *Amici* Caplin & Cohen, only *Mobile Republican* and *Transport Manufacturing* concern penalties not in chapter 68. *Transport Manufacturing* explicitly relies on a Code provision that treats interest due on interest as part of the tax due, *see Transp. Mfg.*, 382 F.2d at 797 n.8 (citing 26 U.S.C. § 294(b) (1952)), and is thus analogous to the chapter 68 penalties and *Mobile Republican* concerned a penalty that enforced substantive tax provisions. Moreover, of all the chapter 68 penalty cases cited by *Amici* Caplin & Cohen, only *Spencer* did not explicitly rely on the specific provisions that expressly define those penalties as taxes for AIA purposes—and *Spencer* is not really a penalty case in the first place.[7]

For his part, *Amicus* Long cites no cases applying the AIA to suits to enjoin exactions denominated as

---

[7] *Amici* Caplin & Cohen's misleading citation of legal authority should inform this Court's evaluation of their factual representations as well. *Cf. Liberty Univ.*, 2011 WL 3962915, at *14 ("As former IRS Commissioners warned in a recent brief, allowing these suits would severely hamper IRS collection efforts." (citing Caplin & Cohen *Amici* Br., *Seven-Sky*)).

penalties that have not been statutorily defined as taxes. *See* Br. for *Amicus* Long at 36–43. *Amicus* Long does not even cite *Mobile Republican*, presumably because he recognizes that *Mobile Republican* only applied the AIA to the § 527(j) penalty because that penalty enforces substantive tax provisions. Indeed, *Amicus* Long avoids all discussion of the relevant case law, presumably because almost all of those cases rely on specific provisions that define the penalties at issue as taxes for AIA purposes. *See* Br. for *Amicus* Long at 36–43. Instead, *Amicus* Long resorts, as did the Fourth Circuit and Judge Kavanaugh, to statutory arguments that have never before been considered. This Court should not abandon the reasoned analysis that courts have traditionally used in applying the AIA to Code penalties in favor of novel arguments that are neither sound nor prudent.

C. The AIA Is Inapplicable to Suits Seeking to Enjoin the Individual Mandate Penalty Because That Penalty Has Not Been Statutorily Defined as a Tax and Does Not Enforce a Substantive Tax Provision

As the overwhelming majority of courts to consider the issue have concluded, the AIA is inapplicable to suits seeking to enjoin the § 5000A(b)(1) individual mandate penalty because—under the traditional analysis that courts have used in applying the AIA—it is not expressly defined as a tax by any Code provision and it does not enforce a substantive tax provision. *See Thomas More Law Center v. Obama*, 651 F.3d at 539 (holding that the penalty for failing to comply with the individual mandate is not a tax for AIA purposes); *Seven-Sky v. Holder*, 661 F.3d at 5 (same); *Goudy–Bachman v. H.H.S.*, 764 F. Supp. 2d

684, 694 (M.D. Pa. 2011) (same); *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 627 (W.D. Va. 2010) (same); *U.S. Citizens Ass'n v. Sebelius*, 754 F. Supp. 2d 903, 909 (N.D. Ohio 2010) (same); *Florida ex rel. McCollum v. H.H.S.*, 716 F. Supp. 2d 1120, 1130 (N.D. Fla. 2010) (same); *see also Thomas More Law Center v. Obama*, 720 F. Supp. 2d 882, 890 (E.D. Mich. 2010) (rejecting application of the AIA to individual-mandate suit for other reasons); *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 603 (E.D. Va. 2010) (same).

The § 5000A(b)(1) individual mandate penalty is not expressly defined as a tax. Unlike most penalties in the Code, the § 5000A(b)(1) penalty was not placed in chapter 68 and has, thus, not been defined as a tax for the purposes of the AIA by either § 6665(a)(2) or the second sentence of § 6671(a). This is significant because courts have explicitly relied on these provisions, which together define chapter 68 penalties as taxes for Code purposes, in concluding that suits to enjoin particular penalties were barred by the AIA. *See, e.g.*, *Souther*, 701 F.2d at 132 (citing 26 U.S.C. § 6671(a)); *Shaw*, 331 F.2d at 496 (citing former 26 U.S.C. § 6659(a)(2) (now codified at 26 U.S.C. § 6665(a)(2))); *Botta*, 314 F.2d at 393 (citing 26 U.S.C. § 6671(a)).

The § 5000A(b)(1) individual mandate penalty does not enforce a substantive tax provision because the requirement that private individuals purchase insurance policies from private companies cannot be a tax. The penalty cannot be a tax because it is not "an enforced contribution to provide for the support of government." *La Franca*, 282 U.S. at 572. Indeed, the government, in its merits brief, does not contend that

the command to purchase a product or service from a private company can itself be a tax. *See* Pet. Br. (Minimum Coverage Provision) at 52–62, *H.H.S. v. Florida*, No. 11-398 (U.S. Jan. 6, 2012) (arguing that the individual mandate penalty is a tax—even though Congress called it a penalty—but not arguing that the mandate itself is a tax). Because the individual mandate penalty does not enforce a substantive tax provision, it cannot qualify for protection under the *Reams–Mobile Republican* line of cases, which, as explained above, apply the AIA to suits to enjoin penalties that enforce substantive tax provisions. *See Mobile Republican*, 353 F.3d at 1362 n.5; *Reams*, 140 F.2d at 240–41.

Moreover, *Amici* have been unable to find *any* case that has *ever* applied the AIA to penalties that are not expressly defined as taxes in the Code and that do not enforce substantive tax provisions. The implication of this dearth of precedent is clear: The AIA is inapplicable to suits seeking to enjoin penalties that are neither defined as taxes nor enforce substantive tax provisions. The penalty for failing to comply with the individual mandate is such a penalty—and so the AIA is inapplicable here.

CONCLUSION

For the foregoing reasons, the AIA does not bar suits seeking to enjoin the penalty that enforces the individual mandate.

Respectfully submitted,

ILYA SHAPIRO
Counsel of Record
CHAIM GORDON
ANASTASIA KILLIAN
Cato Institute
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Amicus Curiae

FEBRUARY 2012

AMICUS CURIAE BRIEF

No. 11-398

In the Supreme Court of the United States

DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.,
PETITIONERS
v.
STATES OF FLORIDA, ET AL.,
RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* CATO INSTITUTE, COMPETITIVE ENTERPRISE INSTITUTE, PACIFIC LEGAL FOUNDATION, 14 OTHER ORGANIZATIONS, AND 333 STATE LEGISLATORS SUPPORTING RESPONDENTS (INDIVIDUAL MANDATE ISSUE)

TIMOTHY SANDEFUR
Pacific Legal Foundation
930 G St.
Sacramento, CA 95834
(916) 419-7111
tms@pacificlegal.org

ROBERT A. LEVY
ILYA SHAPIRO
Counsel of Record
ANASTASIA KILLIAN
Cato Institute
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Amici Curiae

QUESTION PRESENTED

Can a limited government to whom a free people have delegated only certain enumerated powers commandeer that people into purchasing a product from a private business pursuant to its power to pass laws "necessary and proper for carrying into execution" the authority to "regulate Commerce . . . among the several States"?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. The Individual Mandate Exceeds the Scope of the Necessary and Proper Clause as Used to Execute the Power to Regulate Interstate Commerce Under the "Substantial Effects" Doctrine. 6

A. The "Substantial Effects" Doctrine Applies the Necessary and Proper Clause to the Commerce Clause and Allows Congress to Use Its Regulatory Authority While Cabining That Authority. 6

B. Compelling Activity Transcends the Necessary and Proper Clause's Limits on the Commerce Clause 12

C. The *Comstock* Factors That Are the Most Recent Articulation of the Necessary and Proper Clause's Limits Weigh Against the Individual Mandate 14

II. The Individual Mandate Cannot be Justified as an "Essential Part of a Broader Regulatory Scheme" Because Congress Cannot Regulate Inactivity 17

A. Inactivity is Not a Type of Activity. 18

B. The Activity-Based Categorical Distinction Provides Judicially Manageable Standards with a Minimum of Judicial Policymaking 20

III. The Individual Mandate is Not "Proper" Under the Necessary and Proper Clause Because It Constitutes an Unconstitutional Commandeering of the People 24

A. The Constitution Creates a Federal System That Recognizes and Protects Both State and Popular Sovereignty 24

B. Congress Can Intrude on State and Popular Sovereignty Only for Certain Limited Purposes in Certain Circumscribed Ways 26

1. Commandeering is constitutional only when it is textually based or when it relates to the functioning of the Republic or the duties of citizenship 26

2. The individual mandate's commandeering of citizens intrudes on popular sovereignty and allows Congress to avoid the Constitution's call for political accountability and transparent budgeting 28

a. The Origination Clause ensures that mandated wealth transfers are passed through the most politically accountable house of Congress 29

b. The Statement and Account Clause works with the Origination Clause to ensure that the people can accurately assess how much wealth is being extracted from them 31

C. If Congress is Allowed to Avoid Both Political Accountability and Courts' Enforcement of the Necessary and Proper Clause's Limits, It Will Improperly Define the Limits of its Own Power 34

CONCLUSION 36
APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Afroyim v. Rusk, 387 U.S. 253 (1967) 26

Brzonkala v. Virginia Polytechnic Institute,
169 F.3d 820 (4th Cir. 1999) (en banc).....9

Champion v. Ames, 188 U.S. 321 (1903).....13

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).....25

City of Boerne v. Flores, 521 U.S. 507 (1997).....6

Florida v. Dep't of Health & Human Servs.,
780 F. Supp. 2d 1256 (N.D. Fla.) 3

Florida v. Dep't of Health & Human Servs.,
648 F.3d 1235 (11th Cir. 2011).....*passim*

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 6, 7

Gonzales v. Raich, 545 U.S. 1 (2005) .....*passim*

Gregory v. Ashcroft, 501 U.S. 452 (1991).....6

Heart of Atlanta Motel, Inc. v. United States,
379 U.S. 241 (1964).....12

Helvering v. Davis, 301 U.S. 619 (1937) 4

Hepburn v. Griswold,
75 U.S. (8 Wall.) 603 (1870)..... 34-35

Hodel v. Indiana, 452 U.S. 314 (1981) 17

Kansas v. Colorado, 206 U.S. 46 (1907) 6

Katzenbach v. McClung, 379 U.S. 294 (1964) 7, 12

Mead v. Holder, 766 F. Supp. 2d 16 (D.D.C. 2011) .. 18

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) ..... *passim*

McFarlane v. Sheridan Square Press, Inc.,
91 F.3d 1501 (D.C. Cir. 1996) 19

New York v. United States,
505 U.S. 144 (1992) 24, 28, 33

NLRB v. Jones & Laughlin Steel Corp.,
301 U.S. 1 (1937) 9, 12

Printz v. United States, 521 U.S. 898 (1997) .... *passim*

Selective Draft Law Cases, 245 U.S. 366 (1918) 27

Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) 4, 35

Shreveport Rate Cases, 234 U.S. 342 (1914) 7

Thomas More Law Center v. Obama,
651 F.3d 529 (6th Cir. 2011) 2, 3, 35

United States v. Bird, 124 F.3d 667 (5th Cir. 1997) ... 9

United States v. Bond, 131 S. Ct. 2355 (2011) 26

United States v. Comstock,
130 S. Ct. 1949 (2010) 14, 15, 16

United States v. Coombs,
37 U.S. (12 Pet.) 72 (1838) 7

United States v. Darby, 312 U.S. 100 (1941) ... 7, 8 , 17

United States v. E. C. Knight Co.,
156 U.S. 1 (1895) 7

United States v. Lopez, 514 U.S. 549 (1995) .... *passim*

United States v. Morrison,
529 U.S. 598 (2000) ..... *passim*

United States v. Shabani, 513 U.S. 10 (1994) 19

United States v. Wrightwood Dairy Co.,
315 U.S. 110 (1942) 7

Virginia v. Sebelius,
728 F. Supp. 2d 768 (E.D. Va. 2010) 3

Wickard v. Filburn, 317 U.S. 111 (1942) 4, 8, 12

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 26

Constitutional Provisions and Statutes

Patient Protection and Affordable Care Act, Pub. L.
No. 111-148, 124 Stat. 119 (2010) ..... *passim*

26 U.S.C. § 5000(A) 2

U.S. Const. art. I, § 2, cl. 3 27

U.S. Const. art. I, § 7, cl. 1 29

U.S. Const. art. I, § 8, cl. 18 24

U.S. Const. art. I, § 9, cl. 7 .....29, 31

U.S. Const. amend. III 27

U.S. Const. amend. V 27

U.S. Const. amend. VI 27

U.S. Const. amend. VII 27

U.S. Const. amend. IX 27

U.S. Const. amend. X 25

U.S. Const. amend. XIII 27

U.S. Const. amend. XVI 27

Other Authorities

Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L.L. 581 (2011) ...8, 11

Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* (1994) 4

Cong. Budget Office, *The Budgetary Treatment of Proposals to Change the Nation's Health Insurance System* (2009) 32

Cong. Budget Office, *Budgetary Treatment of Proposals to Regulate Medical Loss Ratios* (2009) 33

The Debates In The Several State Conventions On The Adoption Of The Federal Constitution (Jonathan Elliot, ed., 1859) 29-30

The Federalist (Clinton Rossiter, ed., 1961) ... 5, 28, 30

Philippa Foot, *Killing and Letting Die, in Moral Dilemmas* (2002) 19

Alexander Hamilton, Opinion on the Constitutionality of a National Bank (February 23, 1791), *in Hamilton: Writings* (J. Freeman, ed., 2001) 9

Ezra Klein, *The Number-Cruncher-in-Chief,* The American Prospect, Jan. 14, 2009 31-32

Jeannie Jacobs Kronenfeld, *The Changing Federal Role in U.S. Health Care Policy* (1997) 15

Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of The Sweeping Clause,* 43 Duke L.J. 267 (1993) 15

Jason Mazzone, *Can Congress Force You to Be Healthy*? N.Y. Times, Dec. 16, 2010, at A39 21

J. Michael Medina, *The Origination Clause in the American Constitution: A Comparative Survey*, 23 Tulsa L. J. 165 (1987) 29

Robert Pear, *The Clinton Budget: Health Care; Congress' Budget Office May Deal New Blow to Clinton Plan*, N.Y. Times, Feb. 8, 1994 *available at* http://www.nytimes.com/1994/02/08/us/clinton-budget-health-care-congress-s-budget-office-may-deal-new-blow-clinton.html 32

Propagandizing a Health Report, N.Y. Times, Feb. 10, 1994, at A22 32

Prosser and Keeton on the Law of Torts (5th ed. 1984) 18, 19

Ilya Shapiro, *State Suits Against Health Reform Are Well Grounded in Law—and Pose Serious Challenges*, 29 Health Affairs 1229 (June 2010) .. 36

Ilya Shapiro & Trevor Burrus, *Not Necessarily Proper:* Comstock*'s Errors and Limitations*, 61 Syracuse L. Rev. 413 (2011) 14

Ilya Somin, *Taking Stock of* Comstock: *The Necessary and Proper Clause and the Limits of Federal Power*, 2009-10 Cato Sup. Ct. Rev. 239 (2010) 14

Joseph Story, *Commentaries on the Constitution of the United States* (1833) 27, 31

INTEREST OF *AMICI CURIAE*[1]

Amici groups are national and state think tanks and public-interest law firms dedicated to advancing individual liberty: the Cato Institute, Competitive Enterprise Institute, Pacific Legal Foundation, Committee for Justice, National Tax Limitation Committee, Arkansas Policy Foundation, Commonwealth Foundation (Pennsylvania), Illinois Policy Institute, John W. Pope Civitas Institute (North Carolina), Minnesota Free Market Institute at Center of the American Experiment, Mississippi Center for Public Policy, Montana Policy Institute, Nevada Policy Research Institute, North Carolina Institute for Constitutional Law, Rio Grande Foundation (New Mexico), Texas Conservative Coalition Research Institute, and Wyoming Liberty Group. By publishing reports, books, and articles, as well as through litigation, they have established themselves at the forefront of the movement for limited government and free markets.

Amici individuals are a bipartisan group of 333 legislators from 17 states (listed by name and state in the Appendix) that have not passed Health Care Freedom Acts.[2]

---

[1] Pursuant to this Court's Rule 37.3(a), all parties have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs. Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, except that earlier versions of this brief that were filed in several lower courts were partly authored by Prof. Randy Barnett, who has since become of counsel to the private respondents here. No person or entity other than *amici* made a monetary contribution for the preparation or submission of this brief.

[2] Legislators from states that *have* enacted HCFAs have joined an *amicus* brief filed by the Goldwater Institute. The American

This case concerns *amici* because it represents the federal government's most egregious attempt to exceed its constitutional authority since at least the Second World War. *Amici* believe that "the Court either should stop saying that there is a meaningful limit on Congress's power or prove that it is so." *Thomas More Law Center v. Obama,* 651 F.3d 529, 555 (6th Cir. 2011) (Sutton, J., concurring in part).

SUMMARY OF ARGUMENT

The individual mandate[3] exceeds Congress's power to regulate interstate commerce under existing doctrine. The outermost bounds of this Court's Commerce Clause jurisprudence—the "substantial effects" doctrine—stop Congress from reaching intrastate non-economic activity regardless of its effect on the economy. Nor can Congress compel someone to engage in commerce, even if it purports to do so as part of a broader regulatory scheme.

The Constitution does not permit Congress to conscript citizens into economic transactions to remedy the admitted shortcomings—which the government usually terms "necessities"—of a hastily assembled piece of legislation. See Br. for State Petitioners on Severability at 2-4, *NFIB v. Sebelius,* Nos. 11-393 & 11-400 (recounting the "tortuous" legislative history of the Affordable Care Act). Although the Necessary

---

Legislative Exchange Council has also filed a brief on behalf of its members (about 2,000 state legislators), some of whom have also individually joined this or the Goldwater brief.

[3] 26 U.S.C. § 5000(A). Also known as the "minimum coverage provision" of the Patient Protection and Affordable Care Act ("PPACA" or "ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010).

and Proper Clause allows Congress to execute its regulatory authority over interstate commerce, it is not a blank check permitting Congress to ignore constitutional limits by manufacturing necessities and commandeering citizens to do its bidding. "[Salutary] goals and creative drafting have never been sufficient to offset an absence of enumerated powers." *Virginia v. Sebelius*, 728 F. Supp. 2d 768, 780 (E.D. Va. 2010), *vacated and remanded with instructions to dismiss on other grounds*, 656 F.3d 253 (4th Cir. 2011). The individual health insurance mandate is not constitutionally warranted simply because it is "necessary" to make other legislation function properly. Indeed, any law—"necessary" or otherwise—that purports to compel otherwise inactive citizens to engage in economic activity is unconstitutional.

While the government emphasizes the "uniqueness" of the healthcare market and the wisdom of the legislation, "this case is not about whether the Act is wise or unwise...in fact, it is not really about our healthcare system at all. It is principally about our federalist system, and it raises very important issues regarding the Constitutional role of the federal government." *Florida v. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1263 (N.D. Fla.), *aff'd in relevant part*, 648 F.3d 1235 (11th Cir. 2011).

Moreover, what Congress is trying to do here is literally unprecedented, as recognized even by the lower courts that ruled for the government. "Congress has never exercised its commerce power in this way, and nothing suggests that this tradition reflects 220 years of self-restraint." *Thomas More Law Center*, 651 F.3d at 549 (Sutton, J., concurring). "The Government concedes the novelty of the mandate and the

lack of any doctrinal limiting principles." *Seven-Sky v. Holder*, 661 F.3d 1, 14 (D.C. Cir. 2011).

The Congressional Budget Office agrees: "The government has never required people to buy any good or service as a condition of lawful residence in the United States." Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* 1 (1994). Nor has Congress ever before imposed on everyone a civil penalty for declining to participate in the market. And never before have courts had to consider such a breathtaking assertion of power under the Commerce Clause. Even in *Wickard v. Filburn*, 317 U.S. 111 (1942), the federal government claimed "merely" the power to regulate what farmers grew, not to *mandate* that people become farmers, much less to force people to purchase farm products.[4] Even if *not* purchasing health insurance is considered an "economic activity"—which of course would mean that every aspect of human life is economic activity—there is no constitutional warrant for Congress to force Americans to enter the marketplace to buy a particular good or service.

Although often conceived as a Commerce Clause doctrine, the substantial effects test actually applies the Necessary and Proper Clause in the context of the power to regulate commerce. And the Necessary and Proper Clause's grant of discretion to "carry into execution" an enumerated power does not imply a one-way ratchet towards unlimited federal power. In-

---

[4] So, too, in *Helvering v. Davis*, 301 U.S. 619 (1937), the government successfully defended the constitutionality of the Social Security Act in part by emphasizing that it did *not* compel economic activity. *See id.* at 621 (argument of Mr. Jackson) ("No compliance with any scheme of Federal regulation is involved.")

stead, the clause both augments *and limits* Congress's regulatory authority. Consequently, the outermost limits of the substantial effects doctrine are also the outermost limits of Congress' discretion in enforcing its power to regulate commerce. Because economic mandates do not fall within these boundaries, it is unconstitutional to impose them under the guise of regulating commerce.

Moreover, even if economic mandates are deemed "necessary," they are not a "proper" means of executing an enumerated power because they "commandeer" individuals and thereby avoid constitutionally designated avenues of political accountability. Economic mandates alter the constitutional structure in an unprecedented way and thus do not "consist with the letter and spirit of the constitution." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

The explicit purpose of Article I is to grant Congress certain enumerated powers and then strictly limit them. James Madison, the architect of our system of government, famously observed that "[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." *The Federalist* No. 51, at 322 (C. Rossiter, ed., 1961). Thus, Article I gives Congress only certain legislative powers "herein granted," Articles II and III check those powers, and the Tenth Amendment emphasizes that all other powers remain with those who breathed life into the new government in the first place: the sovereign "people of the United States." The Framers believed that limiting federal power, and reserving the "residual" power in the hands of the states and

the people would help "ensure protection of our fundamental liberties" and "reduce the risk of tyranny and abuse." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (citation omitted).

Given the Framers' clear intent to establish a limited government of enumerated powers, it is unsurprising that this Court has consistently reaffirmed that the federal government does not enjoy a general police power. *See, e.g.*, *McCulloch*, 17 U.S. (4 Wheat.) at 405; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187 (1824); *Kansas v. Colorado*, 206 U.S. 46, 87 (1907); *United States v. Lopez*, 514 U.S. 549, 552 (1995); *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997). The Court should not now break with this well established and foundational American principle.

ARGUMENT

I. The Individual Mandate Exceeds the Scope of the Necessary and Proper Clause as Used to Execute the Power to Regulate Interstate Commerce Under the "Substantial Effects" Doctrine

A. The "Substantial Effects" Doctrine Applies the Necessary and Proper Clause to the Commerce Clause and Allows Congress to Use Its Regulatory Authority While Cabining That Authority

Since the New Deal, the Supreme Court has asked whether a particular "economic activity substantially affects interstate commerce" when considering whether Congress can regulate it. *Gonzales v. Raich*, 545 U.S. 1, 25 (2005). The New Deal cases which first developed the "substantial effects" doctrine,

however, found the authority for that doctrine not in the Commerce Clause itself but in its execution via the Necessary and Proper Clause. Although often described as expanding the definition of the word "commerce," these cases show that the New Deal Court actually asked whether federal regulation of the activity in question was *a necessary and proper means* of exercising the regulatory power, because the activity substantially affects that commerce. "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause." *Id.* at 34 (Scalia, J., concurring) (citing *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 78 (1838); *Katzenbach v. McClung*, 379 U.S. 294, 301-02 (1964); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *Shreveport Rate Cases*, 234 U.S. 342, 353 (1914); *United States v. E. C. Knight Co.*, 156 U.S. 1, 39-40 (1895) (Harlan, J., dissenting)). Congress has never been allowed to go further.

In *United States v. Darby*, 312 U.S. 100 (1941), for example, the Court considered Congress's power to "prohibit the employment of workmen in the production of goods 'for interstate commerce' at other than prescribed wages and hours." *Id.* at 108. Instead of stretching the definition of "commerce," the Court focused on how congressional power "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate." *Id.* at 118. The authorities cited for this proposition did not come from *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)—the foundational Commerce Clause case cited

throughout *Darby*—but from *McCulloch*, the seminal Necessary and Proper Clause case.

A year later, in *Wickard*, the Court used the same reasoning: not redefining "commerce," but ruling that the challenged measures were necessary and proper for regulating commerce. Like *Darby*, *Wickard* explicitly relied on the Necessary and Proper Clause, citing *McCulloch*. *See*, 317 U.S. at 130 n.29. *Wickard* did not expand the Commerce Clause itself to allow Congress power to regulate intrastate activity that, when aggregated, substantially affects interstate commerce. Instead, "like *Darby*, *Wickard* is both a Commerce Clause and a Necessary and Proper Clause case[,]" with the substantial effects doctrine reaching Roscoe Filburn's wheat growing via the Necessary and Proper Clause. Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L.L. 581, 594 (2011). Thus the aggregation principle can only apply to economic activities the regulation of which is necessary and proper to effectuating Congress's enumerated power to regulate commerce.

Accordingly, the Court in *Lopez* found that aggregation could apply only to *economic* activity: "Even *Wickard*, which is perhaps the most far-reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that possession of a gun in a school zone does not." 514 U.S. 549, 560 (1995). And in *United States v. Morrison*, the Court held that gender-motivated violence is not economic activity and thus that the substantial effects doctrine was inapplicable. 529 U.S. 598, 613 (2000). The Court thus clarified the substantial effects doctrine by setting the regulation of intrastate

economic activity (in certain contexts) as the absolute limit of federal power under the Commerce and Necessary and Proper Clauses. "Where *economic activity* substantially affects interstate commerce, legislation regulating *that activity* will be sustained." *Lopez*, 514 U.S. at 560 (emphasis added).

Conversely, non-economic activity (or, as in this case, inactivity) cannot be regulated merely because it affects interstate commerce through a "causal chain," or has, in the aggregate, "substantial effects on employment, production, transit, or consumption." *Morrison*, 529 U.S. at 599. The activity being regulated must have a "close and substantial relation to interstate commerce," *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937), and that relationship must be qualitative, not just quantitative. *Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820, 843 (4th Cir. 1999) (en banc), *aff'd sub nom Morrison, supra*; *accord, United States v. Bird*, 124 F.3d 667, 677 n.11 (5th Cir. 1997).

Adopting such a categorical distinction between economic and noneconomic activity allowed the Court to determine whether legislation is "necessary" under the Necessary and Proper Clause without involving it in complex, potentially insoluble evaluations of the "more or less of *necessity* or *utility*" of the challenged law. Alexander Hamilton, Opinion on the Constitutionality of a National Bank (February 23, 1791), *in Hamilton: Writings* 619 (J. Freeman, ed., 2001). This distinction limits congressional power when regulating *intrastate economic activity* to activities closely connected to interstate commerce, thus withholding from Congress any unconstitutional police powers, *see, e.g.*, *Lopez*, 514 U.S. at 567, preserving the role of

states in the federalist system, and minimizing the degree of judicial involvement in utilitarian considerations that are outside the courts' expertise.

Since the New Deal, the Court has eschewed *fact-based* inquiries into the degree of means-end fit (unless a fundamental right is at stake). In *Lopez*, and again in *Morrison*, the Court instead adopted a judicially administrable *categorical* distinction between economic and non-economic activity. As the court below observed, abandoning this categorical rule would force courts to "sit in judgment over every economic mandate issued by Congress, determining whether the level of participation in the underlying market, the amount of cost-shifting, the unpredictability of need, or the strength of the moral imperative were enough to justify the mandate." *Florida*, 648 F.3d at 1296-97. Legislatures are more suited for that task, in just the way that courts are more suited to enforce the Constitution's principled limits on congressional power.

By limiting the substantial effects doctrine to economic activities, *Lopez* and *Morrison* preserved the constitutional scheme of limited and enumerated powers, drawing a judicially administrable categorical line beyond which Congress cannot go when choosing "necessary" means to execute its authority.

But if regulating intrastate *economic* activity can be a "necessary" means of regulating interstate commerce as that term is understood under the Necessary and Proper Clause, the obvious corollary is that regulating *non-economic* activity cannot be "necessary," regardless of its economic effects. And a power to regulate *inactivity* is even more remote from Congress's power over interstate commerce.

Most recently, in *Raich*, the Court found the cultivation of marijuana to be an economic activity—indeed, a type of "manufacture," 545 U.S. at 22—that Congress could prohibit as a necessary and proper means of exercising its commerce power. *Raich* explicitly adhered to the economic/non-economic distinction set out in *Lopez* and *Morrison*: "Our case law firmly establishes Congress's power to regulate purely local activities that are part of an *economic 'class of activities'* that have a substantial effect on interstate commerce." *Id.* at 17 (emphasis added).

Raich also rejected the government's contention that it was Angel Raich's or Roscoe Filburn's non-purchase of an interstate-traded commodity that subjected them to federal law. *See* Barnett, *supra*, at 602-03. Instead, the Court invoked the Webster's Dictionary definition of "economics"—"the production, distribution, and consumption of commodities," *Raich*, 545 U.S. at 25—and refused to adopt the government's sweeping theory that any activity that substitutes for a market activity is "economic." That rejected theory is akin to the one the government advances here: that probable participation in the market in the future constitutes economic activity now.

This Court's precedents are clear: Congress may reach non-commerce under its power to regulate commerce only via the Necessary and Proper Clause, and this executory power is categorically limited—indeed *must* be categorically limited to be judicially administrable—to the qualitatively distinct class of economic activity. In other words, Congress's regulatory authority extends only to certain *types* of activity, rather than to any activity (or inactivity) that passes some threshold *degree* of effect on interstate

commerce. The latter fact-based line would not be judicially administrable, would undermine the principle of enumerated powers, and would involve courts in economic balancing and speculation beyond their ken.

B. Compelling Activity Transcends the Necessary and Proper Clause's Limits on the Commerce Clause

This "Court has always described the commerce power as operating on already existing or ongoing activity." *Florida*, 648 F.3d at 1285. Indeed, no precedent allows Congress to *compel* activity in the guise of regulating commerce. Roscoe Filburn was actively growing wheat. *Wickard*, 317 U.S. at 114-15. The Jones & Laughlin Steel Corporation was voluntarily engaged in the economic activity of steelmaking. *Jones & Laughlin*, 301 U.S. at 26. The Civil Rights Era cases concerned parties that chose to engage in the economic activity of operating a restaurant, *Katzenbach*, 379 U.S. at 296, or a hotel, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964). The *Raich* plaintiffs grew, processed, and consumed medicinal marijuana—all voluntary activities the Court characterized as "manufactur[ing]." 545 U.S. at 22.

These cases fall into two general categories. *Id.* at 35-38 (Scalia, J., concurring) (discussing the "two general circumstances" in which "the regulation of intrastate activities may be necessary to and proper for the regulation of interstate commerce"). First, if persons voluntarily engage in economic activity, for example by undertaking a commercial endeavor, Congress can *regulate the manner* by which their activities are conducted. Such regulation of voluntary economic activity may include *conditional* mandates

such as recordkeeping requirements. The second category, exemplified by *Raich*, concerns Congress's power to *prohibit* a type of commerce altogether—a power the Court has recognized at least since *Champion v. Ames*, 188 U.S. 321 (1903). In *Raich*, the Court found that Congress may prohibit wholly intrastate instances of economic activity as a "necessary" means of prohibiting a type of interstate commerce.

Under either theory, however, Congress can regulate or prohibit *voluntary* economic actions, but cannot *force* people to undertake such actions—even if those actions would have economic consequences. The distinguishing characteristic between a legitimate regulation within the constitutional scheme of enumerated powers, and a limitless federal police power capable of compelling whatever behavior Congress sees fit, is whether a person can, in principle, avoid federal regulations by *choosing not to engage in the regulated activity—i.e.*, not engaging in an economic endeavor or obtaining contraband. *See Florida*, 648 F.3d at 1286 ("[T]he diverse fact patterns of *Wickard, South-Eastern Underwriters, Heart of Atlanta Motel, Lopez, Morrison*, and *Raich* share at least one commonality: they all involved attempts by Congress to regulate preexisting, freely chosen classes of activities."). No such option exists with regard to the individual mandate; it cannot be avoided in principle. It is not, therefore, a regulation of commercial activity, but an unprecedented command that individuals engage in commerce.

C. The *Comstock* Factors That Are the Most Recent Articulation of the Necessary and Proper Clause's Limits Weigh Against the Individual Mandate

In *United States v. Comstock*, 130 S. Ct. 1949 (2010), this Court reiterated the limits of the Necessary and Proper Clause, noting that a law which "confers on Congress a general 'police power, which the Founders denied the National Government and reposed in the States" would not be necessary and proper. *Id.* at 1964 (quoting *Morrison*, 529 U.S. at 618). The *Comstock* Court upheld the federal civil commitment law at issue after weighing five factors: (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in criminal prosecution, (3) the "sound reasons" for the statute given the government's public safety goal, (4) "the statute's accommodation of state interests" and (5) its narrow scope. *Id.* at 1965.

The Court avoided calling these factors a "test"; nor did it explain how they inter-relate, which weigh most heavily, or what to do when different factors point in different directions. *See* Ilya Shapiro & Trevor Burrus, *Not Necessarily Proper: Comstock's Errors and Limitations*, 61 Syracuse L. Rev. 413, 415 (2011). Nevertheless, most of these factors—the lack of a deep history of federal involvement, PPACA's failure to accommodate state interests, and its extraordinarily broad scope—weigh *against* the constitutionality of the individual mandate. *See* Ilya Somin, *Taking Stock of* Comstock: *The Necessary and Proper Clause and the Limits of Federal Power*, 2009-10 Cato Sup. Ct. Rev. 239, 260-67 (2010) (assessing *Comstock*'s implications on PPACA litigation).

First, although the Necessary and Proper Clause is "broad," in that it gives Congress leeway to choose the means for executing legitimate ends, it is not a grant of potentially endless power. *McCulloch* held that only those means which are "within the scope of the constitution . . . which are not prohibited, [and which] consist with the letter and spirit of the constitution, are constitutional." 17 U.S. (4 Wheat.) at 421. *Cf.* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of The Sweeping Clause,* 43 Duke L.J. 267, 297 (1993) ("executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights."). The breadth of the Necessary and Proper Clause thus should not be used as a consideration to further expand the federal reach in a manner that contradicts fundamental constitutional principles like federalism and enumerated powers. The "breadth of the Clause" does not vary from case to case; it is a constant.

Second, there is no "long history" of federal involvement here, unlike in *Comstock*. Not only is the individual mandate without constitutional parallel, but federal involvement in private health insurance is an entirely modern phenomenon. *See, e.g.,* Jeannie Jacobs Kronenfeld, *The Changing Federal Role in U.S. Health Care Policy* 67 (1997) ("[T]he bulk of the federal health legislation that has health impact . . . has actually been passed in the past 50 or so years.").

Third, the mandate does not accommodate state interests. The provision challenged in *Comstock* allowed states to assert authority over any individual civilly committed under it, and indeed to prevent federal detention at the outset. 130 S. Ct. at 1962-63.

The individual mandate, by contrast, does not allow states to assert authority or prevent the compulsory purchase of health insurance. Instead, it ejects states from their longstanding role as the primary authority for regulating this market. And with over half the states suing to have PPACA declared unconstitutional—and many enacting legislation challenging the individual mandate—it is clear that states do not believe their interests are being accommodated.

Finally, the individual mandate is not narrow in scope. It unavoidably applies to every resident American, excepting only the impoverished, and prescribes a blanket rule: buy insurance or pay a fine. It asserts federal authority over *not engaging* in any activity that has ultimate economic consequences—hardly a "narrow" proposition.

The individual mandate fails the *Comstock* multi-factor test and therefore cannot pass muster under the Necessary and Proper Clause.[5] More broadly, it conflicts with fundamental principles of limited federal power, intrudes on traditional state autonomy, and essentially converts Congress's power to regulate commerce into a generalized police power with no principled limit. The Constitution does not authorize such power either directly or by implication.

---

[5] For more discussion of the *Comstock* factors as they apply here, see the Washington Legal Foundation's *amicus* brief.

II. The Individual Mandate Cannot Be Justified as an "Essential Part of a Broader Regulatory Scheme" Because Congress Cannot Regulate Inactivity

Unable to justify the individual mandate under existing doctrine, the government has resorted to a new theory: that the Necessary and Proper Clause authorizes Congress to *mandate* economic activity when doing so is an essential part of a broader regulatory scheme. In other words, while not itself a regulation of interstate commerce, or of intrastate economic activity—or even of intrastate *non*-economic activity—the individual mandate is a necessary and proper means of exercising the lawful ends of regulating the interstate health insurance industry.

The government contends that Congress can expand its own power by jerry-rigging a large legislative scheme and then repairing its gaps and fissures by further legislation that Congress lacks any enumerated authority to impose, thus "resort[ing] to the last, best hope of those who defend *ultra vires* congressional action, the Necessary and Proper Clause." *Printz v. United States*, 521 U.S. 898, 923 (1997). But in all the cases the government cites for this proposition, from *Darby* to *Hodel v. Indiana*, 452 U.S. 314 (1981), Congress only asserted power over individuals who were voluntarily engaged in economic activity, such as producing and shipping lumber, *Darby*, 312 U.S. at 108, or mining coal, *Hodel*, 452 U.S. at 318.

The government also relies on Justice Scalia's concurring opinion in *Raich*, which analyzed Congress's power under a broader regulatory scheme. Yet Justice Scalia only identified circumstances in which Congress may reach intrastate non-economic *activity*.

See Raich, 545 U.S. at 35 (Scalia, J., concurring) ("Our cases show that the regulation of intrastate *activities* may be necessary to and proper for the regulation of interstate commerce in two general circumstances." (emphasis added)). The first of these circumstances included the substantial effects doctrine, which is limited to reaching economic activity. The second is the proposition that Congress may reach "even non-economic local *activity* if that regulation is a necessary part of a more general regulation of interstate commerce." *Id.* at 37 (emphasis added). This rationale does not justify expanding Congress's authority to allow it to compel economic activity.

A. Inactivity Is Not a Type of Activity

The government and the courts ruling in its favor have implicitly acknowledged that Congress can regulate only "activity" by redefining that word to include the making of an "economic decision" concerning how "the uninsured finance what they will consume in the market for health care services." Pet. Br. at 50; *see also Mead v. Holder*, 766 F. Supp. 2d 16, 36 (D.D.C. 2011) (activity/inactivity distinction is "pure semantics"; Congress can regulate any "mental activity, *i.e.*, decision-making," that has ultimate economic effects). Thus, simply abstaining from buying something—one of the infinite goods each of us is not currently buying—is recharacterized as the "activity" of forestalling a purchase (regardless of whether the non-activity is the result of a conscious decision or inertia) and becomes subject to federal regulation. Such linguistic alchemy has at least three weaknesses.

First, the categorical difference between activity and inactivity—or acts and omissions—is a genuine and long-respected one. *See, e.g., Prosser and Keeton*

on the Law of Torts § 56 at 373 (5th ed. 1984) ("there runs through much of the law a distinction between action and inaction."). It is a basic principle of tort law, for example, that one has no duty to act, and cannot generally be punished for nonfeasance, but has only a duty to act reasonably, and not commit misfeasance. *See, e.g.*, *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1511 (D.C. Cir. 1996). So too in criminal law one cannot generally be convicted without engaging in some activity. *See United States v. Shabani*, 513 U.S. 10, 16 (1994) (the law "does not punish mere thought"). The categorical distinction between activity and inactivity is intuitively obvious and understood by the ordinary person. It is also the foundation of moral philosophy relevant to debates over healthcare law and policy. *See, e.g.*, Philippa Foot, *Killing and Letting Die, in Moral Dilemmas* 78-87 (2002) (distinguishing between prohibited killing and allowable withholding of care).

Second, while *activity* means engaging in a particular, definite act, *inactivity* means *not* engaging in a literally infinite set of acts. At any instant, there are innumerable economic transactions into which one is *not* entering. To allow Congress discretionary power to impose compulsory economic mandates within this infinite set of *inactions* would amount to granting it a plenary and unlimited police power of the sort the Constitution specifically withholds. *See Morrison*, 529 U.S. at 618-19 ("The Constitution . . . withhold[s] from Congress a plenary police power") (citing *Lopez*, 514 U.S. at 566); *id.* at 584-85 ("[W]e always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power.") (Thomas, J., concurring).

Finally, if inaction is deemed "economic" due to its economic effects, then the categorical distinction between economic and non-economic activity established in *Lopez* and reaffirmed in *Morrison* and *Raich* would collapse. Indeed, *Lopez* and *Morrison* stand for the proposition that Congress may not regulate intrastate non-economic activities even if, in the aggregate, they have substantial effects on interstate commerce. But *any* class of activity or inactivity, in the aggregate, can be said to have *some* economic consequences. To redefine inactivity as economic activity because of its effects would destroy the line the Supreme Court has time and again drawn between the intrastate economic activity that Congress may reach and the intrastate non-economic activity it may not. This Court should not so undermine its precedent now governing the scope of the Commerce *and* Necessary and Proper Clauses.

B. The Activity-Based Categorical Distinction Provides Judicially Manageable Standards with a Minimum of Judicial Policymaking

There must be some principled limit to Congress's regulatory authority to prevent it from laying claim to a general police power. The most obvious line to draw is one between regulating *activity*—whether economic or non-economic—and *inactivity*. Such a categorical distinction provides a judicially administrable limiting principle with a minimum of judicial intrusion into complicated political or economic analysis. It is also both consistent with and implied by existing precedent. In *Lopez*, the Court observed that Congress can regulate intrastate non-economic activity when doing so is "an essential part of a larger

regulation of economic *activity*, in which the regulatory scheme could be undercut unless the intrastate *activity* were regulated." 514 U.S. at 561 (emphasis added). In *Raich*, Justice Scalia proposed that "Congress may regulate even non-economic local *activity* if that regulation is a necessary part of a more general regulation of interstate commerce." 545 U.S. at 37 (emphasis added). Indeed, in his *Raich* opinion, Justice Scalia used the word "activity" or "activities" 42 times. *See* Jason Mazzone, *Can Congress Force You to Be Healthy?* N.Y. Times, Dec. 16, 2010, at A39.

That the government agrees that "activity" is a categorical prerequisite for federal power under the Commerce and Necessary and Proper Clauses is implied by the many pages of its individual mandate brief it expends trying to turn the inactivity of not buying something into some sort of activity. Thus the uninsured are "*active* in the market for health care" and the mandate "merely regulates how individuals finance and pay for that *active* participation." Pet. Br. at 50 (emphasis added).

But this verbal manipulation of the category of "economic activity" eliminates the principled limit on congressional power under the Necessary and Proper Clause this Court has devised. Virtually all forms of insurance represent "timing" decisions—paying up front for burial costs, loss of life, disability, supplemental income, credit default, business interruption, etc. *See Florida*, 648 F.3d at 1296 (discussing cost-shifting and timing decisions in all insurance markets). Only a government of unbounded powers could mandate that every American insure against such risks. *Id.* ("[T]here is no reason why Congress could not similarly compel Americans to insure against any

number of unforeseeable but serious risks."). The government's fact-based "unique market" plea thus provides no *legal* limit on federal authority, instead inviting standardless judicial examination of "how necessary" a congressional action is. Courts should not be drawn into factual determinations of whether a particular market is "unique" or judgment calls of whether it "makes sense" to require that a given product be paid for at one time or another.

The government essentially asks this Court to predicate the application of our constitutionally limited scheme of powers on a factual assessment of the relationship among those who pre-purchase healthcare, those who go without insurance, and those who cost-shift their healthcare consumption. But these considerations do not provide a judicially administrable line by which future courts can enforce limits on congressional power: They demand instead precisely the sort of inquiry into the "more or less necessity" of a measure that this Court has always rejected as outside the judiciary's proper sphere. Courts must "identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the terms of analysis)." *Raich*, 545 U.S at 47-48 (O'Connor, J., dissenting).

Limiting Congress to *regulating or prohibiting* activity under *both* the "substantial effects" and the "essential to a broader regulatory scheme" doctrines would serve the same general purpose as the categorical distinction between economic and non-economic activity: ensuring that uses of the Necessary and Proper Clause to execute the commerce power are truly incidental to that power and not re-

mote, or mere "pretext[s]" for "the accomplishment of objects not entrusted to the government." *McCulloch*, 17 U.S. (4 Wheat.) at 423. While *all* categorical lines are imperfect, some such line must be drawn to preserve Article I's structure of enumerated and thus limited powers. *See Lopez*, 514 U.S. at 575 (Kennedy, J., concurring) ("Although the resolution of specific cases has proved difficult, we have derived from the Constitution workable standards to assist in preserving separation of powers and checks and balances."). The government's theory here would effectively demolish that structure while offering no suitable replacement, which is constitutionally unacceptable.

Denying Congress the power to *mandate*, as distinct from regulate or prohibit, activity—whether economic or not—by contrast, requires no such judicial policymaking and would affect no other existing law. Congress could have reformed the healthcare system in many ways—including even a Medicare-for-all "single payer" scheme—that would have been legally unassailable under existing doctrine. That it chose a scheme so flawed as to require otherwise unconstitutional patches to make it function does not make those "essential" provisions constitutional.

III. The Individual Mandate is Not "Proper" Under the Necessary and Proper Clause Because It Constitutes an Unconstitutional Commandeering of the People

A. The Constitution Creates a Federal System That Recognizes and Protects Both State and Popular Sovereignty

Even if this Court agrees with the government that mandating activity is *necessary* to Congress's regulation of interstate commerce, it can still hold the action *improper* because people are being commandeered in a manner that violates their sovereignty and avoids political accountability.

In two cases presenting then-unprecedented assertions of power under the Commerce Clause, this Court stated that Congress cannot use this power to mandate or "commandeer" state legislatures and executive officers. *Printz v. United States,* 521 U.S. 898 (1997); *New York v. United States,* 505 U.S. 144 (1992). Such commandeering is "fundamentally incompatible with our constitutional system of dual sovereignty," and therefore improper under our federalist system. *Printz,* 521 U.S. at 935. That is, "residual state sovereignty" was woven into the fabric of the Constitution and is "implicit . . . in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones." *Id.* at 919. Underscoring the enumeration of powers in Article I, Section 8, is the Tenth Amendment, which reiterates that the Constitution preserves state and popular sovereignty by limiting Congress's power. *Id.* Thus, the mandate struck down in *Printz,* even if necessary, could not be justified under the Necessary and Proper Clause: "When a 'la[w]...for carrying into

Execution' the Commerce Clause violates the principle of state sovereignty reflected in" the Tenth Amendment and other constitutional provisions, "it is not a 'La[w] . . . *proper* for carrying into Execution the Commerce Clause.'" *Id.* at 923-24 (quoting U.S. Const. art. I, § 8, cl. 18) (emphasis added).

The Tenth Amendment thus recognizes the existence of multiple sovereigns, of which the *people* are one: "The powers not delegated by the Constitution to the United States, nor prohibited by it to the states, are reserved to the states respectively, *or to the people.*" U.S. Const. amend. X (emphasis added). In this way, the Constitution protects not just state sovereignty, but also popular sovereignty. Just as mandating that states legislatures and executive officials take action is improper "commandeering," so too is mandating that individual citizens enter into transactions with private companies.

As Chief Justice John Jay noted in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471-72 (1793), the people are "truly the sovereigns of the country," and elected officials merely their deputies, exercising delegated authority. Founding Father James Wilson agreed, recognizing that sovereignty starts with the individual: "If one free man, *an original sovereign*, may do all this; why may not an aggregate of free men, *a collection of original sovereigns*, do this likewise?" *Id.* at 456 (emphasis added). Although the Eleventh Amendment reversed the outcome of *Chisholm* and the Supreme Court interpreted that amendment as guaranteeing certain types of state sovereign immunity, this Court has never repudiated the priority of popular sovereignty. Instead, as recently as last term, this Court strongly endorsed

"[f]ederalism as secur[ing] the freedom of the individual," and "protect[ing] the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *United States v. Bond*, 131 S. Ct. 2355, 2364 (2011); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[I]n our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts."); *accord Afroyim v. Rusk*, 387 U.S. 253, 257 (1967) ("In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship.").

B. Congress Can Intrude on State and Popular Sovereignty Only for Certain Limited Purposes in Certain Circumscribed Ways

The Constitution does allow the federal government to intrude on state and popular sovereignty by commandeering states and individuals for certain limited purposes in certain circumscribed ways. Comparing permissible with impermissible instances of commandeering can help sketch the outer limits of this dangerous power.

1. Commandeering is constitutional only when it is textually based or when it relates to the functioning of the Republic or the duties of citizenship.

The few examples of constitutional commandeering are instructive for the exceptional occasions when commandeering is allowed.

State officials can be called on to carry out explicit constitutional duties. In the words of Justice Story,

"The executive authority of the several states may be often called upon to exert Powers or allow Rights given by the Constitution," such as temporarily filling vacant congressional seats or surrendering fugitives from justice. Joseph Story, 3 *Commentaries on the Constitution of the United States* § 1839 (1833).

Similarly, the few legal mandates imposed on the people by the federal government are either implied by specific constitutional clauses—such as responding to censuses, U.S. Const. art. I, § 2, cl. 3, serving on juries, U.S. Const. amend. VI & VII, or paying income taxes, U.S. Const. amend. XVI—or derive from the fundamental preexisting duties that citizens owe that government. *See, e.g.*, *Selective Draft Law Cases*, 245 U.S. 366, 378, 390 (1918) (relying on the "supreme and noble duty of contributing to the defense of the rights and honor of the nation" to reject a Thirteenth Amendment claim).

Not only are the instances of constitutional commandeering rare and carefully circumscribed, but the Constitution reflects an *anti*-commandeering principle in various other provisions. For example, people may not be mandated to quarter soldiers in their homes in peacetime, testify against themselves, labor for another, or relinquish unenumerated rights. U.S. Const. amends. III, V, IX, XIII. There is not even a mandatory duty to vote.

U.S. citizens are not owned by their government and cannot be presumed to be subject to an indefinite command by federal agents. There is certainly no preexisting "supreme and noble duty" to engage in economic activity whenever doing so would be convenient to national regulatory schemes. To hold otherwise would be to deprive Americans of the residual

sovereignty recognized in the Tenth Amendment and make them the servants, rather than the masters, of Congress. *Cf. The Federalist* No. 78 *supra*, at 467 (Alexander Hamilton) ("[to say] that the legislative body are themselves the constitutional judges of their own powers" would "be to affirm that the deputy is greater than the principal; that the servant is above his master.").

2. The individual mandate's commandeering of citizens intrudes on popular sovereignty and allows Congress to avoid the Constitution's call for political accountability and transparent budgeting.

New York and *Printz* expressed deep concerns that allowing Congress to commandeer state legislatures and officials would encourage it do so to avoid political accountability. As Justice O'Connor explained in *New York*, mandates on states are improper because, "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." 505 U.S. at 169. Similarly, the *Printz* Court found it significant that, "[b]y forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." 521 U.S. at 930.

These same accountability concerns are even more present here. Unlike the laws addressed by *New York* and *Printz*, PPACA is one of the largest, most politi-

cally contentious, and most expensive laws ever enacted. Congress realized the negative political repercussions of such legislation and thus tried to diffuse political accountability across a range of public and private actors. Yet the Constitution was designed to direct congressional action through politically accountable channels, as illustrated by the Origination Clause, U.S. Const. art. I, § 7, cl. 1, and the Statement and Account Clause, U.S. Const. art. I, § 9, cl. 7. The individual mandate avoids such channels and thus does not "consist with the letter and spirit of the constitution." *McCulloch*, 17 U.S. (4 Wheat.) at 421.

a. The Origination Clause ensures that mandated wealth transfers are passed through the most politically accountable house of Congress.

The generation of Americans that fought against taxation without representation was understandably wary of government's power to take wealth. To protect against the kind of taxing abuses that helped bring about the American Revolution, the Constitution thus requires that "All Bills for raising Revenue shall originate in the House of Representatives." U.S. Const. art. I, § 7, cl. 1. For many at the Constitutional Convention, it was so important for the taxing power to be closely accountable to the people that omitting the clause could have derailed the entire endeavor. J. Michael Medina, *The Origination Clause in the American Constitution: A Comparative Survey*, 23 Tulsa L. J. 165, 170 (1987).

As Convention Delegate Elbridge Gerry noted, "[t]axation and representation are strongly associated in the minds of the people, and they will not agree that any but their immediate representatives shall

meddle with their purses." 4 *Debates in the Several State Conventions* 416 (J. Elliot, ed. 1836). Similarly, Madison wrote: "The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of the government. They, in a word, hold the purse . . . . This power over the purse may in fact be regarded as the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people." *The Federalist*, No. 58 *supra*, at 359.

Although *amici* do not argue that the Affordable Care Act violates the Origination Clause, that clause should be recognized for the principle it represents: the Framers' concern that laws mandating wealth transfers and exactions should be the most accountable to the people. If commandeering the people through the individual mandate is allowed, then "Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." *Printz*, 521 U.S. at 930. Instead, they can simply commandeer individuals into economic transactions and claim they did not raise taxes. Commandeering the people in this fashion creates constitutional concerns very similar to those recognized in *Printz*.

Having granted the federal government the power to mandate that citizens give up some of their wealth for the support of the general government, the delegates to the Convention placed that power in the House so as to best check that power by popular sovereignty. Yet the individual mandate allows Congress (and the president) to escape political accountability for what would otherwise be a tax increase on persons making less than $250,000 per year by com-

pelling them to make payments directly to private companies rather than to the U.S. Treasury. That evasion of political accountability explains why the mandate was formulated as a regulatory "requirement" enforced by a "penalty."

b. The Statement and Account Clause works with the Origination Clause to ensure that the people can accurately assess how much wealth is being extracted from them.

The Origination Clause would be largely useless without a requirement that budgetary information be accurately kept and timely published. Article I, Section 9, Clause 7 thus requires "a regular Statement and Account of the Receipts and Expenditures of all public Money [to] be published from time to time." According to Justice Story, this clause makes Congress's "responsibility complete and perfect" by ensuring "that the people may know, what money is expended, for what purposes, and by what authority." 3 *Commentaries* § 1342.

Congress tried to avoid this clause's requirements and, more importantly with regard to PPACA, to thwart the Constitution's underlying principle of accountability. Although the Act includes many taxes and fees, much of its total cost will be laid on private individuals, as citizens are commandeered to purchase health insurance many do not want and cannot afford. Through clever political machinations, these costs are largely kept off the books.

In 1994, President Clinton introduced a major healthcare reform proposal that included many similarities to PPACA, most notably an individual health insurance mandate. *See* Ezra Klein, *The Number-*

Cruncher-in-Chief, The American Prospect, Jan. 14, 2009, at 17. The Clinton proposal was unpopular in part because the Congressional Budget Office decided to include in the budget the costs incurred by those individuals. Robert Pear, *The Clinton Budget: Health Care; Congress's Budget Office May Deal New Blow to Clinton Plan*, N.Y. Times, Feb. 8, 1994, *available at* http://www.nytimes.com/1994/02/08/us/clinton-budget-health-care-congress-s-budget-office-may-deal-new-blow-clinton.html. The CBO report galvanized the bill's opponents, who called it a "Federal takeover of health care and a mammoth tax hike to boot." *Propagandizing a Health Report*, N.Y. Times, Feb. 10, 1994, at A22.

Fifteen years later, on the eve of PPACA's enactment, the CBO again analyzed how the individual mandate would be treated for budgeting purposes. CBO, *The Budgetary Treatment of Proposals to Change the Nation's Health Insurance System* 3 (2009). Specifically, the CBO asked whether "cash transactions between private entities—in which the funds do not pass through the U.S. Treasury—[could] be reflected in the federal budget" and whether the mandate could "justify inclusion in the budget of the private-sector costs of the mandated activity." *Id.* It concluded that the budget should include private expenditures when a "nominally private entity is acting as an agent of the government in carrying out a federal program." *Id.* The important question is whether the federal controls "mak[e] health insurance an essentially governmental program, tightly controlled by the federal government with little choice available to those who offer and buy health insurance." *Id.* at 4.

In a subsequent memo issued just 11 days before PPACA was passed, the CBO "determined that setting minimum MLRs[6] under the PPACA at 80 percent or lower for the individual and small-group markets or at 85 percent or lower for the large group market would not cause CBO to consider transactions in those markets as part of the federal budget." CBO, *Budgetary Treatment of Proposals to Regulate Medical Loss Ratios* 2 (2009). As enacted, PPACA mandates these *exact* MLRs. PPACA § 1001 (adding § 2718(b)(1)(A)(i)-(ii) to the Public Health Service Act). The federal budget as interpreted by the CBO thus does not reflect the commandeered-citizen expenditures in the total cost of PPACA.

Amici do not ask this Court to enforce the Statement and Account Clause, except insofar as invalidating the novel power to mandate economic activity would deprive Congress of a new way to evade the accountability imposed by this Clause. Nor do we have a view on the proper method of accounting for the CBO. We simply ask this Court to view the forgoing information in light of the entire circumstances surrounding PPACA, and with the same concern for the abuses of commandeering expressed in *New York*, *Printz*, *McCulloch*, and, ultimately, the Constitution.

---

[6] Medical Loss Ratios: the proportion of premium dollars that an insurer spends on healthcare costs rather than administrative or other costs.

C. If Congress is Allowed to Avoid Both Political Accountability and Courts' Enforcement of the Necessary and Proper Clause's Limits, It Will Improperly Define the Limits of its Own Power

By permitting the unconstitutional commandeering of citizens, the individual mandate crosses the fundamental line between limited, accountable constitutional government and unlimited power cabined only by Congress's political will—which is to say, not cabined at all. Congress's "political will" often directs it to the path of least political resistance, which will often be the path of least political accountability. If Congress can mandate whatever behavior it believes appropriate, without a principled constitutional limit, Congress becomes the sole judge of its powers, contrary to the Constitution.

In *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870), for example, this Court rejected the proposition that Congress is the sole arbiter of what acts are necessary and proper to carrying out its own enumerated powers. To admit that Congress has such unreviewable discretion,

> and, then, to exercise absolutely and without liability to question, in cases involving private rights, the powers thus determined to [be "necessary and proper"], would completely change the nature of American government. It would convert the government, which the people ordained as a government of limited powers, into a government of unlimited powers.... It would obliterate every criterion which this court, speaking through the venerated Chief Justice [Marshall] in [*McCulloch*], established

> for the determination of the question whether legislative acts are constitutional or unconstitutional.

Id. at 617-18.

If the word "proper" is more than dead letter, it must at least mean that acts that destroy the very purpose of Article I—to enumerate and thus limit Congress's powers—are improper. If the federal power to enact economic mandates is upheld, Congress would be free to require *anything* that is part of a national regulatory plan and to then hide those costs from the American public. "If the commerce power permits Congress to force individuals to enter whatever markets it chooses, any remaining hold on national power will evaporate, leaving future limits to the whims of legislative restraint, the epitome of a system *without* restrictions, balance or any other constraints on power." *Thomas More Law Center*, 651 F.3d at 549 (Sutton, J.). "Indeed, at oral argument, the Government could not identify any mandate to purchase a product or service in interstate commerce that would be unconstitutional, at least under the Commerce Clause." *Seven-Sky*, 661 F.3d at 14-15.

Outside of explicit constitutional authority or a preexisting duty of citizenship, imposing "economic mandates" on people is improper, both in the lay and constitutional senses of that word. Allowing Congress to exercise such power would convert it from a government of delegated powers into one of general and unlimited authority, and would reverse the relationship of American citizens to their government.

CONCLUSION

For the first time, the federal government has imposed a mandate not derived from specific constitutional clauses or duties of citizenship. Such mandates cannot be justified by existing doctrines defining and limiting Congress's powers. Upholding the power to impose them "would fundamentally alter the relationship of the federal government to the states and the people; nobody would ever again be able to claim plausibly that the Constitution limits federal power." Ilya Shapiro, *State Suits Against Health Reform Are Well Grounded in Law—and Pose Serious Challenges*, 29 Health Affairs 1229, 1232 (June 2010).

In sum, there is no "generally applicable, judicially enforceable limiting principle that would . . . uphold the mandate without obliterating the boundaries inherent in the system of enumerated congressional powers." *Florida*, 648 F. 3d at 1328. Unless this Court wishes to make federal power boundless—a result contrary to the Constitution's text, structure, and history—it should affirm the judgment below.

Respectfully submitted,

TIMOTHY SANDEFUR
Pacific Legal Foundation
930 G St.
Sacramento, CA 95834
(916) 419-7111
tms@pacificlegal.org

ROBERT A. LEVY
ILYA SHAPIRO
Counsel of Record
ANASTASIA KILLIAN
Cato Institute
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Amici Curiae

February 13, 2012

APPENDIX

List of *Amici Curiae* State Legislators

Arkansas

Sen. Gilbert Baker
Sen. Cecile Bledsoe
Sen. Jonathan Dismang
Sen. Jake Files
Sen. Bruce Holland
Sen. Jeremy Hutchinson
Sen. Missy Irvin
Sen. Johnny Key
Sen. Michael Lamoureux
Sen. Jason Rapert
Sen. Bill Sample
Sen. Eddie Joe Williams
Rep. Denny Altes
Rep. Duncan Baird
Rep. Jonathan Barnett
Rep. Nate Bell
Rep. Lori Benedict
Rep. Mark Biviano
Rep. David Branscum
Rep. John Burris
Rep. Les Carnine
Rep. Davy Carter
Rep. Ann Clemmer
Rep. Charlie Collins
Rep. Linda Collins-Smith
Rep. Bruce Cozart
Rep. Robert Dale
Rep. Gary Deffenbaugh
Rep. Jane English
Rep. Jon Eubanks
Rep. Ed Garner
Rep. Jeremy Gillam
Rep. Kim Hammer
Rep. Justin Harris
Rep. Prissy Hickerson
Rep. Debbie Hobbs
Rep. Karen Hopper
Rep. Jon Hubbard
Rep. Donna Hutchinson
Rep. Lane Jean
Rep. Josh Johnston
Rep. Allen Kerr
Rep. Bryan King
Rep. Andrea Lea
Rep. Kelley Linck
Rep. Stephanie Malone
Rep. Loy Mauch
Rep. Andy Mayberry
Rep. David Meeks
Rep. Stephen Meeks
Rep. Terry Rice
Rep. David Sanders
Rep. Matt Sheperd
Rep. Mary Lou Slinkard
Rep. Gary Stubblefield
Rep. Tim Summers
Rep. Bruce Westerman
Rep. Jon Woods

Illinois

Rep. Joe Sosnowski

Iowa

Rep. Erik Helland

Kentucky
Sen. Joe Bowen
Sen. Tom Buford
Sen. Jared Carpenter
Sen. Julie Denton
Sen. Carroll Gibson
Sen. David Givens
Sen. Ernie Harris
Sen. Jimmy Higdon
Sen. Paul Hornback
Sen. Tom Jensen
Sen. Alice Forgy Kerr
Sen. Bob Leeper
Sen. Vernie McGaha
Sen. Dan Seum
Sen. John Schickel
Sen. Brandon Smith
Sen. Katie Stine
Sen. Robert Stivers II
Sen. Damon Thayer
Sen. Jack Westwood
Sen. David L. Williams
Sen. Charles M. Wilson
Sen. Ken Winters
Rep. Kevin D. Bratcher
Rep. Regina Petrey Bunch
Rep. Dwight D. Butler
Rep. John "Bam" Carney
Rep. Tim Couch
Rep. Ron Crimm
Rep. Jim DeCesare
Rep. Bob M. DeWeese
Rep. Myron Dossett
Rep. C.B. Embry, Jr.
Rep. Bill Farmer
Rep. Danny Ford
Rep. Joseph M. Fischer
Rep. David Floyd
Rep. Sara Beth Gregory
Rep. Mike Harmon
Rep. David B. Housman
Rep. Thomas R. Kerr
Rep. Kimberly P. King
Rep. Adam Koenig
Rep. J. Stan Lee
Rep. Donna K. Mayfield
Rep. Michael L.Meredith
Rep. Brad Montell
Rep. Tim Moore
Rep. Lonnie Napier
Rep. David Osborne
Rep. Ryan F. Quarles
Rep. Marie L. Rader
Rep. Steven Rudy
Rep. Sal Santoro
Rep. Tommy Turner
Rep. Ben Waide
Rep. Alecia Webb-Edgington
Rep. Addia Wuchner
Rep. Jill K. York

Maine
Rep. Jonathan McKane

Maryland
Del. Susan Aumann
Del. Joe Boteler III
Del. Addie Eckardt
Del. Bill Frank

Del. Jeannie Haddaway-Riccio
Del. Michael Hough
Del. Wade Kach
Del. Susan McComas
Del. Anthony J. O'Donnell
Del. Charles Otto
Del. Neil Parrott
Del. Justin Ready
Del. Kathy Szeliga

Michigan
Sen. Dave Hildenbrand
Rep. Tom McMillin

Minnesota
Sen. Bill Ingebrigtsen
Sen. Amy Koch
Sen. Warren Limmer
Sen. Sean Nienow
Sen. Julianne Ortman
Rep. Sarah Anderson
Rep. King Banaian
Rep. Mike Benson
Rep. Bob Dettmer
Rep. Keith Downey
Rep. Steve Drazkowski
Rep. Dan Fabian
Rep. Steven Gottwalt
Rep. Glen Gruenhagen
Rep. David Hancock
Rep. Andrea Kieffer
Rep. Mary Kiffmeyer
Rep. Kathy Lohmer
Rep. Pat Mazorol
Rep. Carolyn McElfatrick
Rep. Pam Myhra
Rep. Branden Peterson
Rep. Duane Quam
Rep. Chris Swedzinski
Rep. Doug Wardlow
Rep. Torrey Westrom
Rep. Kelby Woodard

Mississippi
Sen. Phillip A. Gandy
Sen. Angela Hill
Sen. Chris McDaniel
Sen. Giles K. Ward
Rep. Tracy Arnold
Rep. Mark Baker
Rep. Jim Beckett
Rep. Randy P. Boyd
Rep. Chris Brown
Rep. Charles Busby
Rep. Bubba Carpenter
Rep. Gary A. Chism
Rep. Becky Currie
Rep. Dennis DeBar, Jr.
Rep. Mark Formby
Rep. Andy Gipson
Rep. Rita Martinson
Rep. Kevin McGee
Rep. Doug McLeod
Rep. Alex Monsour
Rep. John Moore
Rep. Randy Rushing
Rep. Greg Snowden
Rep. Jody Steverson
Rep. Jerry Turner
Rep. Jessica Upshaw

Montana
Sen. Ron Arthun
Sen. Joe Balyeat
Sen. John Brenden
Sen. Taylor Brown
Sen. Ed Buttrey
Sen. Jeff Essmann
Sen. Greg Hinkle
Sen. Verdell Jackson
Sen. Llewelyn Jones
Sen. Bob Lake
Sen. Dave Lewis
Sen. Eric Moore
Sen. Carmine Mowbray
Sen. Alan Olson
Sen. Jim Peterson
Sen. Jason Priest
Sen. Rick Ripley
Sen. Jim Shockley
Sen. Jon Sonju
Sen. Donald Steinbeisser
Sen. Bruce Tutvedt
Sen. Chas Vincent
Sen. Ed Walker
Sen. Art Wittich
Sen. Ryan Zinke
Rep. Elsie M. Arntzen
Rep. Mark Blasdel
Rep. Joanne Blyton
Rep. Randy Brodehl
Rep. Tom Burnett
Rep. Christy Clark
Rep. Patrick Connell
Rep. Rob Cook
Rep. Mike Cuffe
Rep. Champ Edmunds
Rep. Ron Ehli
Rep. John Esp
Rep. Kelly Flynn
Rep. Steve Gibson
Rep. Alan Hale
Rep. Kris Hansen
Rep. Gordon Hendrick
Rep. Brian Hoven
Rep. David Howard
Rep. Pat Ingraham
Rep. Douglas Kary
Rep. Dan Kennedy
Rep. Krayton Kerns
Rep. James Knox
Rep. Austin Knudsen
Rep. Steve Lavin
Rep. Cleve Loney
Rep. Gary MacLaren
Rep. Tom McGillvray
Rep. Jonathan McNiven
Rep. Mike Miller
Rep. Jesse O'Hara
Rep. Jerry O'Neil
Rep. Ryan Osmundson
Rep. Ken Peterson
Rep. Lee Randall
Rep. Joe Read
Rep. Keith Regier
Rep. Don Roberts
Rep. Matt Rosendale
Rep. Dan Skattum
Rep. Derek Skees
Rep. Cary Smith
Rep. Janna Taylor
Rep. Gordon Vance
Rep. Wayne Stahl

Rep. Bob Wagner
Rep. Wendy Warburton
Rep. Jeff Welborn

New Jersey
Sen. Joseph M. Kyrillos
Sen. Steve Oroho
Asm. Gary Chiusano
Asm. Alison Littell McHose

New Mexico
Sen. Sue Wilson Beffort
Rep. Yvette Herrell
Rep. Dennis Roch

North Carolina
Sen. Austin Allran

Pennsylvania
Sen. Rich Alloway
Sen. Dave Argall
Sen. Patrick Browne
Sen. Jane Earll
Sen. John Eichelberger
Sen. Ted Erickson
Sen. Mike Folmer
Sen. Bob Mensch
Sen. Chuck McIlhinney
Sen. Jane Orie
Sen. Jeff Piccola
Sen. Joe Scarnati
Sen. Pat Vance
Sen. Mike Waugh
Sen. Don White
Rep. Ryan Aument
Rep. Matthew Baker
Rep. Stephen Bloom
Rep. Michele Brooks
Rep. Jim Christiana
Rep. Gordon Denlinger
Rep. Mark Gillen
Rep. Mauree Gingrich
Rep. Seth Grove
Rep. Rob Kauffman
Rep. Daryl Metcalfe
Rep. Jerry Stern
Rep. Rosemarie Swanger
Rep. Will Tallman

South Dakota
Sen. Stanford Adelstein
Sen. Tim Begalka
Sen. Corey Brown
Sen. Joni Cutler
Sen. Art Fryslie
Sen. Jeff Haverly
Sen. Reid Holien
Sen. Jean Hunhoff
Sen. Kent Juhnke
Sen. Shantel Krebs
Sen. Dan Lederman
Sen. Ryan Maher
Sen. Al Novstrup
Sen. Russell Olson
Sen. Tim Rave
Sen. Larry Rhoden
Sen. Larry Tideman
Rep. Jim Bolin
Rep. Jenna Haggar
Rep. Steve Hickey
Rep. Lora Hubbel

Rep. Melissa Magstadt
Rep. Patty Miller
Rep. David Novstrup
Rep. Manny Steele
Rep. Mark Willadsen

Texas
Rep. Ralph Sheffield

Washington
Rep. Jan Angel
Rep. Barbara Bailey
Rep. Vincent Buys
Rep. Cathy Dahlquist
Rep. Susan Fagan
Rep. Bill Hinkle
Rep. Shelly Short

AMICUS CURIAE BRIEF

No. 11-398

IN THE

Supreme Court of the United States

U.S. DEPARTMENT OF HEALTH
AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

STATE OF FLORIDA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE, JUDICIAL EDUCATION PROJECT, REASON FOUNDATION, THE INDIVIDUAL RIGHTS FOUNDATION, THE HERITAGE FOUNDATION, ENDING SPENDING, INC., AND FORMER SENATORS GEORGE LEMIEUX AND HANK BROWN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS (MINIMUM COVERAGE PROVISION ISSUE)

JOHN C. EASTMAN
ANTHONY T. CASO
KAREN J. LUGO
CENTER FOR CONSTITUTIONAL
JURISPRUDENCE
c/o CHAPMAN UNIV. SCH. OF LAW
One University Drive
Orange, CA 92886
(714) 628-2587

CHRISTOPHER R.J. PACE
Counsel of Record
WEIL, GOTSHAL
& MANGES LLP
1395 Brickell Avenue
Suite 1200
Miami, FL 33131
(305) 577-3100
christopher.pace@weil.com

(Additional Counsel Listed on Signature Page)

240336

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Beginning in 2014, the minimum coverage provision of the Patient Protection and Affordable Care Act, as amended, will require virtually every individual American to procure and maintain a minimum level of health insurance or pay a monthly penalty. 26 U.S.C.A. § 5000A.

The question presented is whether this minimum coverage provision exceeds Congress' authority under Article I of the Constitution.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	6
I. THE PRESUMPTION OF CONSTITUTIONALITY IS SUBSTANTIALLY WEAKENED WHERE CONGRESS PASSES AN UNPRECEDENTED MANDATE WITHOUT ADDRESSING CONCERNS ABOUT ITS CONSTITUTIONALITY	6
II. THE LEGISLATIVE PROCESS LEADING TO THE PASSAGE OF THE ACA WAS SYSTEMICALLY FLAWED	14
A. Giveaways to Secure Support	15
B. The Use of Budget Reconciliation	17
C. The Last-Minute Executive Order	20
D. Illusory Projected Cost Savings	21

Page

III. PRIOR INSTANCES OF LANDMARK SOCIAL LEGISLATION WERE PASSED WITH WIDE MARGINS AND REFLECTED A BROAD CONSENSUS 22

A. The Social Security Act 23

B. The Social Security Amendments (Medicare and Medicaid) 25

C. The Civil Rights Act and the Voting Rights Act 27

D. The Americans with Disabilities Act .. 30

E. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform) 32

CONCLUSION 34

APPENDIX — INTERESTS OF THE OTHER *AMICI* 1a

TABLE OF CITED AUTHORITIES

Page

CASES

Board of Trustees of Univ. of Alabama v. Garrett,
531 U.S. 356 (2001) 30

Bond v. United States,
131 S.Ct. 2355 (2011) 3, 12

Charles C. Steward Mach. Co. v. Davis,
301 U.S. 548 (1937) 11

Helvering v. Davis,
301 U.S. 619 (1937) 11

McCulloch v. Maryland,
17 U.S. 316 (1819) 3

Printz v. United States,
521 U.S. 898 (1997) 12, 13

Railway Express Agency, Inc. v. New York,
336 U.S. 106 (1949) 4

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 29

United States v. Five Gambling Devices,
346 U.S. 441 (1953) 7

United States v. Lopez,
514 U.S. 549 (1995) ..... *passim*

Page

United States v. Morrison,
529 U.S. 598 (2000) 6, 11, 13

Va. Office for Prot. & Advocacy v. Stewart,
131 S.Ct. 1632 (2011) 13

STATUTES & CONSTITUTIONAL PROVISIONS

U.S. CONST. ART. I 8, 25

U.S. CONST. ART. VI 6

U.S. CONST. amend. V 8

U.S. CONST. amend. X 8

2 U.S.C. § 641(e)(2) 18

2 U.S.C. § 644(b)(1)(A) 18

26 U.S.C. § 5000A 2

29 U.S.C. §§ 780a, 781 31

42 U.S.C. § 1395rr-1 15

Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) 30

Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964) 27

Page

Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 . . . . . 1, 16, 19

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 . . . . . *passim*

Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996). 32

Social Security Amendments of 1965, Pub. L. 89-97, 79 Stat. 286 (1965) 25

Rehabilitation Amendments of 1984, Pub. L. No. 98-221, tit. I §§ 141(b)(1), 142(b), 98 Stat. 17, 26-27 31

Social Security Act of 1935, Pub. L. 74-271, 49 Stat. 620 (1935) . . . . . *passim*

Voting Rights Act of 1965, Pub. L. No. 89-100, 79 Stat. 437 (1965) 29

RULES & REGULATIONS

Senate Rule XXII 17

Exec. Order No. 13535, 75 Fed. Reg. 15,599 (Mar. 24, 2010) 20

Page

LEGISLATIVE MATERIALS

79 Cong. Rec. 5469-70 (Apr. 11, 1935) 10

79 Cong. Rec. 5530 (Apr. 12, 1935) 11

79 Cong. Rec. 9531 (June 18, 1935) 11

111 Cong. Rec. 7360 (Apr. 8, 1965) 26

111 Cong. Rec. 7396 (Apr. 8, 1965) 26

111 Cong. Rec. D311 (Mar. 20, 2010) 9

111 Cong. Rec. S11889-11892 (Nov. 20, 2009) 23

111 Cong. Rec. S13015 (Dec. 11, 2009) 9

111 Cong. Rec. S13581 (Dec. 20, 2009) 9

111 Cong. Rec. S13601 (Dec. 20, 2009) 8

111 Cong. Rec. S13723 (Dec. 22, 2009) 9

111 Cong. Rec. S13728 (Dec. 22, 2009) 8

111 Cong. Rec. S13751-53 (Dec. 22, 2009) 9

111 Cong. Rec. S13821-26 (Dec. 23, 2009) 8

Page

111 Cong. Rec. S13823 (Dec. 23, 2009) 13

136 Cong. Rec. 17296-97 (July 12, 1990) 32

136 Cong. Rec. S7449-50 (June 6, 1990) 32

142 Cong. Rec. D851 (July 31, 1996) 32

142 Cong. Rec. D857 (Aug. 1, 1996) 32

156 Cong. Rec. H1843 (Mar. 21, 2010) 8

156 Cong. Rec. H1907 (Mar. 21, 2010) 15

H.R. 7152, 88th Cong. (1964) 28

H.R. Res. 1203, 111th Cong. (2010) 18

Hearings on S. 1564 Before the S. Comm. on the Judiciary, 89th Cong., 1st Sess., 143 (1965) 30

S. Amend. No. 2786 to H.R. 3590, 111th Cong. (introduced Nov. 19, 2009) 17

Americans with Disabilities Act of 1988, H.R. 4498, 100th Cong. (1988) 31

Americans with Disabilities Act of 1988, S. 2345, 100th Cong. (1988) 31

Page

OTHER AUTHORITIES

Arlene Mayerson, *The Americans with Disabilities Act—An Historic Overview*, 7 THE LABOR LAWYER 1 (1991) 31

Bill Clinton, Op-Ed., *How We Ended Welfare, Together*, N.Y. TIMES, Aug. 22, 2006, at A19 33

Breaking—Reconciliation Bill Posted, POLITICO, Mar. 18, 2010 19

Brian Montopoli, *Tallying the Health Care Bill's Giveaways*, CBS NEWS (Dec. 21, 2009) ... 16

CBO, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, Aug. 1994.. 8

Chris Frates, *Payoffs for States Get Harry Reid to 60 Votes*, POLITICO, Dec. 19, 2009..... 15, 16

David A. Hyman, *Convicts and Convictions: Some Lessons from Transportation for Health Reform*, 159 U. PA. L. REV. 1999, 2003, 2007 (2011)..... 5

David A. Hyman, *PPACA in Theory and Practice: The Perils of Parallelism*, 97 VA. L. REV. IN BRIEF 83 (Nov. 4, 2011)..... 14

Page

David M. Herszenhorn & Robert Pear, *Final Votes in Congress Cap Battle over Health Bill*, N.Y. TIMES, Mar. 25, 2010, at A17 ..... 5, 19

David M. Kennedy, *Compromise 4: Whittling Down The New Deal*, 60 AMER. HERITAGE (2010) 24, 25

David Welna, *On Health Bill, Reid Proves the Ultimate Deal Maker*, NATIONAL PUBLIC RADIO (Dec. 23, 2009) 17

Dennis W. Johnson, *The Laws that Shaped America* (Routledge 2009)..... *passim*

Erwin Chemerinsky, *Health Care Reform is Constitutional*, POLITICO, Oct. 23, 2009 10

Henry J. Aaron, *The Mid-Term Elections—High Stakes for Health Policy*, 363 N.E. J. OF MEDIC. 1685 (2010)..... 23

Historical Background and Development of Social Security 24

House Routs Radical Bills for Security, WASH. POST, Apr. 19, 1935, at 1 24

Jennifer Staman & Cynthia Brougher, CRS, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, July 24, 2009 7

Page

John C. Eastman, *Judicial Review of Unenumerated Rights: Does Marbury's Holding Apply in a Post-Warren Court World?*, 28 HARV. J.L. & PUB. POL'Y 713 (2005) 7

Jordan Fabian, *Key Senate Democrat Suggests That He Didn't Read Entire Healthcare Reform Bill*, THE HILL, Aug. 25, 2010 12

Liz Robbins, *Riding Wave of Disaffection, Brown Pushes for an Upset*, N.Y. TIMES, Jan. 18, 2010, at A20 18

Lori Montgomery, *Proposed Long-Term Insurance Program Raises Questions*, WASH. POST, Oct. 27, 2009 21

Lori Montgomery & Shailagh Murray, *In Deal with Stupak, White House Announces Executive Order on Abortion*, WASH. POST, Mar. 21, 2010, at A1 ..... 5, 14

Luis Fuentes-Rohwer, *Judicial Activism and the Interpretation of the Voting Rights Act*, 32 CARDOZO L. REV. 857 (2011) 29

Marcus Tullius Cicero, TREATISE ON THE LAWS: BOOK III (Edmund Spettigue, ed., Francis Barham, trans., 1841-42) (51 BC) 4

Page

Mark Votruba, *Form and Reform: The Economic Realities of the United States Health Care System*, 23 J.L. & HEALTH 89 (2010) 6

Martin B. Gold, SENATE PROC. & PRACTICE (Rowman Littlefield 2d ed. 2008) 18

Mass. Race Draws Millions to Pay for Ads, ASSOCIATED PRESS, Jan. 17, 2010 17

Matt Cover, *When Asked Where the Constitution Authorizes Congress to Order Americans to Buy Health Insurance, Pelosi Says: 'Are You Serious'?*, CNSnews.com, Oct. 22, 2009 9

Peter Suderman, *ObamaCare's Disastrous New Long-Term Care Entitlement*, Reason.com, May 27, 2011 22

Press Release, Nancy Pelosi, Speaker, U.S. House of Representatives, Pelosi Remarks at the 2010 Legislative Conference for National Association of Counties (Mar. 9, 2010) 12

Randy Barnett, Nathaniel Stewart, & Todd Gaziano, WHY THE PERSONAL MANDATE TO BUY HEALTH INSURANCE IS UNPRECEDENTED AND UNCONSTITUTIONAL, Legal Memorandum No. 49, The HERITAGE FOUND. (Dec. 9, 2009) 8, 9

Page

Randy Barnett, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 260-61 (Princeton Univ. Press 2004) 7

Reason.TV, *Wheat, Weed, and Obamacare: How the Commerce Clause Made Congress All Powerful*, Aug. 25, 2010 9

Renée Lettow Lerner, *Enlightenment Economics and the Framing of the U.S. Constitution*, 35 HARV. J.L. & PUB. POL'Y 37 (2012) 10

Rick Swedloff, *Can't Settle, Can't Sue: How Congress Stole Tort Remedies from Medicare Beneficiaries*, 41 AKRON L. REV. 557 (2008)..... 26

Robert C. Byrd, *Opinions*, WASH. POST, Mar. 22, 2009, at A17 19

Robert Dallek, *Compromise 5: Medicare's Complicated Birth*, AMER. HERITAGE (2010)..... 27

Robert Pear, *Deep in Health Bill, Very Specific Beneficiaries*, N.Y. TIMES, Dec. 20, 2009, at A1 ..... 4, 15, 17

Robert Pear, *Obama Reaffirms Insurers Must Cover Contraception*, N.Y. TIMES, Jan. 20, 2012, at A17 21

Page

Robert Pear, *Senate Passes Health Care Overhaul on Party-Line Vote*, N.Y. TIMES, Dec. 25, 2009, at A1 . . . . . 2, 14, 17

Ron Haskins, *Work Over Welfare: The Inside Story of the 1996 Welfare Reform Law* (Brookings Ins. Press 2002) 33

Sam Baker, *HHS Decision Erases Nearly $100B of Projected Savings from Reform Law*, THE HILL, Oct. 14, 2011 22

Shailagh Murray & Lori Montgomery, *Obama Calls for Reconciliation to Prevent Filibuster on Health-Care Reform*, WASH. POST, Mar. 4, 2010, at A07 19

Testimony of HHS Sec. Sebelius, Feb. 15, 2011 . . . 22

The Dirksen Congressional Center, *A Case History: The 1964 Civil Rights Act* 28

Timothy M. Dolan, Op.-Ed., *ObamaCare and Religious Freedom*, WALL ST. JOURNAL, Jan. 25, 2012, at A17 21

VOTE TALLIES: 1935 SOCIAL SECURITY ACT 23

William L. Saunders, Jr. & Anna R. Franzonello, *Health Care Reform and Respect for Human Life: How the Process Failed*, 25 N.D. J. L. ETHICS & PUB. POL'Y 593 (2011) 20

INTEREST OF *AMICI CURIAE*[1]

Amicus the Center for Constitutional Jurisprudence (the "Center") was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to uphold the principles of the American Founding in our national life, including the foundational proposition that the powers of the national government are few and defined, with the residuary of sovereign authority reserved to the States or to the people. In addition to providing counsel for parties at all levels of state and federal courts, the Center and its affiliated attorneys have participated as *amicus curiae*, or on behalf of parties before this Court, in a number of cases addressing the constitutional limits on federal power. The interests of the other *amici* are fully set forth in the Appendix hereto.

SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (the "ACA" or "the Act"), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, is a nearly 2,500-page bill that set in motion a sweeping and comprehensive overhaul of the heretofore State-based health insurance industry. Although a sharply

1. Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

divided Congress passed the ACA by an exceedingly narrow margin, the ACA will impact virtually every man, woman, and child in the United States. With procedural irregularities and partisan maneuvering replacing compromise and circumspection, the ACA was enacted in a strikingly different manner than other major pieces of progressive social legislation in our nation's history.[2]

The heart of the ACA is its minimum coverage provision—an unprecedented and oppressive mandate that, with limited exceptions, compels all Americans to enter into and maintain expensive health insurance contracts throughout their lives to obtain "minimum essential coverage," regardless of the individual's health, desires, or economic interests. 26 U.S.C. § 5000A. This mandate is enforced through a monthly monetary penalty. *See id.* at § 5000A(b). As noted by each of the courts below, the mandate "represents a wholly novel and potentially unbounded assertion of congressional authority." Pet. App. 187a; *see also United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) ("The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term.").

In its zeal to pass the ACA and the unprecedented mandate that lies at its core, a slim but unyielding congressional majority failed meaningfully to address the

---

2. *See* Robert Pear, *Senate Passes Health Care Overhaul on Party-Line Vote*, N.Y. TIMES, Dec. 24, 2009, at A1 ("If the bill becomes law, it would be a milestone . . . comparable to the creation of Social Security in 1935 and Medicare in 1965. But unlike those programs, the initiative lacks bipartisan support.").

constitutional questions about the individual mandate that had been raised by the Congressional Research Service (the "CRS") and Congressional Budget Office ("CBO"), among others, or to otherwise consider the limitations of its enumerated powers. Congress' failure to consider such limitations resulted in a bill that exceeds the powers granted to Congress under the Constitution and severely infringes upon the individual liberty that the Constitution was designed to protect and promote. *See Bond v. United States*, 131 S.Ct. 2355, 2364 (2011). In such circumstances, this Court should not accord to the individual mandate the same "presumption of constitutionality" that it typically grants to congressional enactments in the first instance.[3] *See infra* Argument § I.

The unprecedented nature of the ACA and the purely partisan support for its most troubling provision[4] is compounded by the procedural artifice that directly led

3. *See McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).

4. The Government attempts to paint the ACA's individual mandate as one enjoying long, bipartisan support—a position wholly at odds with the legislative history discussed herein—and to that end includes a misleading reference to a different mandate originally supported by "the Heritage Foundation and a group of health care economists and lawyers associated with the American Enterprise Institute." Br. for Govt. at 14-15. The insurance mandate at issue in the mid-1990s, however, was markedly different from the mandate in the ACA, in that (a) it was for catastrophic-only insurance, which is forbidden by the ACA, and (b) the limited mandate was coupled with fundamental tax relief to help all families (regardless of economic status) pay for it. Moreover, important public policy research since the mid-1990s led health policy experts at Heritage and elsewhere to abandon support for even such a limited mandate. *See* Brief for The Heritage Foundation as *Amicus Curiae* in Nos. 11-11021 and 11-11067 (CA11), pp. 5-6, 8-13.

to its narrow passage. The bill was first pushed through in a rare Christmas Eve vote in 2009—the first vote on that date since 1895—after the final votes necessary for passage were essentially "bought" with egregious provisions that violated the most basic premise that "law" is to be generally applicable.[5] *See, e.g.*, *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law . . . be imposed generally."); Marcus Tullius Cicero, TREATISE ON THE LAWS: BOOK III (Edmund Spettigue, ed., Francis Barham, trans., 1841-42) (51 BC) ("[L]aws should not be enacted in favour of particular individuals, for that is what we call privilege . . . nothing can be more inequitable.").

The normal process of reconciling the Senate bill with an earlier, different version adopted by the House of Representatives was then cast aside when a special election in Massachusetts resulted in the election of a new Senator whose central campaign message was that he would be the vote necessary to stop passage of the ACA. House leaders trolled for mechanisms that would allow the final bill to be adopted without having to return for a second vote in the Senate, at one point even considering a highly irregular "deem passed" maneuver—*i.e.*, "passing" the Senate bill without actually holding a vote. Ultimately, the Senate version of the bill was passed by the House, with the necessary votes secured by an unenforceable assurance by the President not to enforce one provision that was objectionable to some of those who otherwise

5. *See, e.g.*, Robert Pear, *Deep in Health Bill, Very Specific Beneficiaries*, N.Y. TIMES, Dec. 21, 2009, at A1.

supported the bill,[6] and a promise by House leaders of further significant changes in the form of a "sidecar" reconciliation bill in order to circumvent Senate cloture rules.[7] *See infra* Argument § II.

The ACA's sullied passage stands alone. Prior instances of momentous social legislation—including, among others, the Social Security Act of 1935, the 1965 Medicare and Medicaid Amendments to the Social Security Act and the Civil Rights Act of 1964 and Voting Rights Act of 1965—were not tainted by such abuses of the legislative process. Nor were any of these bills steamrolled through Congress or passed by razor-thin, partisan majorities whose members failed to consider and fix glaring constitutional infirmities before voting on the legislation. *See infra* Argument § III.

To be sure, each piece of legislation discussed below was the subject of heated debate and legislative politicking. Few bills, if any, emerge from the wringer of the lawmaking process unscathed and pristine. On each of these other issues, though, Congress forged compromises between seemingly intractable political positions, with the resulting legislation supported by significant, bipartisan

---

6. Lori Montgomery & Shailagh Murray, *In Deal with Stupak, White House Announces Executive Order on Abortion*, WASH. POST, Mar. 21, 2010, at A1.

7. *See* David M. Herszenhorn & Robert Pear, *Final Votes in Congress Cap Battle over Health Bill*, N.Y. TIMES, Mar. 25, 2010, at A17; *see also* David A. Hyman, *Convicts and Convictions: Some Lessons from Transportation for Health Reform*, 159 U. PA. L. REV. 1999, 2003, 2007 (2011) (describing the "legislative chicanery" that occurred in the lead-up to the passage of the ACA).

majorities. Many of these compromises, in fact, were necessary to address duly-raised concerns about the constitutionality of certain aspects of the proposed legislation. The ACA enjoyed no such compromises.[8]

ARGUMENT

I. THE PRESUMPTION OF CONSTITUTIONALITY IS SUBSTANTIALLY WEAKENED WHERE CONGRESS PASSES AN UNPRECEDENTED MANDATE WITHOUT ADDRESSING CONCERNS ABOUT ITS CONSTITUTIONALITY

The "presumption of constitutionality" that this Court has traditionally bestowed upon Congressional action is substantially weakened here. The presumption rightly acknowledges Congress' role as a "coordinate branch of Government," *United States v. Morrison*, 529 U.S. 598, 607 (2000), and there is undoubtedly a "substantial element of political judgment in Commerce Clause matters." *Lopez*, 514 U.S. at 579. Yet it would be "mistaken and mischievous for [Congress] to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance *is their own in the first and primary instance*." *Id.* at 577-78 (Kennedy, J., concurring) (emphasis added); *see also* U.S. CONST. ART. VI. (all members of Congress are "bound . . . to support

8. *See, e.g.*, Mark Votruba, *Form and Reform: The Economic Realities of the United States Health Care System*, 23 J.L. & HEALTH 89, 90 (2010) (The ACA "was a major piece of legislation, where we normally would have expected the kind of bipartisan compromises represented in other landmark pieces of social legislation. In the last century of U.S. history, all major pieces of social legislation have been passed with broad bipartisan support, including Medicare and Medicaid, the Social Security Act, and the Civil Rights Act.").

this Constitution"). Accordingly, in this unparalleled case, where Congress has effectively abdicated its responsibility to meaningfully consider the constitutional implications of its action, the traditional presumption should carry far less force. *See United States v. Five Gambling Devices*, 346 U.S. 441, 449 (1953) (Jackson, J.) ("The rational and practical force of the presumption is at its maximum only when it appears that the precise point in issue here has been considered by Congress and has been explicitly and deliberately resolved.").[9]

In 2009, the CRS—a nonpartisan and objective research arm of the Library of Congress—advised Congress that the scope of the power that must be asserted to sustain the ACA's constitutionality exceeds any exercise of congressional power that has previously been approved by this Court, and "could be perceived as virtually unlimited in scope." Jennifer Staman & Cynthia Brougher, CRS, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, July 24, 2009, at 7; *see also id.*, at 6 (describing the ACA as presenting the "novel issue" "whether Congress can use its Commerce Clause authority to require a person to buy a good or service"). The CRS echoed the same conclusion that was reached years earlier by the equally non-partisan CBO.

---

9. *See also* John C. Eastman, *Judicial Review of Unenumerated Rights: Does Marbury's Holding Apply in a Post-Warren Court World?*, 28 HARV. J.L. & PUB. POL'Y 713, 734-35 (2005) (casting doubt on the presumption of constitutionality where "Congress does not even bother to consider the constitutionality of its own actions"); Randy Barnett, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 260-61 (Princeton Univ. Press 2004) ("The original justification of the presumption of constitutionality rested, in part, on a belief that legislatures would consider carefully, accurately, and in good faith the constitutional protections of liberty before infringing it.").

See CBO, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, Aug. 1994 ("A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action.").

Opponents of the ACA's enactment in both chambers of Congress also repeatedly challenged the constitutionality of the Act generally and the individual mandate specifically. *See, e.g.*, 111 CONG. REC. S13601 (Dec. 20, 2009) (statement of Sen. Orrin Hatch) ("[T]he Constitution also sets limits on our power. We cannot take advantage of the power without recognizing the limits."); 156 CONG. REC. H1843 (Mar. 21, 2010) (statement of Rep. Scott Garrett) ("I have been speaking out on the unconstitutionality of this individual mandate on the House floor, in Budget Committee and through the Constitutional Caucus, of which I am the chair."). Indeed, certain Senators filed points of order directly challenging the constitutionality of the ACA and the individual mandate. *See, e.g.*, *id.* at S13728 (Dec. 22, 2009), S13822-26 (Dec. 23, 2009) (point of order of Sen. John Ensign, asserting unconstitutionality of the ACA under Article I, Section 8 and the 5th Amendment); *id.* at S13821-22 (Dec. 23, 2009) (point of order of Sen. Kay Bailey Hutchison, asserting unconstitutionality of the ACA under the 10th Amendment). Several Members raising these constitutional objections cited the detailed analysis set forth in an 18-page Legal Memorandum published by the Heritage Legal Foundation on December 9, 2009.[10]

---

10. Randy Barnett, Nathaniel Stewart, & Todd Gaziano, *Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional*, LEGAL MEMORANDUM NO. 49, THE HERITAGE FOUND. (Dec. 9, 2009), *available at* http://www.heritage.org/research/reports/2009/12/why-the-personal-mandate-to-buy-health-insurance-is-unprecedented-and-unconstitutional

The response of those pushing the legislation to these constitutional concerns was, in the main, conclusory and platitudinal. *See, e.g.*, *id.* at 111 Cong. Rec. S13581 (Dec. 20, 2009) (statement of Sen. Max Baucus) (concluding, without elaboration, that the individual mandate was constitutional).[11] To the extent the ACA's supporters invoked *any* authority, they merely entered into the record *ipse dixit* editorials or similar statements from academics who advocate a virtually limitless interpretation of the Commerce and Necessary and Proper Clauses. *See, e.g.*, *id.* at S13751-13753 (Dec. 22, 2009) (statement of Sen. Patrick Leahy) (entering opinion of Professor Erwin Chemerinsky into the record).[12] Opinion pieces,

---

(the "Heritage Legal Memorandum"). The Heritage Legal Memorandum was entered into the Congressional Record twice in support of constitutional points of order asserted by Senators Hatch and Ensign, *see* 111 Cong. Rec. S13015 (Dec. 11, 2009), 111 Cong. Rec. S13723 (Dec. 22, 2009), and was prominently discussed in support of Rep. Steve Scalise's amendment to strip the individual mandate from the legislation. *See* 111 Cong. Rec. D311 (Mar. 20, 2010).

11. In fact, some members of the House leadership even mocked those who asked questions about the individual mandate's constitutionality. *See* Matt Cover, *When Asked Where the Constitution Authorizes Congress to Order Americans to Buy Health Insurance, Pelosi Says: 'Are You Serious'?*, Oct. 22, 2009, http://cnsnews.com/node/55971.

12. As the District Court noted below, Professor Chemerinsky holds the remarkable view that Congress' power to regulate under the Commerce Clause is so far sweeping that "'Congress *could* use its commerce power to require people to buy cars.'" Pet. App. 330a (citing Reason.tv, *Wheat, Weed, and Obamacare: How the Commerce Clause Made Congress All Powerful*, Aug. 25, 2010, http://reason.tv/video/show/wheat-weed-and-obamacare-how-t (emphasis in original). Thus, for Professor Chemerinsky, "constitutionality is not among the hard questions to consider" with

however, "do not substitute for reasoned debate about constitutionality of the sort that used to go on regularly in both chambers of Congress." Renée Lettow Lerner, *Enlightenment Economics and the Framing of the U.S. Constitution*, 35 Harv. J.L. & Pub. Pol'y 37, 44 (2012). Remarkably, neither the House nor the Senate held hearings on the constitutionality of the Act prior to its passage, which would have permitted legal scholars to prepare thorough analyses and to be questioned by Members and other witnesses.[13]

It did not have to be this way. When Congress has enacted landmark social legislation in the past, it has often made significant modifications, after considerable internal debate, to fall within the "outer limits" of its enumerated powers. The Social Security Act of 1935, PUB. L. 74-271, 49 STAT. 620 (1935), is instructive. During several months of debate, the bill's opponents raised numerous constitutional concerns, including that Congress was attempting to usurp power from the States. Congress thus carefully circumscribed the original Social Security program to *augment*, rather than supplant, existing state efforts to provide for the unemployed and needy.[14]

---

respect to the ACA. Erwin Chemerinsky, *Health Care Reform is Constitutional*, POLITICO, Oct. 23, 2009, *available at* http://www.politico.com/news/stories/1009/28620.html.

13. Moreover, the bill's proponents in the Senate went so far as to excise a severability clause from the House version of the bill, apparently not even entertaining the possibility that the individual mandate was unconstitutional.

14. Title I of the Act, for example, authorized federal matching grants only to States that had already approved old-age assistance plans, *see* 79 CONG. REC. 5469-70 (Apr. 11, 1935), and Congress also strove to "limit very strictly" the Social Security

When the Social Security bill met with further resistance,[15] its proponents split the retirement provisions into two separate titles—the "tax" provisions of Title VIII, and the benefits provisions of Title II— hoping that this Court would afford some measure of deference to Congress' taxing authority when considering the newly created scheme. Although the bill still had its critics in Congress, *see, e.g.*, 79 CONG. REC. 5530 (Apr. 12, 1935) (statement of Rep. Allen Treadway), its proponents garnered a wide majority, and successfully defended the ensuing constitutional challenge. *See Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).

In stark contrast here, aside from certain self-serving "statutory findings" about the purportedly economic nature of its legislation, Congress failed to tailor the ACA to fall within the "effective bounds" of its "regulatory authority" under the Commerce Clause as delineated in this Court's decisions in *Lopez*, 514 U.S. at 562-63, and *Morrison*, 529 U.S. at 608. On the contrary, due in large part to the procedural irregularities described below, key leaders in both the House and Senate openly admitted that they had not even *read* the 2,500-page bill, let alone weighed its constitutional infirmities. For example, Senator Baucus contended that "I don't think you want me to *waste my time* to read every page of the healthcare bill . . . You know why? It's statutory language . . . . We hire

---

Board's power over States in order to ensure a maximum degree of state control. *Id.* at 5469.

15. In June of 1935, for example, Senator Huey Long predicted that "not a single member of the Supreme Court of the United States will hold this bill constitutional as written." 79 CONG. REC. 9531 (June 18, 1935).

experts."[16] Even Speaker of the House Nancy Pelosi stated unabashedly that "we have to pass the bill so that you can find out what is in it."[17] It should be elemental, though, that "to know whether a legislative act is constitutional requires knowing what it is in the Act." Pet. App. at 4a.

This nation's federalist system "protects the liberty of all persons . . . by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Bond*, 131 S.Ct. at 2364. "When government acts in excess of its lawful powers, that liberty is at stake." *Id.*; *see also Printz v. United States*, 521 U.S. 898, 933 (1997) (the Constitution divides power "precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.").

Here, Congress has not only exceeded the limitations imposed by federalism, it has done so most cavalierly. In contrast to its more circumscribed approach to drafting prior landmark social legislation (*e.g.*, the Social Security Act), Congress has failed to address the constitutionality of the individual mandate in any meaningful way. Where "one or the other level of Government has tipped the scale too far," and thus undermined "the federal balance

---

16. *See* Jordan Fabian, *Key Senate Democrat Suggests That He Didn't Read Entire Healthcare Reform Bill*, THE HILL, Aug. 25, 2010, *available at* http://thehill.com/blogs/blog-briefing-room/news/115749-sen-baucus-suggests-he-did-not-read-entire-health-bill (emphasis added).

17. Press Release, Nancy Pelosi, Speaker, U.S. House of Representatives, Pelosi Remarks at the 2010 Legislative Conference for National Association of Counties (Mar. 9, 2010), http://pelosi.house.gov/news/press-releases/2010/03/releases-March10-conf.shtml.

. . . of our constitutional structure," it is left to this Court to intervene and enforce the Constitution's structural protections. *See Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

This principle carries particular force when Congress has sought to legislate in an area of traditional State regulation without adequately considering its own constitutional limitations (or heeding the views of at least 26 States that expressly disagree with this federal intrusion). Because Congress failed to "take a 'hard look'" at the "thoroughness of [its] legislative procedures," a penetrating and incisive judicial review of the defective political process that gave rise to the ACA is appropriate. *Morrison*, 529 U.S. at 663 (Breyer, J., dissenting).

Moreover, it is particularly important for this Court to conduct a searching and meaningful constitutional inquiry because it is confronted with a congressional measure that is wholly without precedent: a requirement that private citizens buy a product from a private company.[18] *See* Pet. App. at 107a, 320a. Given that "earlier Congresses avoided use of this highly attractive power," it follows that "the power was thought not to exist." *Printz*, 521 U.S. at 905, 907-08; *see also Va. Office for Prot. & Advocacy v. Stewart*, 131 S.Ct. 1632, 1641 (2011) ("Lack of historical precedent can indicate a constitutional infirmity."). The unprecedented nature of the individual mandate thus provides another basis for this Court to view Congress'

18. *See, e.g.*, 111 Cong. Rec. S13823 (Dec. 23, 2009) (statement of Sen. Orrin Hatch) ("Even the Roosevelt administration . . . would not go as far as the legislation before us today would go. Even they knew the Constitution put certain means off limits.").

actions with less deference than it traditionally would accord to the actions of the legislative branch.

II. THE LEGISLATIVE PROCESS LEADING TO THE PASSAGE OF THE ACA WAS SYSTEMICALLY FLAWED

Compounding its failure to conduct a rigorous constitutional inquiry, it is well chronicled that Congress passed the ACA by the slimmest of margins in the wake of various procedural irregularities. Not a single Republican in either the House or the Senate voted in favor of the final bill.[19] Not surprisingly, then, many commentators have derided the ACA as "the most blatantly partisan and divisive piece of social legislation in the past half-century; the only thing bipartisan about [the ACA] was the opposition to it." David A. Hyman, *PPACA in Theory and Practice: The Perils of Parallelism*, 97 VA. L. REV. IN BRIEF 83, 98 (Nov. 4, 2011).

The passage of the ACA was made possible by an unseemly mix of trade-offs, arcane legislative maneuvers and politically expedient promises. Earmarks were doled out to several skeptical legislators in exchange for their support; the highly controversial tactic of budget reconciliation was employed to allow the bill's supporters to circumvent traditional debate and amendment rules; a last-minute promise was made by the President not to enforce one provision concerning abortion funding; and $70 billion in projected cost savings turned out to be illusory when a program touted to reduce the deficit was abandoned as ill-conceived and fiscally unsound.

---

19. *See* Pear, *Senate Passes Health Care Overhaul on Party-Line Vote*, *supra* n.2; *see also* Montgomery & Murray, *supra* n.6.

A. Giveaways to Secure Support

The ACA is rife with *quid pro quo* measures that were included in the bill for the sole purpose of securing the votes of individual members of Congress.[20] As one Democratic Congressman put it in explaining why he was voting against the ACA:

> I am also concerned about the unsavory deal-making that occurred in the United States Senate when the health care bill was considered in December. Some states received special benefits at the expense of other states .... For example, the states of Louisiana, Tennessee, Connecticut and Montana have each received special benefits in the health care reform legislation not made available to other states. I simply cannot countenance this kind of deal-making which goes well beyond the bounds of normal legislative negotiations.[21]

Notably, Senator Baucus—the chairman of the Senate Finance Committee and a principal author of the ACA (despite admittedly not "wast[ing] his time to read" all of it)—succeeded in obtaining additional Medicare funding for individuals affected by asbestos-related illnesses from mining operations in Libby, Montana—his home State. *See* 42 U.S.C. § 1395rr-1; *see also* Pear, *Deep in Health Bill, supra* n.5. Likewise, after initially

---

20. *See* Chris Frates, *Payoffs for States Get Harry Reid to 60 Votes*, POLITICO, Dec. 19, 2009, *available at* http://www.politico.com/news/stories/1209/30815.html.

21. *See* 156 CONG. REC. H1907 (Mar. 21, 2010) (statement of Rep. Rick Boucher).

expressing opposition to the bill, Senator Mary Landrieu of Louisiana only agreed to support it after a provision was inserted to provide hundreds of millions of dollars to her State. *See* ACA § 2006 (increasing Medicaid payments to certain "states recovering from a major disaster"); Brian Montopoli, *Tallying the Health Care Bill's Giveaways*, CBS NEWS (Dec. 21, 2009), *available at* http://www.cbsnews.com/8301-503544_162-6006838-503544. Yet another holdout, Vermont Senator Bernie Sanders, "took credit for $10 billion in new funding for community health centers," including at least two more for Vermont. *See* Frates, *supra* n.20.

In a particularly infamous example, Senator Ben Nelson of Nebraska—the critical 60th Senator to endorse the bill—originally announced his opposition to the ACA but then reversed course after securing a promise from Majority Leader Harry Reid that Nebraska would receive a subsidy for its share of the cost of the ACA's Medicaid expansion.[22] No other State was slated to receive such a windfall, which was dubbed the "Cornhusker Kickback."[23]

Yet other provisions included in the Act granted $100 million to an unspecified "health care facility" and

---

22. Although this subsidy—which was included in the ACA at § 10201—was later repealed by the Health Care and Education Reconciliation Act §§ 1201-1203, it was vital to securing enough votes to pass the ACA.

23. Senator Nelson and Senator Carl Levin of Michigan also carved out an exception for nonprofit insurers in their States from a multi-billion dollar excise tax on insurance companies. Nonprofit insurers located in any of the other 48 States would not benefit from this exemption. *See* Frates, *supra* n.20.

increased Medicare payments to hospitals and doctors in "frontier counties" in Montana, North Dakota, South Dakota, Utah and Wyoming. *See* Pear, *Deep in Health Bill, supra* n.5. Indeed, Majority Leader Reid publicly boasted about the use of such tactics, doubting the existence of any "senator that doesn't have something in this bill that was important to them."[24]

B. The Use of Budget Reconciliation

Capping this undignified process, exactly 60 Senators—the bare minimum under Senate Rule XXII—voted to end debate on a final Senate bill, S. Amend. No. 2786 to H.R. 3590, 111th Cong. The Senate passed the bill the following day—Christmas Eve 2009—by an identical, 60-39 margin. *See* Pear, *Senate Passes Health Care Overhaul on Party-Line Vote, supra* n.2. The ultimate passage of the bill, however, remained uncertain due to the January 19, 2010 election of Scott Brown in Massachusetts, who had run to fill the seat previously occupied by Paul Kirk, one of the 60 Senators who had voted in support of the bill. Senator Brown had expressly promised during the campaign to be "the 41st vote" against the ACA's passage, and the Massachusetts race thus commanded national attention as a mandate on the popularity of the bill.[25] With Senator Brown's election, the proponents of

---

24. David Welna, *On Health Bill, Reid Proves the Ultimate Deal Maker*, NATIONAL PUBLIC RADIO (Dec. 23, 2009), *available at* http://www.npr.org/templates/story/story.php?storyId=121791736.

25. *See, e.g.*, *Mass. Race Draws Millions to Pay for Ads*, ASSOCIATED PRESS, Jan. 17, 2010, *available at* http://www.msnbc.msn.com/id/34908023/ns/politics-more_politics/t/mass-race-draws-millions-pay-ads/.

the bill fell one vote shy of the 60 votes needed to prevent a filibuster on future votes. *See* Liz Robbins, *Riding Wave of Disaffection, Brown Pushes for an Upset*, N.Y. TIMES, Jan. 18, 2010, at A20.

This threatened to derail the bill's final passage, because both Houses of Congress had not yet enacted a single bill. In the ordinary course, two versions of a bill passed by the House and Senate would be reconciled through conference committees, with the final bill requiring a new vote by both chambers. Here, however, because the Senate no longer had the votes necessary to approve any bill resembling that which passed the Senate in December 2009, the House was forced to accept the bill in the exact form in which it had passed the Senate. *See* H.R. Res. 1203, 111th Cong. (2010).

To enact substantive "fixes" to the Senate bill while avoiding a filibuster, the majority party resorted to a legislative maneuver known as "budget reconciliation." The reconciliation process was created in 1974 as a deficit-reduction tool and provides an expedited means to change federal spending programs, revenues and public debt levels. *See* Martin B. Gold, SENATE PROC. & PRACTICE 155 (Rowman Littlefield 2d ed. 2008). Reconciliation bills may only be debated in the Senate for a maximum of twenty hours, *see* 2 U.S.C. § 641(e)(2), thus preventing the possibility of a filibuster. Aware that this fast-track process could lead to abuse, Senator Robert Byrd helped amend the 1974 act to bar any extraneous matter from reconciliation bills. *See* Gold, *supra*, at 155. Accordingly, such bills may only include provisions that have direct budgetary impacts. *See* 2 U.S.C. § 644(b)(1)(A).

Notwithstanding its technicalities, the reconciliation process was never intended to be used to enact substantive changes to broad-reaching social legislation. In fact, Senator Byrd stated publicly that using the reconciliation process to achieve health-care reform would be "an outrage that must be resisted" and that "misuse of the arcane process of reconciliation—a process intended for deficit reduction—to enact substantive policy changes is an undemocratic disservice to our people and to the Senate's institutional role." Robert C. Byrd, *Opinions*, WASH. POST, Mar. 22, 2009, at A17.

Despite Senator Byrd's prior exhortations and undivided opposition from the minority party, the narrow majority—at the urging of President Obama[26]— used the reconciliation process to pass a final bill, the Health Care and Education Reconciliation Act of 2010, by a simple, party-line vote of 220-207 in the House and 56-43 in the Senate. *See* Herszenhorn & Pear, *supra* n.7. Notably, the reconciliation bill made a number of substantive changes to central provisions of the ACA as passed in December 2009. These changes included, among other things, increasing tax-credits for middle-income families who buy insurance; lowering the penalty for not buying insurance; requiring that doctors that care for Medicaid patients be fully reimbursed; imposing a Medicare tax on certain unearned income; and enacting student loan reform.[27]

---

26. *See* Shailagh Murray & Lori Montgomery, *Obama Calls for Reconciliation to Prevent Filibuster on Health-Care Reform*, WASH. POST, Mar. 4, 2010, at A07.

27. *See id.*; *see also Breaking—Reconciliation Bill Posted*, POLITICO, Mar. 18, 2010, *available at* http://www.politico.com/livepulse/0310/BREAKING__Reconciliation_bill_posted_.html.

C. The Last-Minute Executive Order

Both the President and leaders of the majority party in Congress engaged in additional eleventh-hour wrangling to secure the votes of wavering House Democrats. In the weeks prior to the final vote on the reconciliation bill, certain House members, including Democratic Representative Bart Stupak of Michigan, became increasingly concerned about provisions of the bill providing for taxpayer funding of abortion. *See* William L. Saunders, Jr. & Anna R. Franzonello, *Health Care Reform and Respect for Human Life: How the Process Failed*, 25 N.D. J. L. ETHICS & PUB. POL'Y 593, 623 (2011). To address these concerns, President Obama agreed to issue an Executive Order that purported to restrict public funding of abortions, which he signed on March 24, 2010 (behind closed doors and with no reporters present). *See* Exec. Order No. 13535, 75 FED. REG. 15,599 (Mar. 24, 2010). With this "assurance" in hand, the House and Senate passed the reconciliation bill the following day.

The President's Executive Order, however, did not and cannot nullify the ACA's provisions, as executive orders are only entitled to the "force of law" when they do not contradict statutory language. *See* Saunders, *supra*, at 625 (noting that a presidential Executive Order "cannot change or negate statutory law"). Nor is the language of the Executive Order codified anywhere in federal law. The use of an Executive Order to attempt to make substantive modifications to the bill further delegitimizes the process underlying the ACA.[28]

---

28. Similar problems of "delegating" difficult constitutional and political issues to administrative agencies threaten to severely

D. Illusory Projected Cost Savings

The passage of the ACA was also induced by the promise of tens of billions of dollars in illusory cost savings from a fatally-flawed entitlement program that was designed to provide insurance for long-term care (the "Community Living Assistance Services and Supports Act," or "CLASS Act"). During the legislative debate, there was bipartisan opposition to the use of the CLASS Act as a purported savings mechanism given that serious questions about the long-term fiscal solvency of the program were being raised by "an array of groups—including the [CBO] and the American Academy of Actuaries."[29] When the CBO scored the budgetary effects of the pending bill, it counted the $70 billion in premium payments expected to be collected in the CLASS program's first decade toward the ACA's alleged deficit reduction—even though

---

compromise the liberty of a host of religious organizations. For example, the Catholic Church and others have strongly objected to recent healthcare mandates imposed not by an Act of Congress, but by regulations of the Department of Health and Human Services (HHS) to "implement" the ACA. *See, e.g.*, Timothy M. Dolan, Op.-Ed., *ObamaCare and Religious Freedom*, WALL ST. JOURNAL, Jan. 25, 2012, at A17. If left undisturbed, these HHS regulations require that insurance policies under the ACA cover a variety of contraceptive and sterilization services, including the insurance policies for religiously-affiliated charities, social-service agencies, universities, and hospitals. *See* Robert Pear, *Obama Reaffirms Insurers Must Cover Contraception*, N.Y. TIMES, Jan. 20, 2012, at A17.

29. *See* Lori Montgomery, *Proposed Long-Term Insurance Program Raises Questions*, WASH. POST, Oct. 27, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/10/27/AR2009102701417.html.

those premiums were eventually supposed to pay for the program's benefits.[30] Even a supporter of the ACA in the Senate, Senate Budget Committee Chairman Kent Conrad, publicly called the CLASS Act "a Ponzi scheme of the first order." *Id.*

Indeed, the CLASS Act has now been widely accepted to be fiscally unsustainable, and the HHS's decision in October 2011 to scrap the program erased about 40% of the savings that the CBO had estimated the ACA would generate for the government. *See* Sam Baker, *HHS Decision Erases Nearly $100B of Projected Savings from Reform Law*, THE HILL, Oct. 14, 2011 (noting that "Congressional Republicans have long insisted the CLASS Act was a financial gimmick designed to get healthcare reform passed.").

III. PRIOR INSTANCES OF LANDMARK SOCIAL LEGISLATION WERE PASSED WITH WIDE MARGINS AND REFLECTED A BROAD CONSENSUS

In stark contrast to the subversion of the legislative process that gave birth to the ACA, major pieces of social legislation throughout modern American history have

---

30. *See* Peter Suderman, *ObamaCare's Disastrous New Long-Term Care Entitlement*, Reason.com, May 27, 2011, http://reason.com/archives/2011/05/27/obamacares-disastrous-new-long. HHS Secretary Kathleen Sebelius in fact conceded to Congress that "we determined pretty quickly that [the CLASS program] would not meet the requirement that the act be self-sustaining and not rely on taxpayer investments." Testimony of HHS Sec. Sebelius, Feb. 15, 2011, *available at* http://www.c-spanvideo.org/appearance/599563386.

uniformly commanded bipartisan congressional support, reflecting a broad and enduring political consensus on momentous issues. *See Henry J. Aaron, The Mid-Term Elections—High Stakes for Health Policy*, 363 N.E. J. of Medic. 1685, 1685-86 (2010) (compiling data quantifying the broad bipartisan support for major social reform legislation prior to the ACA, and noting that "the evidence of party polarization" concerning the ACA "is overwhelming").

While the debate preceding the enactment of the following bills was undoubtedly fierce and rancorous, the resulting legislation uniformly enjoyed wide bipartisan support, reflecting a legislative process shaped by compromise, not gamesmanship. As Senator Olympia Snowe remarked during debate on the health care vote, "policies that will affect more than 300 million people simply should not be decided by partisan, one-vote-margin strategies . . . just consider for a moment if Social Security, civil rights, or Medicare could have been as strongly woven into the fabric of our Nation had they passed by only one vote and on purely partisan lines." 111 Cong. Rec. S11889-11892 at S11890 (Nov. 20, 2009) (statement of Sen. Olympia Snowe).

A. The Social Security Act

The Social Security Act of 1935 was supported by an overwhelming 372-33 margin in the House of Representatives, and by 77 of 83 voting Senators. *See Vote Tallies: 1935 Social Security Act*, http://www.ssa.gov/history/tally.html (last visited Feb. 10, 2012). 81 out of 102 House Republicans, and 16 out of 25 Senate Republicans, voted to support the bill. *Id.* So did 269 out of

284 House Democrats, and 60 out of 61 Senate Democrats. *Id.* Reflecting this broad, bipartisan consensus, the conference bill reconciling the House and Senate versions of the legislation was passed on a voice vote due to the large bipartisan support underlying the final bill. *Id.*

These majorities did not coalesce accidentally, but rather were the byproduct of a consensus-based approach. First proposed as the "Economic Security Act" in January 1935, the bill was debated in House and Senate committees for two months, and was not signed into law until August. *Id.* Over fifty amendments to the bill were debated and cast aside.[31] Although President Roosevelt had initially envisioned a vast regulatory scheme in which "everybody ought to be in on it . . . cradle to the grave they ought to be in a social insurance system," his administration ultimately acceded to a number of compromises with both Republican and conservative Democratic legislators in order to attract a broad coalition of supporters and to minimize constitutional objections.[32]

These compromises included abandoning plans for universal health care, curtailing coverage and benefits for certain categories of employees (such as farmers and domestic workers), enacting a regressive payroll tax system as a method of financing, and leaving unemployment relief largely to the States.[33] Many of these

---

31. *See* Dennis W. Johnson, THE LAWS THAT SHAPED AMERICA 189 (Routledge 2009) (citing *House Routs Radical Bills for Security*, WASH. POST, Apr. 19, 1935, at 1).

32. *See* David M. Kennedy, *Compromise 4: Whittling Down The New Deal*, 60 AMER. HERITAGE (2010), *available at* http://www.americanheritage.com/content/new-deal-compromised.

33. *Id.*; *see also Historical Background and Development*

compromises, as explained above, were forged specifically to head off concerns about Congress' constitutional authority under Article I to enact such a measure. *See supra* pp. 10-11. Moreover, historians have long noted that the "abundant compromises that attended the Social Security Act's enactment" laid the foundation for subsequent social legislation, including the creation of Medicare and Medicaid in the 1960s. Kennedy, *supra* n.32. These "abundant compromises" did not, however, include the systematic "buying-off" of legislators by diverting federal funds to pet projects in their States.

B. The Social Security Amendments (Medicare and Medicaid)

The Social Security Amendments of 1965, Pub. L. 89-97, 79 Stat. 286 (1965), which created the Medicare and Medicaid programs, enjoyed similarly broad bipartisan support in Congress. After a spirited debate and the consideration of over 500 minor amendments,[34] the House of Representatives passed Medicare and Medicaid by a 307-116 margin, and the Senate voted 70-24 to do the same. Once more, a sizable number of the Republican minority joined with the vast majority of Democrats to vote in favor of a core social initiative promoted by a Democratic administration and Democrat-controlled Congress.

This remarkable consensus was forged through incremental compromises arising out of a "legislative struggle reaching back to the late 1930s." Johnson,

---

of Social Security, http://www.ssa.gov/history/briefhistory3.html ("The Social Security Act did not quite achieve all the aspirations its supporters had hoped.") (last modified Dec. 6, 2011).

34. Johnson, *supra* n.31, at 353.

supra n.31, at 333. Indeed, proponents of the Social Security Amendments thought it necessary, in a clear demonstration of legislative circumspection, to restrict their efforts to narrowly targeted groups with special health-coverage needs. Congress rejected initial efforts to enact universal coverage, instead limiting Medicaid only to "the medically indigent, aged, blind, and disabled persons, dependent children and their parents." 111 Cong. Rec. 7396 (Apr. 8, 1965). Medicare, for its part, was likewise "tailored to meet the needs of our elderly." *Id.* at 7360.

In 1965, the Johnson Administration supported legislation that had been introduced years earlier, the King-Anderson bill, which concentrated on federal assistance for hospital care. The American Medical Association, a fierce opponent of that legislation, backed an alternative program called "Eldercare," while the Republicans, through Representative John Byrnes, proposed a third plan, voluntary in nature and focused on doctors' fees, which would be funded by a small monthly payment from each enrollee with federal funds taken out of general revenue. Johnson, *supra* n.31, at 348-353.

The bill that ultimately advanced through Congress in 1965 "included elements of the proposals from the Democrats, the Republicans, and the [American Medical Association]."[35] President Lyndon Johnson worked closely with Representative Wilbur Mills, the House Ways and Means Committee chairman (and

35. *See* Rick Swedloff, *Can't Settle, Can't Sue: How Congress Stole Tort Remedies from Medicare Beneficiaries*, 41 AKRON L. REV. 557, 570 (2008).

previously an ardent critic of health care legislation), to craft a series of compromise measures to ensure the passage of a bipartisan bill.[36] Mills "cobbled together the administration's bill (hospital coverage), with a Republican substitute (doctors' fees), and joined them with medical assistance for the poor (Medicaid). Mills characterized it as a 'three-layer cake,' and it soon became the law of the land." Johnson, *supra* n.31 at 335. By sharp contrast, the ACA contained no such attempts at compromise, whether of a constitutional nature or otherwise, as reflected in the final voting tallies.

C. The Civil Rights Act and the Voting Rights Act

The Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964)—which outlawed various forms of discrimination based on race, national origin, and gender—ultimately garnered broad bipartisan support and passed by a margin of 73-27 in the Senate and 289-126 in the House of Representatives.

The path to such broad consensus was not smooth. After momentum for civil rights legislation had built in the 1950s and early 1960s, President Kennedy sent a proposed civil rights bill to Congress on June 19, 1963. It was immediately condemned by many Southern lawmakers as "unconstitutional, unnecessary, unwise and beyond the realm of reason." *See* Johnson,

---

36. *See* Robert Dallek, *Compromise 5: Medicare's Complicated Birth*, 60 AMER. HERITAGE (2010), *available at* http://www.americanheritage.com/content/medicare%E2%80%99s-complicated-birth ("To combat charges of socialized medicine and signal his desire to reach an accommodation with the opponents of his initiatives, Johnson advanced a limited bill . . . .").

supra n.31, at 307. Recognizing the threat of a Senate filibuster, the administration first approached the House of Representatives, which heard testimony from 275 witnesses over 70 days of public hearings. The House debated the bill for nine days and considered nearly 100 amendments before passing H.R. 7152 on February 10, 1964.

Debates in the Senate were even more contentious. Southern Democrats followed a three-week filibuster on a procedural question with the longest continuous filibuster in Senate history. *See* Johnson, *supra* n.31, at 313-14. As the stalemate continued, Republican Senate Minority Leader Everett Dirksen and Senator Hubert Humphrey, the Democratic whip, worked together to redraft controversial language in the legislation to garner support among moderate Republicans and to address concerns that the existing legislation exceeded Congressional authority under the Constitution and granted powers to the Federal Government that should properly be reserved to the States.

The Senate bill thus gave States and local communities more authority to address complaints in cases of employment discrimination and public accommodations.[37] While the Senate bill allowed the Attorney General to initiate suits in these areas upon a finding of a "pattern of discrimination," it imposed a period for voluntary compliance before the Attorney General could act, and

---

37. *See* The Dirksen Congressional Center, *A Case History: The 1964 Civil Rights Act, available at* http://www.congresslink.org/print_basics_histmats_civilrights64text.htm (last visited Feb. 10, 2012).

precluded suits brought by the Attorney General on behalf of individuals. *Id.* These efforts produced a coalition of 27 Republicans and 44 Democrats who voted for cloture and ended the marathon filibuster. The bill passed the Senate nine days later by a large majority and the House accepted the Senate version on July 2, 1964. President Johnson signed the bill that same day.

The Voting Rights Act of 1965, Pub. L. No. 89-100, 79 Stat. 437 (1965), which outlawed discriminatory and intimidating voting practices, was also the product of a broad bipartisan consensus. Following a speech by President Johnson before a joint session of Congress on March 15, 1964, voting rights bills were introduced in both the Senate and the House. Sixty-six Senators introduced and co-sponsored the Senate bill, which assured that the bill would not be subject to a filibuster. The bill passed the Senate on May 26, 1964. Despite a few attempts at parliamentary maneuvering by Southern Congressmen, the House passed its own bill in July. Overwhelming majorities of Democrats and Republicans in both chambers of Congress passed the Voting Rights Act (by a final vote of 328-74 in the House and 79-18 in the Senate), and President Johnson signed the Act into law on August 6, 1965.

Although the Voting Rights Act entailed an expansive exercise of Congressional authority, *see South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966), its proponents in the political branches were mindful of the limitations imposed by the Constitution and crafted a measure "that went as far as [they] thought that any legislation could go in light of relevant constitutional proscriptions." Luis Fuentes-Rohwer, *Judicial Activism and the Interpretation of the*

Voting Rights Act, 32 CARDOZO L. REV. 857, 878 (2011). Attorney General Katzenbach, for example, repeatedly testified before Congress that he had "reservations" about the "constitutionality" of certain proposed changes to expand the scope of the legislation—changes that were not included in the final version of the statute. *See* Hearings on S. 1564 Before the S. Comm. on the Judiciary, 89th Cong., 1st Sess., 143 (1965). Hence, in enacting the initial Voting Rights Act, Congress ultimately promulgated "a detailed *but limited* remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified." *Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 373 (2001) (emphasis added).

In marked contrast here, the scope of the ACA is anything "but limited," any reservations regarding its constitutionality went unheeded, and consequently it did not garner the support of a single Republican in the House or Senate.

D. The Americans with Disabilities Act

The Americans with Disabilities Act of 1990 (the "ADA"), Pub. L. No. 101-336, 104 Stat. 327 (1990), evolved out of numerous proposals over a course of years to expand existing civil rights legislation to afford protections to persons with disabilities. In the 1980s, Congress had established the National Council on Disability (the "Council"), an independent Federal body comprised of 15 members appointed by President Reagan, to review all relevant federal laws and make recommendations

to improve upon them.[38] The Council issued a report in 1986 which proposed, among other things, an omnibus "Americans with Disabilities Act."

Congressional committees developed drafts of the ADA in the ensuing years, and in 1988, a bill was introduced in the Democrat-controlled Senate by Republican Senator Lowell Weicker, Jr. and 13 co-sponsors from both sides of the aisle. *See* Americans with Disabilities Act of 1988, S. 2345, 100th Cong. (1988). A bipartisan group of 46 co-sponsors introduced similar legislation in the House. *See* Americans with Disabilities Act of 1988, H.R. 4498, 100th Cong. (1988).

The two companion bills were significantly revised in the 101st Congress; between May 1989 and July 1990, the bill was subject to "numerous amendments, negotiations, markups, and compromises. Throughout this process, the business community's concerns were considered and addressed." Arlene Mayerson, *The Americans with Disabilities Act—An Historic Overview*, 7 The Labor Lawyer 1, 6 (1991). The parties also worked together to address constitutional issues concerning the separation of powers, as an amendment to the proposed legislation introduced in the Senate would have subjected all of Congress, including the House of Representatives, to a private right of action under the ADA and would have vested the executive branch (in the form of the Equal Employment Opportunity Commission or the Attorney

---

38. *See* Rehabilitation Amendments of 1984, Pub. L. No. 98-221, tit. I §§ 141(b)(1), 142(b), 98 Stat. 17, 26-27 (codified as amended at 29 U.S.C. §§ 780a, 781 (1988)).

General) with authority over the legislative branch. That amendment was voluntarily withdrawn.[39]

The ultimate votes on the bill that came out of the conference committee reflected deep bipartisan support. The House passed the bill on July 12, 1990 by a vote of 377-28 and the Senate followed the next day by a 91-6 margin. 136 Cong. Rec. 17296-97 (July 12, 1990). President George H.W. Bush signed the bill into law in short order. There is simply no comparison between this broad consensus—reflected in a majority that exceeded 90% in each chamber—and the acrimonious passage of the ACA amid bipartisan opposition and without *any* bipartisan support.

E. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform)

In 1996, a Republican-controlled Congress worked with President Bill Clinton to pass a landmark welfare reform bill—the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996)—that commanded bipartisan majorities of 78-21 in the Senate and 328-101 in the House. *See* 142 Cong. Rec. D851 (July 31, 1996); *id.* at D857 (Aug. 1, 1996). Although welfare reform had been a signature part of the Republicans' legislative agenda, more Democrats supported the bill than opposed it. *Id.*

---

39. *See* 136 Cong. Rec. S7449-50 (June 6, 1990) (withdrawal of motion by Sen. Charles Grassley to provide aggrieved congressional employees with a private right of action against Congress based on the "assurances" he received from Sen. Tom Harkin that "he will be sensitive to the significant constitutional issues involved").

The final bill reflected several compromises between the political parties, ending a standoff that had seen President Clinton veto two prior welfare reform bills, which had both passed by strict party-line votes. *See generally* Ron Haskins, WORK OVER WELFARE: THE INSIDE STORY OF THE 1996 WELFARE REFORM LAW (Brookings Ins. Press 2002) (detailing the collaboration among Democrats and Republicans in drafting a final, compromise bill). Among other things, the Democrats agreed to the bill's five-year lifetime limit on individuals' welfare benefits, which cohered with the Republicans' vision on how best to transition welfare recipients to the workforce. Democrats also accepted the bill's immigration provisions with reservations. Republicans, in turn, accepted various provisions concerning child support that had been drafted by the Clinton Administration's Department of Health and Human Services. In short, as President Clinton later observed, "[n]either side got exactly what it had hoped for." Bill Clinton, Op-Ed., *How We Ended Welfare, Together*, N.Y. TIMES, Aug. 22, 2006, at A19. This is the very nature of compromise—a feature absent from the steamrolling process that begot the ACA.

At bottom, the ACA represents a fundamental departure from this history of legislative compromise and respect for constitutional boundaries in matters of vast societal importance. Whereas the drafters of these prior bills repeatedly sought to curtail their legislation to meet constitutional and/or political objections en route to overwhelming bipartisan majorities, the proponents of the ACA barreled ahead without regard to serious and duly-raised constitutional concerns.

CONCLUSION

For the foregoing reasons, the presumption of constitutionality that is traditionally applicable to acts of Congress as a coordinate branch of Government has been significantly weakened (if not effectively eliminated) by the structural and procedural deficiencies that accompanied the passage of the ACA: the abdication by Congress of its obligation to make any meaningful effort to consider the constitutionality of the individual mandate; the unprecedented and onerous nature of this congressional measure; and the legislative chicanery that led to the passage of the ACA on a strict party-line vote of a kind never before seen on legislation of great social importance. Accordingly, this Court should conduct a searching and meaningful inquiry into the validity of the ACA's minimum coverage provision and whether Congress has infringed on individual liberty by acting in excess of its authority under the Constitution. This Court should affirm the judgment of the Court of Appeals on this issue.

Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
KAREN J. LUGO
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
c/o CHAPMAN UNIV. SCH. OF LAW
One University Drive
Orange, CA 92886
(714) 628-2587

CHRISTOPHER R.J. PACE
Counsel of Record
WEIL, GOTSHAL & MANGES LLP
1395 Brickell Avenue
Suite 1200
Miami, FL 33131
(305) 577-3100
christopher.pace@weil.com

CARRIE SEVERINO
THE JUDICIAL
EDUCATION PROJECT
113 2nd Street, N.E.
Washington, DC 20002
(616) 915-8180

EDWIN MEESE III
TODD F. GAZIANO
THE HERITAGE FOUNDATION
214 Massachusetts Avenue, NE
Washington DC 20002
(202) 608-6180

MANUEL S. KLAUSNER
LAW OFFICES OF
MANUEL S. KLAUSNER, P.C.
One Bunker Hill Building
601 West Fifth Street
Suite 800
Los Angeles, CA 90071
(213) 617-0414

BRIAN C. BAKER
ENDING SPENDING, INC.
1101 Pennsylvania Avenue, N.W.
Suite 700
Washington, DC 20004
(202) 756-0220

February 13, 2012

APPENDIX

APPENDIX — INTERESTS OF THE OTHER AMICI

Amicus the Judicial Education Project ("JEP") is dedicated to strengthening liberty and justice in America through defending the Constitution as envisioned by its Framers: creating a federal government of defined and limited power, dedicated to the rule of law and supported by a fair and impartial judiciary. The Project educates citizens about these constitutional principles, and focuses on issues such as judges' role in our democracy, how they construe the Constitution, and the impact of the judiciary on our society. JEP's educational efforts are conducted through various outlets, including print, broadcast, and internet media.

Amicus Reason Foundation ("Reason") is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, www.reason.com and www.reason.tv, and by issuing policy research reports, available on www.reason.org, that promote choice, competition, and a dynamic market economy as the foundation for human dignity and progress. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases raising significant constitutional issues.

Appendix

Amicus The Individual Rights Foundation ("IRF") was founded in 1993 and is the legal arm of the David Horowitz Freedom Center. The IRF is dedicated to supporting free speech, associational rights, and other constitutional protections. To further these goals, IRF attorneys participate in litigation and file amicus curiae briefs in cases involving fundamental constitutional issues. The IRF opposes attempts from anywhere along the political spectrum to undermine freedom of speech and equality of rights, and it combats overreaching governmental activity that impairs individual rights.

Amicus The Heritage Foundation ("Heritage") is a nonpartisan and nonprofit 501(c)(3) research and educational institution with the mission "to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense." Soon after its inception in 1973, Heritage's domestic policy scholars began analyzing, and educating policymakers and the public about, health policy issues and proposals for health policy reform. In several publications and statements over the last decade, Heritage health policy experts have opposed on purely policy grounds a government-enforced mandate that individuals or families buy health insurance. In addition, Heritage's Legal Center published the Heritage Legal Memorandum in December 2009, examining the constitutionality of the "individual mandate" provision in the then-pending health care bill, which noted the costly implications of the individual mandate then being debated, and concluded that it would be unconstitutional as drafted.

Appendix

Amicus Ending Spending, Inc. is a non-partisan and non-profit organization dedicated to educating and engaging American taxpayers about wasteful and excessive government spending. Through its website and other media, Ending Spending is dedicated to combating the debt crisis and is focused on the nation's broader fiscal challenges. Formerly known as "Taxpayers Against Earmarks," Ending Spending has a particular interest in raising awareness about the questionable legislative procedures that accompanied the passage of the health care bill, including the use of earmarks to win the votes of wavering legislators.

Amicus George LeMieux is a former United States Senator of the 111th Congress, and a current candidate for the United States Senate from the State of Florida. As a former Senator and current candidate for office, *Amicus* LeMieux has a keen interest in passing health care reform that eliminates healthcare fraud and does not increase the federal deficit. *Amicus* LeMieux also has an interest in the constitutional issues that are at stake in this litigation, as he is cognizant of Congress' duty to uphold the Constitution of the United States and to ensure that the Legislative Branch stays within the bounds of the powers afforded it by the Constitution.

Amicus Hank Brown is a former United States Representative (1981-1991) and former United States Senator (1991-1997) from the State of Colorado. *Amicus* Brown has taught political science courses at the University of Colorado-Boulder, where he is President Emeritus. As a former Member of the Legislative Branch,

Amicus Brown is familiar with and has worked upon prior pieces of social legislation; has witnessed first-hand the evolution of healthcare reform; and has a deep interest in ensuring that Congress does not act in excess of its authority under the Constitution.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

NO. 11-398

Supreme Court, U.S.
FILED
FEB 13 2012
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

DEPARTMENT OF HEALTH & HUMAN SERVICES, *ET AL.*,

PETITIONERS,

v.

STATE OF FLORIDA, *ET AL.*,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR *AMICUS CURIAE* CENTER FOR THE FAIR ADMINISTRATION OF TAXES OPPOSING *VACATUR* (ANTI-INJUNCTION ACT)

A. LAVAR TAYLOR
(COUNSEL OF RECORD)
ADJUNCT PROFESSOR OF LAW, CHAPMAN UNIVERSITY LAW SCHOOL
DIRECTOR, CENTER FOR THE FAIR ADMINISTRATION OF TAXES
6 Hutton Centre Drive, Suite 880
Santa Ana, CA 92707
(714)546-0445
ltaylor@taylorlaw.com
February 2012

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTION PRESENTED

The sole question addressed by the Center for the Fair Administration of Taxes is whether the actions brought by the private litigants and the States challenging the minimum coverage provisions of the Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A, are barred by the Anti-Injunction Act.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTEREST OF *AMICUS* 1

SUMMARY OF ARGUMENT.....4

ARGUMENT 7

I. THE POSITIONS ADVANCED BY *AMICI* WHO URGE *VACATUR* ARE WITHOUT MERIT....7

A. The "Pay Now Litigate Later" Scheme Does not Apply With Respect To Penalties Which Are Not Subject To The Deficiency Procedures In 26 U.S.C. §6213 7

B. The Provisions Unique To The Penalty Imposed By Section 5000A, Which Effectively Prohibit The IRS From Taking Active Collection Measures, Demonstrate An Intent By Congress To Create a New Exception To The Anti-Injunction Act.....12

C. Because The Provisions Contained In Section 5000(A)(g) Are Found Nowhere Else In The Internal Revenue Code, This New Exception To The Anti-Injunction Act Can Be Construed Narrowly, So That The Collection Of All Other "Penalties" Imposed By The Internal Revenue Code Will Remain Subject To The Anti-Injunction Act.....19

II. MANY OF THE ARGUMENTS ADVANCED BY THE PARTIES IN SUPPORT OF THEIR POSITION THAT THE SUIT IS NOT BARRED BY THE ANTI-INJUNCTION ACT ARE NOT PERSUASIVE AND, IF ACCEPTED BY THIS COURT, COULD IMPAIR THE EFFECTIVE ADMINISTRATION OF THE TAX LAWS 22

A. The Anti-Injunction Act Is Either Jurisdictional Or a Non-Waivable Claims Processing Statute; In Either Event, Its Application Can Not Be Waived By The Executive Branch 22

B. The Purpose For Which The Suit Is Maintained Is Irrelevant For Purposes Of Determining Whether The Anti-Injunction Act Applies.....26

C. This Court Need Not Decide Whether Penalties Such As The One Imposed By Section 5000A(b) Are Subject To The Anti-Injunction Act In The Same Manner As "Taxes", But If The Court Reaches This Issue, The Penalty Imposed By Section 5000A(b) Should Not Be Exempted From The Application Of The Anti-Injunction Act Merely Because It Is a "Penalty" And Not a "Tax".....28

D. This Court Need Only Decide Whether The Exception To The Anti-Injunction Act In *South Carolina v. Regan* Applies For

Purposes of Deciding Whether The Anti-Injunction Act Bars the Suit by the States ...29

CONCLUSION 30

TABLE OF AUTHORITIES

Cases **Page(s)**

Bob Jones University v. Simon,
416 U.S. 725 (1974) 22

Callahan v. Commissioner,
130 T.C. No. 3 (2008) 10

Commissioner v. Shapiro,
424 U.S. 614 (1976) 22,24,25

Enochs v. Williams Packing & Navigation Co.,
370 U.S. 1 (1962) 22,25

Florida v. HHS,
716 F.Supp. 2d 1120 (N.D. Fla. 2010) 15

Helvering v. Davis,
301 U.S. 61 (1937) 23

Marbury v. Madison,
5 U.S. 137 (1803) 25

Seven Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) 20,24,28

Smith v. Commissioner,
133 T.C. No. 18 (2009) 8

South Carolina v. Regan,
465 U.S. 367 (1984) 4,7,29,30

Zadvydas v. Davis, 533 U.S. 678 (2001) 25

Statutes

26 U.S.C. § 32 16

26 U.S.C. § 36 16

26 U.S.C. § 5000A 2

26 U.S.C. § 5000A(b) ..... *passim*

26 U.S.C. § 5000A(e)(1) 17

26 U.S.C. § 5000A(e)(2) 17

26 U.S.C. § 5000A(g) 3,15,18,19

26 U.S.C. § 5000A(g)(1) 8

26 U.S.C. § 5000A(g)(2) 13

26 U.S.C. § 5000A(g)(2)(A) 13

26 U.S.C. § 5000A(g)(2)(B) 14

26 U.S.C. § 6213 7

26 U.S.C. § 6213(a) 8

26 U.S.C. § 6320 9

26 U.S.C. § 6320(b) 10

26 U.S.C. § 6320(c) 10

26 U.S.C. § 6330 9

26 U.S.C. § 6330(a) 10

26 U.S.C. § 6330(b) 10

26 U.S.C. § 6330(c)(2)(B) 10

26 U.S.C. § 6330(d) 10,11

26 U.S.C. § 6330(e) 10,11

26 U.S.C. § 6331 10

26 U.S.C. § 7403 15,18

26 U.S.C. § 7421 ..... *passim*

Patient Protection and Affordable Care Act, Pub. L. No. 111-48, 124 Stat. 119 (2010) 1

Other Authorities

EITC Income Limits, Maximum Credit Amounts and Tax Law Updates, www.irs.gov/individuals/article/0,,id=150513,00.html (last visited Feb. 12, 2012) 17

U.S. Department of Justice Tax Division Press Room Page, www.justice.gov/tax/TEN.htm (last viewed Feb. 12, 2012) 13

U.S. Department of Justice Tax Division, FY 2011 Congressional Budget, available at www.justice.gov/jmd/2011justification/pdf/fy11-tax-justification.pdf 13

Your Federal Income Tax, Publication 17 (2011), *available at* http://www.irs.gov/ publications /p17/ch01.html#en_US_2011_publink1000170407 17

INTEREST OF *AMICUS*

This brief is being filed under the parties' blanket consents filed with the Court.

Amicus Center for the Fair Administration of Taxes ("CFAT") is a not for profit organization seeking to promote fairness in the administration of the tax laws to taxpayers as a whole. Currently, the primary means utilized to achieve this goal is through the filing of briefs as *amicus curiae* in tax-related cases throughout the United States. CFAT works jointly with the Chapman University School of Law Appellate Tax Clinic, offering law students the opportunity to assist in the preparation of the *amicus curiae* briefs filed by CFAT. A. Lavar Taylor, the Director for CFAT and Adjunct Professor of Law at Chapman Law School, has over 30 years of experience in the handling of civil and criminal tax controversies, both in government and in private practice.[1]

In this case, private litigants and a number of States have brought suit challenging the constitutionality of the Patient Protection and Affordable Care Act, Pub. L. No. 111-48, 124 Stat.

---

[1] No person other than the named *amicus* or their counsel authored this brief or provided financial support for this brief. Recent University of Illinois College of Law graduate Suoo Lee assisted CFAT in preparing this brief.

119 (2010). In particular, they challenge the constitutionality of the so-called individual mandate.

The individual mandate is found in 26 U.S.C. § 5000A, which imposes a penalty on certain individual taxpayers who fail to maintain certain minimum health insurance coverage.

Three briefs have been filed by other *amici* urging *vacatur* of the suit below on the grounds that the suit was barred by 26 U.S.C. §7421 ("Anti-Injunction Act"). The first brief was filed by the court-appointed *amicus* ("Long *amicus* brief"), a second brief was filed by two former Commissioners of Internal Revenue ("Cohen and Caplin *amicus* brief"), and the third brief was filed by Tax Law Professors ("Tax Law Professors *amicus* brief").

The parties to the suit have filed briefs arguing that the Anti-Injunction Act does not bar the suit, except that the United States argues that Anti-Injunction Act bars the suit by the States. CFAT supports the conclusion that the Anti-Injunction Act does not bar either the suit by the private litigants or the suit by the States and thus disagrees with the result advocated by the three *amici* who urge *vacatur*.

But CFAT is concerned that many of the arguments made by the parties in support of the position that the Anti-Injunction Act does not apply are incorrect and, if adopted by this Court, would be detrimental to the administration of the tax laws.

Accordingly, with respect to the private litigants, *amicus* CFAT urges this Court hold that the Anti-Injunction Act does not bar the suit by the private litigants, but for reasons not clearly articulated by any of the parties in their briefs on the Anti-Injunction Act.

Specifically, CFAT urges that this Court base its holding that the Anti-Injunction Act does not bar suit by the private litigants on the fact that Congress has already effectively prohibited the IRS from taking meaningful collection action to collect the penalty imposed 26 U.S.C. §5000A(b) by virtue of the provisions in section 5000A(g) which bar the IRS from a) pursuing criminal charges against those taxpayers who willfully fail to pay these penalties in violation of the general criminal provisions of the Internal Revenue Code, b) filing a notice of federal tax lien against taxpayers who owe this penalty, and c) collecting the unpaid penalty through levy action. These provisions, which apply to no other liabilities imposed by the Internal Revenue Code, evidence a Congressional intent to effectively prohibit the IRS from taking active collection measures to collect this penalty from those taxpayers who do not pay the penalty. By virtue of these provisions, Congress has created a new exception to the Anti-Injunction Act.

Importantly, the scope of this new exception is extremely narrow. This is because the three provisions described in the preceding paragraph apply only to the penalties imposed under section 5000A(b). By basing its holding that the Anti-Injunction Act does not bar suit by the private

litigants on these unique provisions, the Court will avoid the potential mischief that could arise should the court wade into the "penalty vs. tax" issue that has been extensively briefed by the parties and other *amici*. This particular issue, insofar as it concerns the Anti-Injunction Act, would become moot.

CFAT further urges that, as a general matter, the Court either reject or not rely on the arguments made in the parties' briefs to hold that the Anti-Injunction Act does not bar the suits brought by the private parties.

With respect to the State litigants, CFAT urges this Court to rely only on the exception to the Anti-Injunction Act discussed by the court in *South Carolina v. Regan,* 465 U.S. 367 (1984), to hold that the suit brought by the States is not barred by the Anti-Injunction Act. CFAT urges the Court to reject the other arguments offered by the States in support of this position.

SUMMARY OF ARGUMENT

The arguments of the various *amici* who urge *vacatur* in this case are without merit. The statutory exceptions to the "pay now, litigate later" rule enacted by Congress in 1998 render nearly irrelevant the application of the Anti-Injunction to penalties assessed outside of the deficiency procedures where the taxpayer desires to challenge the merits of the penalty assessment prior to paying the tax.

The Collection Due Process procedures enacted in 1998 allow taxpayers who have been assessed penalties outside of the deficiency procedures to challenge the merits of the penalty assessment both administratively and judicially after the government has recorded a notice of federal tax lien or has issued a notice of intent to levy. While such challenges are pending, the government may not take forced collection action to collect the penalty. Because forced collection measures are statutorily enjoined in this situation, it is not inconsistent with the Anti-Injunction Act to permit the private litigants to bring suit to challenge the penalty imposed by section 5000A(b).

Congress created a new exception to the Anti-Injunction Act by virtue of the provisions in section 5000A which prohibit the government from criminally prosecuting taxpayers who intentionally refuse to pay a section 5000A(b) penalty assessment and which prohibit the government from taking meaningful collection activity to collect penalties assessed under section 5000A(b) against taxpayers who refuse to pay those penalties. These provisions, which apply to no other liabilities imposed by the Internal Revenue Code, evidence Congressional intent to except section 5000A(b) penalties from the application of the Anti-Injunction Act.

Relying on the rationale offered by CFAT for excepting section 5000A(b) penalties from the application of the Anti-Injunction Act ensures that the new exception to the Anti-Injunction Act will be narrowly drawn. Potential problems in the

administration of the tax laws which could result if the Court adopts the position advocated by the United States and the other litigants can be minimized or avoided.

The Anti-Injunction Act is either jurisdictional or a non-waivable claims processing statute. In either event, the application of the Anti-Injunction Act cannot be waived by the Executive Branch. Allowing the Executive Branch to waive the application of the Anti-Injunction Act on a case by case basis would invite a flood of litigation from taxpayers asking the Executive Branch to waive the Act's application in their case. These suits would burden both the courts and the Executive Branch personnel who would be asked to waive the application of the Anti-Injunction Act. In addition, allowing the Executive Branch to waive the application of the Anti-Injunction Act on a case by case basis would invite political favoritism by the Executive Branch or at least would create the appearance of such political favoritism. This could seriously undermine the administration of the tax laws.

This Court, if it adopts the position urged by CFAT, need not decide whether the arguments of the private litigants in support of their position that the Anti-Injunction Act does not bar them from bringing suit. But if the Court does address these arguments made by the private litigants, these arguments should be rejected.

With respect to the State litigants, the exception to the Anti-Injunction Act discussed in

South Carolina v. Regan applies. Should this Court reject this argument, however, the other arguments made by the States in support of their position that the Anti-Injunction Act does not bar their suit should be rejected.

ARGUMENT

I. THE POSITIONS ADVANCED BY AMICI WHO URGE *VACATUR* ARE WITHOUT MERIT

A. The "Pay Now, Litigate Later" Scheme Does Not Apply With Respect To Penalties Which Are Not Subject To The Deficiency Procedures In 26 U.S.C. §6213

All *amici* urging *vacatur* in this case emphasize that one of the key purposes of the Anti-Injunction Act is to ensure the integrity of the "pay now, litigate later" scheme established by Congress. *See* Long *amicus* brief at 25-29, Caplin and Cohen *amicus* brief at 19-23, Tax Law Professors *amicus* brief at 8-10. None of these *amici* properly acknowledge that, in 1998, Congress dramatically altered the "pay now, litigate later" scheme for penalties which are assessed without resort to the deficiency procedures in section 6213 of the Internal Revenue Code.

These statutory exceptions to the "pay now, litigate later" rule swallow the rule itself. Thus, the Anti-Injunction Act is of far less significance than it was prior to 1998 in situations where a "non-

deficiency" penalty is assessed against a taxpayer and the taxpayer wishes to challenge the imposition of the penalty in court prior to paying the assessed penalty.

The penalty imposed by section 5000A(b) is found in Subtitle D of the Internal Revenue Code, Miscellaneous Excise Taxes. This penalty is assessed and collected in the same manner as penalties imposed under Subchapter B of Chapter 68. Section 5000A(g)(1).

Liabilities imposed by Subtitle D, whether designated as "taxes" or as "penalties," generally may be assessed and collected by the government without resort to the deficiency procedures in the Code. Similarly, penalties imposed by Subchapter B of Chapter 68 generally may be assessed and collected without resort to the deficiency procedures in the Code. *See Smith v. Commissioner*, 133 T.C. No. 18 (2009).

By way of contrast, in order to assess and collect liabilities which are subject to the deficiency procedures, whether designated as "taxes" or as "penalties," the government must issue a notice of deficiency to a taxpayer before assessing and collecting the liability. 26 U.S.C. §6213(a). The notice of deficiency in turn gives the taxpayer the right to litigate the merits of a liability in the Tax Court before the government assesses and collects any liability that is determined to exist, absent jeopardy as to collection. *Id.*

Because the government is not required to issue a notice of deficiency before assessing liabilities arising under Subtitle D and penalties imposed by Subchapter B of Chapter 68, the government can simply assess those liabilities or penalties and send the taxpayer a bill. If the taxpayer fails to pay the bill, the government can normally begin the collection process that is well described at pages 10-18 of the Tax Law Professors *amicus* brief.

The Collection Due Process procedures enacted by Congress in 1998, set forth in 26 U.S.C. §§ 6320 and 6330, allow taxpayers to judicially challenge the merits of penalties assessed outside of the deficiency procedures. This judicial challenge can be brought where the taxpayers who have been assessed have not paid any portion of the assessment. And the government generally can not pursue involuntary collection action against the person assessed until the judicial challenge to the merits of the penalty assessment has runs its course.

There are two ways in which taxpayers can bring pre-payment judicial challenges to liabilities which are assessed outside of the deficiency procedures. Both ways involve the Collection Due Process procedures mentioned above.

The government will typically file a notice of federal tax lien against the taxpayer to perfect the tax lien imposed by operation of law vis-à-vis certain third parties where the taxpayer has failed to pay a liability after notice and demand. *See* Tax Law Professors *amicus* brief at 11-14. The Secretary must send the taxpayer written notice of the filing of the

notice of federal tax lien. 26 U.S.C. §6320(a). This notice in turn triggers the right of the taxpayer to an administrative appeal. 26 U.S.C. §6320(b). The taxpayer can challenge the underlying liability in this appeal because the taxpayer "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." 26 U.S.C. §§ 6320(c), 6330(c)(2)(B). See *Callahan v. Commissioner*, 130 T.C. No. 3 (2008). If the taxpayer is not satisfied with the results of this administrative appeal, the taxpayer may file a petition in Tax Court and may challenge the liability. 26 U.S.C. §§ 6320(c), 6330(d). Until the litigation is resolved, the government is generally precluded from taking forced collection action against the taxpayer. 26 U.S.C. § 6330(e).

The government also has the ability to levy on a taxpayer's assets if the taxpayer does not pay an assessment after notice and demand for payment. 26 U.S.C. § 6331. As a general matter, before the government can issue a levy, it must send the taxpayer a notice of intent to levy and wait 30 days. 26 U.S.C. § 6330(a). This notice, like the notice regarding the filing of a notice of federal tax lien, triggers a taxpayer's right to file an administrative appeal. 26 U.S.C. § 6330(b). The taxpayer can challenge the underlying liability in this appeal because the taxpayer "did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." 26 U.S.C. §6330(c)(2)(B). *Callahan v. Commissioner, supra.* If the taxpayer is not satisfied with the results of this administrative appeal, the

taxpayer may file a petition in Tax Court and may challenge the liability. § 6330(d). Until the litigation is resolved, the government is generally precluded from taking forced collection action against the taxpayer. 26 U.S.C. § 6330(e).

Because forced collection of liabilities and penalties assessed without regard to the deficiency proceedings are statutorily enjoined while these prepayment administrative and judicial challenges to the liability are brought by taxpayers, it does not do violence to the Anti-Injunction Act to permit the private litigants who could be subjected to the penalty under section 5000A(b) to challenge the constitutionality of this penalty now. *Amici* Tax Law Professors, at pages 25-29 of their brief, correctly describe the practical obstacles that prevent the government from collecting unpaid penalties assessed under section 5000A(b), but *amici* draw the wrong conclusion from the fact that Congress effectively has prevented the government from taking meaningful collection action against those taxpayers who refuse to pay penalties assessed under section 5000A(b).

Ironically, Congress deprived the private litigants in this case of the ability to make a prepayment challenge to the penalty imposed by section 5000A(b) under the Collection Due Process procedures discussed above when Congress prohibited the government from filing notices of federal tax lien and prohibited the government from taking levy action with respect to unpaid penalties imposed by section 5000A(b). But that does not

indicate a Congressional intent to prohibit the private litigants from challenging the section 5000A(b) penalty here.

To the contrary, this prohibition on forced collection activity by the IRS, coupled with the prohibition on criminal prosecution for an intentional failure to pay the section 5000A(b) penalty, effectively neuters the ability of the IRS to collect the penalty imposed by section 5000A(b) from those taxpayers who refuse to pay. Congress has in effect statutorily enjoined the IRS from taking meaningful collection action to collect penalties imposed by section 5000A(b) which remain unpaid. As the following section of this brief will explain in detail, the government can not take any meaningful collection action to collect a penalty assessed under section 5000A(b). Thus, allowing the private litigants to bring this suit is not inconsistent with the Anti-Injunction Act.

B. The Provisions Unique To The Penalty Imposed By Section 5000A, Which Effectively Prohibit The IRS From Taking Active Collection Measures, Demonstrate An Intent By Congress To Create a New Exception To The Anti-Injunction Act

The Anti-Injunction Act, 26 U.S.C. § 7421, does not bar the current challenge to the minimum coverage provision of the Patient Protection and Affordable Care Act by the private litigants. It is apparent from the statutory scheme that Congress

intended to except the penalty imposed by section 5000A(b) from the application of the Anti-Injunction Act.

Congressional intent to except the section 5000A(b) penalty from the application of the Anti-Injunction Act is expressed in the form of the provisions in section 5000A(g)(2). These provisions, which are unique to the penalty imposed by section 5000A(b), provide as follows.

First, the IRS may not criminally prosecute any taxpayer for their failure to timely pay the penalty imposed by section 5000A(b). 26 U.S.C. §5000A(g)(2)(A). To the best of the knowledge of CFAT, such a provision is virtually unprecedented in the history of the Internal Revenue Code. The IRS vigorously pursues criminal prosecution of those persons whom it believes have intentionally violated the internal revenue laws. The Tax Division of the Department of Justice routinely issues press releases announcing major criminal prosecutions and trumpets its astronomically high conviction rate in its annual reports. *See U.S. Department of Justice Tax Division Press Room Page*, www.justice.gov/tax/TEN.htm (last viewed Feb. 12, 2012); *U.S. Department of Justice Tax Division, FY 2011 Congressional Budget*, at 14-25, *available at* www.justice.gov/jmd/2011justification/pdf/fy11-tax-justification.pdf. All of this is done to persuade taxpayers that they should comply with the tax

laws.[2] The fact that Congress has prohibited the government from criminally prosecuting taxpayers who intentionally fail to pay the penalty imposed by section 5000A(b), thereby depriving the government of its most effective "stick" to compel compliance with the tax laws, is most unusual.

The government is also prohibited from levying, or filing notices of federal tax lien against taxpayers who fail to pay the penalty imposed by section 5000A(b) after that penalty has been assessed. 26 U.S.C. §5000A(g)(2)(B). In this regard, CFAT notes that the IRS collection process has been very well described at pages 10-18 of the Tax Law Professors *amicus* brief. CFAT will not repeat those discussions here.

The prohibitions on the filing of notices of federal tax lien and on issuing levies to collect unpaid penalties assessed under section 5000A(b) are likewise unprecedented. No other liability imposed by the Tax Code, whether denominated a "tax" or a "penalty," is subject to these type of collection restrictions if the person assessed fails to pay the liability after it has been assessed.

Some courts have interpreted these unique restrictions on the ability of the government to pursue collection of penalties assessed under section 5000A(b) to mean that this penalty is not a "tax" for

---

[2] At least to the extent that the tax laws can be comprehended by humans.

purposes of the Anti-Injunction Act. *See, e.g.*, *Florida v. HHS*, 716 F.Supp. 2d 1120, 1141 (N.D. Fla. 2010). A more logical interpretation of these unique restrictions on the ability of the government to collect unpaid section 5000A(b) penalties is that Congress, in enacting the minimum coverage provisions, never intended the Anti-Injunction Act to apply to suits involving the section 5000A(b) penalty such as those brought by the private litigants in this case.

As the Tax Law Professor *amici* explain quite well in their brief at pages 25-29, Congress has effectively neutered the ability of the IRS to collect penalties assessed under section 5000A(b) from unwilling taxpayers. Contrary to what is argued by *amicus* Long, the government has no other effective means of collecting these types of penalties.

The only two methods of forced collection activity not explicitly prohibited by section 5000A(g) are setoffs and suits to reduce the assessment to judgment. *See* Tax Law Professors *amicus* brief at 27-28. Setoff refers to the practice of taking a taxpayer's tax refund for a separate tax period and applying it to an unpaid assessment, such as a penalty assessment under section 5000A(b). A suit to reduce an assessment to judgment is brought by the Department of Justice under 26 U.S.C. §7403 after the IRS has referred the matter to the Department of Justice. Tax Law Professors *amicus* brief at 16.

Neither of these tools allows the government to take effective collection action to collect unpaid penalty assessments under section 5000A(b) against

unwilling taxpayers. Setoff is not an effective collection tool against unwilling taxpayers because most taxpayers who wish to avoid generating a tax refund for a particular tax period can easily do so. Thus, individual taxpayers typically pay their income taxes through withholding at the source, in the case of wages, or through estimated tax payments, in the case of self-employed taxpayers or taxpayers who have no wage income.

It is a simple matter for taxpayers to adjust their withholding from their wages so that they do not have a refund for a particular tax year. A taxpayer merely needs to obtain from a tax professional an estimate of the tax they will owe for that year, based on the taxpayer's anticipated income and deductions. The taxpayer can then adjust the withholding from his or her wages, using a Form W-4, so that the total amount withheld for the year does not exceed the estimated tax liability. Similarly, a self-employed person can use a similar process to calculate their estimated tax payments so that the total payments for a particular tax year do not exceed the estimated tax liability for that year. The taxpayer's estimation process can easily take into account refundable tax credits, such as the home buyer credit allowed under 26 U.S.C. §36. See also Tax Law Professors *amicus* brief at pages 24-29.

There are certain low income taxpayers, such as those receiving the earned income credit allowed under 26 U.S.C. §32, who cannot avoid receiving a refund, because of the nature of the credit. But the government will rarely if ever be collecting a section

5000A(b) penalty from taxpayers receiving these types of credits.

For a taxpayer to receive the EITC, he must satisfy certain income limits and maximum credit amounts. *EITC Income Limits, Maximum Credit Amounts and Tax Law Updates*, www.irs.gov/individuals/article/0,,id=150513,00.html (last visited Feb. 12, 2012). More specifically, for the 2011 tax year a taxpayer wishing to receive the EITC must have earned less than $13,600 ($18,740 if married filing jointly) if he had no qualifying children. *Id.* The amount of the income limit increases slightly as the number of qualifying children increases, but the income limit is still relatively low.

Thus, taxpayers who are eligible for these refundable credits likely cannot afford coverage, are below the filing threshold, or both. Section 5000A(e) exempts taxpayers who cannot afford coverage from paying the penalty. 26 U.S.C. § 5000A(e)(1). Under §5000A(e)(2), taxpayers earning less than the filing threshold are exempt from the 5000A penalty. The current filing threshold is $9,500 for single taxpayers; $19,000 if married filing jointly. *Your Federal Income Tax, Publication 17* (2011), *available at* http://www.irs.gov/publications/p17/ch01.html #en_US_2011_publink1000170407. Although these taxpayers will still file their returns to receive their credits, their status below the filing threshold prevents the IRS from asserting any 5000A(b) penalties. Thus, the setoff power of the IRS is not an

effective collection method for collecting unpaid penalties assessed under section 5000A(b).

Similarly, filing suit to reduce unpaid section 5000A(b) penalty assessments to judgment under section 7403 is not an effective collection tool. As noted by *amici* Tax Law Professors at pages 17-18 of their brief, it is very unlikely as a practical matter that these type of suits will be brought by the Department of Justice. Furthermore, even if a judgment is obtained, it is far from clear that any effective actions could be taken to collect that judgment, in light of the prohibitions on collection contained in section 5000A(g).

Given that Congress has effectively neutered the ability of the government to collect unpaid penalties assessed under section 5000A(b), it is apparent that Congress did not intend for the Anti-Injunction Act to bar the suit brought by the private litigants. The IRS has been deprived of all effective collection tools, having been effectively enjoined statutorily from collecting these unpaid penalty assessments. Thus, the Anti-Injunction Act does not bar the suit brought by the private litigants.

C. Because The Provisions Contained In Section 5000(A)(g) Are Found Nowhere Else In The Internal Revenue Code, This New Exception To The Anti-Injunction Act Can Be Construed Narrowly, So That The Collection Of All Other "Penalties" Imposed By The Internal Revenue Code Will Remain Subject To The Anti-Injunction Act

The United States has traditionally argued for a broad interpretation of the Anti-Injunction Act and for a narrow interpretation of exceptions to the Anti-Injunction Act. The United States has done so for reasons of efficient tax administration. Significant, broad exceptions to the Anti-Injunction Act make it more difficult for the government to collect taxes, so it is no surprise that the United States typically opposes efforts to limit the application of the Anti-Injunction Act.

The exception to the Anti-Injunction Act for which CFAT advocates is an extremely narrow one. Because the statutory provisions upon which CFAT's argument is based apply only to penalties assessed under section 5000A(b), there is no risk of confusion regarding the scope of this exception. The prohibitions on criminal prosecution and collection activity contained in section 5000A(g) apply to no other liability imposed by the Internal Revenue Code. And it is unlikely that Congress will extend the provisions of section 5000A(g) to other liabilities imposed by the Internal Revenue Code.

This contrasts with the exception to the Anti-Injunction Act advocated by the all of the litigants, including the United States, for penalties assessed under section 5000A(b). The basis of this advocated exception is that the section 5000A(b) penalty is a "penalty" and not a "tax." Because the Anti-Injunction Act only prohibits the assessment and collection of "taxes," Congress supposedly did not intend the Anti-Injunction Act to apply to penalties assessed under section 5000A(b).

The United States is a bit more careful than the private litigants and the States are in crafting its argument on this point, because the United States, unlike the private litigants and the States, will have to deal with a great deal of future litigation involving the Anti-Injunction Act. But the arguments of both the United States and the other litigants are flawed and, if accepted by this Court, could result in significant adverse effects on the administration of the tax laws.

The arguments made by the United States in support of its position that the penalty imposed by section 5000A(b) is exempt from the operation of the Anti-Injunction Act because it is a "penalty," arguments which are echoed by the private litigants and the States, are problematical. This point is effectively acknowledged by the United States itself in footnote 21 of its brief. The briefs of *amici* Long, and Caplin and Cohen, effectively rebut the arguments made by the United States. The reasoning offered by Judge Kavanaugh in his dissent in *Seven Sky* is also persuasive.

There are significant potential adverse effects on the administration of the tax laws if this Court were to accept the arguments advanced by the United States, the private litigants, and the States. As noted by *amicus* Long at page 35 of his brief, the Internal Revenue Code contains a "mind-numbing" number of penalties.[3] A recent Lexis search of the federal courts using the terms "Anti-Injunction Act" and "penalty" produced a total 1,240 cases. It is likely that a significant portion of these cases involve a situation where the plaintiff was seeking to enjoin the assessment or collection of a penalty of some sort.

If this Court were to conclude that "penalties" such as the penalty imposed by section 5000A(b) were exempt from the operation of the Anti-Injunction Act, the courts could be flooded with cases in which taxpayers claim that "penalties" which have been assessed against them are not subject to the Anti-Injunction Act. This potential flood of litigation would divert precious resources of the courts and government employees who assist in the administration of the tax laws. It would also have an adverse effect on those persons who have bona fide tax (and other) disputes which must be resolved by the courts.

For these reasons, the argument advanced by CFAT in favor of this Court holding that the Anti-

---

[3] A recent on-line word search of the Internal Revenue Code by CFAT for the word "penalty" returned 665 different hits.

Injunction Act does not bar the suit by the private litigants is far superior to the arguments advanced by the litigants, both as a matter of logic, and as a matter of minimizing the potential for problems in the administration of the tax laws after this Court issues its opinion in this matter.

II. MANY OF THE ARGUMENTS ADVANCED BY THE PARTIES IN SUPPORT OF THEIR POSITION THAT THE SUITS ARE NOT BARRED BY THE ANTI-INJUNCTION ACT ARE NOT PERSUASIVE AND, IF ACCEPTED BY THIS COURT, COULD IMPAIR THE EFFECTIVE ADMINISTRATION OF THE TAX LAWS

A. The Anti-Injunction Act Is Either Jurisdictional Or a Non-Waivable Claims Processing Statute; In Either Event, Its Application Can Not Be Waived By The Executive Branch

The more recent jurisprudence of this Court on the Anti-Injunction Act clearly states that the Anti-Injunction Act is jurisdictional in nature. *See, e.g., Commissioner v. Shapiro,* 424 U.S. 614 (1976), *Bob Jones University v. Simon,* 416 U.S. 725 (1974), *Enochs v. Williams Packing & Navigation Co.,* 370 U.S. 1 (1962). Nevertheless, this Court has in the past permitted the Solicitor General to "waive" the application of the Anti-Injunction Act, which suggests that the Anti-Injunction Act is not a jurisdictional limitation on the courts' ability to

resolve disputes that fall within the scope of that Act. *Helvering v. Davis*, 301 U.S. 619 (1937).

Regardless of whether the Anti-Injunction Act is jurisdictional or is merely a "claims processing statute," there is no evidence that Congress intended to grant the Solicitor General (or anyone else in the Executive Branch) the authority to waive the application of the Anti-Injunction Act where that Act would otherwise bar a suit. Thus, this Court should disavow its prior case law which permitted a member of the Executive Branch to "waive" the application of the Anti-Injunction Act.

There are very good reasons why Congress would not have intended to grant any member of the Executive Branch the authority to waive the application of the Anti-Injunction Act. First, construing the Anti-Injunction Act in manner which permits the Solicitor General or any other member of the Executive Branch to waive the application of the Act in a particular lawsuit would invite a virtual mountain of litigants to file suits to enjoin collection of taxes and ask that the Solicitor General (or other member of the Executive Branch) waive the application of the Anti-Injunction Act, claiming that their case is that "special" case which is so important that the application of the Anti-Injunction Act should be waived. It is doubtful that Congress intended to place such a burden on the courts or that Congress intended to burden the member(s) of the Executive Branch who would have to decide whether to waive the application of the Anti-Inunction Act in each case where such a waiver was sought.

To the best of CFAT's knowledge, there are no Delegation Orders applicable to the Executive Branch which address the question of who would be the person responsible for deciding whether to grant a waiver of the application of the Anti-Injunction Act. Thus, it is not even clear who would have the authority to waive the application of the Anti-Injunction Act if such authority had been granted by Congress.

Second, allowing the Executive Branch to pick and choose which cases in which to apply the Anti-Injunction Act invites political favoritism, or at least the perception of political favoritism, either of which could destroy the fabric of the voluntary compliance system. There is no doubt that the application of the Anti-Injunction Act can work serious hardships at times. *See, e.g., Commissioner v. Shapiro, supra*. But if the Anti-Injunction Act is applied consistently, taxpayers will at least understand that they are all subject to the same rules.

If taxpayers perceive that that the Executive Branch is "playing games" with the application of the Anti-Injunction Act, taxpayers are less likely to remain compliant with the tax laws. Because our system of taxation depends heavily on "voluntary compliance," a decline in the willingness of taxpayers to voluntary comply with the tax laws could have significant adverse consequences for the administration of the tax laws.

For these same reasons, the suggestion by the majority in *Seven Sky v. Holder*, 661 F.3d 1, 33-35 (D.C. Cir. 2011), that the courts defer to the

Executive Branch's interpretation of the Anti-Injunction Act should be rejected. If the Executive Branch has the *de facto* ability to decide when the Anti-Injunction Act applies as the result of courts "deferring" to the Executive Branch's interpretation of that Act, it could result in political favoritism in the administration of the tax laws, or at least the perception of such favoritism. This, in turn, would have an adverse effect on the administration of the tax laws. In this situation, it is appropriate for the courts to have the ultimate say as to what the law is. *Marbury v. Madison*, 5 U.S. 137 (1803).

Both the private litigants and the States argue that the existence of a "judicially created" exception to the Anti-Injunction Act, as set forth in *Enochs v. Williams Packing & Navigation Co., supra,* means that the Anti-Injunction Act is not jurisdictional. CFAT strongly disagrees.

The exceptions to the bar of the Anti-Injunction Act set forth in this Court's opinions are grounded in the Due Process Clause of the Constitution. *See, e.g., Commissioner v. Shapiro, supra,* 424 U.S. at 624-633. The notion that statutes such as the Anti-Injunction Act should be construed in a manner so as to avoid a conflict with the Due Process Clause of the Constitution is not a novel concept. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678 (2001). Accordingly, the arguments raised by the private litigants and the States on this point are without merit.

B. The Purpose For Which The Suit Is Maintained Is Irrelevant For Purposes Of Determining Whether The Anti-Injunction Act Applies

Both the private litigants and the States contend that the Anti-Injunction Act does not bar their suits because they have brought their suits for purposes other than to restrain the assessment or collection of the penalty imposed by section 5000A(b). This Court should reject these arguments for purposes of determining whether the Anti-Injunction Act bars the actions by the private litigants and the States.

Amici who are urging *vacatur* adequately explain why this contention has no merit, *i.e.*, why the motive of a party bringing suit is irrelevant if the effect of the suit is to restrain the assessment or collection of a liability that is subject to the Anti-Injunction Act. CFAT will not repeat here what has already been argued by these *amici*. CFAT merely wishes to point out the adverse effect on the administration of the tax laws that would result if the Court were to accept the arguments advanced by the private litigants and the States.

If taxpayers and other interested parties could avoid the application of the Anti-Injunction Act merely by asserting that their purpose in bringing suit was some purpose other than to restrain the assessment or collection of taxes, then the courts would be flooded with lawsuits filed by taxpayers who claim that they are bringing suit for a purpose other than to restrain the assessment or collection of

a tax, even though the effect of the suit, if successful, would be to restrain the assessment or collection of the tax. Countless numbers of depositions would be taken for the purpose of "ascertaining" the true intent of the parties bringing suit. The courts would become hopelessly bogged down with these types of suits, the vast majority of which would prove to be meritless, to the detriment of those who have bona fide tax (and other) disputes which must be decided by the courts.

The application of the bar of the Anti-Inunction Act should not turn on the creativity of taxpayers and their counsel in developing a "reason" for bringing a suit other than to restrain the assessment or collection of taxes whenever a suit is brought that has the effect of restraining the assessment or collection of taxes. Thus, this particular argument made by the private litigants and the States is untenable.

C. This Court Need Not Decide Whether Penalties Such As The One Imposed By Section 5000A(b) Are Subject To The Anti-Injunction Act In The Same Manner As "Taxes", But If The Court Reaches This Issue, The Penalty Imposed By Section 5000A(b) Should Not Be Exempted From The Application Of The Anti-Injunction Act Merely Because It Is a "Penalty" And Not a "Tax"

Should this Court accept the argument made by CFAT above in parts I B and I C of this brief, this Court need not decide whether penalties such as the one imposed by section 5000A(b) are subject to the Anti-Injunction Act in the same manner as "taxes." CFAT urges the Court to avoid addressing this particular question. If the Court does address the question of whether penalties such as those imposed by section 5000A(b) should be treated like a "tax" for purposes of the Anti-Injunction Act, however, the Court should hold that this penalty is not exempted from the application of the Anti-Injunction Act merely because it is a "penalty" and not a "tax."

CFAT has outlined above in Part IC the reason why this Court should reject this argument. The potential harm to the administration of the tax laws is particularly acute given the textual weaknesses in the United States' argument pointed out by *amici* and by Judge Kavanaugh in his dissent in *Seven Sky*. This Court should not base its holding

on an argument which would, if accepted by the Court, encourage taxpayers to pursue fruitless efforts to enjoin the assessment and collection of tax penalties.

D. This Court Need Only Decide That The Exception To The Anti-Injunction Action In *South Carolina v. Regan* Applies For Purposes of Deciding Whether the Anti-Injunction Act Bars the Suit By The States

This Court, in order to conclude that the Anti-Injunction Act does not bar the suit brought by the States, need decide only that the exception to the Anti-Injunction Act discussed in *South Carolina v. Regan* applies in this case. CFAT supports the States in their efforts to come within the exception to the Anti-Injunction Act contained in *South Carolina v. Regan*. The States should not be deprived of a judicial remedy in this situation. Because the States adequately present this argument in their brief, CFAT will not repeat their arguments here.

CFAT urges the Court to not address any issue beyond the issue of whether the exception to the Anti-Injunction Act contained in *South Carolina v. Regan* applies, an issue which should be resolved in favor of the States. If this Court determines that the exception to the Anti-Injunction Act set forth in *South Carolina v. Regan* does not apply, however, the Court should conclude that the action brought by the States is barred by the Anti-Injunction Act.

CONCLUSION

For the reasons set forth above, this Court should conclude that the action brought by the private litigants is not barred by the Anti-Injunction Act, by virtue of the new exception to the Anti-Injunction act created when Congress enacted the law at issue in this case. This Court should reject all other reasons offered by the private litigants in support of their position that the Anti-Injunction Act does not bar their suit. This Court should further conclude that the suit brought by the States is not barred by the Anti-Injunction Act by virtue of the exception to the Anti-Injunction Act set forth in *South Carolina v. Regan*. This Court should reject all other reasons offered by the States in support of their position that the Anti-Injunction Act does not bar their suit.

Respectfully submitted,

A. LAVAR TAYLOR
(COUNSEL OF RECORD)
ADJUNCT PROFESSOR OF
LAW, CHAPMAN UNIVERSITY
LAW SCHOOL, DIRECTOR,
CENTER FOR THE FAIR
ADMINISTRATION OF TAXES
6 Hutton Centre Drive,
Suite 880,
Santa Ana, CA 92707
(714)546-0445
ltaylor@taylorlaw.com

February 2012

AMICUS CURIAE BRIEF

No. 11-398

In The Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF CHILD ADVOCACY ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS ON THE MINIMUM COVERAGE PROVISION QUESTION

BARBARA B. WOODHOUSE
CHILD RIGHTS PROJECT
EMORY UNIVERSITY
SCHOOL OF LAW
1301 Clifton Road
Atlanta, GA 30322
(404) 727-4934

JEFFREY O. BRAMLETT
Counsel of Record
EMMET J. BONDURANT
MICHAEL A. CAPLAN
BONDURANT, MIXSON & ELMORE LLP
3900 One Atlantic Center
1201 W. Peachtree St., N.W.
Atlanta, GA 30309
(404) 881-4100
bramlett@bmelaw.com

Counsel for Amici Curiae

January 13, 2012

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

A. The Barton Child Law and Policy Center at Emory School of Law 1

B. The Juvenile Law Center 2

C. The University of Florida's Center on Children and Families 3

D. Emory University's Vulnerability and the Human Condition Initiative 4

E. The Child Rights Project 4

F. The Civitas ChildLaw Center of Loyola University Chicago School of Law 5

G. The Health Justice Project at Loyola University Chicago School of Law 6

H. Center for the Human Rights of Children ... 6

INTRODUCTION AND SUMMARY OF ARGUMENT 7

ARGUMENT 11

I. CONGRESS HAS THE POWER UNDER THE COMMERCE CLAUSE TO ENACT THE MINIMUM COVERAGE PROVISION 11

II. PRIOR TO THE ENACTMENT OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT, HEALTH CARE INSURANCE WAS UNAVAILABLE AND UNAFFORDABLE TO MILLIONS OF AMERICANS, INCLUDING CHILDREN.... 13

TABLE OF CONTENTS – Continued

Page

III. THE ACA MAKES QUALITY HEALTH CARE INSURANCE MORE AFFORDABLE AND AVAILABLE FOR CHILDREN 20

A. The ACA extends health care insurance coverage to all children, including children with special health care needs and children aging out of the foster care system 21

1. The ACA increases coverage to children with preexisting conditions and disabilities 22

2. The ACA ensures that all children have access to affordable, quality, essential health care coverage, particularly those children aging out of foster care 25

B. The ACA ensures that all children have access to affordable preventive health care services and programs 28

1. The ACA increases the affordability and availability of preventive health care services for children and their families 28

a. The ACA protects children by making preventive health care for potential, expectant and recent mothers available and affordable 30

TABLE OF CONTENTS – Continued

Page

b. The ACA protects children by making the recommended immunizations available and affordable 32

c. The ACA makes care and screening of children's health available and affordable 34

2. The ACA provides innovative programs to deliver health care to children in their own homes and communities and at their schools ... 37

a. The ACA provides school-based health centers 37

b. The ACA increases funding for home visitation programs 39

c. The ACA provides increased funding for and awareness of childhood obesity initiatives 41

CONCLUSION 43

TABLE OF AUTHORITIES

Page

CASES

Hammer v. Dagenhart, 247 U.S. 251 (1918).....11, 12

United States v. Darby Lumber Co., 312 U.S. 100 (1941).....12

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, sec. VIII, par. I.....12

U.S. Const. art. I, sec. VIII, par. III.....11

U.S. Const. art. I, sec. VIII, par. XVIII.....12

FEDERAL STATUTES

The Children's Health Insurance Program Reauthorization Act of 2009 ("CHIPRA"), Pub. L. No. 111-3, 123 Stat. 8 (2009).....15

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA").....7, 12

Transitional Independent Living Program for Old Foster Children, Pub. L. No. 99-272 § 12307 (1986).....26

18 U.S.C. § 2251-60.....12

42 U.S.C. § 280h-4.....37

42 U.S.C. § 280h-5.....37

42 U.S.C. § 293k.....20

42 U.S.C. § 293k-2.....20

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 300gg 20, 24
42 U.S.C. § 300gg-13 ..... 28, 29
42 U.S.C. § 300u-11 20
42 U.S.C. § 300u-12 42
42 U.S.C. § 300u-12(i) 42
42 U.S.C. § 622(b)(15)(A) 27
42 U.S.C. § 675(5)(H) 27
42 U.S.C. § 677(b)(3) 27
42 U.S.C. § 711 39
42 U.S.C. § 711(d)(3)(A)(i)(I) 40
42 U.S.C. § 711(d)(3)(A)(i)(II) 40
42 U.S.C. § 711(d)(3)(A)(ii) 40
42 U.S.C. § 1320b-9a(e)(1) 42
42 U.S.C. § 1320b-9a(e)(3)(A)(i)-(iii) 42
42 U.S.C. § 1320b-9a(e)(3)(B)-(D) 42
42 U.S.C. § 1320b-9a(e)(8) 42
42 U.S.C. § 1396a(a) 27
42 U.S.C. § 1396(a)(10)(A)(i)(IX) 21
42 U.S.C. § 1397(dd)-(ee) 21
42 U.S.C. § 2707 21
42 U.S.C. § 18031 20
42 U.S.C. § 18044 20
42 U.S.C. § 18083 20

TABLE OF AUTHORITIES – Continued

Page

42 C.F.R. pt. 457 (2010) 16

74 Fed. Reg. 4199, 4200 (January 23, 2009) 14

CONGRESSIONAL MATERIALS

CBO's March 2011 Estimate of the Effects of the Insurance Coverage Provisions Contained In the Patient Protection and Affordable Care Act 1 (Mar. 18, 2011) 13

ADMINISTRATIVE MATERIALS

AFCARS Report – Preliminary FY 2010 Estimates as of June 2011 (18), Administration for Children & Families, Department of Health & Human Services, *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report18.htm 26

Affordable Care Act for Americans with Disabilities, HealthCare.gov (Nov. 16, 2010) 23, 24

Catalyst Center, Affordable Care Act: A Side-by-Side Comparison of Major Provisions and the Implications for Children and Youth with Special Health Care Needs (Feb. 2011) 23, 24, 25

Center for Disease Control and Prevention, General Recommendation on Immunization (Jan. 2011) 32

Centers for Disease Control and Prevention, Report to Congress on Section 317 immunization program (2009) 33

TABLE OF AUTHORITIES – Continued

Page

Centers for Medicare and Medicaid Services, Medicare & Medicaid Services, *Children's Health Insurance Program (CHIP)* 15

Children's Defense Fund, *Who Are the Uninsured Children: Profile of America's Uninsured Children* (Jan. 2011) 14

Families with Children and the Affordable Care Act, HealthCare.gov, http://www.healthcare.gov/news/factsheets/2011/08/families.html 24

The Fostering Connections to Success and Increasing Adoptions Act of 2008 27

Health Resources and Services Administration, United States Preventive Services Task Force, USPTF A and B Recommendations (2010) 31

Health Resources and Services Administration, Women's Preventive Services: Required Health Plan Coverage Guidelines (2011) 31

Healthy Youth! Student Health and Academic Achievement, Centers for Disease Control and Prevention (last updated Nov. 4, 2011) 38

Henry J. Kaiser Family Foundation, *Medicaid and Children's Health Insurance Provisions in the New Health Reform Law* (Apr. 7, 2010) 14

HHS Announces New Investment in School-Based Health Centers, U.S. Department of Health & Human Services (2011) 39

TABLE OF AUTHORITIES – Continued

Page

Immunize Action Coalition, Unprotected People Reports (2011) 33

Kaiser Commission on Medicaid and the Uninsured, *Where are States Today? Medicaid and CHIP Eligibility Levels for Child and Non-Disabled Adults* (2011) 16

Nat'l Ass'n of County & City Health Officials, *Health Reform and Local Health Departments Webinar* (Apr. 13, 2010) 21

Periodicity Schedule of the Bright Futures Recommendations for Pediatric Preventive Health Care (2011) 34, 35

Uniform Panel of the Secretary's Advisory Committee on Heritable Disorders in Newborns and Children (2011) 34, 35

OTHER AUTHORITIES

Andy Schneider et al., The Kaiser Commission on Medicaid and the Uninsured, *The Medicaid Resource Book* at 131 (2002) 14

Anna C. Spencer, *Express Lanes, Premium Assistance and Contingency Funds: The New Provisions in CHIPRA,* 30 STATE HEALTH NOTES 541 (Jun. 22, 2009) 16, 17

Barbara Bennett Woodhouse, *Who Owns the Child?:* Meyer *and* Pierce *and the Child as Property,* 33 WM. & MARY L. REV. 995 (1992) 12

TABLE OF AUTHORITIES – Continued

Page

Barbara S. Klees et al., Office of Retirement and Disability Policy, *Annual Statistical Supplement* (Nov. 1, 2010) 15

Bonnie B. Strickland et al., *Access to the Medical Home: New Findings from the 2005-2006 National Survey of Children with Special Health Care Needs*, 123 PEDIATRICS e996 (2009) 19

Bruce Perry, *Childhood Experience and Expression of Genetic Potential: What Childhood Neglect Tells Us About Nature and Nurture*, 3 Brain and Mind 79 (2002) 30

Burton L. Edelstein & David A. Albert, *Columbia Commentary: The Boy Who Died From a Toothache* (2009) 35

Charles E. Irwin et al., *Preventive Care for Adolescents: Few Get Visits and Fewer Get Services*, 123 PEDIATRICS e565 (2009) 36

Charlotte Lewis et al., *Dental Insurance and its Impact on Preventive Dental Care Visits for U.S. Children*, 138 J. OF THE AM. DENTAL ASS'N 369 (2007) 35

Claire Hannan et al., *Maintaining the Vaccine Safety Net*, 124 PEDIATRICS S571 (2009) 33

David W. Kaplan et al., *Managed Care and School-Based Health Centers*, 152 ARCH. PEDIATRICS & ADOLESCENT MEDICINE 25 (1998) 38

TABLE OF AUTHORITIES – Continued

Page

Denise K. Thompson, *The Patient Protection and Affordable Care Act of 2010 (PL 111-148): An Analysis of Maternal-Child Health Home Visitation*, 12 POLICY POLITICS & NURSING PRACTICE 175 (Oct. 2011) 40

Frank M. Biro & Michelle Wien, *Childhood Obesity and Adult Morbidities*, 91 AM. J. CLIN. NUTR. 1499S (2010) 41

G. Solanki & H.H. Schauffler, *Cost-sharing and the Utilization of Clinical Preventive Services*, 17 AM. J. PREV. MED. 127 (1999) 34

Gary Claxton et al., Kaiser Family Foundation and Health Research & Educational Trust, *Employer Health Benefits 2011 Annual Survey* (2011) 17

Genevieve M. Kenney & Stan Dorn, Health Policy Center of the Urban Institute, *Health Care Reform for Children with Public Coverage: How Can Policymakers Maximize Gains & Prevent Harm? Timely Analysis of Immediate Health Policy Issues* (2009) 17, 18, 25

Jack Hadley, *Sicker and Poorer – The Consequences of Being Uninsured: A Review of the Research on the Relationship Between Health Insurance, Medical Care Use, Health, Work and Income*, 60 MEDICAL CARE RESEARCH AND REVIEW 3S (2003) 31

TABLE OF AUTHORITIES – Continued

Page

Janet Currie et al., *Has Public Health Insurance for Older Children Reduced Disparities in Access to Care and Health Outcomes?*, 27 JOURNAL OF HEALTH ECONOMICS 1567 (2008) 28

John Reiss & Robert Gibson, *Health Care Transition: Destination Unknown*, 110 PEDIATRICS 1307 (2002).....25

John Reiss, Robert Gibson & Leslie Walker, *Health Care Transition: Youth, Family, and Provider Perspectives*, 115 PEDIATRICS 112 (2005).....26

John Santelli et al., *School-Based Health Centers and Adolescent Use of Primary Care and Hospital Care*, 19 J. OF ADOLESCENT HEALTH 267 (1996) 38

Jonathan Gruber, *The Role of Consumer Copayments for Health Care: Lessons From the Rand Health Insurance Experiment and Beyond*, Kaiser Family Foundation (2006) 34

Judith S. Palfrey, *How Health Care Reform Can Benefit Children and Adolescents*, 34 NEW ENG. J. MED. 361:e34 (Oct. 22, 2009).....17

Kathleen Farrell et al., National Academy for State Health Policy for the Catalyst Center, *The ACA and Children with Special Health Care Needs: An Analysis and Steps for State Policymakers* (Jan. 2011) .....*passim*

TABLE OF AUTHORITIES – Continued

Page

Kristine Goodwin et al., *The Children's Health Insurance Program: A Primer for State Legislatures* (2009) 15, 16

Lawrence B. Finer & Stanley K. Henshaw, *Disparities in rates of unintended pregnancy in the United States, 1994 and 2001*, 38 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 90 (2006) 32

Lenette Azzi-Lessing, *Home Visitation Programs: Critical Issues and Future Directions*, 25 EARLY CHILDHOOD RESEARCH QUARTERLY 387 (2011) 40

Mandy A. Allison et al., *School-Based Health Centers: Improving Access and Quality of Care for Low-Income Adolescents*, 120 PEDIATRICS 887 (2007) 37

Mark D. Simms et al., *Health Care Needs of Children in the Foster Care System*, 106 Pediatrics 909 (2000) 26

Martha Heberlein et al., Kaiser Commission on Medicaid and the Uninsured & Georgetown University Center for Children and Families, *Holding Steady, Looking Ahead: Annual Findings of a 50-State Survey of Eligibility Rules, Enrollment and Renewal Procedures, and Cost-Sharing Practices in Medicaid and CHIP* (2010) 16

Mary Ann Baily & Thomas H. Murray, *Ethics, Evidence, and Cost in Newborn Screening*, 38 HASTINGS CENTER REPORT 23 (2008) 36

TABLE OF AUTHORITIES – Continued

Page

Megan C. Lindley et al., *National Vaccine Advisory Committee Report: Financing the Delivery of Vaccines to Children and Adolescents: Challenges to the Current System,* 124 PEDIATRICS S548 (2009) 34

Miles A. McNall, *The Impact of School-Based Health Centers on the Health Outcomes of Middle School and High School Students,* 100 AM. J. PUBLIC HEALTH 1604 (2010) 38

Paul H. Wise, *Transforming Preconceptional, Prenatal, and Interconceptional Care Into a Comprehensive Commitment to Women's Health,* 18 WOMEN'S HEALTH ISSUES S13 (2008) 30, 31

Philip J. Smith et al., *Associations Between Childhood Vaccination Coverage, Insurance Type, and Breaks in Health Insurance Coverage,* 6 PEDIATRICS 1972 (2006) 33

Richard P. Barth, *On Their Own: The Experiences of Youth After Foster Care,* 7 CHILD AND ADOLESCENT SOCIAL WORK 419 (1990) 26

R.E. Behrman & A.S. Butler, *Preterm birth: Causes, consequences, in prevention,* National Academics Press (2007) 31

Robin Mekonnen et al., *Achieving Better Health Care Outcomes for Children in Foster Care,* 56 Pediatric Clinics of North America 405 (2009) 26

TABLE OF AUTHORITIES – Continued

Page

Steven A. Haas et al., *Health and the Educational Attainment of Adolescents: Evidence from the NLSY97*, 49 J. HEALTH SOC. BEHAV. 178 (2008) 38

Thomas R. Frieden et al., *Reducing Childhood Obesity Through Policy Change: Acting Now to Prevent Obesity*, 29 HEALTH AFF. 357 (2010) 41

BRIEF OF CHILD ADVOCACY ORGANIZATIONS AS *AMICI CURIAE*

This brief is submitted on behalf of various child advocacy centers and child health projects for the purpose of informing the Court about the perspective of children in this case.[1]

INTEREST OF *AMICI CURIAE*

A. The Barton Child Law and Policy Center at Emory School of Law

The Barton Child Law & Policy Center is a clinical program of Emory Law School dedicated to promoting and protecting the legal rights and interests of children involved with the juvenile court, child welfare and juvenile justice systems in Georgia. The Center achieves its reform objectives through research-based policy development, legislative advocacy, and holistic legal representation for individual clients. The Barton Center's children's rights agenda is based on the belief that policy and law should be informed by research and that legal service to children and families need to be holistic. The premise

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

behind representing the "whole" child exists at the core of the Barton Center's mission and our approach to student instruction. That basis recognizes that children should be viewed in their social and familial contexts and provided with individualized services to protect their legal rights, respond to their human needs, and ameliorate the social conditions that create risk. The Barton Center adopts an interdisciplinary, collaborative approach to achieving justice for youth.

The Barton Center has engaged in policy and legislative advocacy to promote children's rights since it was founded in March 2000. The Barton Center currently houses the Barton Public Policy and Legislative Advocacy Clinic, the Barton Juvenile Defender Clinic, and the Appeal for Youth Clinic, allowing us to provide a voice for youth issues through individual representation and systemic reform advocacy. Legal services provided by the Barton Center are provided at no cost to our clients. The work of the Barton Center is funded by Emory Law School, private gifts, foundation grants, and contracts with a variety of organizations.

B. The Juvenile Law Center

The Juvenile Law Center, founded in 1975, is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent

harm, and ensure access to appropriate services. Recognizing the critical developmental differences between youth and adults, Juvenile Law Center works to ensure that the child welfare, juvenile justice, and other public systems provide vulnerable children with the protection and services they need to become healthy and productive adults. Juvenile Law Center works to ensure that the juvenile justice and child welfare systems be used only when necessary and that children and families served by those systems receive high-quality and evidence-based physical and mental health care and that those services be provided in the community whenever possible. Juvenile Law Center participates as *amici curiae* in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children.

C. The University of Florida's Center on Children and Families

The Center on Children and Families (CCF) at the University of Florida Fredric G. Levin College of Law in Gainesville, Florida is an organization whose mission is to promote the highest quality teaching, research and advocacy for children and their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered,

evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and youth in a variety of settings, including the Virgil Hawkins Civil Clinics and Gator Team Child juvenile law clinic.

D. Emory University's Vulnerability and the Human Condition Initiative

The Vulnerability and the Human Condition Initiative (VHC) is located at Emory University in Atlanta, Georgia. VHC supports interdisciplinary research exploring the nature and policy implications of human and institutional vulnerability. Scholars associated with the Initiative are experts in health, poverty, family and children's law, constitutional law, criminal law, and juvenile justice, as well as general areas such as torts and contracts. Of particular concern to VHC scholars are the ways in which responses to shared human vulnerability are structured through the creation of societal institutions, particularly when such institutional arrangements privilege some and disadvantage others. VHC has national and international affiliations and hosts visiting scholars from around the world, as well as holding several yearly workshops and conferences.

E. The Child Rights Project

The Child Rights Project (CRP) is a project of Emory Law School engaging students in researching

and writing friend of the court briefs in cases of importance to children and youth. Its mission is to highlight for the judiciary and the public the often unanticipated impact of court decisions on children, our most vulnerable citizens. The CRP's goal is to train new generations of lawyers in multidisciplinary research and advocacy. The CRP collaborates with distinguished law firms to provide pro bono representation to an underserved population. Leadership of the CRP has over twenty-five years of experience in appellate advocacy on behalf of children.

F. The Civitas ChildLaw Center of Loyola University Chicago School of Law

The Civitas ChildLaw Center is a program of the Loyola University Chicago School of Law, whose mission is to train law students, attorneys and child welfare professionals to be effective advocates for children, to influence policy and legislative reforms to improve the lives of children and families, and to promote justice for children and families through interdisciplinary teaching, scholarship and service. The ChildLaw Policy Institute, within the ChildLaw Center, works to promote child-centered laws, policies and practices, and focuses on a broad range of policy projects designed to improve children's health, safety, and well-being and maintains an interest in the policies and practices at the state and federal level that impact children and youth, including those aging out of foster care. Among the faculty of the ChildLaw Center are academics, lawyers and scholars who have

litigated, taught, consulted and written extensively in the area of child and family well-being for several decades.

G. The Health Justice Project at Loyola University Chicago School of Law

The Health Justice Project at Loyola University Chicago School of Law is a medical-legal partnership in which law students and attorneys collaborate with social workers, public health students, and community health care providers to identify and address social and legal issues that negatively impact the health of low-income patients. Once identified, law students and pro bono attorneys in the Health Justice Project provide legal representation, advice, and referrals to remedy the legal and social issues that negatively impact health. Advanced Health Justice Policy, within the Health Justice Project, focuses on policy projects designed to improve the health of vulnerable, low-income populations. Among the faculty of the Health Justice Project are academics and lawyers who have litigated, taught, consulted, and written in the area of health of low-income populations.

H. Center for the Human Rights of Children

The Center for the Human Rights of Children (CHRC) is a University Center of Excellence at Loyola University Chicago, whose mission is to represent, coordinate, and stimulate efforts to understand,

protect and apply the human rights of children. The CHRC focuses on a broad range of projects and initiatives advancing children's political, social, economic, and civil rights, and maintains a particular interest in policies and practices at the state and federal level that impact access to appropriate services to advance children's health and well-being. Among the affiliated faculty of the CHRC are scholars who have taught, consulted, advocated, and written extensively in the area of child rights, and child and family health and well-being for several decades.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA") extends and expands the delivery of health care of vital importance to America's children. The minimum coverage provision enacted by elected policy makers ensures that its comprehensive reforms to the health insurance system are feasible and sustainable.

Unlike adults, children have little or no control over their access to care or the purchase of health insurance. Prior to the enactment of the ACA, health care insurance was unavailable and unaffordable to millions of Americans, including children. A primary purpose of the ACA is to ensure that quality and affordable health care would be accessible to the most vulnerable populations, including children. Despite

programs such as Medicaid and CHIP, an estimated half of children with special health care needs lacked access to the type of comprehensive health care necessary to promote optimal child outcomes. Private health insurance had become ever more expensive and increasingly narrow, leaving families unable to afford or unable to obtain insurance because children were disqualified as a result of preexisting conditions or caps on coverage.

The ACA reflects a series of legislative policy choices addressing the commercial insurance market's failure to provide an affordable health care insurance product for many children and their families. It enables parents to access affordable coverage through health "exchanges," and it increases access to "child-only" policies to assure all children are covered. It forbids job-based health plans and new individual plans to deny coverage for children under age 19 based on a preexisting condition, including a disability.

The ACA also increases access to insurance for young adults. For children with special health care needs transitioning from child to adult care, this regulatory intervention into the insurance markets facilitates the delivery of essential continuous care. In addition, the ACA includes special provisions to assure continuity of coverage for youth who are leaving the foster care system. Aging out of foster care often means aging out of health care, a gap that is particularly onerous for foster care youth because

half of all foster care youth have chronic medical problems.

The ACA enhances the accessibility of preventive care by prohibiting insurers from placing cost-sharing requirements on certain forms of preventive care. The ACA recognizes that prenatal care for mothers is an essential element in assuring a child's healthy development. Indeed, the health of the mother impacts the child for life because the vast majority of brain cells are formed in utero in the second and third trimesters. The elected policy makers' decision to expand insurance coverage for women's preventive health care secures healthier infant birth weights and diminishes rates of disability and morbidity. The ACA provides for screenings and services that span the preconception, prenatal, and postpartum periods.

The ACA also makes recommended immunizations against childhood diseases more available and affordable. The ACA requires health insurance providers to make available, at no additional cost, evidence-informed preventive care and screenings for infants, children, and adolescents. Preventive health care measures range from screening for developmental delays and obesity screening to drug and alcohol abuse counseling. ACA preventive care also extends to oral health risk assessment and appropriate follow-up care. The ACA also makes early detection and screening of children's health status more available and affordable. The screenings provided for by ACA promote early detection and treatment of heritable

disorders in newborns and children, and saves children's lives.

The ACA provides for innovative programs to deliver health care to children in their own homes and communities and at their schools. The ACA provides school-based health centers to deliver convenient, quality care to children. It recognizes that education and health are closely linked. Children who suffer from health problems are substantially less likely to complete high school and transition to post-secondary education. School-based health centers increase access to health care for many of those who need it most, including underserved adolescents, a population long considered difficult to reach.

The ACA provides for home visitation programs. Home visitation has been recognized for its potential to foster early child development and competent parenting, as well as to reduce risk for child abuse and neglect and other poor outcomes for vulnerable families. ACA funding helps to jumpstart promising initiatives in maternal and early childhood health, the benefits of which are long-term and substantial. The judicial removal of such provisions would be to the detriment of state-based early childhood home visitation programs across the country and would destroy many opportunities for further research.

Recognizing a growing problem that threatens the health of our citizenry, the ACA also provides funding for efforts to combat childhood obesity. Grants to schools, recreation facilities, daycare

facilities, and other community organizations, as well as programs aimed at parents and educators, will have long-term and substantive benefits.

The ACA represents a leap forward in children's access to affordable quality health care. Its expansion of health care delivery to children generally, and especially to those with special health care needs, is a rational and appropriate policy decision well within Congress' power under the Commerce Clause to regulate the nationwide market for health services and to address the market's failure to advance and to protect the health of America's children.

ARGUMENT

I. CONGRESS HAS THE POWER UNDER THE COMMERCE CLAUSE TO ENACT THE MINIMUM COVERAGE PROVISION.

This is not the first instance in which the Court has been asked to curtail an effort by Congress to address the vital interests of children through the exercise of its Commerce Clause powers. *See* U.S. Const. art. I, sec. VIII, par. III. In 1918, the Court was invited to invalidate federal legislation regulating the hours and working conditions of child laborers. The Court concluded that Congress lacked the power to address the exploitation of America's children in factories, mines and mills. *Hammer v. Dagenhart*, 247 U.S. 251 (1918). Justice Holmes, in

dissent, wrote: "[I]f there is any matter upon which civilized countries have agreed . . . it is the evil of premature and excessive child labor. . . . It is not for this Court to pronounce when . . . [regulation] is permissible as against strong drink but not as against the product of ruined lives." *Hammer*, 247 U.S. at 280. The Holmes dissent ultimately prevailed. The Court recognized its error – twenty-three years later – in *United States v. Darby Lumber Co.*, 312 U.S. 100, 115 (1941).

Legislative authority to protect children under the Commerce Clause is not limited to child labor laws.[2] Children deprived today of adequate health care, much like Reuben Dagenhart – whose health was destroyed by breathing dust and shouldering heavy loads as a child – are condemned to live with the life-long consequences of decisions made by others. Barbara Bennett Woodhouse, *Who Owns the Child?*: Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 114-115 & n. 653 (1992).

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA") is of special importance to the nation's children. The Congressional Budget Office has projected that the

---

[2] *See, e.g.*, 18 U.S.C. § 2251-60 (federal laws against child pornography and child sex exploitation). In addition to the Commerce Clause, *amici* believe that the ACA is a proper exercise of other legislative authority conferred by Article I of the Constitution, including Congress' powers under the taxing, spending, and necessary-and-proper clauses. *See* U.S. Const. art. I, sec. VIII, par. I & par. XVIII.

ACA will reduce the number of non-elderly individuals without insurance by about 33 million by 2017. *CBO's March 2011 Estimate of the Effects of the Insurance Coverage Provisions Contained In the Patient Protection and Affordable Care Act* 1 (Mar. 18, 2011). The elected policy makers who enacted this legislation acted within the scope of their constitutional authority to advance and to protect the health and wellbeing of America's children.

II. PRIOR TO THE ENACTMENT OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT, HEALTH CARE INSURANCE WAS UNAVAILABLE AND UNAFFORDABLE TO MILLIONS OF AMERICANS, INCLUDING CHILDREN.

Congress passed the ACA to address a cluster of severe societal problems caused by the inability of millions of Americans to afford health insurance or to obtain necessary health care. Among Congress's primary concerns was the health and wellbeing of children, who are especially vulnerable due to their inability to purchase health care themselves or to make mature decisions regarding their health. Children rely entirely on adults to procure health insurance for them, but for many families, affordable health care insurance for their children has not, until now, been within their financial means. As a result, children have been left without necessary preventive treatment and medical care.

In 2009, nearly eight million children did not have health insurance. Children's Defense Fund, *Who Are the Uninsured Children: Profile of America's Uninsured Children* 1 (Jan. 2011). Of those eight million children, 68.2 percent came from families with incomes greater than 100 percent of the federal poverty line.[3] *Id.* Consequently, those families earned too much to qualify for government-funded health care coverage, but too little to afford private insurance. The remaining 31.8 percent of children came from families with incomes at or below 100 percent of the federal poverty line. *Id.* For those children, Medicaid, a state and federally funded cooperative health care program, provided subsidized or extremely low-cost health care. Henry J. Kaiser Family Foundation, *Medicaid and Children's Health Insurance Provisions in the New Health Reform Law* 1 (Apr. 7, 2010).

Until recently, Medicaid only covered children under the age of six with family incomes below 133 percent of the federal poverty line and children age 6 to 18 with family incomes below 100 percent of the federal poverty line. Andy Schneider et al., The Kaiser Commission on Medicaid and the Uninsured, *The Medicaid Resource Book* at 131 (2002). Medicaid is jointly funded by state and federal governments, but each state administers its own Medicaid program. Federal oversight of state-run programs is administered by the Centers for Medicare and Medicaid

---

[3] In 2009, a family of four living at the federal poverty line earned an annual income of $22,050. 74 Fed. Reg. 4199, 4200 (January 23, 2009).

Services, which also establishes eligibility standards and requirements for service, including delivery, quality, and funding. Barbara S. Klees et al., Office of Retirement and Disability Policy, *Annual Statistical Supplement* (Nov. 1, 2010).

Before the adoption of ACA, Congress tried temporarily and unsuccessfully to subsidize families with modest incomes who did not qualify for Medicaid assistance. Children whose family incomes exceed the eligibility standards for Medicaid may be eligible to receive benefits through Children's Health Insurance Programs ("CHIPs"), which are administered by the Department of Health and Human Services. Like Medicaid, CHIPs are jointly funded by state and federal governments, and limited oversight is conducted by the Centers for Medicare and Medicaid Services, Medicare & Medicaid Services. *Children's Health Insurance Program (CHIP), available at* http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Childrens-Health-Insurance-Program-CHIP/Childrens-Health-Insurance-Program-CHIP.html (last visited January 10, 2012). Broad federal guidelines have yielded inconsistent state-by-state applications, with each state having a different system. Kristine Goodwin et al., *The Children's Health Insurance Program: A Primer for State Legislatures* at 2 (2009). All fifty states and the District of Columbia operate CHIPs. *Id.*

The Children's Health Insurance Program Reauthorization Act of 2009 ("CHIPRA"), Pub. L. No. 111-3, 123 Stat. 8 (2009) reauthorized CHIPs to extend

benefits to fiscal year 2013. Anna C. Spencer, *Express Lanes, Premium Assistance and Contingency Funds: The New Provisions in CHIPRA*, 30 STATE HEALTH NOTES 541 (June 22, 2009). CHIPRA allowed the states to expand their Medicaid programs, to combine CHIPs with current Medicaid programs, or to create separate CHIPs. *See* Goodwin, *supra* at 11. A state which created a separate CHIP may also impose cost-sharing, tailor their benefit packages, and employ flexibility in eligibility and enrollment matters. 42 C.F.R. pt. 457 (2010).

After CHIPRA, 12 states and the District of Columbia expanded their Medicaid programs, 21 states combined CHIPs with Medicaid, and 17 states created separate CHIPs. Martha Heberlein et al., Kaiser Commission on Medicaid and the Uninsured & Georgetown University Center for Children and Families, *Holding Steady, Looking Ahead: Annual Findings of a 50-State Survey of Eligibility Rules, Enrollment and Renewal Procedures, and Cost-Sharing Practices in Medicaid and CHIP* at 29 (2010). As of January 2011, half of the states increased the amount of children they cover and provided affordable coverage options to children in families with income at or above 250 percent of the federal poverty line. Kaiser Commission on Medicaid and the Uninsured, *Where are States Today? Medicaid and CHIP Eligibility Levels for Child and Non-Disabled Adults* at 1 (2011). Four states expanded the eligibility threshold to less than 200 percent of the federal poverty line. *Id.*

CHIPRA has allowed the states to make children's health care more affordable and available. However, CHIPRA is only authorized to continue through 2013. Spencer, *supra* at 541. Even with the expansions permitted by CHIPRA, five million to six million children may remain uninsured because of eligibility requirements and the unaffordability of private insurance. Judith S. Palfrey, *How Health Care Reform Can Benefit Children and Adolescents*, 34 NEW ENG. J. MED. 361:e34 (Oct. 22, 2009).

Pre-ACA efforts to facilitate affordable and quality health care for children proved, in the judgment of Congress, inadequate. CHIPs assist many low-income families with providing children with the health care they need. However, non-qualifying families must continue to rely on private insurance or employer-sponsored plans, which are often unaffordable and insufficiently comprehensive. Between 2009 and 2011, the cost of maintaining private health insurance skyrocketed. Total premiums for families with employer-sponsored plans increased from $5,791 to $15,073, an increase of over $9,000. Gary Claxton et al., Kaiser Family Foundation and Health Research & Educational Trust, *Employer Health Benefits 2011 Annual Survey* at 13 (2011).

Private insurance coverage also requires significantly more out-of-pocket costs, such as co-payments, coinsurance, and deductibles. Genevieve M. Kenney & Stan Dorn, Health Policy Center of the Urban Institute, *Health Care Reform for Children with Public Coverage: How Can Policymakers Maximize*

Gains & Prevent Harm? Timely Analysis of Immediate Health Policy Issues at 3 (2009). Prior to the adoption of ACA, such plans also included both annual and lifetime caps on covered benefits, requiring families to pay very high costs if children experience serious health problems. *Id.* at 5. Additionally, private insurance has often been narrower than what is offered by public insurance, and thus often has not included critical preventive and early diagnosis care, a medical necessity that promotes the healthy physical, behavioral, and emotional development of children. *Id.* at 3.

In 2005, despite the limited availability of Medicare and CHIPs assistance, over 12 percent of children with special health care needs were uninsured for some period of time during that year. Kathleen Farrell et al., National Academy for State Health Policy for the Catalyst Center, *The ACA and Children with Special Health Care Needs: An Analysis and Steps for State Policymakers* at 9 (Jan. 2011). Gaps in coverage are particularly problematic for children with special health care needs:

> Approximately one of every seven children under 18 years of age, or 14 percent of children in the United States, has a special health care need. Children with special health care needs have or are at increased risk for a chronic physical, developmental, behavioral, or emotional condition and also require health and related services of a type or amount far greater than required by children generally . . . With advances in medical

> treatment, children with some of the most complex conditions are now surviving well into adulthood, so that transition from child to adult coverage systems has become a critical issue.

Id. at 8.

Children with special health care needs often demand such a high level of care that parents must quit their jobs to care for their children. This can result in reduced income or loss of employer-based insurance. *Id.* at 10.

One study found that, "[a]lthough most [children with special health care needs] have a usual source of care, some do not, and approximately one half do not have access to the type of comprehensive health care necessary to promote optimal child outcomes." Bonnie B. Strickland et al., *Access to the Medical Home: New Findings from the 2005-2006 National Survey of Children with Special Health Care Needs*, 123 PEDIATRICS e996, e1001 (2009). "These findings reinforce the need to continue and to expand federal, state, and community efforts to eliminate disparities in access to care." *Id.* This myriad of gaps in coverage for children contributed to Congress' decision to finally address the dire problems existing in health care with the ACA.

III. THE ACA MAKES QUALITY HEALTH CARE INSURANCE MORE AFFORDABLE AND AVAILABLE FOR CHILDREN.

The ACA helps to fill the gaps that exist in health care coverage for children and their families. The ACA includes many provisions that recognize the special vulnerability of children and ensures the provision of affordable and quality health care for children.

In providing access to health care, the ACA prohibits health insurers from excluding coverage of preexisting conditions for children. 42 U.S.C. § 300gg. It also seeks to remedy the lack of children's health care services in private health care plans by requiring basic pediatric services under all plans, including oral and vision care. 42 U.S.C. § 293k. Further, the ACA also requires health insurers to cover low-cost preventive services. 42 U.S.C. § 300u-11.

In addition to requiring basic pediatric services and preventive care, the ACA expands the health care workforce to include more pediatric professionals. 42 U.S.C. §§ 293k, 293k-2. For families without job-based coverage, the ACA allows those families to opt-in to allow their children to receive health care services. The ACA provides a tax credit to families who would otherwise be unable to afford insurance through state-based health insurance "exchanges." 42 U.S.C. §§ 18031, 18044, 18083. The exchanges are designed to foster competition and increase consumer choice, allowing for better coverage and

lower expenses. Nat'l Ass'n of County & City Health Officials, *Health Reform and Local Health Departments Webinar* (Apr. 13, 2010), *available at* http://www.naccho.org/advocacy/healthreform/aca.cfm (last visited January 10, 2012). The ACA also ensures that children will have access to affordable child-only insurance policies, regardless of whether their parent moves, changes jobs, leaves a job, or becomes disabled. 42 U.S.C. § 2707.

For children who rely on government-funded health care programs, such as Medicaid and CHIP, the ACA expands the provision of public medical services. The ACA extends federal funding of CHIPs for an additional two years to September 30, 2015, and provides states with additional funding to ensure children have access to this proven successful program. 42 U.S.C. §§ 1397(dd)-(ee). The Act provides health care insurance for children aging out of foster care, making mandatory the current State option to extend Medicaid coverage up to age 26 to foster children who have aged out of the foster care system. 42 U.S.C. § 1396(a)(10)(A)(i)(IX).

A. The ACA extends health care insurance coverage to all children, including children with special health care needs and children aging out of the foster care system.

The ACA provides significant benefits to children with special health care needs and children aging out of the foster care system, children who are uniquely

vulnerable and have been historically deprived of needed health care services. The ACA assists these groups with the crippling costs of health care. Assisting with these costs earlier in life can often lower the burden that these groups place on health care providers and insurers later in life if they are not properly treated at a young age. A ruling that eliminates these benefits in the ACA would be detrimental to children with special health care needs and children aging out of foster care.

1. The ACA increases coverage to children with preexisting conditions and disabilities.

The enactment of the ACA had powerful and important implications for children with preexisting conditions and children with disabilities. These children are often referred to as children with special health care needs. In January 2011, the National Academy for State Health Policy for the Catalyst Center urged lawmakers to pass the ACA in order to address the needs of the "approximately 10.2 million children with special health care needs in this country, with a wide array of diagnoses." Farrell, *supra* at 8. For children with special health care needs, costly and comprehensive care is often necessary. The ACA protects children with special health care needs by preventing insurers from capping benefits and mandating that essential benefits are provided. "The Affordable Care Act prohibits health plans from putting a lifetime dollar limit on most benefits . . .

and does away with these limits entirely in 2014." *Affordable Care Act for Americans with Disabilities,* HealthCare.gov, *http://www.healthcare.gov/news/fact sheets/2010/11/affordabale-care-act-americans-disabilities.html*; *see also Catalyst Center, Affordable Care Act: A Side-by-Side Comparison of Major Provisions and the Implications for Children and Youth with Special Health Care Needs* (Feb. 2011). According to the article released by the National Academy for State Health Policy, "Over 33 percent of families of [children with special health care needs] report their health coverage is inadequate in regard to whether their children can see the providers they need, whether needed benefits are covered, and whether uncovered costs are reasonable." Farrell, *supra* at 9.

The ACA addresses this need in part by mandating that insurers cover certain essential benefits, including ambulatory patient services, emergency services, hospitalization, laboratory services, maternity and newborn care, pediatric services including oral and vision care, preventive and wellness services, as well as chronic disease management, rehabilitative and habilitative services and devices, prescription drugs, and mental health and substance abuse services. *Affordable Care Act: A Side-by-Side Comparison,* supra at 7. The minimum coverage provision is an integral part of the law and makes this scheme feasible. Without the minimum coverage provision, these provisions of vital importance to children with special health care needs will fail and these protections will be lost.

The ACA increases access to health care for children with special health care needs, specifically those with preexisting conditions who have historically been denied coverage. The cost of care for these children can be crippling for a family if the child is denied insurance due to the child's preexisting condition. Under the ACA, "Job-based health plans and new individual plans are no longer allowed to deny or exclude coverage for [children under age 19] based on a preexisting condition, including a disability." *Families with Children and the Affordable Care Act*, HealthCare.gov, http://www.healthcare.gov/news/factsheets/2011/08/families.html (last visited Jan. 10, 2012); *see also Affordable Care Act: A Side-by-Side Comparison, supra* at 4; 42 U.S.C. § 300gg. This provision carries great importance for children with special health care needs. In 2008, insurers denied over 20,000 children's applications due to preexisting conditions. *Affordable Care Act: A Side-by-Side Comparison, supra* at 4. Farrell, *supra* at 14. The ACA increases access to preventive care for children with special health care needs by ensuring that those under 19 are not denied coverage. This investment in preventive care can lower costs to public and private insurers as well as individuals by decreasing the need for costly treatments for illness and disease that have gone untreated. *Affordable Care Act for Americans with Disabilities*, HealthCare.gov (Nov. 16, 2010), (last visited Jan. 10, 2012), http://www.healthcare.gov/news/factsheets/2010/11/affordable-care-act-americans-disabilities.html.

The ACA increases access to insurance for young adults, which is of great importance to Children with Special Health Care Needs transitioning from child to adult care, a population for whom continuous care is essential. Farrell, *supra* at 8. Under the ACA, young adults who are not eligible for employer-based coverage are entitled to remain covered by their parents' insurance plan until age 26. *Health Care Reform for Children, supra*. During this transitional period in young adults' lives, they may not yet be eligible for comprehensive employer-based care. And, for children with special health care needs, they may not have sufficient income to purchase the needed coverage independently. Until 2014, insurers may continue denying or limiting coverage for Americans with disabilities over the age of 19. *Affordable Care Act: A Side-by-Side Comparison*, *supra* at 4. Allowing young adult children with special health care needs to gain coverage through their parents' insurance will help ensure continuing care for the transition to adult care. *Id.*; *Families with Children*, *supra*. States have the option to expand coverage in this way effective immediately with the expansion becoming mandatory in 2014. *Health Care Reform for Children*, *supra*.

2. The ACA ensures that all children have access to affordable, quality, essential health care coverage, particularly those children aging out of foster care.

Many children who age out of foster care also age out of health care. John Reiss & Robert Gibson,

Health Care Transition: Destination Unknown, 110 PEDIATRICS 1307 (2002); John Reiss, Robert Gibson & Leslie Walker, *Health Care Transition: Youth, Family, and Provider Perspectives*, 115 PEDIATRICS 112 (2005). Many foster children will remain in foster care until they reach the age of majority, and "the odds of moving easily into independence are stacked against" them. Richard P. Barth, *On Their Own: The Experiences of Youth After Foster Care*, 7 CHILD AND ADOLESCENT SOCIAL WORK 419 (1990). Aging out of health care is particularly problematic for foster care youth because half of all foster care youth have chronic medical problems. Robin Mekonnen et al., *Achieving Better Health Care Outcomes for Children in Foster Care*, 56 Pediatric Clinics of North America 405 (2009). Of the some 400,000 children in foster care, many face multiple barriers to adequate health care. *AFCARS Report – Preliminary FY 2010 Estimates as of June 2011 (18)*, Administration for Children & Families, Department of Health & Human Services, *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/ report18.htm; *see* Mark D. Simms et al., *Health Care Needs of Children in the Foster Care System*, 106 PEDIATRICS 909 (2000).

Because so many older foster children leave foster care "in a rush and with no feasible living plans," including health plans, Barth, *supra*, the federal government has responded with initiatives such as Congress' 1986 Transitional Independent Living Program for Older Foster Children, Pub. L. No. 99-272 § 12307 (1986). The ACA continues the

goal of providing foster care youth with a healthy transition from pediatric to adult care. Under the ACA, states must extend Medicaid coverage up to age 26 to foster children aging out of the system by 2014. 42 U.S.C. § 1396a(a). This provision will provide foster children with quality, affordable health insurance, one of the challenges children face when aging out of the foster care system.

These challenges have been recognized before by the federal government. The Fostering Connections to Success and Increasing Adoptions Act of 2008 ("FCSIAA") requires states to develop an oversight and coordination plan regarding health care services for children in foster care. The ACA builds on the FCSIAA, requiring that the transition plan include information on options for health insurance and on the importance of designating another individual to make health care treatment decisions on behalf of the child if he or she becomes unable to do so. 42 U.S.C. §§ 622(b)(15)(A), 675(5)(H), 677(b)(3).

Providing additional information about the complexities of health insurance and of making treatment decisions is an important part of this transition out of foster care. Coverage of all youth, whether under private plans or under public programs such as Medicaid, is essential to a coherent system of health insurance for hundreds of thousands of youths as they mature into adulthood in a difficult economy where jobs are scarce. Striking down the mandatory coverage provision will upset the balance

that the ACA created in order for its other provisions to be feasible.

B. The ACA ensures that all children have access to affordable preventive health care services and programs.

Under the ACA, children will now have access to the preventive health care that has been out of their reach in the past. Children are especially in need of preventive health care: research on Medicaid eligibility in early childhood reveals that access to early adequate medical care has positive future effects on health, potentially placing children on healthier life trajectories. Janet Currie et al., *Has Public Health Insurance for Older Children Reduced Disparities in Access to Care and Health Outcomes?*, 27 JOURNAL OF HEALTH ECONOMICS 1567 (2008).

1. The ACA increases the affordability and availability of preventive health care services for children and their families.

The ACA increases the availability and affordability of preventive health care services. 42 U.S.C. § 300gg-13. The ACA requires health insurance providers to provide certain types of preventive care and forbids them from placing any cost-sharing requirements on the care on the following services:

> (1) evidence-based items or services that have in effect a rating of "A" or "B" in

the current recommendations of the United States Preventive Services Task Force;

(2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved;

(3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration; and

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

Id. The ACA specifically protects children by requiring – at no additional cost to the family – three categories of preventive care: (a) care for potential, expectant, and recent mothers, (b) recommended immunizations, and (c) care and screening of children.

a. The ACA protects children by making preventive health care for potential, expectant and recent mothers available and affordable.

Health care for mothers must extend from the prenatal to the postpartum period to sufficiently protect children's health. Paul H. Wise, *Transforming Preconceptional, Prenatal, and Interconceptional Care Into a Comprehensive Commitment to Women's Health*, 18 WOMEN'S HEALTH ISSUES S13 (2008). "The health of the mother during pregnancy impacts the child for life because the vast majority of a person's brain cells are born and formed in utero in the second and third trimester." Bruce Perry, *Childhood Experience and Expression of Genetic Potential: What Childhood Neglect Tells Us About Nature and Nurture*, 3 Brain and Mind 79, 82 (2002). Chemicals, such as alcohol and tobacco, transferred to the child in utero can change the ways in which neurons in the child's brain differentiate and ultimately function. *Id.* at 83. The health of the mother can alter the child's brain function for life.

Preventive health care covered by the ACA fills in the gaps and provides for screenings and services that span the preconception, prenatal, and postpartum periods. The ACA requires health insurance providers to cover health services and items that have a rating of "A" or "B" in the current recommendation of the United States Preventive Services Task Force as well as additional screenings and services

specifically for women that are recommended by the comprehensive guidelines supported by the Health Resources and Services Administration. United States Preventive Services Task Force, USPTF A and B Recommendations (2010), *available at* http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm; Health Resources and Services Administration, Women's Preventive Services: Required Health Plan Coverage Guidelines (2011), *available at* http://www.hrsa.gov/womensguidelines. Many of the covered services, items, and screenings focus on preconception, prenatal, and postpartum preventive health care, ranging from contraceptive education to breastfeeding counseling.

Children benefit from their mothers' access to affordable preventive health care. When women's preventive health care is covered by health insurance, birth weights are healthier, and rates of disability and morbidity are lower. Jack Hadley, *Sicker and Poorer – The Consequences of Being Uninsured: A Review of the Research on the Relationship Between Health Insurance, Medical Care Use, Health, Work, and Income*, 60 MEDICAL CARE RESEARCH AND REVIEW 3S (2003); R.E. Behrman & A.S. Butler, *Preterm birth: Causes, consequences, and prevention*, National Academies Press (2007). Preventive health care for women – including tobacco-use, alcohol-use, and illicit drug-use counseling – is crucial in the preconception period because the woman only has a matter of months to ameliorate health issues during the prenatal period. Wise, *supra*. To best protect children,

preventive health care must be made available and affordable to women regardless of pregnancy status because approximately half of all pregnancies in the United States are unplanned. Lawrence B. Finer & Stanley K. Henshaw, *Disparities in rates of unintended pregnancy in the United States, 1994 and 2001*, 38 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 90 (2006). In making preventive health care more available and affordable to women regardless of pregnancy, ACA protects the health of future generations.

b. The ACA protects children by making the recommended immunizations available and affordable.

The ACA requires health insurance providers to make available, at no extra cost, immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention ("CDC"). The CDC currently recommends routine vaccination to prevent 17 vaccine-preventable diseases that occur in infants, children, adolescents, or adults. Center for Disease Control and Prevention, General Recommendation on Immunization (Jan. 2011), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/rr6002a1.htm?s_cid=rr6002a1_e.

Immunizations are one of the most cost-effective and successful preventive measures in health care.

Claire Hannan et al., *Maintaining the Vaccine Safety Net*, 124 PEDIATRICS S571 (2009). Yet, children in the United States still suffer and die from vaccine-preventable diseases. Vaccine-preventable meningitis took the life of college freshman Joseph Patrick Kepferle in 2000. In 2004, Nelyn Baker, an 18-day-old infant, died after contracting vaccine-preventable pertussis from his unvaccinated mother. A two-year-old child, who had not been vaccinated, died in New York in 2008 from vaccine-preventable Hib disease. *See* Immunize Action Coalition, Unprotected People Reports (2011), *available at* http://www.immunize.org/reports. Vaccines would have saved their lives.

Although vaccines are available and affordable to most children through private and public insurance or through the federal Vaccines For Children ("VFC") program, an estimated 11 percent of young children and 20 percent of adolescents fall outside of this coverage because they are underinsured and do not qualify for free VFC vaccines. Centers for Disease Control and Prevention, Report to Congress on Section 317 immunization program (2009), *available at* http://www.317coalition.org/documents/cdcreport11.pdf. Uninsured children are significantly less likely to receive appropriate and timely vaccinations. Philip J. Smith et al., *Associations Between Childhood Vaccination Coverage, Insurance Type, and Breaks in Health Insurance Coverage*, 6 PEDIATRICS 1972 (2006). Children with health insurance that requires cost-sharing for vaccinations are less likely to get vaccinated than children with health insurance that does

not require cost-sharing for vaccinations. Jonathan Gruber, *The Role of Consumer Copayments for Health Care: Lessons From the Rand Health Insurance Experiment and Beyond*, Kaiser Family Foundation (2006); G. Solanki & H.H. Schauffler, *Cost-sharing and the Utilization of Clinical Preventive Services*, 17 AM. J. PREV. MED. 127 (1999). Higher out-of-pocket costs translate to lower rates of vaccination. Megan C. Lindley et al., *National Vaccine Advisory Committee Report: Financing the Delivery of Vaccines to Children and Adolescents: Challenges to the Current System,* 124 PEDIATRICS S548 (2009). The ACA addresses this problem by mandating that every child be covered by health insurance and requiring the insurer to provide vaccinations at no additional cost.

c. The ACA makes care and screening of children's health available and affordable.

The ACA requires health insurance providers to make available, at no additional cost, evidence-informed preventive care and screenings for infants, children, and adolescents as provided for in the comprehensive guidelines supported by the Health Resources and Services Administration ("HRSA"). The comprehensive guidelines supported by HRSA appear in two charts: the Periodicity Schedule of the Bright Futures Recommendations for Pediatric Preventive Health Care (2011), and the Uniform Panel of the Secretary's Advisory Committee on Heritable Disorders in Newborns and Children.

Periodicity Schedule of the Bright Futures Recommendations for Pediatric Preventive Health Care (2011), *available at* http://brightfutures.aap.org/pdfs/AAPBrightFuturesPeriodicitySched101107.pdf; Uniform Panel of the Secretary's Advisory Committee on Heritable Disorders in Newborns and Children (2011), *available at* http://www.hrsa.gov/advisorycommittees/mchbadvisory/heritabledisorders/recommendedpanel/uniformscreeningpanel.pdf.

The Bright Futures Recommendations provide for preventive health care measures that range from obesity screening to drug and alcohol abuse counseling. Notably, the recommendations include provisions for oral health risk assessment and appropriate follow-up care, a reform that would have saved Deamonte Driver's life. In 2007, at the age of 12, Deamonte Driver died after a tooth infection spread to his brain. Burton L. Edelstein & David A. Albert, *Columbia Commentary: The Boy Who Died From a Toothache* (2009), *available at* http://www.simplestepsdental.com/SS/ihtSS/r.==/st.126871/t.75944/pr.3.html. In 2007, there were twice as many children without dental coverage as there are children without health insurance. Charlotte Lewis et al., *Dental Insurance and its Impact on Preventive Dental Care Visits for U.S. Children*, 138 J. OF THE AM. DENTAL ASS'N 369 (2007). The ACA expands preventive health care so that oral health care is available and affordable to all children.

The Bright Futures Recommendations include many preventive health care services targeted at

adolescents. Few adolescents receive preventive health care visits: only about 38 percent of adolescents received a preventive visit in the last 12 months. Charles E. Irwin et al., *Preventive Care for Adolescents: Few Get Visits and Fewer Get Services*, 123 PEDIATRICS e565 (2009). Among those who received a visit, few were provided with treatment in line with the preventive health care in the comprehensive guidelines. *Id.* Making the preventive health care of the comprehensive guidelines affordable and available increases the number of children and adolescents who receive adequate preventive health care.

The screenings recommended by the Uniform Panel promote early detection and treatment of heritable disorders in newborns and children. Mary Ann Baily & Thomas H. Murray, *Ethics, Evidence, and Cost in Newborn Screening*, 38 HASTINGS CENTER REPORT 23 (2008). In 2000, two-year-old Ben Haygood died from a rare, inherited, undiagnosed medium chain acyl-coenzyme A dehydrogenase deficiency ("MCADD"). If Ben had been screened for MCADD at birth, his family would have known that Ben could not go without food for more than a couple of hours without getting violently ill, or possibly dying. A diagnosis would have saved his life. By requiring health insurance providers to cover newborn and child screening of heritable disorders, the ACA will save children's lives.

2. The ACA provides innovative programs to deliver health care to children in their own homes and communities and at their schools.

The ACA offers research-based preventive health care programs that are designed to benefit children. The ACA also designates millions of dollars to fund and improve these programs. These programs include (a) school-based health centers, (b) home visitation programs, and (c) obesity awareness initiatives. These provisions are vital to protecting the future health of our nation. If the mandate is struck down, these provisions which provide preventive care to promote healthy children and lower future expenditures will be lost.

a. The ACA provides school-based health centers.

The ACA provides an annual $50 million in grants between 2010 and 2013 to school-based health centers that serve children eligible for medical assistance. 42 U.S.C. §§ 280h-4 and 280h-5. School-based health centers increase access to health care for many of those who need it most, including underserved adolescents, a population long considered difficult to reach. Mandy A. Allison et al., *School-Based Health Centers: Improving Access and Quality of Care for Low-Income Adolescents*, 120 PEDIATRICS e887 (2007).

Studies have revealed that the availability of primary health care in a school-based setting leads to

increased use of primary care, reduced use of emergency rooms, and fewer hospitalizations. John Santelli et al., *School-Based Health Centers and Adolescent Use of Primary Care and Hospital Care*, 19 J. OF ADOLESCENT HEALTH 267 (1996). Such programs also result in a dramatic increase in adolescents seeking treatment for mental health problems and substance abuse. David W. Kaplan et al., *Managed Care and School-Based Health Centers*, 152 ARCH. PEDIATRICS & ADOLESCENT MEDICINE 25 (1998). Adolescents have also reported greater satisfaction with their health, more physical activity, and greater consumption of healthy foods as compared to non-users of school-based health programs. Miles A. McNall, *The Impact of School-Based Health Centers on the Health Outcomes of Middle School and High School Students*, 100 AM. J. PUBLIC HEALTH 1604 (2010).

Moreover, health and education are linked. Adolescents who experience worse health are substantially less likely to complete high school and transition to post-secondary education. Steven A. Haas et al., *Health and the Educational Attainment of Adolescents: Evidence from the NLSY97*, 49 J. HEALTH SOC. BEHAV. 178 (2008). In fact, the Centers for Disease Control has noted that "the academic success of America's youth is strongly linked with their health. . . . In turn, academic success is an excellent indicator for the overall well-being of youth, and is a primary predictor and determinant of adult health outcomes." Healthy Youth! Student Health and Academic Achievement, Centers for Disease Control

and Prevention (last visited Nov. 4, 2011), http://www.cdc.gov/healthyyouth/health_and_academics/index.htm. Given the proven efficacy of school-based health centers in reaching underserved populations, such programs ultimately do far more than simply treat the immediate primary care needs of youth.

In July 2011, $95 million in grants were provided to 278 school-based health center programs across the country, in the first series of awards under these provisions. *HHS Announces New Investment in School-Based Health Centers*, U.S. Department of Health & Human Services (2011), http://www.hhs.gov/news/press/2011press/07/20110714a.html. These grants will allow awardees, already serving some 790,000 patients, to serve an additional 440,000 patients. *Id.* The ACA provides for an additional $105 million toward such programs through 2013, allowing hundreds of thousands more to be served.

b. The ACA increases funding for home visitation programs.

The ACA provides $1.5 billion toward early childhood home visitation programs. 42 U.S.C. § 711. Individual states are asked to identify communities with concentrations of premature birth, low-birth weight infants, and infant mortality, including infant death due to neglect, or other indicators of at-risk prenatal, maternal, newborn, or child health; poverty; crime; domestic violence; high rates of high-school drop-outs; substance abuse; unemployment; or child

maltreatment. The provisions incentivize states to invest in evidence-based early childhood home visitation initiatives.

Home visitation has been recognized for its potential to foster early child development and competent parenting, as well as to reduce risk for child abuse and neglect and other poor outcomes for vulnerable families. Lenette Azzi-Lessing, *Home Visitation Programs: Critical Issues and Future Directions*, 25 EARLY CHILDHOOD RESEARCH QUARTERLY 387 (2011). However, it has also been widely recognized that more rigorous research into all phases of home visitation research is needed. Denise K. Thompson, *The Patient Protection and Affordable Care Act of 2010 (PL 111-148): An Analysis of Maternal-Child Health Home Visitation*, 12 POLICY POLITICS & NURSING PRACTICE 175 (Oct. 2011).

Under the ACA, 75 percent of total funding will go toward well-designed, research-based, and rigorously evaluated programs. 42 U.S.C. § 711(d)(3)(A)(i)(I). The remaining 25 percent will go toward new and promising approaches yet to be evaluated. 42 U.S.C. § 711(d)(3)(A)(ii); *see also* 42 U.S.C. § 711(d)(3)(A)(i)(II). All funded programs must establish quantifiable three- and five-year benchmarks for improvements in fields such as maternal and newborn health, prevention of injuries or child abuse, emergency department visits, school readiness, crime or domestic violence, and family economic self-sufficiency. Failure to do so could ultimately result in the revocation of the grant.

Thus, the ACA helps to jumpstart promising initiatives in maternal and early childhood health, the benefits of which may be long-term and substantial. The repeal of such provisions would be to the detriment of state-based early childhood home visitation programs across the country and destroy many opportunities for further research.

c. The ACA provides increased funding for and awareness of childhood obesity initiatives.

Childhood obesity is "epidemic" in the United States. Thomas R. Frieden et al., *Reducing Childhood Obesity Through Policy Change: Acting Now to Prevent Obesity*, 29 HEALTH AFF. 357 (2010). The consequences of this epidemic include earlier puberty and menarche in girls, type 2 diabetes and increased incidence of metabolic syndrome in youth and adults, obesity in adulthood, as well as cardiovascular disease and several cancers in adults. Frank M. Biro & Michelle Wien, *Childhood Obesity and Adult Morbidities*, 91 AM. J. CLIN. NUTR. 1499S (2010). Policy interventions, such as the obesity-related measures included in the ACA that make healthy dietary and activity choices easier, are needed to push comprehensive change in attitudes toward childhood obesity. Frieden, *supra* at 360. Such provisions in the ACA make sure that we act now, before the epidemic of childhood obesity "become[s] increasingly difficult to address." *Id.*

Several provisions in the ACA are designed to provide obesity-related services to the population at large. For example, the ACA provides education and outreach regarding preventive benefits. 42 U.S.C. § 300u-12. Such provisions include raising awareness of obesity screening and counseling for children and adults enrolled in Medicaid. 42 U.S.C. § 300u-12(i).

The ACA provides $25 million in funding for the Childhood Obesity Demonstration Project, an initiative to address childhood obesity. 42 U.S.C. § 1320b-9a(e)(8). Over the period of fiscal years 2010 to 2014, the Secretary of Health and Human Services may award grants to develop a "comprehensive and systematic model for reducing childhood obesity." 42 U.S.C. § 1320b-9a(e)(1). These grants will help schools, recreation facilities, daycare facilities, and other community organizations to promote nutrition and healthy eating behaviors, physical activity, and other after-school and weekend activities to reduce obesity. 42 U.S.C. §§ 1320b-9a(e)(3)(A)(i)-(iii). They will also help educators, health professionals, parents, and others promote these healthy habits. 42 U.S.C. §§ 1320b-9a(e)(3)(B)-(D).

CONCLUSION

This Court should consider the special importance of the ACA to families and children who are already receiving the benefits of enhanced access to health insurance coverage and quality health care, defer to the policy judgments of elected officials and uphold the constitutionality of the ACA.

Respectfully submitted,

BARBARA B. WOODHOUSE
CHILD RIGHTS PROJECT
EMORY UNIVERSITY SCHOOL OF LAW
1301 Clifton Road
Atlanta, GA 30322
(404) 727-4934

JEFFREY O. BRAMLETT
Counsel of Record
EMMET J. BONDURANT
MICHAEL A. CAPLAN
BONDURANT, MIXSON & ELMORE LLP
3900 One Atlantic Center
1201 W. Peachtree St., N.W.
Atlanta, GA 30309
(404) 881-4100
bramlett@bmelaw.com

January 13, 2012

AMICUS CURIAE BRIEF

No. 11-398

In The
Supreme Court of the United States

DEPARTMENT OF HEALTH
AND HUMAN SERVICES, et al.,

Petitioners,

v.

FLORIDA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

AMICUS BRIEF ON BEHALF OF CITIZENS AND LEGISLATORS IN THE FOURTEEN HEALTH CARE FREEDOM STATES IN SUPPORT OF RESPONDENTS (MINIMUM COVERAGE PROVISION)

NICHOLAS C. DRANIAS
Counsel of Record
CLINT D. BOLICK
DIANE COHEN
CHRISTINA SANDEFUR
GOLDWATER INSTITUTE
SCHARF-NORTON CTR. FOR CONST. GOV'T
500 E. Coronado Road
Phoenix, AZ 85004
P: (602) 462-5000/F: (602) 256-7045
ndranias@goldwaterinstitute.org

LINDA W. KNIGHT
GULLETT SANFORD
ROBINSON & MARTIN PLLC
150 Third Avenue South, Suite 1700
Nashville, TN 37201
P: (615) 244-4994/F: (615) 256-6339
lknight@gsrm.com

GEOFFREY D. TALMON
TALMON LAW OFFICE, PLLC
910 W. Main Street, Suite 358
Boise, ID 83702
P: (208) 841-9481/F: (208) 906-8650
gtalmon@talmonlaw.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTRODUCTION 1

INTEREST OF AMICI CURIAE..... 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. Because the Individual Mandate violates the principle of state sovereignty, Courts should not hesitate to strike it down or limit its reach 9

II. The federal government does not have unlimited implied power under the "letter and spirit" of the Constitution 14

III. The principle of state sovereignty limits federal power and guarantees states an exclusive area of *substantive* legal authority, in addition to structural autonomy under the "letter and spirit" of the Constitution..... 17

IV. The exclusive fields of law reserved to the states under the principle of state sovereignty include laws, such as Health Care Freedom Laws, which check and balance claims of implied federal power by protecting constitutional liberty..... 21

V. Especially in Health Care Freedom States, the Individual Mandate clearly violates the principle of state sovereignty 23

TABLE OF CONTENTS – Continued

Page

VI. **Alternatively, the Individual Mandate should be ruled unenforceable in Health Care Freedom States because of the constitutional limitations imposed by this Court on the doctrine of implied preemption** 27

CONCLUSION 31

TABLE OF AUTHORITIES

Page

CASES

Acme, Inc. v. Besson, 10 F. Supp. 1 (D. N.J. 1935) 25

Alden v. Maine, 527 U.S. 706 (1999) 10, 11

Bond v. United States, 131 S.Ct. 2355 (2011) 18, 19, 21

Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820 (4th Cir. 1999) 12

Chamber of Commerce of the United States v. Whiting, 131 S.Ct. 1968 (2011) 27, 28, 31

Cipollone v. Liggett Group, 505 U.S. 504 (1992) 28

City of Boerne v. Flores, 521 U.S. 507 (1997) 11, 12

Coleman v. Thompson, 501 U.S. 722 (1991) 16

DeCanas v. Bica, 424 U.S. 351 (1976) 28

Ex parte Virginia, 100 U.S. 339 (1880) 12

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S.Ct. 3138 (2010) 15

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 10, 11, 12, 14

Gonzales v. Raich, 545 U.S. 1 (2005) 8, 9, 10

Gonzalez v. Oregon, 546 U.S. 243 (2006) 24, 29, 31

Gregory v. Ashcroft, 501 U.S. 452 (1991) 23, 27, 29, 31, 32

Griswold v. Connecticut, 381 U.S. 479 (1964) 25

TABLE OF AUTHORITIES – Continued

Page

Hertz Drivurself Stations v. Siggins, 58 A.2d 464 (Pa. 1948) 7

Hillsborough County, Fla. v. Automated Medical Labs., Inc., 471 U.S. 707 (1985) 28

Hodel v. Virginia Surface Mining & Recl. Assn., 452 U.S. 264 (1981) 26

Horne v. Flores, 129 S.Ct. 2579 (2009) 12

Katzenbach v. Morgan, 383 U.S. 641 (1966) 12

Lambert v. Yellowly, 272 U.S. 581 (1926) 25

Linder v. United States, 268 U.S. 5 (1925) 25

Magill v. Brown, 16 F. Cas. 408 (E.D. Pa. 1833) 25

Massachusetts v. Sebelius, 698 F. Supp. 2d 234 (D. Mass 2010) 10

Massachusetts v. Upton, 466 U.S. 727 (1984) 25

McCulloch v. Maryland, 17 U.S. 316 (1819) 15

Mead v. Holder, 766 F. Supp. 2d 16 (D.D.C. 2011) 7

Medtronic Inc. v. Lohr, 518 U.S. 470 (1996) 24

Merrell v. Joe Bullard Oldsmobile, Inc., 529 So.2d 943 (Ala. 1988) 15

Munn v. People of State of Illinois, 94 U.S. 113 (1876) 7

National League of Cities v. Usery, 426 U.S. 833 (1976) 10, 26

New York v. U.S., 505 U.S. 144 (1992) 11, 16, 18, 19

TABLE OF AUTHORITIES – Continued

Page

Paul v. Virginia, 75 U.S. 168 (1869) 25

Printz v. U.S., 521 U.S. 898 (1997) .....*passim*

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 24

Strauder v. West Virginia, 100 U.S. 303 (1880) 12

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) 21

United States v. Bongiorno, 106 F.3d 1027 (1st Cir. 1997) 10

United States v. Comstock, 130 S. Ct. 1949 (2010) 10

United States v. Lopez, 514 U.S. 549 (1995) 8, 11, 19

United States v. Morrison, 529 U.S. 598 (2000) 11, 12

Virginia v. Rives, 100 U.S. 313 (1880) 12

Wickard v. Filburn, 317 U.S. 111 (1942) 9

Wyeth v. Levine, 129 S. Ct. 1187 (2009) 28

Z.B. v. Ammonoosuc Cmty. Health Servs., 2004 U.S. Dist. LEXIS 13058 (D. Me. July 13, 2004) 10

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. § 18115 31

Ariz. Const. Art. XXVII, § 2 (2011) 5

A.R.S. § 36-1301 (2011) 5

O.C.G.A. § 31-1-11 (2011) 5

TABLE OF AUTHORITIES – Continued

Page

Idaho Code § 39-9001 (2011) 5

Ind. Code § 4-1-12-3 (2011) 5

2011 Kan. ALS 114 (2011) 5

La. R.S. § 22:1018 (2011) 5

§ 1.330 R.S. Mo. (2011) 5

N.D. Cent. Code § 26.1-36-45 (2011) 5

N.H. Rev. Stat. § 420-N:1 (2011) 5

Oh. Const. Art. I, § 21 (2011) 5

Okla. Const. Art. II, § 37 (2011) 5

Tenn. Code Ann. § 56-7-1016 (2011) 5

Utah Code Ann. § 63M-1-2505.5 (2012) 5

Va. Code Ann. § 38.2-3430.1:1 (2011) 5

U.S. Const. amend. V 5, 25, 26

U.S. Const. amend. IX 5, 24, 25 26

U.S. Const. amend. X 3, 5, 15, 26

U.S. Const. amend. XI 16

U.S. Const. amend. XIV 12, 25

U.S. Const. amend. XVII 13

U.S. Const. art. I, § 4 15

U.S. Const. art. I, § 8 20

U.S. Const. art. I, § 8, clause 18 9

TABLE OF AUTHORITIES – Continued

Page

U.S. Const. art. IV, § 4 15

U.S. Const. art. V. 15

OTHER AUTHORITIES

Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 Am. Crim. L. Rev. 1261, 1302 (1989) 23, 24

Byron Schlomach, *Removing the Middleman: What States Can Do to Make Health Care More Responsive to Patients*, Goldwater Institute Policy Report no. 230 (Jan. 13, 2009), http://goldwaterinstitute.org/article/removing-middleman-what-states-can-do-make-health-care-more-responsive-patients-0 30

Calvin R. Massey, *The Anti-Federalist Ninth Amendment and its Implications for State Constitutional Law*, 1990 Wis. L. Rev. 1229, 1232 (1990) 24

Erwin Chemerinsky, *The Hypocrisy of Alden v. Maine: Judicial Review Sovereign Immunity and the Rehnquist Court*, 33 Loyola L.A. L. Rev. 1283, 1299 (June 2000) 10

Fox News Video (March 9, 2010), http://www.breitbart.tv/nancy-pelosi-we-need-to-pass-health-care-bill-to-find-out-whats-in-it/ (last visited February 9, 2012) 13

TABLE OF AUTHORITIES – Continued

Page

Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 297-326, 330-33 (1993) 17

Joseph Story, *Commentaries on the Constitution of the United States*, Vol. 1, 189, 195-97 (Little, Brown & Co. 1878) 16

Letter from Thomas Jefferson to Joseph C. Cabell (May 1816), in *The Jeffersonian Cyclopedia* 131 (J. Foley 1900) 20

Michael Krebs, *Conyers: 'What good is reading the bill if it's a thousand pages'*, Digital Journal (July 29, 2009), http://digitaljournal.com/article/276659 (last visited February 9, 2012) 13

Robert Moffit, *Revitalizing Federalism: The High Road Back to Health Care Independence*, Heritage Foundation Backgrounder no. 2432, 3 (June 30, 2010) 7

Robert G. Natelson, *Tempering the Commerce Power*, 68 Mont. L. Rev. 95, 99-102 (Winter 2007) 14

Robert G. Natelson, *The Enumerated Powers of the States*, 3 Nev. L.J. 469, 483-88 (Spring 2003) 24

The Federalist Nos. 28, 31, 51 (Alexander Hamilton, James Madison) (Gideon ed., 1818) 16, 22

TABLE OF AUTHORITIES – Continued

Page

The Federalist No. 33 (Alexander Hamilton) (Gideon ed., 1818) 17

The Federalist No. 45 (James Madison) (Gideon ed., 1818) 9

William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977) 32

Youtube video, http://biggovernment.com/publius/2010/04/01/rep-phil-hare-d-il-i-dont-worry-about-the-constitution/ (last visited February 9, 2012) 13

INTRODUCTION

Fourteen states have enacted or adopted "Health Care Freedom Laws" that protect individual freedom of choice in health care plans. In these "Health Care Freedom States," the Minimum Coverage provision of the Patient Protection and Affordable Care Act ("Individual Mandate") threatens to quash a traditional exercise of state sovereignty that directly serves the structural purpose of federalism in our compound republic – the protection of individual liberty and decentralized local governance guaranteed by the Bill of Rights. Such federal overreaching must be rejected if the vertical separation of powers established by our Constitution means anything at all.

INTEREST OF AMICI CURIAE[1]

The undersigned Health Care Freedom Amici agree that the Individual Mandate poses a grave threat to the principle of state sovereignty. Indeed, the very existence of the Individual Mandate proves that Congress too often forgets that the federal government's powers are limited and enumerated, not plenary. Fortunately, the existence of Health Care

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Freedom Laws in fourteen states brings the Individual Mandate's unconstitutionality into stark relief.

This brief is joined by 101 legislators from various Health Care Freedom states, including Arizona,[2] Kansas,[3] Missouri,[4] New Hampshire,[5] Ohio,[6] Tennessee,[7]

---

[2] State Senate Majority Whip Frank Antenori, Senators Ron Gould, Judy Burges, Al Melvin, Nancy Barto, and John McComish, and Speaker of the House Andy Tobin, Representatives Nancy McLain, Cecil Ash, and Jack Harper.

[3] Representatives Greg Smith and Terri Lois Gregory.

[4] Senator Jane Cunningham and State Representatives Cary Smith and Keith Frederick.

[5] Representatives Andrew Manuse, Jordan Ulery, Kevin Avard, Daniel Itse, Seth Cohn, and Spec Bowers.

[6] Representatives Andrew Thompson and Barbara Spears.

[7] Lt. Gov. and Speaker of the Senate Ronald Ramsey, Majority Leader Senator Mark Norris, Speaker Pro Tem Senator Bo Watson, Republican Caucus Chair Senator Bill Ketron, Senators Mae Beavers, Mike Bell, Stacey Campfield, Michael Faulk, Dolores Gresham, Jack Johnson, Brian Kelsey, Becky Massey, Randy McNally, Doug Overbey, Kerry Roberts, Steve Southerland, Jim Summerville, Jim Tracy and Ken Yager; Speaker of the House Beth Harwell, Majority Leader Representative Gerald McCormick, Speaker Pro Tem Representative Judd Matheny, Republican Caucus Chair Representative Debra Young Maggart, and Representatives David Alexander, Harry Brooks, Kevin Brooks, Sheila Butt, Scotty Campbell, Glen Casada, Jim Cobb, Vince Dean, Vance Dennis, Bill Dunn, Linda C. Elam, Jimmy Eldridge, Joshua Evans, Jeremy Faison, Richard Floyd, John Forgety, Jim Gotto, Curtis Halford, Steve Hall, Michael Harrison, Ryan Haynes, Joey Hensley, M.D., Matthew Hill, Andy Holt, Julia Hurley, Curtis G. Johnson, Phillip Johnson, Kelly Keisling, Ron Lollar, Jon Lundberg, Pat Marsh, Jimmy Matlock, Steve McDaniel, Don Miller, Richard Montgomery, Frank Niceley, Mark Pody, Dennis Powers, John

(Continued on following page)

and Utah.[8] They have heard from constituents throughout their respective states, have studied and weighed the relevant issues and factors, including the burdens imposed upon States and their citizens by the Individual Mandate. Consequently, they are in a unique position to have determined that their respective state's Health Care Freedom law represents a deliberative and legitimate exercise of powers reserved to the states or the people under the Tenth Amendment. Speaking for themselves and the citizens they represent, these legislators condemn the Individual Mandate's usurpation of power from the states and the people.

The Goldwater Institute filed this brief because it is committed to advancing the principles of limited government, economic freedom, and individual responsibility, all of which are threatened by the Individual Mandate. The Scharf-Norton Center for Constitutional Litigation seeks to enforce the features of our state and federal constitutions that protect individual rights, including the principle of state sovereignty. The defense of Health Care Freedom Laws is at the core of this mission. The Institute not only represents thousands of members residing in all fourteen Health Care Freedom States, the Institute's

---

Ragan, Barrett Rich, Bill Sanderson, Charles Sargent, Cameron Sexton, Tony Shipley, Mike Sparks, Art Swann, Curry Todd, Eric Watson, Terri Lynn Weaver, Mark White, Kent Williams, Ryan Williams, Tim Wirgau and Rick Womick.

[8] Representative Ken Ivory.

litigation director, Clint D. Bolick, is also the author of the original Health Care Freedom Act model legislation. The Goldwater Institute recently appeared before the United States Supreme Court in *McComish v. Bennett* (No. 10-239).

Finally, the Idaho Freedom Foundation ("IFF") joins this brief. IFF advocates for free market solutions, private property rights, individual responsibility, and transparent, limited government. IFF has an interest in protecting the rights of the people of Idaho individually, as well as the rights of the State of Idaho as a whole. Because Idaho passed the Idaho Health Freedom Act to protect the right of its citizens to purchase as much or as little health insurance as they choose, and because Idaho is the state that will arguably be most dramatically affected by the Patient Protection and Affordable Care Act and its Individual Mandate, IFF has an interest in supporting Idaho and the other Health Care Freedom States in this case.

The Goldwater Institute and IFF are both nonpartisan, tax exempt educational foundations under Section 501(c)(3) of the Internal Revenue Code. They have no parent corporation. They have issued no stock. They certify that they have no parents, trusts, subsidiaries and/or affiliates that have issued shares or debt securities to the public. All parties have been given timely notice of the filing of this brief.

SUMMARY OF ARGUMENT

The citizens and states of Arizona, Georgia, Idaho, Indiana, Kansas, Louisiana, Missouri, North Dakota, New Hampshire, Ohio, Oklahoma, Tennessee, Utah, and Virginia have codified guarantees of the fundamental freedom not to be commandeered into purchasing a private insurance product known as a "health plan." Ariz. Const. Art. XXVII, § 2 (2011); A.R.S. § 36-1301 (2011); O.C.G.A. § 31-1-11 (2011); Idaho Code § 39-9001 (2011); Ind. Code § 4-1-12-3 (2011); 2011 Kan. ALS 114 (2011); La. R.S. § 22:1018 (2011); § 1.330 R.S. Mo. (2011); N.D. Cent. Code § 26.1-36-45 (2011); N.H. Rev. Stat. § 420-N:1 (2011); Oh. Const. Art. I, § 21 (2011); Okl. Const. Art. II, § 37 (2011); Tenn. Code Ann. § 56-7-1016 (2011); Utah Code Ann. § 63M-1-2505.5 (2012); Va. Code Ann. § 38.2-3430.1:1 (2011). The enactment of such laws is fully within the powers traditionally reserved to the states and the people under the Tenth Amendment. Moreover, the freedom guaranteed by Health Care Freedom Laws falls squarely within the traditional conception of ordered liberty protected from federal overreach by the Fifth and Ninth Amendments.

From the vantage point of the fourteen Health Care Freedom States, the unconstitutionality of the Individual Mandate is clearly compelled by the principle of state sovereignty. This is because the division of power between the states and the federal government is ultimately aimed at protecting individual liberty through decentralized local governance. The Individual Mandate clashes directly with this principle in Health Care Freedom states because it is

premised on the notion that the federal government has implied power to override state sovereignty even when such sovereignty is exercised in service of the very purpose for which our system of dual sovereignty exists.

As illustrated by its threat to the integrity of Health Care Freedom Laws, the Individual Mandate completely disregards the principle that hard questions regarding the boundary between state sovereignty and implied federal power must be resolved in favor of the division of power that diffuses, rather than concentrates, power; that sustains individual liberty; and that preserves, rather than negates, state sovereignty over essentially local matters. In short, the Individual Mandate threatens to disrupt the proper functioning of a viable vertical separation of powers.

For this reason, as well as those advanced by Respondents and other allied amici, the Individual Mandate is utterly inconsistent with the letter and spirit of the Constitution. The lower court decisions should be affirmed because the Individual Mandate must be struck down even as a claimed exercise of implied federal power under the Necessary and Proper Clause. Alternatively, the Court should reject any claim by the federal government that the Individual Mandate lawfully preempts Health Care Freedom Laws. Instead, to avoid the serious constitutional questions spotlighted by the lower court decisions, the Individual Mandate must not be construed to displace Health Care Freedom Laws.

ARGUMENT

Any connection between the Individual Mandate and the regulation of interstate commerce rests upon a chain of reasoning that is so extraordinarily attenuated and unprecedented that it defies logic. One line of argument, for example, claims that commerce "among" the states is substantially affected by the aggregated "mental activity" of individuals choosing not to engage in intrastate health insurance transactions. *Mead v. Holder*, 766 F. Supp. 2d 16, 36 (D.D.C. 2011). This argument expands the Commerce Clause's reach into the regulation of the individual mind, which is perhaps the most private and intrastate of jurisdictions. It thereby exceeds *even the grasp of the police power* in a republican form of government, which has been traditionally limited to matters that are "affected with a public interest." *See, e.g., Munn v. People of State of Illinois*, 94 U.S. 113, 139-40 (1876) (Field, J., dissenting); *Hertz Drivurself Stations v. Siggins*, 58 A.2d 464, 470 (Pa. 1948); Robert Moffit, *Revitalizing Federalism: The High Road Back to Health Care Independence*, Heritage Foundation Backgrounder no. 2432, 3 (June 30, 2010) (observing that "[i]n the classical sense, a republic means limited government; it underscores a sharp distinction between *res publica* (public affairs) and *res privata* (private affairs)").

Another line of argument by the federal government contends that the Individual Mandate is an essential element of PPACA's comprehensive regulation of coverage standards in health insurance, just

as the prohibition of local marijuana cultivation and consumption in *Raich* was regarded as necessary to the comprehensive prohibition of interstate trade in illicit drugs. *Gonzales v. Raich*, 545 U.S. 1 (2005). But *Raich* upheld a ban on medical marijuana as being necessary to a comprehensive regulatory regime that itself *directly* regulated interstate commerce in illicit drugs. By contrast, the Individual Mandate is not necessary to any comprehensive regulation regime imposed by PPACA *directly* on interstate commerce. Instead, the Individual Mandate's connection to the Commerce Clause is based entirely on a "House that Jack Built" rationale to which no limiting principle can be applied.[9]

In short, the Individual Mandate clearly does not *itself* regulate "the use of the channels of interstate commerce" or "the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Quoting United States v. Lopez*, 514 U.S. 549, 558-59 (1995). It commandeers individuals, who are otherwise economically inactive, to engage in

---

[9] The claim that the Commerce Clause authorizes the Individual Mandate boils down to the three step argument that the regulation of intrastate health insurance decisions (1) is necessary to ensure the feasibility of PPACA's *coverage standards*, which (2) regulate *intrastate* health insurance commerce (given the current structure of state-centric health insurance markets), which (3) is necessary to the regulation of interstate commerce. Even if the difference between inactivity and economic activity were somehow immaterial, the connection between the Individual Mandate and interstate commerce is one step beyond the connection upheld in *Raich*.

intrastate health insurance transactions. The Mandate thus has nothing to do with directly regulating *actual* interstate commerce. Its constitutionality hinges entirely upon it being swept by the Necessary and Proper Clause impliedly into the Commerce and the Supremacy Clause. *Cf. Raich*, 545 U.S. at 5, 22 (citing U.S. Const. art. I, § 8, clause 18; *Wickard v. Filburn*, 317 U.S. 111 (1942)); *id.* at 34-35, 38-39 (Scalia, J., concurring).

However, as underscored in *The Federalist* No. 45, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain to the state governments are numerous and indefinite." *Id.* at 57. (James Madison) (Gideon ed., 1818). The so-called "sweeping clause" does not have an unlimited ability to sweep every conceivable federal law into the scope of Congress' delegated powers by implication. To the contrary, the Court should not hesitate to strike down or limit the reach of federal laws, such as the Individual Mandate, that rest upon expansive and tenuous claims of implied power when the principle of state sovereignty is at stake, as is clearly the case in Health Care Freedom States.

I. Because the Individual Mandate violates the principle of state sovereignty, Courts should not hesitate to strike it down or limit its reach.

With respect to claims of implied federal power, the Court has effectively reversed its aberrational

holding in *Garcia v. San Antonio Metropolitan Transit Authority* that the defense of state sovereignty should be mounted from within the political process at the federal level – in Congress – not within the court system. 469 U.S. 528, 554 (1985). Instead, when enforcing state sovereignty's limitation on claims of implied federal power, the Court has revived the fully-engaged form of judicial review exhibited in *National League of Cities v. Usery*, 426 U.S. 833 (1976). In fact, jurists and academics across the jurisprudential spectrum agree that the Court has thereby effectively overruled *Garcia*. *See, e.g.*, *Massachusetts v. Sebelius*, 698 F. Supp. 2d 234, 249 n. 142, 252 n. 154 (D. Mass 2010) (citing *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997); *Z.B. v. Ammonoosuc Cmty. Health Servs.*, 2004 U.S. Dist. LEXIS 13058, at *15 (D. Me. July 13, 2004)); Erwin Chemerinsky, *The Hypocrisy of Alden v. Maine: Judicial Review Sovereign Immunity and the Rehnquist Court*, 33 Loyola L.A. L. Rev. 1283, 1299 (June 2000). Moreover, the deferential framework of *Garcia* has not been revived through the expansive view of implied federal power enforced in *Raich* or *Comstock* because the Court was careful to emphasize that the principle of state sovereignty was not implicated by either case. *United States v. Comstock*, 130 S.Ct. 1949, 1962-63 (2010); *id.* at 1968 (Kennedy, J., Alito, J., concurring); *Raich*, 545 U.S. at 41 (Scalia, J., concurring).

As explained in *Alden v. Maine*, the Court is now committed to enforcing the principle of state

sovereignty that "[t]he States 'form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" 527 U.S. 706, 714 (1999) (citations omitted). The principal claim of *Garcia* – that judicial enforcement of this principle is unworkable – has been fully repudiated by the Court's own jurisprudential record.

In *New York v. U.S.*, 505 U.S. 144 (1992), for example, the Supreme Court held that Congress may not "commandeer" state legislatures by requiring them to legislate as directed by the federal government. *United States v. Lopez*, 514 U.S. 549 (1995), held that Congress does not have implied power to regulate wholly intrastate noneconomic activities. *Printz v. U.S.*, 521 U.S. 898 (1997), held that Congress may not evade separation of powers and "commandeer" state executive officials by ordering them to conduct background checks of purchases of firearms under the Brady Bill. *City of Boerne v. Flores*, 521 U.S. 507 (1997), ruled that a remedial civil rights law that invades state sovereignty must be closely drawn to remedy actual civil rights violations – it cannot effectively manufacture new civil rights. *Alden*, 527 U.S. at 713-14, ruled that states could not exist as autonomous sovereign governments subject to the risk that the federal government could subject them to damages claims in their own courts for failing to pay overtime to their employees. And in *United States v. Morrison*, 529 U.S. 598 (2000), the Court held

Congress may not regulate and criminalize wholly intrastate criminal activities with no economic aspect.

Under current precedent, the Court properly patrols the boundaries between state sovereignty and implied federal power without deferring to Congress. *See, e.g., Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 895-97 (4th Cir. 1999), *aff'd, Morrison*, 529 U.S. 598. Such fully-engaged judicial review has been further buttressed by cases that have repeatedly applied heightened scrutiny even to federal actions that have invoked the 14th Amendment's Enforcement Clause to override state sovereignty (where, if anything, the principle of state sovereignty is less secure). *See, e.g., Horne v. Flores*, 129 S.Ct. 2579, 2595-96 (2009); *City of Boerne*, 521 U.S. at 527-36.[10]

The current rule of law is the correct one. It is entirely appropriate for the Court to continue to review claims of implied federal power independently and without deference to Congress when the principle of state sovereignty is at stake. The judicial disengagement embraced by the *Garcia* majority in favor of political action cannot be reconciled with the fact

---

[10] The Enforcement Clause under the Fourteenth Amendment has long been analogized to the Necessary and Proper Clause. *Katzenbach v. Morgan*, 383 U.S. 641, 648 (1966) (citing *Ex parte Virginia*, 100 U.S. 339, 345-46 (1880); *Virginia v. Rives*, 100 U.S. 313, 318 (1880); *Strauder v. West Virginia*, 100 U.S. 303, 311 (1880)).

that states *as states* have not been represented in Congress since the ratification of the 17th Amendment. Nor can it be reconciled with the public record of obvious congressional disregard for constitutional responsibilities in passing the PPACA.

On March 9, 2010, for example, Speaker of the House Nancy Pelosi famously justified the passage of PPACA with the observation: "But we have to pass the bill so that you can find out what is in it." *See* Fox News Video (March 9, 2010), http://www.breitbart.tv/nancy-pelosi-we-need-to-pass-health-care-bill-to-find-out-whats-in-it/ (last visited February 9, 2012). Likewise, during his speech at a National Press Club luncheon, House Judiciary Chairman John Conyers (D-Mich.), questioned the point of lawmakers reading the health care bill, stating: "What good is reading the bill if it's a thousand pages and you don't have two days and two lawyers to find out what it means after you read the bill?" Michael Krebs, *Conyers: 'What good is reading the bill if it's a thousand pages'*, Digital Journal (July 29, 2009), http://digitaljournal.com/article/276659 (last visited February 9, 2012). Similarly, when pressed about the constitutionality of PPACA, Representative Phil Hare said, "I don't worry about the Constitution on this, to be honest." Youtube video, http://biggovernment.com/publius/2010/04/01/rep-phil-hare-d-il-i-dont-worry-about-the-constitution/ (last visited February 9, 2012).

As these statements illustrate, Congress simply cannot be entrusted with exclusive authority to protect our system of dual sovereignty. Nor should it

be entrusted with such power. As passionately emphasized by Justice Powell in his dissent to the holding of *Garcia*:

> The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective "counterpoise" to the power of the Federal Government. . . . [F]ederal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.

Garcia, 469 at 571-72 (Powell, J., dissenting). In short, federal courts must engage congressional overreach when state sovereignty is at issue *because the Constitution commands it.*

II. The federal government does not have unlimited implied power under the "letter and spirit" of the Constitution.

The federal government does not have unlimited implied power. The Necessary and Proper Clause entails more than a means-end test. "Necessary and proper" is a term of art meant to confirm that the federal government, as agent for the states and the people, has implied incidental power to implement appropriately its expressly granted powers. Robert G. Natelson, *Tempering the Commerce Power*, 68 Mont. L. Rev. 95, 99-102 (Winter 2007). In agency law, a grant of "authority to do whatever acts or use

whatever means are reasonably *necessary and proper* to the accomplishment of the purposes for which the agency was created" means that "an agent has implied authority to do that which *the nature of the business would demand in its due and regular course*." *Merrell v. Joe Bullard Oldsmobile, Inc.*, 529 So.2d 943, 947 (Ala. 1988) (emphasis added). Thus, the federal government's implied power is circumscribed by the agency principle that the clause authorizes only those actions that the "nature" of the political system established by the Constitution would "demand in its due and regular course." In other words, the "letter and spirit" of the Constitution is the standard against which a claim to implied power is measured. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819); *see generally Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S.Ct. 3138, 3167 (2010) (Breyer, J., dissenting).

The principle of state sovereignty must be taken into account in an intellectually honest assessment of the "letter and spirit" of the Constitution. *Printz*, 521 U.S. at 918-19 ("Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.' This is reflected throughout the Constitution's text") (citing U.S. Const. art. I, § 4 (granting power to state legislatures over congressional elections); *id.* art. IV, § 4 (guaranteeing states a republican form of government); *id.* art. V (incorporating states into the amendment process); *id.* amend. X (reserving to states powers not delegated); *id.* amend.

XI (making states immune to suit in federal court). To avoid the threat to liberty posed by concentrated power, the Constitution established a system "of complete decentralization." Joseph Story, *Commentaries on the Constitution of the United States*, Vol. 1, 189, 195-97 (Little, Brown & Co. 1878). Such "complete decentralization" was not meant to be purely formalistic, structural or passive.

As held in *New York*, "States are not mere political subdivisions of the United States." 505 U.S. at 161-66, 186. Instead, federalism was meant to establish a dynamic "constitutional equilibrium" that would preserve liberty by (1) diffusing power and thereby preventing the abuse of concentrated power, and (2) enabling the people to leverage the sovereignty of the states or the federal government, as needed, to protect their rights and keep the other government in check. *New York*, 505 U.S. at 181-82, 187-88; *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J. dissenting)); *see also The Federalist* Nos. 28, 31, 51 (Alexander Hamilton, James Madison) (Gideon ed., 1818).

By its nature, therefore, the political system established by the Constitution *cannot* "demand in its *due and regular* course" the enactment of federal laws that dangerously concentrate all power in the federal government. *New York*, 505 U.S. at 181, 187-88 (1992) (observing the Constitution "divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution

to the crisis of the day"). Any claim by the federal government to such implied authority, as entailed by the "House that Jack Built" rationale underpinning the Individual Mandate, is inconsistent with the "letter and spirit" of the Constitution and, therefore, cannot be rooted in the implied power confirmed by the Necessary and Proper Clause.

III. The principle of state sovereignty limits federal power and guarantees states an exclusive area of *substantive* legal authority, in addition to structural autonomy under the "letter and spirit" of the Constitution.

Current Supreme Court precedent confirms that the principle of state sovereignty limits the scope of implied federal power under the "letter and spirit" of the Constitution. As held in *Printz*:

> When a "Law . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty . . . it is not a "Law . . . *proper* for carrying into Execution the Commerce Clause," and is thus, in the words of *The Federalist*, "merely [an] act of usurpation" which "deserves to be treated as such."

521 U.S. at 923-24 (emphasis added) (citing *The Federalist* No. 33 (Alexander Hamilton) (Gideon ed., 1818); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 297-326, 330-33 (1993)). Put differently, as more

recently held in *Bond v. United States*, "Impermissible interference with state sovereignty is not within the National Government's enumerated powers, and action that exceeds the National Government's enumerated powers undermines the State's sovereign interests." 131 S.Ct. 2355 (2011).

In *Bond v. United States*, the Court unanimously ruled, "Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity . . . Federalism secures the freedom of the individual." *Bond*, 131 S.Ct. at 2365. Accordingly, our system of dual sovereignty denies "any one government complete jurisdiction over all the concerns of public life." *Id.* at 2364. It empowers "[s]tates to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Id. Bond* thus clearly recognizes that the principle of state sovereignty guarantees an exclusive area of *substantive* jurisdiction for the states, in addition to structural autonomy. This rule of law is compelled by the reasoning of the Court's prior precedent and the "letter and spirit" of the Constitution.

After all, the Court's prohibition on "commandeering" in *New York* and *Printz* is not a standalone constitutional axiom. It is an extension of the first principle that the Constitution is designed to prevent the dangerous concentration of power in any one government to "reduce the risk of tyranny and abuse." *New York*, 505 U.S. at 181-82, 187-88. *Printz*

specifically emphasized that "the power of the Federal Government would be augmented immeasurably if it were able to impress into its service – and at no cost to itself – the police officers of the 50 States." *Id.* at 922. That rationale logically extends beyond the specific holdings in *New York* and *Printz* because a prohibition on federal commandeering is necessary, *but not sufficient*, for a meaningful division of power within our system of federalism.

To ensure our system of dual sovereignty can effectively protect individual liberty from a dangerous concentration of power in the federal government, the principle of state sovereignty must impose *both* structural *and* substantive limits on the federal government's claims of implied power to displace state laws. *Lopez*, 514 U.S. at 577 ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."). As recognized in *Bond*, tyranny and abuse is threatened if "any one government" is able to seize "complete jurisdiction over all the concerns of public life." Allowing the federal government to exclusively occupy the entire field of substantive law within a state's jurisdiction, while prohibiting "commandeering," would transform states into nothing more than glorified student governments.

That is not the vision of state sovereignty held by the Framers or Ratifiers of the Constitution – as directly evidenced by the fact that the Constitution textually restricted Congress' "exclusive" legislative authority only to areas ceded to the federal government by consent of the states. U.S. Const. art. I, § 8. As explained by Thomas Jefferson,

> The way to have good and safe governments is not to trust all to one, but to divide it among the many, distributing to everyone exactly the functions he is competent to. Let the national government be entrusted with the defence [*sic*] of the nation and its foreign and federal relations; the state governments with the civil rights, laws, police and administration of what concerns the state generally. . . . What has destroyed liberty and the rights of man in every government which has ever existed under the sun? The generalizing and concentrating all cares and powers into one body, no matter whether of the autocrats of Russia or of France or of the aristocrats of a Venetian Senate.

Letter from Thomas Jefferson to Joseph C. Cabell (May 1816), in *The Jeffersonian Cyclopedia* 131 (J. Foley 1900).

In short, the Founders intended for the principle of state sovereignty to guarantee decentralization of power over *substantive* fields of law, not just the structures of government. To fulfill its fundamental purpose of preventing the concentration of power and tyranny, such decentralization necessarily includes

the reservation of an exclusive area of substantive legal authority to the states. *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (observing "citizens . . . have two political capacities, one state and one federal, each protected from incursion by the other" and the states and federal governments each have their "own set of mutual rights and obligations to the people").

IV. The exclusive fields of law reserved to the states under the principle of state sovereignty include laws, such as Health Care Freedom Laws, which check and balance claims of implied federal power by protecting constitutional liberty.

The Constitution's reservation of exclusive substantive legal authority to the states was not meant to be merely passive. As suggested in *Bond*, the Founders fully anticipated that the people would be able to resist federal usurpation through affirmatively exerting state sovereignty to protect their constitutional liberty through "positive law," such as the Health Care Freedom Act. The Constitution established a dynamic decentralized system of governance that was meant to passively *and* actively balance power against power over time, both horizontally, between the departments of the federal government, and vertically, between the states and the federal government.

Alexander Hamilton – hardly the champion of state sovereignty among the Founders – said it best in *The Federalist* No. 28:

> In a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and those will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. *If their rights are invaded by either, they can make use of the other as the instrument of redress.*

Id. 28 (Alexander Hamilton) (Gideon ed., 1818) (emphasis added). Likewise, in *The Federalist* No. 51, James Madison underscored, "[i]n the compound republic of America . . . [t]he different governments will control *each other*."

In other words, our system of dual sovereignty was not designed to allow the federal government to claim implied power to bypass state sovereignty, occupy the state's entire jurisdiction within the scope of its reserved powers, and deprive the people of their liberty without any active check or balance from the states. As understood by the Founders and the Ratifiers, the principle of state sovereignty recognizes that a state *as a state* has the constitutional authority to exercise its reserved powers substantively and

actively to secure constitutional liberty both for purposes of local governance and, if necessary, to resist federal overreach. This point is not the same as the long-rejected contention that the state has *parens patriae* standing to enforce the rights of its citizenry – *i.e.*, that the state can stand in the shoes of its citizens and enforce *their* rights. Instead, the point is that "the promise of liberty" lies in the "tension between federal and state power." *Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991). When states enact positive laws to protect constitutional liberty, such as Health Care Freedom Laws, they are creating the tension *states were meant to create as states* to ensure a constitutional equilibrium. This principle of state sovereignty clearly stands against the constitutionality of the Individual Mandate, especially in Health Care Freedom States.

V. Especially in Health Care Freedom States, the Individual Mandate clearly violates the principle of state sovereignty.

One of the clearest substantive limits on implied federal power arises from the fact that Tenth Amendment's guarantee of state sovereignty was originally meant to work "in tandem" with the substantive guarantees of individual liberty found in the Bill of Rights. Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 Am. Crim. L. Rev. 1261, 1302 (1989). Far from being an ink blot, the whole

point of the Ninth Amendment was to ensure that the scope of delegated federal power was – at the very least – bounded by fundamental liberties guaranteed by state law. Calvin R. Massey, *The Anti-Federalist Ninth Amendment and its Implications for State Constitutional Law*, 1990 Wis. L. Rev. 1229, 1232 (1990). James Madison, for example, clearly expected state legislatures and constitutions to furnish the substance of the rights reserved under the Ninth Amendment. *Wilmarth*, 26 Am. Crim. L. Rev. at 1293.

Based on this original understanding of the Constitution, state law guarantees of individual freedom should limit the reach of *implied* federal power so long as the state law (1) is within the scope of the traditionally reserved powers of the states, and (2) arises from the same conception of fundamental rights and ordered liberty that is guaranteed by the Bill of Rights. *Cf. Wilmarth*, 26 Am. Crim. L. Rev. at 1302. Under this test, which workably draws upon categories already defined by precedent, the Individual Mandate clearly violates the principle of state sovereignty in Health Care Freedom States.

First of all, the protection of individual rights, as well as the regulation of health insurance contracts, clearly fall within the traditionally reserved sovereign powers of the states. *See, e.g.*, Robert G. Natelson, *The Enumerated Powers of the States*, 3 Nev. L.J. 469, 483-88 (Spring 2003); *Gonzalez v. Oregon*, 546 U.S. 243, 375 (2006); *Medtronic Inc. v. Lohr*, 518 U.S. 470, 475 (1996); *PruneYard Shopping*

Center v. Robins, 447 U.S. 74, 83 (1980) (holding a state may exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution); *Lambert v. Yellowly*, 272 U.S. 581, 589 (1926); *Linder v. United States*, 268 U.S. 5, 18 (1925); *Paul v. Virginia*, 75 U.S. 168, 182 (1869).

Secondly, Health Care Freedom Laws facilitate the exercise of Fifth and Ninth Amendment rights because the personal right under state law to purchase or not purchase health insurance is among the continuum of liberty interests protected by the Fifth and Ninth Amendments. *Massachusetts v. Upton*, 466 U.S. 727, 737 (1984) (Stevens, J., concurring) (observing that Ninth Amendment protects rights recognized under state law); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1964); *id.* at 486-87 (Goldberg, J., concurring) (contending the freedom to prescribe and sell contraceptive devices has been regarded as within the continuum of liberty interests protected by the Fourteenth Amendment's incorporation of the Ninth Amendment); *Acme, Inc. v. Besson*, 10 F. Supp. 1, 6 (D. N.J. 1935) (indicating the "local, intimate, and close relationships of persons and property" are protected by the Ninth Amendment); *Magill v. Brown*, 16 F. Cas. 408, 428 (E.D. Pa. 1833) (observing "personal rights are protected by . . . the 9th amendment").

Taken together, the Individual Mandate not only threatens to displace state sovereignty reserved

under the Tenth Amendment, it threatens the violation of constitutional liberty protected by the Fifth and Ninth Amendments. The "letter and spirit" of the Constitution thus condemns the Individual Mandate to the extent that it is premised on the implied power confirmed by the Necessary and Proper Clause. The principle of state sovereignty therefore protects Health Care Freedom Laws from displacement by the Individual Mandate.

This does not mean, as contended by the losing party in *Hodel v. Virginia Surface Mining & Recl. Assn.*, that all federal laws necessarily violate the principle of state sovereignty whenever they seek to override state laws. 452 U.S. 264, 287-90 (1981). Rather, the principle of state sovereignty protects state laws from claims of *implied* federal power that dangerously concentrate power and prevent our system of dual sovereignty from fulfilling its function of protecting constitutional liberty and decentralized local governance. *Printz*, 521 U.S. at 924; *National League of Cities*, 426 U.S. at 845, 852-54. The bottom line is that it is not "proper" for the federal government to claim implied power to frustrate the very purpose of our system of federalism. Therefore, in view of its threat to Health Care Freedom Laws in fourteen states, the Individual Mandate is unconstitutional.

VI. Alternatively, the Individual Mandate should be ruled unenforceable in Health Care Freedom States because of the constitutional limitations imposed by this Court on the doctrine of implied preemption.

Because PPACA does not expressly preempt state law guarantees of individual freedom of choice in health plans, the Individual Mandate's displacement of Health Care Freedom Laws under the Supremacy Clause hinges upon the doctrine of implied preemption. The principles of implied preemption, however, are not mere rules of construction. They were developed by the Court with an explicit awareness of the need to preserve state sovereignty from federal overreach to protect liberty; and they serve a substantive purpose. They ensure that state sovereignty is protected against federal preemption if at all possible. As emphasized in *Gregory*:

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty.

Gregory, 501 U.S. at 458-459. As more recently explained in *Chamber of Commerce of the United States v. Whiting*:

> Implied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.' Our precedents 'establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act.'

131 S.Ct. 1968, 1985 (2011). In short, when the principle of state sovereignty is at issue, the doctrine of implied preemption assumes constitutional dimensions.

In light of the federalism factors at issue in this case, it is simply impossible to construe the Individual Mandate as impliedly preempting Health Care Freedom Laws. First of all, it is well-established that preemption of the states' police powers is not presumed even where the federal government comprehensively regulates a field of law. *DeCanas v. Bica*, 424 U.S. 351, 357-58 (1976). To the contrary, where, as here, a federal law conflicts with the traditional police powers of the states, the Court will presume Congress did not intend to preempt state law. *Wyeth v. Levine*, 129 S.Ct. 1187, 1194-95 (2009); *Cipollone v. Liggett Group*, 505 U.S. 504, 518 (1992). To overcome this presumption, Congressional intent to preempt state law must *at the very least* be "clear." *Hillsborough County, Fla. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 715-16 (1985).

Secondly, federal laws that encroach on state laws exerting traditional sovereign powers, even if within the federal government's enumerated powers, must be shown to unequivocally displace contrary state law and policy; otherwise, state law and policy will stand and be carved out from the federal legal scheme. In *Gonzalez v. Oregon*, for example, the Court refused to recognize the federal government's claim of supremacy over a state law that would allow euthanasia, because control over health care decisions fall within a traditional area of state sovereignty. 546 U.S. 243 (2006). The Court held that congressional intent to "effect a radical shift of authority from the States to the Federal Government" must be unequivocal, otherwise the court would not permit preemption. This ruling reflected the earlier holding in *Gregory*, which rejected an effort to preempt a provision of the Missouri Constitution setting mandatory retirement ages for state judges, asserting that core state functions cannot be preempted unless the intrusion is stated in "unmistakably clear" terms. *Id.* at 460.

In the present case, it is far from "clear," much less "unequivocal" or "unmistakably clear" that Congress intended for the Individual Mandate to preempt state laws that guarantee freedom of choice

in health plans.[11] This is because PPACA broadly guarantees that:

> No individual, company, business, nonprofit entity, or health insurance issuer offering group or individual health insurance coverage shall be required to participate in any Federal health insurance program created under this Act (or any amendments made by this Act), or in any Federal health insurance program expanded by this Act (or any such amendments), and there shall be no penalty or fine imposed upon any such issuer for choosing not to participate in such programs.

---

[11] In fact, regardless of the expressed beliefs of Congress, enforcing the Individual Mandate in Health Care Freedom States is likely counterproductive to PPACA's asserted goals of health care cost containment. This is because increased participation in health insurance, without including measures such as high deductibles and expanded health savings accounts, causes health care costs to spiral upward because individuals tend to demand more services and to be less cost conscious when a third party pays their bill. Byron Schlomach, *Removing the Middleman: What States Can Do to Make Health Care More Responsive to Patients*, Goldwater Institute Policy Report no. 230 (Jan. 13, 2009), http://goldwaterinstitute.org/article/removing-middleman-what-states-can-do-make-health-care-more-responsive-patients-0. Consequently, mandating the purchase of health insurance meeting one-size-fits-all coverage criteria devised in Washington, D.C. (regardless of whether it is useful or appropriate for the needs and desires of the people of any particular state) is anticipated to generate excessive demand and competition for scarce medical services. This will increase health care costs and diminish access to health care from what it would otherwise be the case in many, if not most, states.

42 U.S.C. § 18115. PPACA can thus be construed as intended to accommodate, rather than displace, state laws that guarantee freedom of choice in health care plans as against the "comprehensive" federal health insurance program of which the Individual Mandate is a part. Indeed, the foregoing provision is akin to the provision of IRCA in *Whiting*, 131 S.Ct. at 1985, that expressly reserved to "the States the authority to impose sanctions on employers hiring unauthorized workers," thus precluding any claim by the federal government of implied preemption.

Taken together, the Individual Mandate *does not* clearly and unequivocally displace Health Care Freedom Laws. Following *Whiting*, *Oregon*, and *Gregory*, the federalism factors that give rise to the serious constitutional concerns discussed in the preceding sections and in the lower courts' decisions preclude any claim that the Individual Mandate impliedly preempts Health Care Freedom Laws. Accordingly, it would be unlawful, if not unconstitutional, to enforce the Individual Mandate within Health Care Freedom States.

CONCLUSION

Above and beyond the "great latitude" the states enjoy in the exercise of their police powers over public health and safety, *Oregon*, 546 U.S. at 270, our federalist system guarantees the states (and the people) decentralized autonomy to experiment with

heightened protections of individual liberty. *Gregory*, 501 U.S. at 458; *see generally* William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). From this perspective, it is obviously never "proper" for the federal government to frustrate the purpose of federalism by displacing state sovereignty when it serves to protect individual liberty. The Health Care Freedom Laws of Arizona, Georgia, Idaho, Indiana, Kansas, Louisiana, Missouri, North Dakota, New Hampshire, Ohio, Oklahoma, Tennessee, Utah, and Virginia unequivocally reveal that the Individual Mandate dangerously concentrates power in the federal government beyond anything contemplated by the drafters of the Constitution or the state legislatures that ratified it.

Respectfully submitted on this 13th day of February, 2012, by:

NICHOLAS C. DRANIAS
Counsel of Record
CLINT D. BOLICK
DIANE COHEN
CHRISTINA SANDEFUR
GOLDWATER INSTITUTE
SCHARF-NORTON CTR. FOR CONST. GOV'T
500 E. Coronado Road
Phoenix, AZ 85004
P: (602) 462-5000/F: (602) 256-7045
ndranias@goldwaterinstitute.org

LINDA W. KNIGHT
GULLETT SANFORD
ROBINSON & MARTIN PLLC
150 Third Avenue South, Suite 1700
Nashville, TN 37201
P: (615) 244-4994/F: (615) 256-6339
lknight@gsrm.com

GEOFFREY D. TALMON
TALMON LAW OFFICE, PLLC
910 W. Main Street, Suite 358
Boise, ID 83702
P: (208) 841-9481/F: (208) 906-8650
gtalmon@talmonlaw.com

AMICUS CURIAE BRIEF

No. 11-398

In The
Supreme Court of the United States

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, et al.,

Petitioners,

v.

STATE OF FLORIDA, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

ARGUMENT ON BEHALF OF AMICUS CURIAE, CITIZENS' COUNCIL FOR HEALTH FREEDOM, SUPPORTING THE RESPONDENTS, AND ADDRESSING THE MINIMUM COVERAGE PROVISION ISSUE

JOHN REMINGTON GRAHAM
Counsel of Record
180 Haut de la Paroisse
St-Agapit, Comté de Lotbinière
Québec G0S 1Z0 Canada
jrgraham@oricom.ca
TEL-FAX 418-888-5049

*Counsel for Amicus Curiae
Citizens' Council for Health Freedom*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of Amicus Curiae	1
Summary of the Argument	2
Argument of Amicus Curiae	4
A. The "intended meaning" of the United States Constitution	4
B. The Framers and the Commerce Clause	8
C. The errors in *Wickard v. Filburn*	18
Concluding Observations	20

TABLE OF AUTHORITIES

Page

Decisions of the United States Supreme Court:

Gibbons v. Ogden, 9 Wheaton 1 (U. S. 1824) 3, 6, 7, 8, 12

Gonzales v. Raich, 545 U. S. 1 (2005) 3, 19

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937) 15, 20

Ogden v. Saunders, 12 Wheaton 213 (U. S. 1827) 7

Powell v. McCormick, 395 U. S. 486 (1969) 8

Prigg v. Pennsylvania, 16 Peters 539 (U. S. 1842) 8

Southern Pacific Co. v. Arizona, 325 U. S. 761 (1944) 13

United States v. Darby, 312 U. S. 494 (1941) 15

United States v. E. C. Knight & Co., 156 U. S. 1 (1895) 12

United States v. Lopez, 514 U. S. 549 (1995) 3, 19

United States v. Morrison, 529 U. S. 598 (2000) ... 3, 19

Wickard v. Filburn, 317 U. S. 111 (1942) 3, 4, 18, 19, 20, 21

Wiscart v. D'Auchy, 3 Dallas 321 (U. S. 1796) 6

Historical References and Learned Treatises:

Sir William Blackstone, *Commentaries on the Laws of England*, Edward Christian, London, 1765 ..... 5, 6

TABLE OF AUTHORITIES – Continued

Page

Jacob Cooke, *The Reports of Alexander Hamilton*, Harper & Row, New York, 1964, cited by short title as "Cooke's Reports":

Opinion on the Bank (1791) 4, 12, 14

Report on Manufactures (1791) 18

Thomas Cooley, *Constitutional Limitations*, Little Brown & Co., Boston, 8th edition 1927 8

Jonathan Elliot (ed.), *Debates on the Federal Constitution*, J. B. Lippincott & Co., Philadelphia, 2nd edition 1859, cited by short title as "Elliot's Debates":

Vol. 1, Annapolis Convention (1786), Jackson's Journal (1787), or Yates' Minutes (1787) 9, 11, 15, 16, 17

Vol. 2, New York Convention (1788) 16

Vol. 5, Madison's Notes (1787) 9, 10, 11, 15, 16, 17

The Federalist, Mentor edition by the New American Library, New York, 1961, cited by short title as "the Federalist" with ordinal numbering:

No. 9 (Hamilton) 16

No. 16 (Hamilton) 16

No. 17 (Hamilton) 17, 21

No. 22 (Hamilton) 17

No. 32 (Hamilton) 7, 13

No. 33 (Hamilton) 12

TABLE OF AUTHORITIES – Continued

Page

No. 34 (Hamilton) 17

No. 40 (Madison) 7

No. 44 (Madison) 12

No. 78 (Hamilton) 7, 16

No. 83 (Hamilton) 10

Samuel Johnson, *Dictionary of the English Language*, 4th edition 1773 14

Key Law Review Articles:

Robert L. Stern, *That Commerce which Concerns More States than One*, 47 Harvard Law Review 1335 (1934) 3

Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 University of Chicago Law Review 101 (2001) 3

INTEREST OF AMICUS CURIAE

The Citizens' Council for Health Freedom is a private non-profit corporation organized under the laws of the State of Minnesota, with a mission promoting "patient and doctor freedom, medical innovation, and the right of citizens to a confidential patient-doctor relationship." Our goals include reduced dependency on government health care programs, and a free and open health care market, a charitable safety net strengthened by tax incentives, and elimination of taxes on health care services.[1]

The Citizens' Council for Health Freedom believes the Patient Protection and Affordable Care Act of 2010, (Public Law 111-148, 124 U. S. Statutes 119 as amended by Public Law 111-152, 124 U. S. Statutes at Large 1029), is so fiscally irresponsible, so intrusive of freedom of choice in medical treatment, so dangerous to the preservation of human privacy in the patient-doctor relationship and in medical records, so fraught with bureaucratic complexity, so

---

[1] As regards Rule 37.6 of the Rules of the United States Supreme Court, counsel for amicus curiae prepared this entire submission, with helpful and appreciated guidance and suggestions of the president and chief executive officer of the Citizens' Council for Health Freedom on certain points of detail. Neither counsel for amicus curiae, nor any party to any of the three causes, with respect to which writs of certiorari were granted on November 14, 2011 (Ns. 11-393, 11-398, and 11-400) has made any monetary contribution to fund the preparation and submission of this amicus brief. Blanket consents have been filed by the parties in this case.

expansive in growth of government, so incomprehensible in language and length, so destructive of our American health care system, and so manifestly and incurably unconstitutional, that the entire bulwark of this legislation should be legislatively repealed or judicially set aside, and the vital work of health care reform must be commenced anew.

In keeping with Rule 37.1 of the United States Supreme Court, the Citizens' Council appears as amicus curiae by the undersigned, who was admitted to the bar of the Minnesota Supreme Court on October 20, 1967 (#3664X), and to the bar of the United States Supreme Court on August 5, 1971. He is in good standing as an officer in both courts.

SUMMARY OF THE ARGUMENT

Blanket consents having graciously been filed by the parties of record in this cause, the Citizens' Council for Health Freedom proceeds with its contribution as allowed by Rule 37.3, acutely aware of the admonition set forth in Rule 37.1 of the Rules of the United States Supreme Court. The Citizens' Council for Health Freedom does not wish to reargue the case for the attorneys general of more than half the States of the Union who will be heard through eminent counsel of their choosing in these proceedings. While we shall briefly outline our views in broader context, we here offer **a focused argument for the following specific proposition** in relation to the first question on

which a writ of certiorari has been granted in this cause, to wit: **that the opinion of the court in *Wickard v. Filburn*, 317 U. S. 111 (1942), is inconsistent with the intended meaning and historic purpose of the third clause of Article I, Section 8 of the United States Constitution, commonly known as the Commerce Clause, as made evident from the records of the Philadelphia Convention of 1787, and certain writings of Alexander Hamilton in *The Federalist*, his Opinion on the Bank, and his Report on Manufactures, and that, therefore, *Wickard v. Filburn* should be overruled or disregarded in this case.**

We are aware of relevant scholarly articles, including especially those by Robert L. Stern, *That Commerce which Concerns More States than One*, 47 Harvard Law Review 1335 (1934), and Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 University of Chicago Law Review 101 (2001), and we are familiar with the decisions of this Court on the Commerce Clause from *Gibbons v. Ogden*, 9 Wheaton 1 (U. S. 1824), up through the contemporary trilogy of *United States v. Lopez,* 514 U. S. 549 (1995); *United States v. Morrison*, 529 U. S. 598 (2000); and *Gonzales v. Raich*, 545 U. S. 1 (2005).

We do not entirely agree with either Stern or Barnett on the intention of the Framers. We believe that judicial interpretation of the Commerce Clause has been badly flawed from the time of John Marshall to the present, occasioned by making too much of the dicta found in *Gibbons v. Ogden* on the distinction

between interstate and intrastate commerce and supposed exclusive authority of Congress over commerce, as well as an erroneous identification of production with intrastate commerce, and failure to understand labor relations as a part of commerce. This confusion led to the unfortunate result in *Wickard v. Filburn* which should not be allowed to mislead this Court in dealing with the individual mandate in Section 1501 in the Patient Protection and Affordable Care Act in this cause (No. 11-398)

In order to show why *Wickard v. Filburn* should be overruled, and why the individual mandate should be struck down as unconstitutional, we shall reconsider the proper definition of the so-called "intended meaning" of the United States Constitution, and explain the idea as the Framers themselves understood it. Then we shall give attention to the historical facts and interpretative rules for discovering "intention of the Framers" regarding the Commerce Clause.

ARGUMENT OF AMICUS CURIAE

A. The "intended meaning" of the United States Constitution

The long and involved controversy between those who favor the "intention of the Framers" and those who favor the "living Constitution" is neatly resolved by Alexander Hamilton in his Opinion on the Bank (1791) where he said, "Whatever may have been the intention of the framers of a constitution or a law,

that intention is to be sought for in the instrument itself, according to **the usual and established rules of construction**." – Jacob E. Cooke (ed.), *The Reports of Alexander Hamilton*, Harper & Row, New York, 1964, p. 94, hereinafter given reference as Cooke's Reports. [Emphasis supplied] In these words Hamilton did away with the notion that the intended meaning of the United States Constitution is an historical or political consensus among the Framers. There really is an intended meaning, and Hamilton defined what it consists of. It embraces the true and ageless Constitution which cannot be changed to suit political agendas or perceived exigencies, but it is different than what some have supposed. **The "intended meaning" is an objective idea or abstract significance which emerges when the document is correctly interpreted according to certain rules of construction which came to us from the common law of England, and no less the civil law of Rome, and in light of certain historical information contemplated by those rules.**

And what were "the usual and established rules of construction" in Hamilton's thinking? They are found in the first book of Sir William Blackstone's renowned treatise, from which the founding fathers of the United States learned their law. In Book I, page 59 of Edward Christian's edition of *Commentaries on the Laws of England*, published in London in 1765, Blackstone observed, "The fairest and most rational method to interpret the will of the legislator is by

exploring his intentions at the time the law was made, by signs the most natural and probable. And these signs are **either the words, the context, the subject matter, the effects and consequences, or the spirit and reason for the law.**" [Emphasis supplied] He then proceeded to give us five rules on pages 59-61. These rules, used for the interpretation of acts of Parliament in Great Britain but assumed by the founding fathers of the United States for construction of American statutes and constitutions, are found in case reports and other authorities. They may be summarized as follows:

– General words are to be taken in their usual and natural meaning, not necessarily in point of strict grammar, but as widely understood at the time of adoption. See, e. g., Chief Justice John Marshall in *Gibbons v. Ogden*, 9 Wheaton at 188. Terms of art or technical words are to be taken as they were understood by those learned in the field at the time of adoption. Often, for example, terms of the common law are used, in which case the meaning must be derived from the common law. See, e. g., Chief Justice Oliver Ellsworth in *Wiscart v. D'Auchy*, 3 Dallas 321 at 327-330 (U. S. 1796).

– If a word, phrase, or clause is still dubious, the meaning may be established from the context of the document by comparing it with another part of the same instrument or its predecessor containing similar or related language, enabling corresponding provisions to shed light upon each other and thereby to efface ambiguity. See, e. g., Chief Justice John

Marshall in *Gibbons v. Ogden*, 9 Wheaton at 191. Cf. Alexander Hamilton, *The Federalist,* No. 32, Mentor edition from the New American Library, New York, 1961, pp. 199-200, hereinafter given reference as the Federalist, using ordinal numbering for each of the papers, and pagination from the Mentor edition. This rule on context blends into a like precept, to wit:

– A provision may be read in reference to its subject matter. Hence, provisions concerning the same or a related question should all be read together to avoid inconsistency and achieve harmony between them in relation to a common end, and also, if possible, to give each a useful meaning and thereby avoid redundancy, surplusage, or idle language. See James Madison in the 40th Federalist, p. 248, and Alexander Hamilton in the 78th Federalist, p. 468.

– As to effects and consequences, if an expression, either generally or in relation to particular facts, can be read in different ways, the construction more in conformity with natural justice as confirmed by legal tradition should be adopted. See, e. g., Justice Smith Thompson in *Ogden v. Saunders*, 12 Wheaton 213 at 312 (U. S. 1827).

– But, when ambiguities cannot be adequately resolved by reference to the general or technical meaning of words, context, subject matter, and effects and consequences, resort should be had to the reason and spirit of the provision in question, or, in other words, **the historic purpose sought to be accomplished at the time of framing and adoption**, in

keeping with which language should be clarified, so that language should be given more general or specific meaning as required to fit the objective. See, e. g., Chief Justice John Marshall in *Gibbons v. Ogden*, 9 Wheaton at 188-189, and Justice Joseph Story in *Prigg v. Pennsylvania*, 16 Peters 539 at 610-611 (U. S. 1842). And here we should take note of the observation by Judge Thomas Cooley, supported by an abundance of authority, where he said, **"When the inquiry is directed to ascertaining the mischief designed to be remedied, or the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the convention which framed the instrument."** – *Constitutional Limitations*, Little Brown & Co., Boston, 8th edition 1927, Vol. 1, p. 142 [Emphasis supplied] An excellent example of examining convention debates for this purpose is found in the opinion of Chief Justice Earl Warren in *Powell v. McCormack*, 395 U. S. 486 at 522-548 (1969).

B. The Framers and the Commerce Clause

We propose here to undertake an analysis of the Philadelphia Convention of 1787 and related events in order to assist this Court in rediscovering the intended meaning of the power of Congress to regulate commerce among the several States. For this purpose we shall make reference to the five-volume compendium edited by Jonathan Elliot, *Debates on the Federal Constitution*, J. B. Lippincott & Co., Philadelphia, 2nd edition

1859, which has often been cited by this Court and is hereinafter given reference as Elliot's Debates.

It is well known that the Philadelphia Convention was summoned by the Congress of the Confederation on recommendation of the Annapolis Convention which had concluded a year earlier that there was a need for consideration of a "uniform system" of regulating "the commerce and trade of the United States," but that "the power of regulating trade" was of "such comprehensive extent" that providing for and adopting it would probably require "other adjustments" in the then-existing federal system. See 1 Elliot's Debates 116-119.

At the Philadelphia Convention, the plan of Governor Edmund Randolph of Virginia emerged from the committee of the whole as the working draft of what later became the United States Constitution. Governor Randolph's plan included a proposed grant of legislative authority to Congress, and, as adopted as a sixth resolution by the Convention on July 26, 1787, and referred to the committee on detail, this proposed grant was described as a power "to legislate in all cases for the general interests of the Union, and also those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by individual legislation." See 1 Elliot's Debates 144, 153, 181-182, 206-207, and 221 (Journal, May 29 and 31, June 13 and 19, July 16, 17, and 26, 1787); and 5 Elliot's Debates 127-128, 139, 190, 317, 319-320, and 375 (Madison's Notes, May 29 and 31, June 13 and 19, July 16, 17, and 26, 1787).

The records of the Convention disclose that this broad description of proposed authority was meant only as a preliminary sketch of what the subsequent enumeration of powers was supposed to accomplish. Governor Randolph himself emphatically disclaimed any intention of giving "indefinite powers to the national legislature, declaring that he was entirely opposed to such an inroad on state jurisdictions." See 5 Elliot's Debates at 139 (Madison's Notes, May 31, 1787). Hence, it may be inferred that the specific enumeration of powers should be read to prevail over any intimation that Congress possesses a general power of legislation. In the 83rd Federalist, p. 497, Alexander Hamilton was crystal clear on this point when he later said, "The plan of the convention declares that the power of Congress, or, in other words, of the national legislature, shall extend to certain enumerated cases. This specification of particulars evidently **excludes all pretension of a general legislative authority**." [Emphasis supplied]

A further inference must be that **the construction of any clause effectively giving Congress a general legislative authority is necessarily in error**. But at the same time, given the nature of the broad purpose set forth in the sixth resolution of the Convention on July 26, 1787, the powers thereafter enumerated by the Convention should be liberally construed as remedial provisions, resolving ambiguity in favor of adequate, though not more than required discretion in addressing problems common among the

several States to promote the general interests of the whole Union.

In light of this background on historic purpose, it is easier to grasp the intended meaning of the third clause of Article I, Section 8 of the United States Constitution, insofar as it provides that Congress shall have power "to regulate commerce . . . among the several States. . . ." The adoption of this provision by the Convention on August 16, 1787, as one of the most important enumerated powers proposed by the committee on detail, was routine, uneventful, and unanimous. See 1 Elliot's Debates 226, 245, 247, 256, 280, 283 (Journal, August 6, 16, 18, 22, and 31, September 4, 10, 12, and 17, 1787); and 5 Elliot's Debates 378, 434, 439, 462, 503, 506-507, 536, 560 (Madison's Notes, August 6, 16, 18, 22, and 31, September 4, 10, 12, and 17, 1787).

We can infer from the records of the Philadelphia Convention just recited that the power to regulate commerce "among the several States" was a power to regulate commerce whenever, in the reasoned judgment of Congress, the general interests of the Union should require it, or whenever, in the prudent judgment of Congress, regulation by legislatures of the several States might not be adequate to produce national harmony. **Let it be remembered here that this power over commerce, though broad, was meant to be qualified by the eighteenth clause of Article I, Section 8 of the United States Constitution, which is, not an additional source of power, but rather a limit on the means which**

may be used, viz., means necessary and proper, – i. e., means reasonably conducive to, but consistent in principle with the end authorized, and not expressly or impliedly prohibited by the Constitution. See the 33rd Federalist, pp. 201-204 (Hamilton); the 44th Federalist, pp. 283-286 (Madison); and Cooke's Reports, pp. 88-91 (Hamilton's Opinion on the Bank).

The opinion of John Marshall in *Gibbons v. Ogden* in 9 Wheaton at 186-197 was very good insofar as he held that the power of Congress includes not merely trade concerning more States than one, but also the avenues of such trade, including navigation.

But Marshall's dicta, having nothing to do with the matter before him, caused trouble in later years, as where in 9 Wheaton at 194 he made reference to commerce completely internal to a State as if such trade was necessarily reserved to the several States by the 10th Amendment, giving rise to confusion over an imagined distinction between **interstate** commerce and **intrastate** commerce, which was never mentioned in the Philadelphia Convention. See, e. g., *United States v. E. C. Knight & Co*, 156 U. S. 1 at 13-16 (U. S. 1895). This confusion lingered for years, and induced unfortunate decisions in the early years of the Great Depression.

Again in 9 Wheaton at 209, Marshall suggested the notion that the power of Congress over commerce was exclusive of the several States, as if the Commerce Clause **standing alone was in and of itself** a restraint on commercial regulation by the States,

even where Congress had passed no statute addressing a particular problem under consideration. This notion led to judicial decisions which actually regulated commerce, thereby confounding judicial with legislative power. See, e. g., *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1944).

Even so Hamilton, who attended the Annapolis Convention and was on the committee on style in the Philadelphia Convention, stated in the 32nd Federalist, pp. 198-199, that powers granted to Congress were not meant to be exclusive of the States unless made exclusive in express language, or expressly given to Congress but expressly denied the States, or inconsistent, not in mere policy or convenience, but in principle with a concurrent authority of the States. Nothing of the sort can be said of the power conferred upon Congress in the third clause in Article I, Section 8, at least insofar as it concerns domestic commerce.

It follows that, under the intended meaning of the United States Constitution, the Commerce Clause leaves the States free to regulate commerce as they see fit unless Congress, in the exercise of sound discretion, intervenes with uniform regulations for the good of the whole Union in light of conditions prevailing at any particular time in history. As expounded by Hamilton, therefore, **the intended meaning of the power of Congress to regulate commerce is not a quaint antique, but a modern, practical, and dynamic provision,** – good

when Marshall wrote in 1824, also good in the troubled year of 1937, and still good in the uncertainty of 2012.

In any event, it is important not to confound a distinction between interstate and intrastate commerce, which was not even discussed by the Framers, and a very different distinction, which the Framers plainly did have in mind, between commerce on the one hand, and on the other agriculture, manufacturing, and other activities which, whether or not economic in nature, were not considered part of commerce, and were thus understood as lying beyond the power of Congress.

In his Opinion on the Bank, for example, Hamilton gave us a far-reaching explanation of what the Commerce Clause was meant to authorize. See Cooke's Reports at 98-99, where he mentioned regulation of trade and navigation, thus anticipating Marshall, but went further to mention "regulating the manner of contracting with seamen," in other words labor relations, and "regulation of policies of insurance." Given dictionaries then published – e. g., Samuel Johnson's *Dictionary of the English Language*, 4th edition 1773 –, and Hamilton's enumeration, **the power of Congress to "regulate commerce," as the phrase was generally understood when George Washington became President, includes necessary and proper statutes touching upon the marketing, buying, selling, barter, and exchange of all forms of property**

both tangible and intangible, and even labor relations. And it is fair enough to say that, under Hamilton's view, *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), and even *United States v. Darby*, 312 U. S. 494 (1941), can be seen as having rightly decided that Congress may regulate labor relations, for Hamilton believed that labor relations were part of commerce. Nor was it a mistake in these decisions to soften the distinction between interstate and intrastate commerce. But error lurks in **the false rationale or premise that Congress can regulate manufacturing, agriculture, and other forms of production as such, if Congress finds, however feeble the pretext, that such activity "substantially affects" commerce. Congress was never meant to have such power.** Let this latter point be examined:

Alexander Hamilton is not a character to be stereotyped, for his actual views, when discovered, are often surprising, – stunning is a better word. It cannot be gainsaid that Hamilton attended the Philadelphia Convention, determined to establish a strong, centralized government under which the States would be reduced to mere administrative provinces. See his grand day-long oration recorded in 1 Elliot's Debates 417-428 (Yates' Minutes, June 18, 1787), and 5 Elliot's Debates 198-205 (Madison's Notes, June 18, 1787). Yet, at the Convention, he learned much and changed his mind. Afterwards, Hamilton forthrightly proclaimed that, under the work of the Philadelphia Convention, the United

States would be a "confederate republic" in which the States would "preserve their sovereignty;" that the Union "could be dissolved;" and that the "friends of the proposed Constitution" conceded "the right of the people" (acting through their elected delegates sitting in convention to exercise sovereign power) "to alter or abolish the established Constitution whenever they find it inconsistent with their happiness" (as actually happened in England in 1688-1689, and in American colonies of England in 1775-1776). See the 9th Federalist, pp. 74-75; and the 78th Federalist, p. 469. Cf. the 16th Federalist, p. 118.

Likewise Hamilton astonishes us in what he had to say about intended constitutional limitations on the power of Congress to regulate commerce. Gouverneur Morris made it unmistakable in the Philadelphia Convention that **"agriculture and manufacturing" were considered distinct from "commerce and finance,"** as appears in 1 Elliot's Debates 250 (Journal, August 20, 1787); 5 Elliot's Debates 446 (Madison's Notes, August 20, 1787). In those days, **"agriculture, commerce, and manufactures" were thought of as distinct activities**. See, e. g., the speech of Melancton Smith in the New York Convention of 1788, as recorded in 2 Elliot's Debates 336-337. Generous though his idea of commerce was, **Hamilton himself distinguished "trade and finance" over which Congress was granted power, from "the supervision of agriculture," or "agriculture and manufactures" which were consigned to the States**. See the

17th Federalist, p. 118, the 22nd Federalist, pp. 143-144, and the 34th Federalist, p. 209.

Let it be conceded that Congress was meant to have broad discretionary authority over commerce throughout the Union. Even so, **under the intended meaning of the United States Constitution, Congress cannot regulate production, or any activity that is not commerce, on the pretext that such activity "substantially affects" commerce**. In exercising power over commerce, Congress can prescribe rules for the hiring of artisans and workers in the private sector. But Congress cannot dictate by normative statutes what those artisans and workers shall produce, or how they shall produce it, because, under the **intended meaning of the United States Constitution**, such responsibility belongs to the States.

It is true that the Framers were aware and intended that Congress could tax and spend in ways calculated to encourage or discourage other activities not in themselves commerce, as may be illustrated:

George Mason wanted a power of Congress to enact sumptuary laws, in other words to regulate consumption of luxury items – activity in any event different from commerce as such –, but his proposal was voted down because it was said in opposition that taxation could better be used to entice people to be sensible about such matters. See 1 Elliot's Debates 251 (Journal, August 20, 1787), and 5 Elliot's Debates 447 (Madison's Notes, August 20, 1787). If the power to

regulate commerce had been understood as including power to prohibit or regulate consumption, Mason would not have made his motion, because there would have been no need for it.

Another example is found in one of the most brilliant of Hamilton's papers. In his Report on Manufactures (1791), Hamilton proposed the use of taxing and spending in order to promote growth and quality in American industry. See Cooke's Reports 115-205. He spoke of taxing and spending, because, as the man more interested than all of the other Framers in the power of Congress to regulate commerce, he certainly knew that Congress could not regulate manufacturing, or for that matter any other mode of production. **Under the intended meaning, therefore, if a domestic activity is not commerce as such, Congress cannot regulate it on any theory under the third clause of Article I, Section 8 of the United States Constitution.**

C. The errors in *Wickard v. Filburn*

In *Wickard v. Filburn*, 317 U. S. 111 (1942), this Court upheld an act of Congress which imposed a **penalty or civil fine** as a kind of sanction for producing more wheat for home consumption than the federal government allowed.

In so doing, Congress did not regulate marketing, buying, selling, or exchanging wheat, – in other words, "commerce" as the Framers understood the word. Instead Congress regulated production which,

though economic, was not commerce in legal contemplation. The production of the farmer sanctioned was trivial on the national market, but the decision sustaining the act of Congress was based on the conjecture that, if all other farmers across the country likewise exceeded statutory limits on production, the effect on commerce might be substantial. On this tenuous, hypothetical assumption, the statute was upheld as constitutional.

But *Wickard v. Filburn* in 317 U. S. was decided **contrary to the intended meaning of the United States Constitution** for two main reasons:

First, Congress cannot regulate something not commerce whenever Congress supposes that it "substantially affects" commerce. All things, even holy religion, divorce proceedings, domestic violence, and use of firearms can be said to have "substantial effects" on commerce, if the reasoning in *Wickard* be legitimate. For such an extrapolation effectively converts the power of Congress over commerce into power of general legislation, which is **exactly what the Philadelphia Convention intended not to grant Congress**. It was this sense of things which prompted the judicial course corrections by the majorities in *Lopez* and *Morrison,* but was unfortunately not understood or appreciated by the majority in *Raich*.

And, secondly, Congress is restrained no less from attempting such a regulation, because the third clause of Article I, Section 8 of the United States

Constitution was meant by the Framers to vest authority in Congress for the regulation of commerce, but not agriculture and manufacturing, the arts and sciences, consumption, or any other **activity not amounting to what the Framers properly called "commerce,"** – i. e., marketing, buying, selling, barter, and exchange, including the avenues of trade.

CONCLUDING OBSERVATIONS

Now we quickly tie the errors in *Wickard v. Filburn* into this and related causes now pending before this Court:

If the penalty imposed by Section 1501 of the Patient Protection and Affordable Care Act were a tax, it would be a capitation tax, because assessed per capita, yet a nullity because not apportioned as required by the fourth section of Article I, Section 9 of the United States Constitution. Therefore, in keeping with the well-settled rule that a statute must be construed as far as possible in conformity with constitutional principle, as to which see, e. g., *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. at 30, all talk about the Tax Anti-Injunction Act is spurious and out of place. In short, this penalty cannot be taken as a tax, because, if it were a tax, it would be patently unconstitutional. Hence the imposition must be construed as a civil fine. Such is our view on question 2 in this cause (No. 11-398).

Considered as a civil fine, however, it is a sanction against refusal or failure to buy health insurance offered by a private company, and as such a regulation of public health, very much like laws which require drivers not engaged in commerce to buy automobile insurance from a private company, – in any event, what Hamilton called "the regulation of the mere domestic police of a State," as such reserved by the 10th Amendment, and, on that account, beyond the intended scope of the power of Congress to regulate commerce. See the 17th Federalist, p. 118. The penalty cannot be saved by *Wickard v. Filburn* which, as shown, runs contrary to the **intended meaning of the United States Constitution**, was therefore wrongly decided, and should be overruled or disregarded in this cause.

Accordingly, we agree with the conclusion of the United States District Court for Northern Florida that the individual mandate ordained by Section 1501 of the Patient Protection and Affordable Care Act of 2010 is unconstitutional. Such is our view of question 1 in this cause (No. 11-398).

And, while we have not argued these points here, since we rely on others to carry the burden in related causes, we agree with the conclusion of Judge Roger Vinson that the rest of the Act, and the amending legislation, are not severable from the individual mandate (question 3 in No. 11-400, and No. 11-393). We also believe that the conditions imposed by Congress on grants to the States under this legislation are coercive and unconstitutional, hence we endorse

the argument of the attorneys general of twenty-six States on this point (question 1 in No. 11-400).

Respectfully submitted,

JOHN REMINGTON GRAHAM
180 Haut de la Paroisse
St-Agapit, Comté de Lotbinière
Québec G0S 1Z0 Canada
TEL-FAX 418-888-5049
jrgraham@oricom.ca

Counsel for Amicus Curiae
Citizens' Counsel for Health Freedom

AMICUS CURIAE BRIEF

No. 11-398

In the
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF CONSTITUTIONAL LAW AND ECONOMICS PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS (MINIMUM COVERAGE PROVISION)

WILSON R. HUHN
Counsel of Record
29475 BRYCE ROAD
PEPPER PIKE, OH 44124
(216) 789-0507
whuhn@uakron.edu

Counsel for Amici Curiae

January 12, 2012

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF CONTENTS. i

TABLE OF AUTHORITIES. ii

INTEREST OF AMICI CURIAE. 1

SUMMARY OF ARGUMENT. 2

ARGUMENT. 2

I. THE CONSTITUTION DOES NOT EMBODY ANY PARTICULAR ECONOMIC THEORY. 2

II. IN A BROAD RANGE OF AREAS OF CONSTITUTIONAL LAW, THE SUPREME COURT HAS RULED THAT IN REVIEWING THE VALIDITY OF ECONOMIC LEGISLATION THE COURTS MUST DEFER TO LEGISLATIVE JUDGMENT, TO THE EXTENT THAT THIS PRINCIPLE MUST BE CONSIDERED TO BE AN ASPECT OF THE SEPARATION OF POWERS. 7

III. ECONOMIC ANALYSIS IS SUITED TO THE LEGISLATIVE DUTY TO DEVELOP PUBLIC POLICY BUT IS NOT COMPATIBLE WITH THE JUDICIAL DUTY TO INTERPRET THE MEANING OF THE CONSTITUTION. 11

CONCLUSION. 17

TABLE OF AUTHORITIES

Cases

Adair v. United States,
208 U.S. 161 (1908). 4

Adkins v. Children's Hospital,
261 U.S. 525 (1923). 4, 5

Coppage v. Kansas,
236 U.S. 1 (1915). 4, 5

Dandridge v. Williams,
397 U.S. 471 (1970). 6

Dred Scott v. Sandford,
60 U.S. 393 (1857). 4

Ferguson v. Skrupa,
372 U.S. 726 (1963). 5, 8

Florida v. U.S. Dept. of Health and Human Services,
780 F.Supp.2d 1256 (N.D. Fla. 2010). 15

Katzenbach v. McClung,
379 U.S. 2744 (1964). 8

Lincoln Federal Labor Union No. 19129, A.F. of L. v. Northwestern Iron & Metal Co.,
335 U.S. 525 (1949). 7

Lochner v. New York,
198 U.S. 45 (1905). 3, 4, 5, 6

Maher v. Roe,
432 U.S. 464 (1977). 6

Minnesota v. Clover Leaf Creamery Co.,
449 U.S. 456 (1981). 9

Parrish v. West Coast Hotel,
300 U.S. 379 (1937). 5

Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,
476 U.S. 717 (1984). 10

Planned Parenthood of Southeastern Pennsylvania v. Casey,
505 U.S. 833 (1992). 6

South Dakota v. Dole,
483 U.S. 203 (1987). 10

United States v. Carolene Products,
304 U.S. 144 (1938). 8, 9

United States v. Comstock,
__ U.S. __, 130 S.Ct. 1949 (2010). 10

Usery v. Turner Elkhorn Mining Co.,
428 U.S. 1 (1976). 9

Virginia v. Sebelius,
728 F.Supp.2d 768 (E.D. Va. 2010),
rev'd for lack of jurisdiction
656 F.3d 252 (4th Cir. 2011). 3

Wickard v. Filburn, 317 U.S. 111 (1942). 10

Williamson v. Lee Optical,
348 U.S. 483 (1955). 8

Constitutional Provisions

U.S. Const., art. I, sec. 8, cl. 1
(General Welfare Clause). 7, 10

U.S. Const., art. I, sec. 8, cl. 3
(Commerce Clause). 7, 9, 10

U.S. Const., art. I, sec. 8, cl. 18
(Necessary and Proper Clause).. . . . . 7, 10

U.S. Const., amend. 5
(Due Process Clause).. . . . . 7, 8, 9, 10

U.S. Const., amend. 14, sec. 1
(Due Process Clause).. . . . . 7, 8, 9, 10

U.S. Const., amend. 14, sec. 1
(Equal Protection Clause). 7, 8, 9

Statutes

38 U.S.C. § 7401
(Veterans Health Administration). 12

42 U.S.C. § 1395 (Medicare). 12

42 U.S.C. § 1396 (Medicaid). 12

42 U.S.C. § 254b (community health centers). . . . 12

42 U.S.C. § 254d
(National Health Service Corps).. 12

Pub. L. 111-148, 124 Stat. 119
(Patient Protection and Affordable
Care Act). 1, 2, 17

Mass. St. 2006, c. 58
(An Act Providing Access to Affordable, Quality,
Accountable Health Care). 13

Other Authorities

Brief Amici Curiae of Economic Scholars in
Support of Defendants-Appellees,
Liberty University, Inc., v. Geithner. 15

Congressional Budget Office, Letter to
Nancy Pelosi, Speaker, U.S. House of
Representatives, *Preliminary Estimate
of the Effects of the Insurance Coverage
Provisions of the Reconciliation Legislation*. 14

Davis, Karen, et al., *Mirror, Mirror on the
Wall: An International Update on the
Comparative Performance of American
Health Care*. 14

Families USA, *Costly Coverage: Premiums
Outpace Paychecks* (August 2009). 15

Joint Tax Commission, JCT *report on
House Reconciliation Bill H.R. 4872*
(Report JCX-16-10), (March 18, 2010). 14

Kaiser Family Foundation, *Employer
Health Benefits Annual Survey*. 15

Pearson, Mark, *Written Statement to Special Senate Commission on Aging: Disparities in health expenditure across OECD countries: Why does the United States spend so much more than other countries?* 15

Rowland, Diane, Testimony Before the U.S. Senate Committee on Finance, *Medicaid and Health Reform*. 15

World Health Organization, *World Health Report* 2000. 14

INTEREST OF AMICI CURIAE[1]

Each of the *amici curiae* is a professor of economics who has specialized in the area of health care or a professor of law who has studied, taught, published, or practiced in the area of Constitutional Law.

Amici submit this brief to articulate and support a set of principles at the intersection of constitutional law and economics: namely, that the Constitution does not embody a particular economic theory; that economic legislation enjoys a strong presumption of constitutionality; and that in this particular case the complex economic judgments underlying the Patient Protection and Affordable Care Act are committed to the legislative branch and are beyond the constitutional authority of the judicial branch.

Amici are:

Prof. Richard L. Aynes, University of Akron School of Law; Assoc. Prof. David S. Cohen, Earle Mack School of Law at Drexel University; Assoc. Prof. Cindy Galway Buys, Southern Illinois University School of Law; Prof. Wilson R. Huhn, University of Akron School of Law; Prof. Richard Saphire, University of Dayton School of Law; Prof. Robert H. Smith, Suffolk

---

[1] Counsel for all parties received notice of *amici*'s intent to file this brief at least ten days prior to the due date; all parties have consented to this filing. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

University Law School; Prof. Emeritus Lloyd B. Snyder, Cleveland-Marshall College of Law; Prof. Katherine Swartz, Harvard University; Prof. Rebecca Zietlow, University of Toledo College of Law.

SUMMARY OF ARGUMENT

During the 19th century and the beginning of the 20th century the Supreme Court took the position that the Constitution embodied the economic theory of *laissez faire* and it struck down state and federal legislation that was inconsistent with that theory. After 1937 the Supreme Court rejected that notion and instead embraced the healthy principle that the Constitution does not embody any particular economic theory. This change was appropriate because the changing and competing models and theories that are used to explain and predict human economic behavior are suited to legislative decision-making but have no place in the judicial responsibility to interpret the meaning of the Constitution. The principle of separation of powers requires the courts to defer to Congress on questions of economic policy. As a consequence, the Court should uphold the constitutionality of the individual mandate of the PPACA.

ARGUMENT

I. THE CONSTITUTION DOES NOT EMBODY ANY PARTICULAR ECONOMIC THEORY

It has been suggested that the individual mandate contained in the Patient Protection and Affordable Care Act (PPACA), Pub. L. 111-148, 124 Stat. 119 (2010), is unconstitutional because Congress lacks the

power to force people to purchase a product that they do not wish to purchase; that this constitutes an unconstitutional interference with the operation of the free market. See, *e.g.*, *Virginia v. Sebelius*, 728 F.Supp.2d 768 (E.D. Va. 2010), *rev'd for lack of jurisdiction* 656 F.3d 252 (4th Cir. 2011). In striking down the individual mandate the District Court stated: "At its core, this dispute is not simply about regulating the business of insurance – or crafting a scheme of universal health insurance coverage – it's about an individual's right to choose not to participate." *Id.* at 788.

In 1905 in the case of *Lochner v. New York*, 198 U.S. 45 (1905) Justice Oliver Wendell Holmes declared that "a Constitution is not intended to embody a particular economic theory." *Id.* at 75. Holmes was writing in dissent, because at that time the Supreme Court had most definitely interpreted the Constitution to incorporate one particular school of economics. Holmes wrote:

> [A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. 198 U.S., at 75 (Holmes, J. dissenting).

Consistent with Holmes' dissent, the Constitution itself does not mandate or even mention any particular economic theory. Despite the silence of the Constitution on this point, the Supreme Court of that era embraced the notion that there is a constitutional right to be free of government regulation in the use of one's property. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857) (striking down law that prohibited slavery in the northern territories of the United States upon the ground that this constituted a violation of slaveholders' constitutional right to property); *Lochner*, (striking down maximum hour legislation); *Adair v. United States*, 208 U.S. 161 (1908) (striking down a statute protecting the right to belong to a union); *Coppage v. Kansas*, 236 U.S. 1 (1915) (same); and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (striking down a minimum wage law for women and children as violation of Due Process rights of employers). In all of these cases the Court ruled that the rights of property were entitled to broad constitutional protection from interference by legislatures. While it is certainly true that the Constitution prohibits legislatures from depriving persons of certain vested rights, taking private property for public use without just compensation, interfering with the obligation of contracts, or depriving people of property without due process of law, the Supreme Court of that era also extended constitutional protection to the economic advantage that the ownership of property confers upon its owner in the marketplace. The Court explained its rationale for this theory in *Coppage*, where it stated that inequalities of bargaining power are inherent in the right of property and that legislatures are therefore constitutionally powerless to redress inequalities arising from the ownership of property:

> No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. ... And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. 236 U.S., at 17.

In 1937 in the case of *Parrish v. West Coast Hotel*, 300 U.S. 379 (1937) (upholding minimum wage law), the Supreme Court overruled *Adkins* and declared that "freedom of contract" would no longer be recognized as a constitutional principle. The Court stated: "In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract." *Id.* at 391. In *Ferguson v. Skrupa*, 372 U.S. 726 (1963), the Court added: "The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases - that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely - has long since been discarded." *Id.* at 730. Instead, the Court adopted Holmes' view that the Constitution does not embody any particular economic theory:

> We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt

> adjusting. ... Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas. *Id.* at 732.

In 1992, in the case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) the Supreme Court explained that the *Lochner* line of cases was overruled because the Supreme Court had erred in adopting the theory of *laissez faire* as a constitutional principle. It was an error – "a fundamentally false assumption" – for the justices to have treated their faith in "a relatively unregulated market to satisfy minimal levels of human welfare" as a fundamental principle of constitutional law. *Id.* at 861-862.

Accordingly, the Constitution is no longer considered to embody the economic theory of *laissez faire* or interpreted to protect the rights of property against government regulation. But neither has the Supreme Court chosen to incorporate redistributivist principles into the Constitution. *See Dandridge v. Williams*, 397 U.S. 471, 484 (1970) (no constitutional right to welfare); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (no constitutional right to subsidized housing); *Maher v. Roe*, 432 U.S. 464 (1977) (no constitutional right to public funding for abortion). In the area of Equal Protection, the Supreme Court has declined to treat the poor as a suspect class or wealth as a suspect classification. *See Rodriguez v. San Antonio Independent School District*, 411 U.S. 1, 29 (1973) (stating, "[T]his Court has never heretofore held that

wealth discrimination alone provides an adequate basis for invoking strict scrutiny"). Similarly, the Court has acknowledged that the Due Process Clause does not favor labor over capital. *See Lincoln Federal Labor Union No. 19129, A.F. of L. v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 537 (1949) (stating, "Just as we have held that the due process clause erects no obstacle to block legislative protection of union members, we now hold that legislative protection can be afforded non-union workers.") The Constitution does not take sides between the rich and the poor nor does it dictate economic policy.

Accordingly, the courts must accord great deference to the judgment of Congress regarding the constitutionality of economic legislation.

II. IN A BROAD RANGE OF AREAS OF CONSTITUTIONAL LAW, THE SUPREME COURT HAS RULED THAT IN REVIEWING THE VALIDITY OF ECONOMIC LEGISLATION THE COURTS MUST DEFER TO LEGISLATIVE JUDGMENT, TO THE EXTENT THAT THIS PRINCIPLE MUST BE CONSIDERED TO BE AN ASPECT OF THE SEPARATION OF POWERS.

The Supreme Court has ruled in a broad range of areas in constitutional law that economic legislation is presumed constitutional and that the courts are not to substitute their judgment on economic matters for that of the legislature. In various cases interpreting the Due Process Clauses, the Equal Protection Clause, the General Welfare Clause, the Commerce Clause, and the Necessary and Proper Clause, the Supreme Court has stated:

[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators. *United States v. Carolene Products*, 304 U.S. 144, 152 (1938) (Stone, J.) (upholding federal law against challenge under Due Process Clause).

[T]o be constitutional ... It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955) (Douglas, J.) (unanimous decision) (upholding state law against challenge under Equal Protection Clause).

We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (Black, J.) (unanimous decision) (upholding state law against challenge under Due Process Clause).

[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end. *Katzenbach v. McClung*, 379 U.S. 274 303-304 (1964) (Clark,

J.) (unanimous decision with concurring opinions by Black, Douglas, and Goldberg, JJ.) (upholding federal law under Commerce Clause).

It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. *Usery v. Turner Elkhorn Mining* Co., 428 U.S. 1, 15 (1976) (Marshall, J.) (upholding federal law against challenge under Due Process Clause).

Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, *United States v. Carolene Products Co.*, 304 U.S. 144, 153-154 (1938), they cannot prevail so long as "it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable." *Id.*, at 154. Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (Brennan, J.) (footnote omitted) (upholding state law against challenge under Equal Protection Clause).

> [Referring to] the strong deference accorded legislation in the field of national economic policy.... *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 476 U.S. 717, 729 (1984) (Brennan, J.) (unanimous decision upholding federal law against challenge under Due Process Clause).
>
> In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. *South Dakota v. Dole*, 483 U.S. 203 (1987) (Rehnquist, J.) (upholding federal law under General Welfare Clause).
>
> [I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power. *United States v. Comstock*, __ U.S. __, 130 S.Ct. 1949, 1956 (2010) (Breyer, J.) (upholding federal law under Necessary and Proper Clause).

The principle that the courts must defer to legislatures in the formation of economic policy infuses the Constitution. It is so pervasive that it must be considered a fundamental aspect of the doctrine of Separation of Powers.

In the landmark case of *Wickard v. Filburn*, 317 U.S. 111 (1942) (unanimous decision upholding allotment program of federal Agricultural Adjustment Act against challenge under Commerce Clause),

Justice Robert Jackson explained why the courts are disabled from second-guessing the judgment of legislatures on economic questions:

> The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. *Id.* at 129 (Jackson, J.).

The allocation of economic burdens and benefits among classes of persons necessarily involves compromise. Compromise among economic interests is appropriate in the formation of economic policy by the legislative branch, but it has no place in the interpretation of the Constitution by the judicial branch.

The following section of this brief identifies a number of economic factors that Congress had to consider in designing the PPACA.

III. ECONOMIC ANALYSIS IS SUITED TO THE LEGISLATIVE DUTY TO DEVELOP PUBLIC POLICY BUT IS NOT COMPATIBLE WITH THE JUDICIAL DUTY TO INTERPRET THE MEANING OF THE CONSTITUTION

In deciding whether to enact the individual mandate as part of the PPACA, Congress had to consider a host of interrelated factors including the following: the cost of health care in the United States; the cost of health insurance; the extent of out-of-pocket expenses for health care; the increase in the cost of

health insurance relative to increases in personal income and the cost of living; the absolute and relative cost borne by persons in different income groups; the extent and effect of cost-shifting under current law; and the number and effect of personal bankruptcies attributable to the cost of health care. Most importantly, Congress had to assess the state of the nation's health and the effect of the lack of adequate insurance upon people's health.

In deciding whether the nation's system of paying for medical care ought to be reformed, Congress also had to evaluate the cost and effectiveness of current federally funded programs, including Medicare, 42 U.S.C. § 1395, Medicaid, 42 U.S.C. § 1396, the National Health Service Corps, 42 U.S.C. § 254d, the Veterans Health Administration, 38 U.S.C. § 7401, and federally funded community health centers, 42 U.S.C. § 254b. For purposes of comparison, Congress had to familiarize itself with the details of the health care delivery systems in other countries as well as the relative cost and efficacy of those programs. Once again, a prime consideration was whether the people of other countries enjoy better health than American citizens.

Congress also had to predict the likely effect of the PPACA on all of the previously mentioned cost and health factors. Specifically, Congress sought to anticipate the likely effect of insurance reforms, including guaranteed issue regardless of health; guaranteed coverage of preexisting conditions; complete coverage for preventive care; coverage for adult children; and minimum medical loss ratios. It had to determine the level of federal subsidies to individuals and families of different income groups

that would be necessary to enable them to purchase health insurance and offset out-of-pocket expenses; the future cost of federal contributions to the states that would be necessary to pay for the expansion of Medicaid; and the extent and mix of tax increases and spending reductions that would be necessary to pay for these reforms.

In keeping with our constitutional tradition that the states have served as laboratories for experimentation in governing, Congress also examined the efficacy of health insurance reform in the various states and modeled the PPACA after the plan that was adopted in Massachusetts in 2006, Mass. St. 2006, c. 58 (An Act Providing Access to Affordable, Quality, Accountable Health Care).

In making these determinations Congress had at its disposal an array of economic studies from various sources, including the Agency for Healthcare Research and Quality,[2] the Office of the Actuary of the Centers for Medicare and Medicaid Services,[3] the

---

[2] *See, e.g.*, Agency for Healthcare Research and Quality, Healthcare Cost and Utilization Project, *HCUP Facts and Figures 2009*, at http://www.hcup-us.ahrq.gov/reports/factsandfigures/2009/TOC_2009.jsp (containing data relating to the cost and efficacy of hospital care in the United States).

[3] *See, e.g.*, Office of the Actuary, Centers for Medicare and Medicaid Services, *Estimated Effects of the "Patient Protection and Affordable Care Act" as Proposed by the Senate Majority Leader on November 18, 2009* (December 10, 2009), at http://src.senate.gov/files/OACTMemorandumonFinancialImpactofPPAA%28HR3590%29%2812-10-09%29.pdf#page=1 (estimating the effect of the proposed PPACA on health care coverage and total health expenditures).

Congressional Budget office,[4] the Joint Commission on Taxation,[5] the Commonwealth Fund,[6] the Organisation for Economic and Cooperative Development,[7] the World Health Organization of the United Nations,[8] the

---

[4] *See, e.g.*, Congressional Budget Office, Letter to Nancy Pelosi, Speaker, U.S. House of Representatives, *Preliminary Estimate of the Effects of the Insurance Coverage Provisions of the Reconciliation Legislation Combined with H.R. 3590 as Passed by the Senate* (March 18, 2010), at http://www.cbo.gov/ftpdocs/113xx/doc11355/hr4872.pdf (estimating the effect of the proposed PPACA on health care coverage and the federal budget).

[5] *See, e.g.*, Joint Commission on Taxation, *JCT report on House Reconciliation Bill H.R. 4872* (Report JCX-16-10), (March 18, 2010), accessible at http://www.jct.gov/publications.html?func=startdown&id=3671. (estimating the effect of the proposed PPACA on the federal budget).

[6] *See, e.g.*, Davis, Karen, et al., *Mirror, Mirror on the Wall: An International Update on the Comparative Performance of American Health Care* (May 15, 2007), Commonwealth Fund, at http://www.commonwealthfund.org/Publications/Fund-Reports/2007/May/Mirror--Mirror-on-the-Wall--An-International-Update-on-the-Comparative-Performance-of-American-Healt.aspx (comparing the United States to other industrialized countries on a number of measures regarding performance of the health care system).

[7] *See, e.g.*, Organisation for Economic and Cooperative Development, OECD.StatExtracts, at http://stats.oecd.org/index.aspx?DataSetCode=HEALTH_STAT (setting forth data regarding health and health care within a number of industrialized countries).

[8] *See, e.g.*, World Health Organization, *World Health Report 2000*, at http://www.who.int/whr/2000/en/ (measuring and comparing the health of the population of different countries).

Kaiser Family Foundation,[9] and Families USA.[10] Congress also was free to consider the voluminous literature published by health care economists[11] as well as their testimony before Congress.[12]

All of the foregoing economic factors had to be considered in designing this complex, comprehensive scheme of legislation. In the words of the District Court below, the various elements of the PPACA are a "finely crafted watch," containing "approximately 450 separate pieces," many if not most of which are interrelated and interdependent. *Florida v. U.S. Dept. of Health and Human Services*, 780 F.Supp.2d 1256, 1304 (N.D. Fla. 2010). Congress had to choose not only

---

[9] *See, e.g.*, Kaiser Family Foundation, *Employer Health Benefits Annual Survey*, available from Kaiser Family Foundation, at http://ehbs.kff.org/ (tracking increases in the cost of health insurance, average income, and the cost of living since 1999).

[10] *See, e.g.*, Families USA, *Costly Coverage: Premiums Outpace Paychecks* (August 2009), at http://www.familiesusa.org/resources/publications/reports/costly-coverage.html (comparing increases in cost of health insurance to increases in income and inflation).

[11] *See, e.g.*, Brief Amici Curiae of Economic Scholars in Support of Defendants-Appellees, Liberty University, Inc., v. Geithner, __ F.3d __ (4th Cir. 2011) (citing numerous studies by economic scholars relating to the necessity of the individual mandate).

[12] *See, e.g.*, Rowland, Diane, Testimony Before the U.S. Senate Committee on Finance, *Medicaid and Health Reform*, Kaiser Family Foundation at http://www.kff.org/healthreform/upload/050509RowlandTestimony.pdf/; Pearson, Mark, *Written Statement to Special Senate Commission on Aging: Disparities in health expenditure across OECD countries: Why does the United States spend so much more than other countries?*, OECD (September 30, 2009), at http://www.oecd.org/dataoecd/5/34/43800977.pdf.

from a competing set of economic models and theories but also had to decide how to combine the hundreds of moving parts of this Act into a comprehensive and unified scheme of economic regulation. This was a matter of legislative prerogative and is beyond judicial competency.

In the exercise of its lawmaking function, Congress is not only permitted but expected to take economic data and expert economic opinion into account in determining whether to enact a system of universal health care coverage and in deciding what form that system should take. While judges as individuals are as capable as legislators at understanding and acting upon this information, it is incompatible with their judicial role to bring these considerations to the interpretation of the Constitution. The role of the courts is limited to determining whether Congress had a rational basis for enacting a particular plan of economic legislation.

CONCLUSION

The United States Constitution does not grant the courts any role in the development of economic policy. This power is instead conferred upon Congress. Accordingly, the individual mandate contained in the Patient Protection and Affordable Care should be upheld.

January 12, 2012

Respectfully submitted,

WILSON R. HUHN
Counsel of Record
29475 Bryce Road
Pepper Pike, OH 44124
(216) 789-0507
whuhn@uakron.edu

AMICUS CURIAE BRIEF

No. 11-398

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS (Minimum Coverage Provision)

GILLIAN E. METZGER
TREVOR W. MORRISON
435 West 116th Street
New York, NY 10027
(212) 854-1997

ANDREW J. PINCUS
Counsel of Record
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

INTRODUCTION AND 2

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. THE MINIMUM COVERAGE PROVISION FALLS WITHIN CONGRESS'S EXPANSIVE TAX POWER AND IS NOT AN IMPERMISSIBLE DIRECT TAX. 7

A. The Tax Power Is Broad, And Extends To Levies With A Regulatory Purpose And Effect. 7

B. The Minimum Coverage Provision Falls Within The Tax Power Because It Serves The General Welfare, Is Reasonably Related To Revenue Raising, And Does Not Infringe Any Constitutionally-Protected Individual Rights. 11

C. The Minimum Coverage Provision Is Not A Direct Tax Subject To The Constitution's Apportionment Requirement. 15

II. THE MINIMUM COVERAGE PROVISION SHOULD BE TREATED AS A TAX BECAUSE CONGRESS DID NOT CLEARLY INTEND OTHERWISE 19

A. Federal Statutes Are Presumed Constitutional And Congress Is Not Required To Identify Expressly The Powers Under Which It Acts. 19

TABLE OF CONTENTS—continued

Page

B. Clear Evidence Is Required To Conclude That Congress Has Disavowed Reliance On The Tax Power. 26

C. Congress Did Not Clearly Disclaim Reliance On Its Tax Power In Adopting The Minimum Coverage Provision. 29

CONCLUSION 34

TABLE OF AUTHORITIES

Page(s)

CASES

A. Magnano Co. v. *Hamilton*,
292 U.S. 40 (1934) 10

Bailey v. *Drexel Furniture Co. (Child Labor Tax Case)*, 259 U.S. 20 (1922) 10, 13

Board of Trustees v. *Garrett*,
531 U.S. 356 (2001) 26

Bob Jones Univ. v. *Simon*, 416 U.S. 725 (1974) 10

Brushaber v. Union Pac. R.R.,
240 U.S. 1 (1916) 7

Buckley v. *Valeo*, 424 U.S. 1 (1976) 11

In re Chateaugay Corp.,
53 F.3d 478 (2d Cir. 1995) 33

Chavez v. *Arte Publico Press*,
204 F.3d 601 (5th Cir. 2000) 24

Cohens v. *Virginia*,
19 U.S. (6 Wheat.) 264 (1821) 8

Crawford v. *Davis*,
109 F.3d 1281 1283 (8th Cir. 1997) 24

Edward J. DeBartolo Corp. v. *Fla. Gulf Coast Building & Constr. Trade Council*,
485 U.S. 568 (1988) 27

EEOC v. *Wyoming*, 460 U.S. 226 (1983) 22, 23, 24

FCC v. *Beach Communications*,
508 U.S. 307 (1993) 21

Flint v. *Stone Tracy Co.*, 220 U.S. 107 (1911) 17

Florida Prepaid Postsecondary Educ. Expense Bd. v. *College Savings Bank*,
527 U.S. 627 (1999) 23, 24

TABLE OF AUTHORITIES—continued

Page(s)

Florida v. *HHS*,
648 F.3d 1235 (11th Cir. 2011), cert. granted, No. 11-398 ..... 5, 19

Goshtasby v. *Bd. Of Trustees*,
141 F.3d 761 (7th Cir. 1998) 25

Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 25

Griffin v. *Breckenridge*, 403 U.S. 88 (1971) 24

Hedgepeth v. *Tennessee*,
215 F.3d 608 (6th Cir. 2000) 28, 32

Helvering v. *Davis*, 301 U.S. 619 (1937) 11

Hill v. Wallace, 259 U.S. 44 (1922) 10

Hooper v. *California*, 155 U.S. 648 (1895) 27

Hylton v. *United States*,
3 U.S. (3 Dall.) 171 (1796) 16, 18

Katzenbach v. *McClung*, 379 U.S. 294 (1964) 22

Kimel v. *Fla. Bd. of Regents*,
528 U.S. 62 (2000) 23, 25

Knowlton v. *Moore*, 178 U.S. 41 (1900) 17

Leathers v. *Medlock*, 499 U.S. 439 (1991) 28

In re Leckie Smokeless Coal Co.,
99 F.3d 573 (4th Cir. 1996) 29, 32

Lesage v. Texas,
158 F.3d 213 (5th Cir. 1998), rev'd on other grounds, 528 U.S. 18 (1999) 24

Liberty University, Inc. v. *Geithner*,
2011 WL 3962915 (4th Cir. 2011) 4, 31

License Tax Cases,
72 U.S. (5 Wall.) 462 (1867) 7, 9, 23

Lochner vs. *New York*, 198 U.S. 45 (1905) 10, 13

TABLE OF AUTHORITIES—continued

Page(s)

Marchetti v. *United States*, 390 U.S. 39 (1968)..... 7,
McCray v. *United States*, 195 U.S. 27 (1904)..... 10
McCulloch v. *Maryland*,
17 U.S. (4 Wheat.) 316 (1819)..... 22
Mills v. *State of Maine*,
118 F.3d 37 (1st Cir. 1997) 24
Minor v. *United States*, 396 U.S. 87 (1969)..... 9
Mistretta v. *United States*,
488 U.S. 361 (1989)..... 20
Mont. Dep't of Revenue v. *Kurth Ranch*,
511 U.S. 767 (1994)..... 11, 12, 14
Murphy v. *IRS*,
493 F.3d 170 (D.C. Cir. 2007)..... 17
Nammack v. *Comm'r*,
56 T.C. 1379 (1971), aff'd, 459 F.2d 1045
(2d Cir.1972)..... 27
Nelson v. *Sears, Roebuck, & Co.*,
312 U.S. 359 (1941)..... 28
Nevada Dep't of Human Resources v. *Hibbs*,
538 U.S. 721 (2003)..... 26
Pac. Ins. Co. v. *Soule*,
74 U.S. (7 Wall.) 433 (1869)..... 17
Pace v. *Burgess*, 92 U.S. 372 (1876)..... 23
Patton v. *Brady*, 184 U.S. 608 (1902) 17
Pennhurst State School &
Hospital v. *Halderman*, 451 U.S. 1 (1981)... 24, 25
Pension Benefit Guar. Corp. v. *R.A. Gray &*
Co., 467 U.S. 717 (1984)..... 20
Perez v. *United States*, 402 U.S. 146 (1971) 22

TABLE OF AUTHORITIES—continued

Page(s)

Pollock v. *Farmers' Loan & Trust Co.*,
158 U.S. 601 (1895) 17

Regan v. *Taxation with Representation*,
461 U.S. 540 (1983) 15, 28

Russello v. *United States*, 464 U.S. 16 (1983) 30

Salazar v. *Buono*,
130 S. Ct. 1803 (2010) 20, 27

Scholey v. *Rew*,
90 U.S. (23 Wall.) 331 (1875) 17

Seven-Sky v. *Holder*,
661 F.3d 1 (D.C. Cir. 2011) ..... *passim*

Sonzinsky v. *United States*,
300 U.S. 506 (1937) 9, 10, 12, 13

South Dakota v. *Dole*, 483 U.S. 203 (1987) 11, 12

Spreckels Sugar Ref. Co. v. *McClain*,
192 U.S. 397 (1904) 17

Springer v. *United States*,
102 U.S. 586 (1880) 17

The Civil Rights Cases, 109 U.S. 3 (1883) 24

Thomas More Law Ctr. v. *Obama*,
651 F.3d 529 (6th Cir. 2011) 4, 5, 19

Thomas v. *United States*, 192 U.S. 363 (1904) 17

Tyler v. *United States*, 281 U.S. 497 (1930) 18

United States R.R. Retirement Bd. v. *Fritz*,
449 U.S. 166 (1981) 21

United States v. *Butler*, 297 U.S. 1 (1936) 10

United States v. *Carolene Prods. Co.*,
304 U.S. 144 (1938) 21

TABLE OF AUTHORITIES—continued

Page(s)

United States v. *Constantine*,
296 U.S. 287 (1935) 10, 14

United States v. *Doremus*,
249 U.S. 86 (1919) 9, 11, 15

United States v. *Gerlach Live Stock Co.*,
339 U.S. 725 (1950) 9

United States v. *Kahriger*,
345 U.S. 22 (1953) 7, 9, 11

United States v. *Lopez*, 514 U.S. 549 (1995) 22, 25

United States v. *Morrison*,
529 U.S. 598 (2000) 20, 21

United States v. *New York*,
315 U.S. 510 (1942) 6

United States v. *Playboy Entertainment Group*, 529 U.S. 803 (2000) 20

United States v. *Ptasynski*, 462 U.S. 74 (1983) 7

United States v. *Reorganized CF & I Fabricators*, 518 U.S. 213 (1996) 14, 28, 29

United States v. *Sanchez*,
340 U.S. 42 (1950) 9, 10, 11, 15

United States v. *Sotelo*, 436 U.S. 268 (1978) 28

United States v. *United States Shoe Corp.*,
523 U.S. 360 (1998) 23

Usery v. *Turner Elkhorn Mining Co.*,
428 U.S. 1 (1976) 20, 21

Varner v. *Illinois State Univ.*,
226 F.3d 927 (7th Cir. 2000) 24

Veazie Bank v. *Fenno*,
75 U.S. (8 Wall.) 533 (1869) 8, 17

TABLE OF AUTHORITIES—continued

Page(s)

Woods v. *Cloyd W. Miller Co.*,
333 U.S. 138 (1948) 22

CONSTITUTION AND STATUTES

U.S. Const. art. I 5
U.S. Const. art. I, § 8 9
U.S. Const. art. I, § 8, cl. 1 ..... 3, 7, 11
U.S. Const. art. I, § 8, cl. 3 3
U.S. Const. art. I, § 9, cl. 4 16
U.S. Const. amend. I 1, 28
U.S. Const. amend. XVI 17
U.S. Const. amend. XIII 24
U.S. Const. amend. XVI 17
U.S. Const. amend. XIV, § 5. ..... *passim*
26 U.S.C. § 4974 18
26 U.S.C. § 4980B 18
26 U.S.C. § 4980E 18
26 U.S.C. § 5000A 3, 31
26 U.S.C. § 5000A(b)(2) 32
26 U.S.C. §§ 5000A(c) 14
26 U.S.C. § 5000A(g)(2) 14, 32
26 U.S.C. § 7421(a) 2, 4
42 U.S.C. § 1985(3) 24
Pub. L. No. 111-148, §§ 1501(a)(2)(F) 3
Pub. L. No. 111-148, §§ 1501(b) 3, 14, 31
Pub. L. No. 111-148, § 1502(b) 32
Pub. L. No. 111-148, § 1563(a)(1) 12

TABLE OF AUTHORITIES—continued

Page(s)

Pub. L. No. 111-152 § 1002 ..... 3, 14

MISCELLANEOUS

Articles of Confed. art. VIII (1781) 8

Roger Brown, *Redeeming the Republic: Federalists, Taxation, and the Origins of the Constitution* (1993) 8

Charles Bullock, *The Origin, Purpose and Effect of the Direct-Tax Clause of the Federal Constitution I*, 15 Pol. Sci. Q. 217 (1900) 8

155 Cong. Rec. S13,558 (Dec. 20, 2009) 33

155 Cong. Rec. S13,751 (Dec. 22, 2009) 33

155 Cong. Rec. S13,755 (Dec. 22, 2009) 33

155 Cong. Rec. S13,830 (Dec. 23, 2009) 33

Michael Dorf & Neil Siegel, *"Early Bird Special" Indeed!: Why the Tax Anti-Injunction Act Permits the Present Challenges to the Minimum Coverage Provision*, 121 Yale L.J. Online (2011), available at http://papers.ssrn.com-/sol3-/papers.cfm?abstract_-id=1969540 2

The Federalist No. 30 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 8

Jack Hadley et al., *Covering the Uninsured in 2008: Current Costs, Sources of Payment, and Incremental Costs*, Health Affairs (Aug. 25, 2008) 3

Katherine Hayes, *Overview of the Policy, Procedure, and Legislative History of the Affordable Care Act*, 7 NAELA J. 1 (2011) 31

TABLE OF AUTHORITIES—continued

Page(s)

H.R. Rep. No. 111-443, 111th Cong., 2d Sess. (2010) 3, 33

Joint Comm. on Taxation, 111th Cong., *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," As Amended, in Combination with the "Patient Protection and Affordable Care Act"* (Mar. 21, 2010) 33

Letter from Douglas Elmendorf, Director, Cong. Budget Office, to Nancy Pelosi, Speaker, U.S. House of Representatives (Mar. 20, 2010) 12

Edwin Seligman, *The Income Tax* (1914) 16

Joseph Story, *Commentaries on the Constitution of the United States* (Melville Bigelow ed., 5th ed. 1891) 18

INTEREST OF THE *AMICI CURIAE*

Amici are professors of law who teach and write about constitutional law and tax law, including Congress's power to tax. They have substantial expertise in the text, history, and structure of the Constitution, as well as this Court's decisions relating to the legislative authority of the federal government, especially the tax power. Their legal expertise thus bears directly on the constitutional issues before the Court.[1] *Amici* are:

- Jack M. Balkin, Knight Professor of Constitutional Law and the First Amendment, Yale Law School;
- Brian Galle, Assistant Professor of Law, Boston College Law School;
- Edward Kleinbard, Professor of Law, University of Southern California Gould School of Law;
- Gillian E. Metzger, Vice Dean and Stanley H. Fuld Professor of Law, Columbia Law School;
- Trevor W. Morrison, Isidor and Seville Sulzbacher Professor of Law, Columbia Law School.[2]

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs have been filed with the Clerk.

[2] Institutional affiliations are provided for identification purposes only.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici submit this brief to explain why the minimum coverage provision of the Affordable Care Act ("ACA") falls well within the settled understanding of the scope of Congress's tax power.[3]

The ACA establishes a comprehensive regime to address the crisis in uncompensated health care services in the United States. Uninsured individuals frequently obtain healthcare services without fully paying for them. Providing uncompensated services to the uninsured cost the American healthcare system $43 billion in 2008 alone—a cost that was substantially subsidized by the government with the remainder passed on to private insurers, insured families, and employers. See Pub. L. No. 111-148, §§ 1501(a)(2)(F), 10106(a) (2010); Jack Hadley et al., *Covering the Uninsured in 2008: Current Costs, Sources of Payment, and Incremental Costs*, Health Affairs W403-W406 (Aug. 25, 2008) (*cited in* H.R.

---

[3] We do not address whether the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a) ("AIA"), precludes the Court from reaching the merits of the questions presented in this case. Critically, the Court could decide that this case does not involve a "suit for the purpose of restraining the assessment or collection of [a] tax" under the AIA, but nonetheless uphold the Minimum Coverage Provision as an exercise of the tax power, because the scope of the AIA and of Congress's tax power are not coterminous. Michael Dorf & Neil Siegel, *"Early Bird Special" Indeed!: Why the Tax Anti-Injunction Act Permits the Present Challenges to the Minimum Coverage Provision*, 121 Yale L.J. Online (2011) (draft at 3-4), available at http://papers.ssrn.com-/sol3-/papers.cfm?abstract_-id=1969540 (because the levy imposed by the Provision cannot be assessed and collected until 2015, the current litigation is not "for the purpose of restraining assessment and collection of [a] tax," and the AIA does not apply).

Rep. No. 111-443, pt. 2, 111th Cong., 2d Sess., at 983 (2010)).

The Minimum Coverage Provision addresses this serious problem by requiring individuals either to purchase a minimally adequate health insurance plan for themselves and their families or to pay an annual tax. See Pub. L. No. 111-148, §§ 1501(b), 10106, *amended by* Pub. L. No. 111-152 § 1002 (2010), *codified at* 26 U.S.C. § 5000A.[4]

Amici are confident that the Minimum Coverage Provision is a permissible exercise of Congress's authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. But the provision also falls squarely within the Constitution's grant to Congress of the "Power To lay and collect Taxes, Duties, Imposts and Excises." *Id.* art. I, § 8, cl. 1.

This Court has long recognized that Congress's tax power is exceedingly broad. A tax is valid as long as it (1) serves the general welfare, (2) is reasonably related to revenue raising, and (3) does not violate any independent constitutional prohibition. The Court has also repeatedly affirmed that the tax power is not limited to subjects that fall within Congress's other enumerated powers, and that a levy may be upheld as a tax even if its overwhelming purpose and effect is regulatory.

The Minimum Coverage Provision plainly satisfies these requirements. Indeed, several appellate

---

[4] The amount of the tax is set at a percentage of income or an absolute amount, whichever is greater, up to the average national cost of purchasing a minimally adequate policy for the taxpayer's household size. Those earning too little to owe federal income tax are exempt, as are several other specified groups.

judges addressing the various constitutional challenges to the ACA either stated that the Provision is a valid exercise of Congress's tax power or acknowledged that the tax power could well support enactment of a measure of this sort. *Liberty University, Inc.* v. *Geithner*, 2011 WL 3962915, at *16 (4th Cir. 2011) (Wynn, J., concurring) (agreeing with the panel's holding that the AIA applies and then stating that, "were I to reach the merits, I would uphold the constitutionality of the Affordable Care Act on the basis that Congress had the authority to enact the individual and employer mandates under its plenary taxing power"); *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 552-53 (6th Cir. 2011) (Sutton, C.J., concurring in part and delivering the opinion of the court in part) (suggesting that, "*if* the legislature had used taxes in this part of the Affordable Care Act, the Act likely would be constitutional"); see also *Seven-Sky* v. *Holder*, 661 F.3d 1, 48 & n.38 (D.C. Cir. 2011) (Kavanaugh, J., dissenting as to jurisdiction) (stating that "just a minor tweak to the current statutory language would definitively establish the law's constitutionality under the Taxing Clause" and suggesting that, even without such a "tweak," the Minimum Coverage Provision could perhaps be interpreted to "pass muster under the Taxing Clause").

To some judges unwilling to uphold the Minimum Coverage Provision under the tax power, the critical obstacle was not whether the Congress's constitutional authority could encompass the provision but whether Congress sufficiently evidenced its intent to exercise that power. *Florida* v. *HHS*, 648 F.3d 1235, 1314 (11th Cir. 2011) ("The breadth of the taxing power, well noted by the government and its *amici*, fails to resolve the question we face: whether the individual mandate is a tax in the first place."),

cert. granted, No. 11-398; *Thomas More Law Ctr.*, 651 F.3d at 553 (Sutton, C.J., concurring in part and delivering the opinion of the court in part) (fact that the Minimum Coverage Provision likely could have been passed as an exercise of Congress's tax power "does not tell us whether Congress invoked this power or whether the penalty is a 'Tax[ ]' under Article I of the Constitution. It did not, and it is not.").

In refusing to evaluate the Minimum Coverage Provision as an exercise of Congress's tax power, these judges departed from the well-established principle that federal statutes must be accorded a presumption of constitutionality. Fidelity to that presumption—and respect for the elected Branches and the people they represent—requires that a provision falling within a grant of legislative power, including the tax power, be deemed an exercise of that power in the absence of clear evidence that Congress intended otherwise. Any other approach would as a practical matter replace the presumption of constitutionality with a presumption that Congress prefers to have its enactments invalidated if it does not invoke its tax power with some special level of clarity or specificity. There is no warrant for such a dramatic departure from this Court's time-tested approach.

That is especially true because this Court in the tax context has repeatedly ***rejected*** the argument that an enactment may be sustained under the tax power only if Congress expressly invoked that authority or used the term "tax" in the relevant provision. Thus, the Court has characterized monetary levies as "taxes" even though they were not labeled as such by Congress. Eschewing a formalistic focus on labels, the Court's cases teach that if an enactment functions as a tax—that is, if it is a "pecuniary bur-

den laid upon individuals or property for the purpose of supporting the government," *United States* v. *New York*, 315 U.S. 510, 515-16 (1942) (quotation marks omitted)—it may be sustained under the tax power without regard to whether the term "tax" appears in the statute. When Congress enacted the Provision, therefore, it could not have anticipated that applying the label "tax" was essential to invoke its tax power.

Certainly the legislative record in this case does not support concluding that Congress intended to disclaim reliance on its tax power. Although parts of the record could be read to suggest that some in Congress did not deem the Minimum Coverage Provision a tax, other parts strongly affirm the view that Congress considered the Provision to be a tax.

The Provision itself contains numerous references consistent with its characterization as a tax, including a specification that the amount owing shall be paid as part of individuals' annual tax returns. The legislative record also contains several references to the Provision as a tax. There is, therefore, simply no warrant to infer that Congress meant to rule out treating the Provision as a tax—especially if the consequence were a finding that the Provision is unconstitutional.

ARGUMENT

The question whether the Minimum Coverage Provision is a constitutional exercise of Congress's tax power divides logically into two issues: whether the tax power is broad enough to support a measure like the Minimum Coverage Provision, and whether the Provision may be upheld as an exercise of that power. This brief addresses those questions in turn,

and explains why the Court should answer yes to both.

I. THE MINIMUM COVERAGE PROVISION FALLS WITHIN CONGRESS'S EXPANSIVE TAX POWER AND IS NOT AN IMPERMISSIBLE DIRECT TAX.

A. The Tax Power Is Broad, And Extends To Levies With A Regulatory Purpose And Effect.

The Constitution grants Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises." U.S. Const. art. I, § 8, cl. 1. This Court has long emphasized the wide scope of Congress's taxing power, describing it as "extensive," *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1867), "exhaustive," *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 12 (1916), and "virtually without limitation," *United States* v. *Ptasynski*, 462 U.S. 74, 79 (1983). It is thus well-settled that "the constitutional restraints on taxing are few," and that, in general, "[t]he remedy for excessive taxation is in the hands of Congress, not the courts." *United States* v. *Kahriger*, 345 U.S. 22, 28 (1953), *overruled in part on other grounds by Marchetti* v. *United States*, 390 U.S. 39 (1968).

The breadth of the taxing power is no accident. The fundamental problem that doomed the Articles of Confederation was the Continental Congress's lack of taxing authority. Rather than levying taxes itself, the federal government was required to send the States "requisitions" for funds, with the amount per State set "in proportion to the value of all land within each State." Articles of Confed. art. VIII (1781). The States were then expected to levy and collect taxes to provide the requisitioned amount. They of-

ten failed to do so, however, and Congress had few means by which to enforce compliance. See generally Roger Brown, *Redeeming the Republic: Federalists, Taxation, and the Origins of the Constitution* (1993).

The failure of the requisition system, which ultimately "reduced the United States to bankruptcy[,] * * * demonstrated the need of a central government that should possess the power of taxation." Charles Bullock, *The Origin, Purpose and Effect of the Direct-Tax Clause of the Federal Constitution I*, 15 Pol. Sci. Q. 217, 218 (1900). Creating a federal government with a more robust taxing power and adequate revenue was thus a principal motivation for adopting the Constitution. See *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 388 (1821); see also *The Federalist* No. 30 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Brown, *supra*, at 3-8. Indeed, "nothing is clearer, from the discussions in the Convention and the discussions which preceded final ratification by the necessary number of States, than the purpose to give this power to Congress, as to the taxation of everything except exports, in its fullest extent." *Veazie Bank* v. *Fenno*, 75 U.S. (8 Wall.) 533, 540 (1869).

Against that historical backdrop, this Court has rejected arguments that the tax power extends only to matters within Congress's reach under the Commerce Clause or other grants of legislative authority. Instead, it has recognized that the Taxation Clause "delegates a power separate and distinct from those later enumerated" in Article I, Section 8, and that its scope is "not restricted by them." *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950). In the *License Tax Cases*, 72 U.S. (5 Wall.) 462 (1867), for example, the Court noted that "Congress has no power of regulation nor any direct control" over "the

internal commerce or domestic trade of the States," but nonetheless sustained under the tax power a federal statute requiring purchase of a license before engaging even in certain intrastate trades and businesses. *Id.* at 470-71; see also *United States* v. *Sanchez*, 340 U.S. 42, 44 (1950) ("Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate.").

Similarly, a tax is not rendered invalid because it is motivated by a regulatory purpose or because it has a regulatory effect. The Court long ago deemed it "beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed." *Sanchez*, 340 U.S. at 44; see also *Kahriger*, 345 U.S. at 27 (noting numerous instances in which the Court upheld taxes notwithstanding a manifest "intent to curtail and hinder, as well as tax"); *Minor* v. *United States*, 396 U.S. 87, 98 n.13 (1969). "[A] tax is not any the less a tax because it has a regulatory effect." *Sonzinsky* v. *United States*, 300 U.S. 506, 513 (1937).

For precisely this reason, the Court has long "held that the fact that other motives may impel the exercise of federal taxing power does not authorize courts to inquire into that subject." *United States* v. *Doremus*, 249 U.S. 86, 93 (1919). As long as "the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it." *Ibid.*; see also *Sonzinsky*, 300 U.S. at 513-14 ("Inquiry into the hidden motives which may move (a legislature) to exercise a power constitutionally conferred upon it is beyond the competency of courts."); *A. Magnano Co.*

v. *Hamilton*, 292 U.S. 40, 44 (1934); *McCray* v. *United States*, 195 U.S. 27, 59 (1904).

To be sure, during the 1920s and 1930s the Court did invalidate some federal taxes on the ground that they had been adopted primarily to enforce compliance with a regulatory program that exceeded Congress's authority under the then-prevailing interpretation of the Commerce Clause. See, *e.g.*, *United States* v. *Butler*, 297 U.S. 1, 58-59 (1936); *United States* v. *Constantine*, 296 U.S. 287, 295 (1935); *Hill v. Wallace*, 259 U.S. 44, 66-68 (1922); *Bailey* v. *Drexel Furniture Co. (Child Labor Tax Case)*, 259 U.S. 20, 37-38 (1922). The Court has since discredited those decisions, however, explaining that it had "abandoned" its earlier "distinctions between regulatory and revenue-raising taxes," *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 741 n.12 (1974), and insisting that a tax remains valid "even though * * * the revenue purpose of the tax may be secondary." *Sanchez*, 340 U.S. at 44.

Even if the Court's *Lochner*-era decisions retained some force today, they would merely support invalidating as pretextual a tax so high as to amount to a coercive penalty to compel compliance with a regulatory scheme that falls wholly outside Congress's other enumerated powers. That was the situation addressed by those decisions, and that is how the Court has interpreted them since then. See, *e.g.*, *Kahriger*, 345 U.S. at 29-32. Absent such extreme circumstances, however, those cases do not license judicial second-guessing of Congress's intentions in enacting legitimate taxes. Instead, any scrutiny the Court today devotes to the purposes underlying a tax focuses on ensuring it is not a criminal sanction in disguise. See *Mont. Dep't of Revenue* v. *Kurth Ranch*,

511 U.S. 767, 779-83 (1994) (tax on drugs constituted criminal punishment and therefore violated the Double Jeopardy Clause).

B. The Minimum Coverage Provision Falls Within The Tax Power Because It Serves The General Welfare, Is Reasonably Related To Revenue Raising, And Does Not Infringe Any Constitutionally-Protected Individual Rights.

Though broad, the tax power is not unlimited. The Court has identified three criteria that a levy must satisfy to be upheld as a constitutionally permissible tax.

First, a tax measure must raise funds that specifically "pay the Debts and provide for the common Defence and general Welfare." U.S. Const. art. I, § 8, cl. 1. Congress, however, enjoys wide discretion to determine whether a tax measure serves the general welfare. *Helvering* v. *Davis*, 301 U.S. 619, 641 (1937); see also *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987); *Buckley* v. *Valeo*, 424 U.S. 1, 90-91 (1976).

Second, the measure must bear "some reasonable relation" to the "raising of revenue," *Doremus*, 249 U.S. at 93-94, even if the revenue actually produced is "negligible." *Sanchez*, 340 U.S. at 44; accord *Kahriger*, 345 U.S. at 28 (noting tax at issue "produces revenue"); *Sonzinsky*, 300 U.S. at 514 (upholding tax "productive of some revenue").

Third, like any exercise of enumerated power, a tax is invalid if it runs afoul of the provisions of the Constitution that protect individual rights, such as the Fifth Amendment's prohibition on double jeopardy. See *Kurth Ranch*, 511 U.S. at 778-79, 784.

The Minimum Coverage Provision satisfies these requirements.

1. In determining whether a congressional enactment furthers the general welfare, "courts should defer substantially to the judgment of Congress." *Dole*, 483 U.S. at 207. By encouraging individuals to purchase health insurance, the Minimum Coverage Provision alleviates the costs—incurred by the government and by other Americans (through increased health insurance premiums)—that are associated with providing uncompensated care to the uninsured. Such cost reductions and expansions in access to health insurance assuredly constitute contributions to the general welfare.

2. The Minimum Coverage Provision clearly constitutes a revenue-raising measure. Congress specifically found that the ACA "will reduce the Federal deficit," Pub. L. No. 111-148, § 1563(a)(1), 124 Stat. 119, 270, and the Congressional Budget Office estimated that the Minimum Coverage Provision in particular will produce approximately $4 billion annually by 2017. Letter from Douglas Elmendorf, Director, Cong. Budget Office, to Nancy Pelosi, Speaker, U.S. House of Representatives (Mar. 20, 2010), at 2, tbl.4. Between 2010 and 2019, the provision is estimated to generate approximately $17 billion in revenue. *Ibid.*

These sums are more than enough to satisfy the revenue requirement. See *Sonzinsky*, 300 U.S. at 514 n.1 (upholding tax that raised $5,400 in revenue in 1934—less than $90,000 in today's dollars); see also *Seven-Sky*, 661 F.3d at 45 (Kavanaugh, J., dissenting as to jurisdiction) (noting the $4 billion raised by the Provision would "would pay the annual salaries of about 100,000 members of the U.S. Military. That's real revenue.").

To be sure, the Minimum Coverage Provision also serves a regulatory purpose by encouraging individuals to purchase health insurance. But as we have explained (see pages 9-11, *supra*), this Court's precedents make plain that a regulatory purpose cannot invalidate a measure that otherwise may be sustained under the tax power.

Moreover, even if the *Lochner*-era decisions retained some vitality, they would not provide any basis for invalidating the tax here. Unlike the regulatory regimes at issue in those cases, the Minimum Coverage Provision is not the only means of enforcing the multi-faceted statutory plan contained in the ACA. The statute's other requirements are separately specified and are easily sustainable in their own right under Congress's commerce and spending powers.

The critical question on this point is not whether Congress in enacting the Minimum Coverage Provision meant to achieve a regulatory objective in addition to raising revenue—plainly it did, and plainly it may. *Sonzinsky*, 300 U.S. at 513. The question for purposes of the constitutional analysis is whether the Minimum Coverage Provision raises revenue for use in service of the general welfare—and plainly it does.

The Provision also is neither punitive nor a disguised criminal penalty. The amount of tax imposed by the Provision is not a "heavy exaction" or otherwise disproportionate assessment. *Bailey*, 259 U.S. at 36. It is limited to the national average of the premiums for the lowest level of qualified health plans for the taxpayer's family size that are available on the newly created health exchanges, and it contains exemptions based on low income and inability

to pay. See Pub. L. No. 111-148, § 1501(b) (adding 26 U.S.C. §§ 5000A(c)(1), (2), 5000A(e)(1), (2)) (as amended by Pub. L. No. 111-152, § 1002 (2010)).

That is quite unlike impositions found to constitute regulatory penalties rather than taxes, where individuals faced substantial monetary liability well in excess of any underlying value. See *United States* v. *Reorganized CF & I Fabricators*, 518 U.S. 213, 225-26 (1996) (finding tax to be a penalty where it imposed a tax of 110 percent in addition to the amount an employer owed for an underfunded pension plan); *Kurth Ranch*, 511 U.S. at 780 & n.17 (noting high rate of taxation, at approximately 400 percent of market value, in concluding tax was actually a criminal penalty); *Constantine*, 296 U.S. at 295 (concluding imposition ten to forty times as large as underlying tax was a penalty and emphasizing that the fact an "exaction * * * is highly exorbitant * * * points in the direction of a penalty rather than a tax").[5]

Moreover, the fact that the Minimum Coverage Provision imposes a tax only on individuals who fail to comply with the requirement that they obtain insurance provides no basis for concluding that the Provision is not a tax. This Court has upheld a variety of provisions as valid taxes even though they established requirements that were enforced through

---

[5] The Minimum Coverage Provision also is not tied to criminal conduct, and the Secretary of the Treasury is precluded from enforcing it through prosecution. See 26 U.S.C. § 5000A(g)(2). Cf. *Kurth Ranch*, 511 U.S. at 780-83 (emphasizing high tax rate, deterrent purpose, and criminal prohibition on underlying taxed activity in concluding tax amounted to a criminal penalty).

financial impositions. *Doremus*, 249 U.S. at 90-91 & 94-95 (upholding measure making it unlawful for an individual to transfer opiates except by using IRS forms that were available only when the individual registered and paid a tax); *Sanchez*, 340 U.S. at 44 (upholding a registration requirement for dealing in marijuana together with an increased tax on those failing to comply); see also U.S. Br. 59-62 (explaining why the obligation to purchase insurance does not undermine the Provision's status as a tax).[6]

3. The Minimum Coverage Provision does not violate any constitutionally-protected individual right. No one has a right to be free from taxation, and Congress's decision to target individuals who choose to forgo insurance is indisputably rational, given the aggregate impact of that choice on the government and society as a whole. *Regan* v. *Taxation with Representation*, 461 U.S. 540, 547 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."). The provision thus plainly qualifies as a legitimate, enforceable tax.

C. The Minimum Coverage Provision Is Not A Direct Tax Subject To The Constitution's Apportionment Requirement.

The Direct Tax Clause provides that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein be-

---

[6] Judge Kavanaugh's observation that "[t]he only reason the current statute *may not* suffice under the Taxing Clause is that [it] arguably does not just incentivize certain kinds of lawful behavior but also mandates such behavior," *Seven-Sky*, 661 F.3d at 48 (dissenting as to jurisdiction; emphasis in original), is thus inconsistent with this Court's precedents.

fore directed to be taken." U.S. Const. art. I, § 9, cl. 4. The apportionment requirement does not apply to the Minimum Coverage Provision.

Although the precise meaning of "direct tax" was obscure even at the Founding, this Court has consistently understood the class of taxes subject to the apportionment requirement to be extremely narrow.[7] Writing seriatim in *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171 (1796), the Court's first Direct Tax Clause case, the Justices suggested that only two kinds of taxes—capitation taxes and taxes on land—clearly constituted direct taxes; they expressed serious doubt that any other types of taxes fell within that category. See *id.* at 175 (opinion of Chase, J.) ("I am inclined to think * * * that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstances; and a tax on LAND."); *id.* at 177 (opinion of Paterson, J.) ("Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax, and tax on land, is a questionable point."); *id.* at 183 (opinion of Iredell, J.) ("Perhaps a direct tax in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil.").

---

[7] The requirement that direct taxes be apportioned was included in the Constitution to help secure a compromise over the treatment of slaves for purposes of representation. Edwin Seligman, *The Income Tax* 552 (1914). It was limited to direct taxes precisely to ensure it would not interfere substantially with the broad taxing authority the Framers intended to grant to the federal government. Bullock, *supra*, at 222.

Accordingly, the Court in the nineteenth century sustained unapportioned taxes on a variety of forms of income and property on the ground that they qualified as excises, including: taxes on insurance premiums, *Pac. Ins. Co.* v. *Soule*, 74 U.S. (7 Wall.) 433 (1869); state bank notes, *Veazie Bank*, 75 U.S. (8 Wall.) 533; inheritances, *Scholey* v. *Rew*, 90 U.S. (23 Wall.) 331 (1875); and income, *Springer* v. *United States*, 102 U.S. 586, 592 (1880).[8]

The Direct Tax Clause continues to be interpreted very narrowly today. As one court of appeals recently put it, "[o]nly three taxes are definitely known to be direct: (1) a capitation * * *, (2) a tax upon real property, and (3) a tax upon personal property." *Murphy* v. *IRS*, 493 F.3d 170, 181 (D.C. Cir. 2007). Plainly, the Minimum Coverage Provision is not one of these types of taxes.

---

[8] In *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895), the Court struck down the federal income tax as an unapportioned direct tax. *Pollock* did not hold that all income taxes are direct taxes, but instead was limited to taxes on income derived from real and personal property. The Nation responded by adopting the Sixteenth Amendment, providing that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. Const. amend. XVI. And the Court upheld a wide range of unapportioned taxes after *Pollock*. See *Knowlton* v. *Moore*, 178 U.S. 41 (1900) (federal estate tax); *Patton* v. *Brady*, 184 U.S. 608 (1902) (tax on manufacturing of tobacco); *Thomas* v. *United States*, 192 U.S. 363 (1904) (stamp tax on memorandum or contracts of sale of stock certificates); *Spreckels Sugar Ref. Co.* v. *McClain*, 192 U.S. 397 (1904) (tax on sugar refining); *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 177 (1911) (corporate income tax).

The Provision is in no way tied to property. Neither is it a capitation. As Justice Story explained, "capitation taxes, or, as they are more commonly called, poll taxes, [are] taxes upon the polls, heads, or persons, of the contributors." Joseph Story, *Commentaries on the Constitution of the United States* § 954 (Melville Bigelow ed., 5th ed. 1891). Such a tax is imposed on the person "without regard to property, profession, or any other circumstance." *Hylton*, 3 U.S. at 175 (opinion of Chase, J.).

That does not describe the Minimum Coverage Provision. Far from being imposed "without regard to property, profession, or any other circumstance," *ibid.*, it is instead contingent on very specific circumstances: the taxpayer's failure to pay premiums into a qualified health care plan in a given month, and the taxpayer's ability to pay. The Provision does not operate directly on any person or property, but only indirectly as a function of a taxpayer's particular decisions. See *Tyler* v. *United States*, 281 U.S. 497, 502 (1930) ("A tax laid upon the happening of an event, as distinguished from its tangible fruits, is an indirect tax.").[9]

This Court has never struck down a federal tax on the ground that it is an unapportioned capitation,

---

[9] There are numerous examples of Congress taxing the failure to make a particular economic arrangement. See, *e.g.*, 26 U.S.C. § 4974 (tax on failure of retirement plans to distribute assets); *id.* § 4980B (tax on failure of group health plan to extend coverage to beneficiary); *id.* § 4980E (tax on failure of employer to make comparable Archer MSA contributions). None of those provisions is subject to the Direct Tax Clause's apportionment requirement.

and there is no basis for concluding that the Minimum Coverage Provision is the first such tax.

II. THE MINIMUM COVERAGE PROVISION SHOULD BE TREATED AS A TAX BECAUSE CONGRESS DID NOT CLEARLY INTEND OTHERWISE.

Some lower courts have rested their refusal to uphold the Provision under the tax power—even though it falls easily within the settled understanding of Congress's broad authority—on their conclusion that Congress did not clearly evidence its intent to exercise its tax power. See *Florida* v. *HHS*, 648 F.3d at 1313-20; *Thomas More Law Ctr.*, 651 F.3d at 552-54 (Sutton, C.J.) (concurring in part and delivering the opinion of the court in part).

That determination is at odds with this Court's precedents and with the presumption of constitutionality that attaches to duly-enacted federal laws. Fidelity to that presumption requires that a provision falling within the reach of Congress's tax power should be deemed an exercise of that power unless there is clear evidence that Congress intended otherwise. That evidence is lacking here.

A. Federal Statutes Are Presumed Constitutional And Congress Is Not Required To Identify Expressly The Powers Under Which It Acts.

The Minimum Coverage Provision, like the ACA of which it is part, constitutes legislation "'adjusting the burdens and benefits of economic life,'" and as such "'come[s] to the Court with a presumption of constitutionality.'" *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) (quoting *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15

(1976)). As applied to federal legislation, the presumption of constitutionality is rooted in basic separation of powers principles. "Respect for a coordinate branch of Government forbids striking down an Act of Congress except upon a clear showing of unconstitutionality." *Salazar* v. *Buono*, 130 S. Ct. 1803, 1820 (2010) (plurality opinion); see also *Mistretta* v. *United States*, 488 U.S. 361, 384 (1989) ("'When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons.'"); *United States* v. *Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds").

The presumption of constitutionality generally does not apply when a measure implicates individual constitutional rights whose invasion triggers more searching judicial scrutiny. *United States* v. *Playboy Entertainment Group*, 529 U.S. 803, 817 (2000) ("When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed."). But the Court has consistently and repeatedly held that the presumption of constitutionality applies to ordinary economic legislation subject to minimal rationality review. *E.g.*, *FCC* v. *Beach Communications*, 508 U.S. 307, 314-15 (1993) ("On rational-basis review, a classification in a statute * * * comes to us bearing a strong presumption of validity."); *Usery*, 428 U.S. at 5 ("It is by now well established that legislative Acts adjusting the burdens

and benefits of economic life come to the Court with a presumption of constitutionality.").

The Court has also applied the presumption of constitutionality when adjudicating claims that legislation exceeds the bounds of Congress's enumerated powers. *Morrison*, 529 U.S. at 607 (invoking "presumption of constitutionality" in challenge to legislation as exceeding Congress's commerce power and its authority under § 5 of the Fourteenth Amendment).

One consequence of this Court's adherence to the presumption of constitutionality is that it "has never insisted that a legislative body articulate its reasons for enacting a statute." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1981); see also *Beach Communications*, 508 U.S. at 315 (same). The presumption that Congress intends to legislate constitutionally means that Congress must be given the benefit of any constitutionally adequate basis for legislating that a reviewing court can plausibly identify. *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (courts should generally assume an adequate basis for legislating unless "facts made known or generally assumed * * * preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislature."); see also *United States* v. *Lopez*, 514 U.S. 549, 562-63 (1995) ("We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce.") (citing *Katzenbach* v. *McClung*, 379 U.S. 294, 304 (1964), and *Perez* v. *United States*, 402 U.S. 146, 156 (1971), to same effect).

Most significantly for the present case, the Court repeatedly has recognized that the principle that

Congress need not identify the basis for an enactment means that Congress need not specify the head of legislative authority under which it acts. In the first great opinion on federal powers, *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall did not require Congress to specify which powers authorized the creation of the Second Bank of the United States. *Id.* at 407 (noting a variety of different powers from which the Bank might be justified).

Nor has the Court imposed any such requirement in the years since. Instead, it has confirmed that "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); accord *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983) (Congress need not "anywhere recite the words 'section 5' or 'Fourteenth Amendment'" to invoke its Section 5 power). All that is needed is for a court to be "able to discern some legislative purpose or factual predicate that supports the exercise of that power." *EEOC*, 460 U.S. at 243 n.18.[10]

---

[10] Where the purpose or predicate relevant to a particular head of constitutional authority cannot be discerned, of course, the Court will not uphold the statute on that ground. See *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Savings Bank*, 527 U.S. 627, 642 & n.7 (1999) (rejecting the Fifth Amendment's Just Compensation Clause as a basis for sustaining the Patent Remedy Act, noting not just that Congress had explicitly invoked other powers but also that "[t]here is no suggestion in the language of the statute itself, or in the House or Senate Reports of the bill which became the statute, that Congress had [the Just Compensation Clause] in mind").

The Court has applied this well-settled approach in the context of the tax power, holding in the *License Tax Cases* that the federal enactment—which was framed in terms of the granting of a license—was authorized by tax power, because "[t]he granting of a license * * * must be regarded as nothing more than a mere form of imposing a tax." 72 U.S. at 471; cf. *United States* v. *United States Shoe Corp.*, 523 U.S. 360, 367 (1998) ("'[W]e must regard things rather than names' * * * in determining whether an imposition on exports ranks as a tax" for purposes of constitutional analysis) (quoting *Pace* v. *Burgess*, 92 U.S. 372, 276 (1876).

Indeed, the Court repeatedly has analyzed legislation based on powers that Congress did ***not*** expressly invoke. See, *e.g.*, *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 78 (2000) (analyzing constitutionality of Age Discrimination in Employment Act (ADEA) of 1967 under Fourteenth Amendment, even though Congress did not explicitly state it was acting pursuant to that power and the Court had previously sustained the ADEA under the commerce power); *Griffin* v. *Breckenridge*, 403 U.S. 88, 97, 104-05 (1971) (analyzing constitutionality of 42 U.S.C. § 1985(3) under Thirteenth Amendment, despite statutory language echoing the Fourteenth Amendment's Equal Protection Clause); *The Civil Rights Cases*, 109 U.S. 3, 10 (1883) (analyzing the Civil Rights Act of 1867 under the Thirteenth Amendment notwithstanding Congress's express invocation of the Fourteenth Amendment).[11]

---

[11] Lower courts have done so consistently as well, insisting that "absent an outright congressional declamation," a court must inquire "whether or not the objectives of the legislation are

Although the Court stated in *Pennhurst State School & Hospital* v. *Halderman* that "we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment," 451 U.S. 1, 16 (1981), it quickly rejected any effort to convert that language into a requirement that Congress "expressly articulate" the particular legislative power on which any given measure is based. See *EEOC*, 460 U.S. at 243 n.18. Moreover, the Court's statement in *Pennhurst* was rooted in the particularly sensitive federalism concerns raised when Congress regulates the States themselves pursuant to Section 5 of the Fourteenth Amendment.[12] The Court has never even intimated

---

within the scope of Congress'[s] power." *Mills* v. *State of Maine*, 118 F.3d 37, 43-44 (1st Cir. 1997); see also *Varner* v. *Illinois State Univ.*, 226 F.3d 927, 930 n. 2 (7th Cir. 2000) (sustaining Equal Pay Act under § 5 of the Fourteenth Amendment and rejecting claim that Congress relied on the commerce power, not § 5 authority, in applying the Act to the States, notwithstanding Congress's express invocation of the commerce power). Some courts have stated that Congress's "specific intent" to invoke a particular power is "irrelevant." See *Lesage v. Texas*, 158 F.3d 213, 217 (5th Cir. 1998), rev'd on other grounds, 528 U.S. 18 (1999); *Crawford* v. *Davis*, 109 F.3d 1281 1283 (8th Cir. 1997). But see *Chavez* v. *Arte Publico Press*, 204 F.3d 601, 605 (5th Cir. 2000) (suggesting that *Pennhurst* and *Florida Prepaid* may preclude reliance on implicit Fourteenth Amendment authority, but nonetheless analyzing validity of legislation under § 5).

[12] This Court subsequently characterized *Pennhurst* as announcing a "plain statement rule," under which "in the face of * * * [statutory] ambiguity, the Court "will not attribute to Congress an intent to intrude on state governmental functions." *Gregory* v. *Ashcroft*, 501 U.S. 452, 470 (1991). Such clear statement rules do not address Congress's constitutional authority to pass the provision in question, but instead operate solely to narrow the provision's substantive scope. See *ibid.* (stating that the plain statement rule it articulated applies "regardless of

that any similar hesitancy should apply where, as here, the statutory provision in question regulates purely private activity in a manner that does not implicate specific state prerogatives.

Of course, statements by Congress can help establish that a challenged measure meets the substantive prerequisites for the exercise of particular legislative powers. Thus, congressional findings can assist in demonstrating that a regulated activity has a substantial impact on interstate commerce when that impact is not "visible to the naked eye." *Lopez*, 514 U.S. at 562-63.

Similarly, congressional identification of a pattern of constitutional violations on the part of the States helps establish that legislation designed to prevent or remedy such violations falls within Congress's authority under Section 5 of the Fourteenth Amendment. See *Nevada Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721, 729-36 (2003) (reviewing congressional evidence in concluding that pattern exists sufficient to sustain the Family and Medical Leave Act under Section 5); *Board of Trustees* v. *Garrett*, 531 U.S. 356, 368 (2001) (Congress failed to "identify a pattern of irrational state discrimination in employment against the disabled" such as would be re-

---

whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment"); *Goshtasby* v. *Bd. Of Trustees*, 141 F.3d 761, 768 (7th Cir. 1998) ("Despite * * * *Pennhurst* * * * the rule remains that Congress need not use magic words to exercise its enforcement power under § 5"; "[t]he question in *Pennhurst* was whether Congress intended a particular result, regardless of the constitutional grant of power under which it acted") (internal quotations and additions omitted), abrogated on other grounds by *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62 (2000).

quired to uphold Title I of the Americans with Disabilities Act under Section 5).

But this Court has carefully—and repeatedly—disclaimed any requirement that the constitutional grounds on which a statute may be upheld are limited to the specific head or heads of legislative power explicitly invoked by Congress.

B. Clear Evidence Is Required To Conclude That Congress Has Disavowed Reliance On The Tax Power.

Congress can, of course, refuse to invoke one of its constitutional powers when enacting particular legislation. Respect for Congress and its primary policymaking role arguably means courts should honor an express congressional renunciation of a particular power as the basis for challenged legislation.

In light of the presumption that federal laws are constitutional, however, the standard for determining that Congress has renounced a power must be a high one—Congress should not be deemed to have disavowed a basis for upholding a challenged measure absent clear evidence to that effect. It is common sense that Congress would wish a law that it has passed to be valid and effective. To be sure, legislative *opponents* of a bill might want it held unconstitutional if possible, but the majorities who vote *for* a bill almost always prefer that courts consider every possible basis for upholding their work. Before invalidating a law that is within Congress's constitutional authority, and thereby negating the decision made by the People's democratically-elected representatives, a court should be absolutely certain that Congress would have preferred that counter-intuitive result.

A contrary approach, allowing courts to infer congressional disavowal of a constitutional power based on ambiguous or conflicting evidence, would flout the presumption of constitutionality's insistence that federal legislation must not be struck down "except upon a clear showing of unconstitutionality." *Salazar*, 130 S. Ct. at 1820 (plurality opinion). The need for clear evidence of congressional rejection is all the more acute if dispensing with a particular power might put a measure wholly outside the scope of congressional authority. See *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Building & Constr. Trade Council*, 485 U.S. 568, 575 (1988) ("'[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'") (quoting *Hooper* v. *California*, 155 U.S. 648, 657 (1895)).

There is an especially strong need for clear evidence before concluding that Congress has disavowed reliance on its tax power. "[T]he presumption of constitutionality of an act of Congress * * * is particularly strong in the case of a revenue measure." *Nammack* v. *Comm'r*, 56 T.C. 1379, 1385 (1971), aff'd, 459 F.2d 1045 (2d Cir.1972) (*per curiam*). Indeed, tax laws are typically accorded a strong presumption of constitutionality even when they implicate certain individual rights. *Leathers* v. *Medlock*, 499 U.S. 439, 451 (1991) ("in the First Amendment context [there is a] * * * strong presumption in favor of duly enacted taxation schemes"); *Regan*, 461 U.S. at 547 ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."). This case, of course, does not involve any claimed violation of an individual right. But the critical point is that the presumption of constitutionality applies with particular force in the tax area, and

courts therefore should be extremely reluctant to deprive Congress of the benefit of its tax power.

Moreover, relying simply on the absence of the label "tax" to conclude that a monetary levy does not constitute a tax would be at odds with the well-established principle, invoked in a number of areas of the law, that courts must "look[] behind the label placed on [an] exaction" in determining whether it is a tax. *Reorganized CF & I Fabricators*, 518 U.S. at 220. Thus, "whether or not [a provision is] called a 'tax' in the statute creating it," a court must focus "directly on the operation of the provision" in determining whether it constitutes a tax for purposes of the bankruptcy code. *Ibid.* Similarly, in "passing on the constitutionality of a tax law," a court is "concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Nelson* v. *Sears, Roebuck, & Co.*, 312 U.S. 359, 363 (1941) (quotation omitted); see also *United States* v. *Sotelo*, 436 U.S. 268, 275 (1978) (characterizing as a tax an exaction labeled a "penalty" in the Internal Revenue Code); *Hedgepeth* v. *Tennessee*, 215 F.3d 608, 612-15 (6th Cir. 2000) (fee for handicapped parking placards was a tax); *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 583 (4th Cir. 1996) (Coal Act premiums are taxes).

Against this backdrop, a change in this Court's approach could prove quite disruptive. To give just one example, a sudden insistence that taxes must be expressly labeled as such would mark a significant departure from current understandings of when unsecured claims for excise taxes are entitled to a priority in bankruptcy proceedings. See *Reorganized CF & I Fabricators*, 518 U.S. at 220-24 (discussing the

Court's long history of holding that labels are not determinative in that context).

C. Congress Did Not Clearly Disclaim Reliance On Its Tax Power In Adopting The Minimum Coverage Provision.

There is no clear evidence here demonstrating that Congress disclaimed reliance on its tax power in enacting the Minimum Coverage Provision.

1. Those arguing that the tax power is unavailable point out that the Provision is denominated as a "penalty," which departs from the language in earlier versions of the legislation (including the bill that first passed the House) that denominated the Provision a "tax." Moreover, they continue, the ACA contains other exactions that are expressly termed taxes. In addition, Congress included findings in the ACA establishing the aggregate impact on interstate commerce of failing to obtain insurance, but none on the revenue that the Minimum Coverage Provision was expected to raise.

That evidence is plainly insufficient to overcome the presumption of constitutionality.

As noted above, this Court has never demanded that Congress expressly invoke a particular head of constitutional power before legislation may be upheld under that power. That is especially true for the tax power, because the Court has expressly held that the label "tax" is ***not*** required—how a provision operates, not what it is called, determines whether it is a tax. Congress therefore had no reason to expect that changing the word "tax" to "penalty" in the Minimum Coverage Provision could possibly foreclose invocation of the tax power.

Nor could Congress have expected such a dramatic result to flow from the fact that other measures in the ACA are expressly labeled taxes. Ordinarily, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (internal quotations omitted). But the critical question here is whether Congress intended this change to preclude reliance on the tax power, even if that meant the Provision would be held unconstitutional. Against the background of consistent jurisprudence declaring statutory labels irrelevant in the tax context (see pages 23 & 28-29, *supra*), Congress had no reason to expect that this change could be constitutionally decisive. And Congress also could not have anticipated that the absence of statutory findings expressly tied to the tax power might possibly have such an effect in view of the absence of decisions by this Court requiring such findings.

Attributing a constitutionally decisive consequence to the labels Congress used is especially unjustified given the "extraordinary electoral circumstances" that "short-circuited" the usual legislative process leading to the ACA's passage. *Seven-Sky*, 661 F.3d at 30 n.13 (Kavanaugh, J., dissenting as to jurisdiction). Congress's use of the budget reconciliation procedure meant there was no opportunity for the House and Senate to produce a conference report resolving differences between the two chambers' bills, and subsequent amendments were severely limited by Senate rules limiting reconciliation measures. See Katherine Hayes, *Overview of the Policy, Procedure, and Legislative History of the Affordable*

Care Act, 7 NAELA J. 1, 7-9 (2011). The restrictive nature of the process strongly weighs against drawing any inferences about congressional intent—let alone outcome determinative inferences—from changes to the text during that process.

2. Moreover, much more substantial evidence demonstrates that Congress intended to invoke its tax power and that it understood the Minimum Coverage Provision to be a tax.

Most significantly, the Provision operates like a tax. Congress incorporated the Provision into the Internal Revenue Code and made identification of health insurance coverage or payment part of the most common tax-related activity: filing an annual tax return. Pub. L. No. 111-148, §§ 1501(b), 1502 (amending Internal Revenue Code to include 26 U.S.C. §§ 5000A, 6055).

The Provision repeatedly references taxpayers and tax returns, with "some form of the word 'tax' appear[ing] * * * over forty times." *Liberty University*, 2011 WL 3962915, at *19 (Wynn, J., concurring). Any amount due from the taxpayer under the Provision is included with the taxpayer's return and thus paid into general revenues, along with any other tax that is due. See Pub. L. No. 111-148, § 1502(b) (adding 26 U.S.C. § 5000A(b)(2)); see generally U.S. Br. 53.

Congress did exempt the Provision from certain traditional tax enforcement mechanisms—such as criminal penalties, liens, and levies. 26 U.S.C. § 5000A(g)(2). But it retained others. See U.S. Br. 54. And the very fact that Congress deemed it necessary to exempt the Provision from some tax enforcement measures powerfully suggests that Congress unders-

tood the provision to be a tax. Cf. *Seven-Sky*, 661 F.3d at 33 n.15 (Kavanaugh, J., dissenting as to jurisdiction) ("The key point * * * is that the penalty may be enforced only by the IRS * * * . The fact that the IRS cannot use *all* of its traditional enforcement tools does not make it any less an IRS-enforced provision.").

Lower courts have previously emphasized similar features in determining that a monetary levy qualifies as a tax. The Fourth Circuit, for example, has found that incorporation of an assessment into the Internal Revenue Code and invocation of IRS enforcement powers demonstrates that a measure is an exercise of Congress's tax power. *In re Leckie*, 99 F.3d at 583; see also *Hedgepeth*, 215 F.3d at 612-13 (emphasizing assessments went into funds that served the general welfare in concluding they were taxes). The Second Circuit, too, has said that "[t]he placement" of a statutory provision within a subtitle "of the Internal Revenue Code," together with "its granting of enforcement powers to the Secretary of the Treasury"—as here—"provides a strong indication of Congress's intent" that the requirements under the provision be construed as taxes. *In re Chateaugay Corp.*, 53 F.3d 478, 498 (2d Cir. 1995).

Moreover, the legislative history demonstrates that Congress understood the Minimum Coverage Provision to function in part as a tax and to be supported by the tax power. See H.R. Rep. No. 111-443, pt. 1, at 265 (referring to the Minimum Coverage Fee Provision as imposing "[a] tax on individuals who opt not to purchase health insurance"); see also Joint Comm. on Taxation, 111th Cong., *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," As Amended, in Combi-*

nation with the "Patient Protection and Affordable Care Act" (Mar. 21, 2010) (including Minimum Coverage Provision in explanation of the revenue provisions of the ACA in combination with the Reconciliation Act).

Several members of Congress expressly invoked the tax power as a basis for enacting the Provision. The Chairman of the Senate Finance Committee, for example, concluded that "Congress has power to enact this legislation pursuant to the taxing and spending powers." 155 Cong. Rec. S13,830, S13,832 (Dec. 23, 2009) (Sen. Baucus); see also 155 Cong. Rec. S13,558, S13,581-82 (Dec. 20, 2009) (Sen. Baucus); accord 155 Cong. Rec. S13,751, S13,753 (Dec. 22, 2009) (Sen. Leahy). Opponents of the ACA likewise deemed it a tax. *E.g.*, 155 Cong. Rec. S13,755, S13,755-56 (Dec. 22, 2009) (Sen. Wicker); 155 Cong. Rec. S13,558, S13,579 (Dec. 20, 2009) (Sen. Coburn).

* * *

The legislative record is best read as demonstrating that Congress intended the Minimum Coverage Provision to be a tax. But even if the record is viewed as unclear, such ambiguity is plainly insufficient to withhold from the Provision the constitutional benefit of Congress's tax authority. There simply is no basis for concluding that, having finally achieved comprehensive health care reform in the United States, Congress would have preferred its work to be nullified rather than upheld as a permissible exercise of the tax power.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

GILLIAN E. METZGER
TREVOR W. MORRISON
435 West 116th Street
New York, NY 10027
(212) 854-1997

ANDREW J. PINCUS
Counsel of Record
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Amici Curiae

JANUARY 2012

AMICUS CURIAE BRIEF

No. 11-398

In The Supreme Court of the United States

DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.,
Petitioners,
v.
FLORIDA, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR DOCS4PATIENTCARE, BENJAMIN RUSH SOCIETY, PACIFIC RESEARCH INSTITUTE, GALEN INSTITUTE, AND ANGEL RAICH AS *AMICI CURIAE* ON THE MINIMUM COVERAGE PROVISION ISSUE IN SUPPORT OF RESPONDENTS

C. DEAN MCGRATH, JR.
MCGRATH & ASSOCIATES
1025 Thomas Jefferson Street, N.W.
Washington, D.C. 20007
(202) 295-2304
cdm7578@yahoo.com

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, DC 20008
(202) 237-8165
jaffe@esjpc.com

JOHN HOFF
6471 WISHBONE TERRACE
CABIN JOHN, MD 20818
(301) 229-1906
johnseaburyhoff@yahoo.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Interest of *Amici Curiae* 1

Summary of Argument 3

Argument 5

I. The Individual Mandate Has No Demonstrated Link to Reducing Any Cost Shift to Private Insurance, and in Fact Worsens the Asserted Problem 8

A. The Amount of Uncompensated Care Is Exaggerated Because It Ignores Existing Sources of Funding for the Care of the Uninsured. 10

B. The Individual Mandate Addresses Only a Fraction of the Alleged Problem 13

C. The Mandate Exacerbates Cost Shifting by Increasing Consumption of Under-Reimbursed Services 14

II. The Individual Mandate Is Not Necessary and Proper to "Carry into Execution" the Commerce Power 21

Conclusion 32

TABLE OF AUTHORITIES

Cases

Gonzales v. *Raich*, 545 U.S. 1 (2005) 3, 6, 29

McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 7, 22, 25, 26

United States v. *Comstock*, 130 S. Ct. 1949 (2010) 7, 22, 28, 29

United States v. *DeWitt*, 76 U.S. 41 (1869) 27

Statutes

U.S.C.A. § 18091 8

Other Authorities

1 ANNALS OF CONG. (Joseph Gales ed., 1789) 23

2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Jonathan Elliot, ed., 2d ed. 1836) 23

A Friend to the Union, *reprinted in John Marshall's Defense of McCulloch v. Maryland* 78 (Gerald Gunther ed., 1969) 27

Agency for Healthcare Research and Quality, *Research Findings #27: Health Care Expenses in the United States, 2000* (April 2004), http://www.meps.ahrq.gov/data_files/publications/rf21/rf21.shtml 15

CBO, *Analysis of the Major Health Care Legislation Enacted in March 2010* (March 30, 2011) 9, 13

CBO, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* (June 16, 2010) 13, 15

Colorado Children's Healthcare Access Program, *Compare: Reimbursement for Medicaid Versus Commercial Health Insurance Versus Office Expenses*, CCHAP Newsletter Three – Article 1, January 2007, available at http://www.cchap.org/newsletter-three/#one 16

David Olmos, *Mayo Clinic in Arizona to Stop Treating Some Medicare Patients*, Bloomberg, December 31 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aHoYSI84VdL0 16

Families USA, *Hidden Health Tax: Americans Pay a Premium* (2009) 8, 10

Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993) 22, 23, 24

Jack Hadley & John Holahan, *How Much Medical Care Do the Uninsured Use and Who Pays for It?* 2003, HEALTH AFFAIRS, http://content.healthaffairs.org/content/early/2003/02/12/hlthaff.w3.66.full.pdf 15

Jack Hadley, John Holahan, Teresa Coughlin & Dawn Miller, *Covering the Uninsured in 2008: A Detailed Examination of Current Costs and Sources of Payment, and Incremental Costs of Expanding Coverage* (Kaiser Commission on Medicaid and the Uninsured, August 2008), available at http://www.kff.org/uninsured/upload/7809.pdf. 11, 12, 16

John D. Shatto & M. Kent Clemens, *Projected Medicare Expenditures under an Illustrative Scenario with Alternative Payment Updates to Medicare Providers*, Office of the Actuary, Centers for Medicare and Medicaid Services, HHS, May 13 2011, available at https://www.cms.gov/ReportsTrustFunds/Downloads/2011TRAlternativeScenario.pdf 17

Peter Harbage & Len M. Nichols, *A Premium Price: The Hidden Costs All Californians Pay in Our Fragmented Health Care System*, ISSUE BRIEF # 3 (New America Foundation Dec. 2006), http://www.newamerica.net/files/HealthIBNo3.pdf 15

Stephen Zuckerman, Aimee F. Williams & Karen E. Stockley, *Trends in Medicaid Physician Fees 2003-2008*, HEALTH AFFAIRS, April 28, 2009, *available at* http://content.healthaffairs.org/content/28/3/w510.full.html 16

Constitutional Provisions

UNITED STATES CONSTITUTION, Art I, sec. 8, cl. 18 ..... 7, 29

UNITED STATES CONSTITUTION, Art. I, sec. 8, cl. 1 30

UNITED STATES CONSTITUTION, Art. I, sec. 8, cl. 8 31

UNITED STATES CONSTITUTION, Art. II, sec. 1, cl. 1 31

UNITED STATES CONSTITUTION, Art. II, sec. 3 31

INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae Docs4PatientCare is a non-profit 501(c)(6) membership organization of concerned physicians committed to the establishment of a health care system that preserves the sanctity of the doctor-patient relationship, promotes quality of care, supports affordable access to all Americans, and protects patients' freedom of choice. It has an interest in this case because the individual mandate contradicts these fundamental principles and sets a dangerous precedent regarding the inappropriate use of federal power to dictate the choices of Americans.

Amicus Curiae Benjamin Rush Society is a membership organization that includes medical students, residents, fellows, and doctors across the political spectrum — as well as members of the general public — who believe that the profession of medicine calls its practitioners to serve their patients, rather than the government. The Society believes that the physician-patient relationship is a voluntary and mutually beneficial one. Both parties have a right to enter this relationship freely. The proper role of government is to protect this freedom, not to diminish it. The Society is part of the Pacific Research Institute. The Society is interested in this case because the individual mandate undermines such freedom by compelling

---

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the blanket consent letters from all parties, on file with this Court.

some individuals to purchase health insurance notwithstanding their free choice to the contrary.

The Pacific Research Institute is a non-profit nonpartisan 501(c)(3) organization that champions freedom, opportunity, and personal responsibility by advancing free-market policy solutions to the issues that impact the daily lives of all Americans. It demonstrates how free interaction among consumers, businesses, and voluntary associations is more effective than government action at providing the important results we all seek—good schools, quality health care, a clean environment, and economic growth. Founded in 1979 and based in San Francisco, PRI is supported by private contributions. Its activities include publications, public events, media commentary, invited legislative testimony, and community outreach.

The Galen Institute is a non-profit, Section 501(c)(3) public policy research organization devoted to advancing ideas and policies that would create a vibrant, patient-centered health sector. It promotes public debate and education about proposals that support individual freedom, consumer choice, competition, and innovation in the health sector. It focuses on individual responsibility and control over health care and health insurance, lower costs through competition, and a reliable safety net for vulnerable populations. Galen's policies promote continued medical innovation, advances in personalized medicine, and expanded access to health care and coverage in the 21st century Information Age economy.

Angel McClary Raich was the lead respondent in one of this Court's important recent Commerce

Clause cases, *Gonzales* v. *Raich*, 545 U.S. 1 (2005). She suffers from terminal cancer and the related effects of radiation and chemotherapy. She thus brings to this case the perspective of both a patient in our healthcare system and a litigant with a personal understanding of the implications of an expansive construction of the Commerce Clause on individual freedom. Her interest in this case stems from both her belief that the individual mandate will worsen, rather than improve, the problems in our healthcare system, and from her concern that the government's expansive views of the Commerce and Necessary and Proper Clauses will lead to the limitless federal power against which she warned in her own case before this Court.

None of the above *amici* is publicly traded or has any parent corporations, other than as noted, and no publicly traded corporation owns 10% or more or any of the above *amici*.

SUMMARY OF ARGUMENT

1. Petitioners' claim that the individual mandate is needed to avoid the supposedly significant market effects of cost-shifting by the uninsured both exaggerates the amount of the problem potentially affected by the mandate and fails to recognize that the mandate actually *increases*, rather than reduces, any claimed cost-shifting to private parties. Rather than play any meaningful role in addressing the claimed $43 billion in uncompensated care consumed by 50 million uninsured, the mandate only changes the behavior of 16 million uninsured persons who consume at most only $9.5 billion in uncompensated care.

Furthermore, because 6.5 million of those 16 million uninsured persons will enroll in Medicaid, rather than obtain private insurance, they will actually consume more uncompensated care than the entire 16 million persons did without insurance, for a net increase in uncompensated care of between $0.5 and $3 billion. That perverse result occurs because their average consumption of healthcare will double and because doctors and hospitals receive a significantly lower rate of compensation for Medicaid patients than they do for the uninsured. The net consequence of the mandate on the 16 million uninsured as a whole, therefore, has no substantial effect on the claimed commerce problem of cost-shifting other than to make it worse. Given the disconnect between the alleged problem affecting interstate commerce and the proposed solution, the mandate has no tangible link or rational relationship to the Commerce Clause and is not necessary and proper to deal with the alleged problem of cost shifting.

2. Nor is the mandate necessary and proper to "carry[] into Execution" the new insurance restrictions contained in the Act. While petitioners claim that the mandate is needed to avoid the destructive effects of adverse selection resulting from the Act's must-issue and community-rating requirements, that argument misconceives the scope of the Necessary and Proper Clause. That Clause permits such additional authority as is necessary and proper for "carrying into Execution" an enumerated power such as the commerce power. The mandate, however, does nothing to help "Execut[e]" the new insurance rules. Rather, its sole purpose is to avoid or offset the natural

consequences that flow *from* the full execution of such rules.

Petitioners' claim to any authority that allows Congress to achieve its goals or "ends" in connection with a regulation of commerce misconceives the meaning of the constitutional phrase "carry[] into Execution" and would render Congress's authority unlimited: *Any* conceivable policy goal or "end" could be ascribed to a regulation of commerce, at which point Congress could claim all further authority it deemed desirable for achieving that goal or end. Indeed, the less effective a legitimate exercise of authority was at achieving a particular policy outcome, the greater would be Congress's claim to more unenumerated power under petitioners' theory. Such a "bootstrapping" approach to expanding congressional power is inconsistent with both the text and history of the Necessary and Proper Clause and the fundamental logic of the Constitution.

ARGUMENT

Two of petitioners' primary Commerce Clause justifications for the individual mandate are: (1) that the failure to purchase insurance shifts costs to other private participants in the insurance market, and hence the mandate regulates behavior having a substantial effect on interstate commerce; and (2) that the mandate is required to avoid the destructive effects of new federal insurance rules imposed by the Act, and hence the mandate is necessary and proper

to effectuate those rules. Pet Br. (Min. Cov.) at 18-19.[2]

Neither of those justifications, however, is based on the Commerce Clause directly, but both are instead based on extensions of the commerce power via the Necessary and Proper Clause. Regarding activities that have a "substantial effect" on interstate commerce, Justice Scalia has explained that

> unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, * * * Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause. * * *.

Gonzales v. *Raich*, 545 U.S. 1, 34 (2005) (Scalia, J., concurring in the judgment) (citations omitted).

Similarly, the power to regulate behavior in order to effectuate a separate and otherwise proper regulation of commerce derives from the language of the Necessary and Proper Clause itself – granting Con-

---

[2] This brief does not address petitioners' further claim that the mandate is a direct regulation of the means of paying for commerce in healthcare. That issue is addressed by respondents and numerous other *amici*. This brief assumes that the mandate will not be deemed a direct regulation of interstate commerce and addresses only petitioners' arguments that assert authority beyond that provided by the Commerce Clause alone.

gress authority to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," Art I, sec. 8, cl. 18 – as has been recognized by this Court since *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

For a statute to be authorized under the Necessary and Proper Clause, it must "constitute[] a means that is rationally related to the implementation of a constitutionally enumerated power." *United States* v. *Comstock*, 130 S. Ct. 1949, 1956 (2010). Unlike the more lenient rational basis test applied in the Due Process Clause context, however, the rational relationship needed to expand the reach of the Commerce Clause requires

> a tangible link to commerce, not a mere conceivable rational relation, * * *. " '[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.' " * * * The rational basis referred to in the Commerce Clause context is a demonstrated link in fact, based on empirical demonstration.

Comstock, 130 S. Ct. at 1967 (Kennedy, J., concurring in the judgment) (citations omitted).

With those standards in mind, neither of petitioners' claims to penumbral Commerce Clause authority via the Necessary and Proper Clause is sufficient. The individual mandate is not "rationally related" to addressing the claimed problem of cost-shifting by the uninsured. Failures of basic arithmetic in the reimbursement data cited by the government, and the exclusion of *increased* cost-shifting caused by the mandate itself, show that there is no "demonstrated

link in fact" between the uninsured who are impacted by the individual mandate and any decrease in cost shifting that might substantially affect interstate commerce.

Furthermore, a fundamental confusion between facilitating the *exercise* of the commerce power over the sale of insurance and altering the *policy outcomes* of such exercise shows that the individual mandate does not serve to "carry[] into Execution" the regulation of insurance under the commerce power.

I. The Individual Mandate Has No Demonstrated Link to Reducing Any Cost Shift to Private Insurance, and in Fact Worsens the Asserted Problem.

Petitioners make a variety of economic claims in support of their argument that the mandate is necessary to reduce the effects on commerce from cost shifting between the uninsured and the insured. Citing a study by Families USA, petitioners claim that 50 million uninsured individuals annually consume $116 billion in healthcare, $43 billion of which is uncompensated, "*i.e.*, care received by uninsured patients but not paid for by them or by a third party on their behalf." Pet. Br. (Min. Cov.) at 7-8 (*citing, inter alia*, Families USA, *Hidden Health Tax: Americans Pay a Premium*, at 2, 6 (2009)). Petitioners then claim that such uncompensated costs are passed on to private insurers, who in turn pass it on to insurance purchasers, resulting in an increase in average family premiums of over $1,000 per year. Pet. Br. (Min. Cov.) at 8 (citing 42 U.S.C.A. § 18091(a)(2)(F); Families USA, *Hidden Health Tax*, at 2, 6). The govern-

ment has claimed that the Act *as a whole* will result in an additional 34 million people obtaining coverage by 2021, 17 million of which will be covered through expanded Medicaid and CHIP coverage, the remainder through newly obtained private insurance. CBO, *Analysis of the Major Health Care Legislation Enacted in March 2010* (March 30, 2011), at 1.

Those numbers exaggerate the problem that the mandate is claimed to address and overstate the extent to which the mandate even potentially rectifies the asserted problem. The claimed amount of uncompensated care consumed by the uninsured, for example, excludes $13 billion in additional existing government payments that offset the cost of treating the uninsured. And the claim that 34 million uninsured will obtain coverage misleadingly aggregates the effects of the Act as a whole, rather focusing on the distinct effects of the individual mandate – both positive and negative – on uncompensated care.

As discussed below, looking to the facts and as revealed in the government's own data, the demonstrable amount of total uncompensated care for the uninsured is only $30 billion. The mandate itself only results in new coverage for 16 million persons who would have consumed, at most, $9.5 billion in uncompensated care. Because 6 to 7 million of the 16 million persons affected by the mandate will obtain new coverage through Medicaid – which notoriously undercompensates for medical services – and increase their total consumption of healthcare, they will actually generate a *net increase* in uncompensated care, rather than a reduction. And that net increase in uncompensated care turns out to be greater

than any reduction in uncompensated care from the remainder of the 16 million uninsured who will obtain private insurance as a result of the mandate.

Thus, by only partially addressing an exaggerated problem in a counterproductive way, the mandate lacks a rational relationship to addressing any problem with a substantial effect on commerce.

A. The Amount of Uncompensated Care Is Exaggerated Because It Ignores Existing Sources of Funding for the Care of the Uninsured.

The government claims that 50 million uninsured consume $116 billion, or an average of $2,320 per person, of healthcare, of which $43 billion, or $860 per person is uncompensated. Pet. Br. (Min Cov.) at 19.

That claim, however, relies on the assertion that only $30 billion of the cost of care for the uninsured is paid by third-party sources such as government programs and charities. *Id.* at 8 (citing Families USA, *Hidden Health Tax*, at 2, 6).[3] That figure, however,

---

[3] We do not discuss the government's cost of paying for uncompensated care to the uninsured because petitioners' cost-shifting theory and Congress's findings on which they rely turn only on costs paid by private market participants, not by governments or charities. But to the extent that the costs shifted to the government were relevant for Commerce or Necessary and Proper Clause purposes, suffice it to say that the individual mandate, even with its penalty provisions, does not ameliorate such costs but in fact exacerbates them. As the CBO has recognized, the individual mandate will impose a net cost to the federal government of $252 billion dollars between 2014, when it becomes effective, and 2020. CBO, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* (June 16, 2010),

excludes numerous government and private funding sources that offset the cost of care for the uninsured, such as state and local payments to hospitals and support for indigent care, direct care programs that serve the uninsured, the federal government's Community Health Centers program, AIDS and HIV programs, Maternal and Child Health Block Grants, and the National Health Service Corps.

In a study sponsored by the Kaiser Commission on Medicaid and the Uninsured, Professor Jack Hadley and his colleagues added together these multiple sources of government funding for care of the uninsured, in addition to the sources considered in the Families USA study, and found that the government provides $42.9 billion in funding that supports care for the uninsured.[4]

Once the full, actual amount of third-party payments for the uninsured is taken into account, the amount of uncompensated care substantially declines. Even using the government's starting points for consumption and patient out-of-pocket payments,

---

at 1-2. Such costs overwhelmingly exceed any current government outlays for those uninsured affected by the mandate.

And that additional cost does not even take into account the billions of dollars in costs shifted to the States as a result of the Medicaid expansion and the increased utilization of Medicaid caused by the mandate and other parts of the health-care law.

[4] Jack Hadley, John Holahan, Teresa Coughlin & Dawn Miller, *Covering the Uninsured in 2008: A Detailed Examination of Current Costs and Sources of Payment, and Incremental Costs of Expanding Coverage*, at 26-47, 51 (Kaiser Commission on Medicaid and the Uninsured, August 2008), available at http://www.kff.org/uninsured/upload/7809.pdf.

there is only $30 billion in uncompensated care potentially shifted via higher insurance premiums. That amounts to only 26% of consumption and $600 per person in uncompensated care.

Tables 1 and 2 summarize the calculations:

Table 1: Uncompensated Care – Government Figures			
	Dollars (billions)[5]	%	Per Person
50 million uninsured			
Consumption	116	100	$2,320
Patient payments	43	37	$ 860
Third-Party Payments	30	26	$ 600
Uncompensated Care	**43**	**37**	**$ 860**

Table 2: Uncompensated Care Including Additional Third Party Payments per Hadley, *et al.*			
	Dollars (billions)	%	Per Person
50 million uninsured			
Consumption	116	100	$2,320
Patient Payments	43	37	$ 860
All Third-Party Payments	43	37	$ 860
Uncompensated Care	**30**	**26**	**$ 600**

[5] Total dollars in these tables, and in Table 3 on page 19, are rounded to the nearest half-billion. Percentages are rounded to the nearest percent

B. The Individual Mandate Addresses Only a Fraction of the Alleged Problem.

In addition to overstating the total amount of uncompensated care consumed by the uninsured, petitioners' figures also are misleading in citing the total amount of uncompensated care as justification for the mandate when the mandate itself only causes less than a third of the 50 million uninsured to obtain new coverage.

Indeed, petitioners quietly concede this point in a footnote late in their brief, admitting that the individual mandate is responsible for only 16 million new people obtaining coverage by 2019. Pet. Br. (Min Cov.) at 32-33 n. 7 (citing the "expert judgment" of Congressional Budget Office ("CBO") projections contained in CBO, *Analysis of the Major Health Care Legislation Enacted in March 2010*, at 18 (March 30, 2011), and CBO, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance*, at 2 (June 16, 2010).[6]

Those 16 million account for only $9.6 billion in uncompensated care.[7] That is far less than the $43 billion figure petitioners start with.

---

[6] The CBO's estimate of 34 million persons with new coverage by 2021, *supra* at 8-9, includes many persons who will voluntarily obtain coverage based on other changes made by the Act, regardless of the mandate.

[7] This figure is obtained by multiplying 16 million persons by the per-person uncompensated care figure of $600, *supra* at 12, Table 2.

For ease of calculation we have conservatively assumed that the per-person costs of uncompensated care are equally distributed among the uninsured. However, that assumption likely

But even that number is exaggerated in that it does not account for *increases* in uncompensated care also caused by the mandate.

C. The Mandate Exacerbates Cost Shifting by Increasing Consumption of Under-Reimbursed Services.

When considering the issue of uncompensated care, the government blithely assumes that coverage is tantamount to compensation, and that every patient covered will reduce the amount of uncompensated care. That assumption has no demonstrable basis in fact and, according to the government's own sources, is wrong.

The problem with the government's assumption is that many of the 16 million persons influenced by the mandate will sign up for Medicaid, rather than obtain private insurance coverage. That will result in increased consumption, decreased provider compensation, and a net increase in total uncompensated care as a result of the individual mandate.

As the government's own data recognize, of the 16 million individuals who will get coverage due to the

---

overestimates the effect of the individual mandate on the amount of uncompensated care received by those whose behavior will be changed by the mandate. Many of the 16 million uninsured pressed by the mandate into obtaining private or employer-based coverage likely consume less healthcare than the average uninsured, and likely paid out of pocket a higher than average percentage of their healthcare costs while uninsured. Those persons thus consumed less than their pro-rata share of uncompensated care, and removing them from the pool of the uninsured will have a smaller impact in reducing uncompensated care.

mandate, 6 to 7 million will obtain governmental coverage under Medicaid and the Children's Health Insurance Program (CHIP). CBO, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance*, at 2. With respect to these persons, the individual mandate will actually increase the amount of uncompensated care because such coverage simultaneously increases their consumption of healthcare services yet systematically under-compensates providers for such services.

It is well recognized that the uninsured consume approximately 50% less healthcare than do the insured.[8] Once covered by government programs – under which they would pay little or nothing for healthcare – the newly covered can be expected to double their consumption.[9]

---

[8] Peter Harbage & Len M. Nichols, *A Premium Price: The Hidden Costs All Californians Pay in Our Fragmented Health Care System*, ISSUE BRIEF # 3, at 2 (New America Foundation Dec. 2006), http://www.newamerica.net/files/HealthIBNo3.pdf (uninsured nationally receive an average of 50% of the care received by the insured) (citing for Agency for Healthcare Research and Quality, *Research Findings #27: Health Care Expenses in the United States, 2000* (April 2004), http://www.meps.ahrq.gov/data_files/publications/rf21/rf21.shtml.); Jack Hadley & John Holahan, *How Much Medical Care Do the Uninsured Use and Who Pays for It?* 2003, HEALTH AFFAIRS, at W3-69 to W3-70, http://content.healthaffairs.org/content/early/2003/02/12/hlthaff.w3.66.full.pdf (full year uninsured received about half as much care as the privately insured).

[9] Much of the differential consumption is attributable to lack of access to and resources for health care, particularly for low-income uninsured. For higher income uninsured, however, those choosing to forego insurance are, on average healthier, though the 50% consumption differential between insured and unin-

While such consumption will now be covered under Medicaid and CHIP, it is also well recognized that Medicaid systematically underpays for healthcare services, on average paying only 72% of the amounts paid by Medicare, which itself pays only 80% of what is paid by private insurers.[10] That amounts to Medicaid paying, on average, only 58% of what private insurers pay – a 42% underpayment. Even petitioner

---

sured holds even controlling for health. Hadley, *et al.*, *Covering the Uninsured in 2008* at 19 ("the uninsured use less care than the insured (holding health status constant), because they pay for much of their care themselves and because their health is generally better than the insured's"). Persons who would receive governmental insurance under the mandate, however, fall into the former group, with consumption likely a function of resources and having to internalize much of the cost of care. Once they are under governmental coverage for which they do not have to pay, their consumption of healthcare that is now entirely free to them will rise.

[10] David Olmos, *Mayo Clinic in Arizona to Stop Treating Some Medicare Patients*, Bloomberg, December 31 2009, ("Nationwide, doctors made about 20 percent less for treating Medicare patients than they did caring for privately insured patients in 2007, a payment gap that has remained stable during the last decade"), *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aHoYSI84VdL0; Stephen Zuckerman, Aimee F. Williams & Karen E. Stockley, *Trends in Medicaid Physician Fees 2003-2008* HEALTH AFFAIRS, April 28, 2009, at w510 (Medicaid fees were only 72% of Medicare fees in 2008), *available at* http://content.healthaffairs.org/content/28/3/w510.full.html; Colorado Children's Healthcare Access Program, *Compare: Reimbursement for Medicaid Versus Commercial Health Insurance Versus Office Expenses*, CCHAP Newsletter Three – Article 1, January 2007, at 2 (reimbursement rates for pediatric care routinely less than half of commercial rates and rarely above 80% of commercial rates), available at http://www.cchap.org/newsletter-three/#one.

HHS itself optimistically pegs Medicaid payments at between 58% to 66% of private health insurance payments, a 34% to 42% underpayment.[11]

Combining the nature of coverage caused by the mandate, the increased consumption, and the Medicaid under-compensation rates yields a startling result. Rather than consuming roughly $4 billion in uncompensated care when they were uninsured,[12] the 6.5 million persons who will enroll in Medicaid as a result of the mandate will consume between *$10 billion and $12.5 billion* in uncompensated care.[13] For

---

[11] John D. Shatto & M. Kent Clemens, *Projected Medicare Expenditures under an Illustrative Scenario with Alternative Payment Updates to Medicare Providers*, Office of the Actuary, Centers for Medicare and Medicaid Services, HHS, May 13 2011, at 6-7 (Medicaid payment rates of 66% of private insurance rates for hospital inpatient services and 58% for physician services), available at https://www.cms.gov/ReportsTrustFunds/Downloads/2011TRAlternativeScenario.pdf.

[12] 6.5 million persons x $600 per person uncompensated care, *supra*, at 12, Table 2.

[13] Using the middle of the CBO's range of persons shifting to Medicaid, the calculation is as follows: 6.5 million persons x $2420 per person consumption x 2 x (0.34 to 0.42 undercompensation rate). These figures do not provide any further reduction for other government programs that might indirectly subsidize such undercompensation for two reasons. First, the HHS figure cited in footnote 11 already includes Medicaid disproportionate share payments, which are part of the government compensation included by both Hadley and Families USA. John D. Shatto & M. Kent Clemens, *Projected Medicare Expenditures*, at 6. Second, most of the other government programs and payments included would become largely irrelevant once this group was covered by Medicaid in that they would be able to visit their own physicians and would no longer separately utilize programs for the indigent. The cost of the underpayment thus would be borne

this cohort, the mandate actually makes the problem of uncompensated care far worse than it was before. In fact, the problem is so much worse under Medicaid that the *net* effect for the entire 16 million people affected by the mandate, including those getting private insurance, is an increase in uncompensated care of between $0.5 billion to $3 billion.

Table 3 on the following page summarizes the calculations leading to this conclusion.

---

by such physicians rather than any government-funded clinic or similar program.

Table 3: Impact of the **Individual Mandate**			
	Dollars (billions)	%	Per Person
16 million covered			
Costs Before Mandate			
Consumption	37		$2,320
Reimbursement	27.5	74	$1,720
Uncompensated Care	**9.5**	**26**	**$ 600**
Costs After Mandate			
9.5 million insured			
Consumption	44		$4,640
Reimbursement	44	100	$4,640
Uncompensated Care	**0**	**0**	**$ 0**
6.5 million Medicaid			
Consumption	30		$4,640
Reimbursement Range (58%-66%)	17.5 20	58 66	$2,691 $3,248
Uncompensated Care **Range (42%-34%)**	**12.5** **10**	**42** **34**	**$1,949** **$1,569**
Total Consumption of Combined 16 million	74		$4,640
Total Uncompensated Care	12.5 10	17 14	$ 781 $ 638
Net Increase in Uncompensated Care	**3** **0.5**	**32** **0.1**	**$ 181** **$ 38**

Even ignoring the offsetting increase in uncompensated care by individuals joining Medicaid as a result of the mandate, the decrease in uncompensated from 9.5 million individuals getting private insurance as a result of the mandate is only $5.7 billion. That amount is trivial in the context of national spending on healthcare of $2.6 trillion. It amounts to only 0.2% of spending and certainly does not have a *substantial* effect on interstate commerce. In fact, it is effectively a rounding error. But, of course, that decrease is more than offset by the net increase from new Medicaid patients in any event.

Thus, while the mandate will cause 16 million people to obtain coverage, such coverage does not fix the cost-shifting claimed as the basis for Commerce Clause authority, but in fact *increases* the amount of uncompensated care and the costs that are potentially shifted. From the perspective of the Commerce and Necessary and Proper Clauses, the cure is worse than the disease. That would seem to be the antithesis of a rational relationship between the problem of cost shifting affecting interstate commerce and the supposedly necessary and proper means of supplementing the Commerce Clause to address that problem.

Rather than the individual mandate being a means of addressing $43 billion in uncompensated care and supposed cost shifting that significantly affects commerce, it addresses an insubstantial amount of costs that are unlikely to be noticed, much less shifted, and actually *causes* more uncompensated care than it purports to cure. Under the standards for invoking the Necessary and Proper Clause in sup-

port of the Commerce Power, the individual mandate is a total failure. It is not rationally related to the implementation of the commerce power, and its connection to solving any problem that substantially affects commerce has no basis in fact or empirical demonstration.

II. The Individual Mandate Is Not Necessary and Proper to "Carry into Execution" the Commerce Power.

Petitioners also argue that the individual mandate is necessary and proper to avoid the negative consequences of the new insurance rules adopted by the Act. *See* Pet. Br. (Min. Cov.) at 21-30. According to petitioners, the new legislation forbidding insurance companies from denying coverage to persons with pre-existing conditions, and requiring them to price coverage based on community ratings rather than individual risks, creates an incentive for people to forego insurance until after they have already become sick and are about to incur medical expenses. Such so-called adverse selection would make insurance unprofitable and ultimately non-viable.

The individual mandate seeks to avoid this result by requiring insurance coverage at all times, thereby precluding last-minute purchases and providing a guaranteed stream of income to insurance companies from persons who are not consuming as much healthcare as those who are already ill. According to petitioners' theory, adopting the mandate to avoid such self-inflicted consequences "is necessary to make effective the Act's core reforms of the insurance market." Pet. Br. (Min. Cov.) at 24; *id.* at 30 (individual

mandate "is 'necessary' to the end of regulating insurance underwriting practices without running insurers out of business") (citation and internal quotation marks omitted).

The critical flaw in petitioners' analysis is that it confuses an effort to avoid the natural results of its economically destructive insurance rules with "carrying into Execution" such rules. The Necessary and Proper Clause, however, grants only a facilitating power, not a cure-all to ensure favorable results. To read it as petitioners have would render the qualifying language "for carrying into Execution" meaningless, and would effectively grant Congress a police power.

The Necessary and Proper Clause gives Congress authority to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Art I, sec. 8, cl. 18. To qualify under this grant of authority, a law must not merely be needful or desirable; it must also have as its function "carrying into Execution" one of the enumerated powers. *See McCulloch*, 17 U.S. (4 Wheat.) at 412; *Comstock*, 130 S. Ct. 1949, 1957 (2010). This Clause "is not a self-contained grant of power. It authorizes Congress only to pass laws that 'carry[] into Execution' powers the Constitution elsewhere vests in one or more institutions of the federal government." Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 274 (1993).

The Framers understood that the "for carrying into Execution" qualifier imposed a meaningful limitation on Congress and served to support the protective con-

straints introduced by a scheme of enumerated powers. James Madison, for example, noted that the authority granted by the Necessary and Proper Clause " 'only extended to the enumerated powers. Should Congress attempt to extend it to any power not enumerated, it would not be warranted by the clause.' " Lawson & Granger 43 DUKE L.J. at 275 n. 24 (quoting Statement by James Madison at the Virginia convention in 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 455 (Jonathan Elliot, ed., 2d ed. 1836) (hereinafter ELLIOT'S DEBATES)). James Wilson similarly noted that the Clause was " 'limited and defined' " by the "for carrying into Execution" language, and Elbridge Gerry explained that the Clause " 'gives no legislative authority to Congress to carry into effect any power not expressly vested by the constitution.' " Lawson & Granger 43 DUKE L.J. at 275 n. 24 (quoting ELLIOT'S DEBATES at 468 and 1 ANNALS OF CONG. 277 (Joseph Gales ed., 1789)).

For the "carrying into Execution" language to have any meaningful function or role, it must be understood in the natural and instrumental sense of allowing Congress to give effect to or implement some other power.

> To carry a law or power into execution in its most basic sense means to provide enforcement machinery, prescribe penalties, authorize the hiring of employees, appropriate funds, and so forth to effectuate that law or power. It does *not* mean to regulate unenumerated subject areas to make the exercise of enumerated powers more efficient.[]"

Lawson & Granger 43 DUKE L.J. at 331 (emphasis in original; footnote omitted).

Once the limitation imposed by the "for carrying into Execution" language is acknowledged, it is apparent that the individual mandate does not carry into execution the new insurance rules. Petitioners do not claim that the new insurance rules would fail to operate, could not be enforced, or otherwise would lack effect absent the mandate. Rather, the very problem they identify is that the new insurance restrictions would be all too effective, and thus have predictably destructive consequences as a result of their operation. What petitioners argue is that absent the mandate the new rules Congress enacted would not be *desirable* and would not accomplish Congress's underlying *policy* goals. But that is not a matter of execution; it is a matter of outcome.

In claiming that the mandate makes the insurance regulations "effective" and supports the congressional "end" of regulating the insurance market without negative consequences, Pet. Br. (min. Cov.) at 24, 30, petitioners seem to be misreading and expanding upon language from *McCulloch*, where Chief Justice Marshall noted:

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the

> manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.[]

17 U.S. (4 Wheat.) at 421 (footnote omitted).

The "end" to which Chief Justice Marshall was referring in the above passage, however, was not the policy goal of Congress, but rather the *exercise* of an enumerated power. Petitioners do not claim Congress is incapable of exercising its power to regulate insurance absent the mandate. The new insurance restrictions are law, and Congress has chosen the various means it deems most beneficial for carrying them into execution, ranging from reporting requirements and provisions for review and enforcement, to penalties for non-compliance. The exercise of Congressional power is thus fully realized – "carr[ied] into Execution" – without the mandate. It is only the consequences and downstream results of such exercise that Congress seeks to alter with the mandate.

The distinction between the supplemental means for exercising an enumerated power and the substantive ends or outcomes towards which the power is directed can be seen in *McCulloch*'s examples and discussions preceding the quoted passage.

In considering the establishment of a national bank under the Necessary and Proper Clause, Chief Justice Marshall referred back to the power to raise revenues and raise and support armies, and noted that the exercise of such powers "may require, that

the treasure raised in the north should be transported to the south, that raised in the east, conveyed to the west." 17 U.S. (4 Wheat.) at 408. Having the means of paying for the expenses of an army is plainly instrumental to the power to raise an army. But there is no suggestion that the Necessary and Proper Clause would support any other extra-enumerated powers simply to achieve the policy goals for which the army has been raised or deployed. Indeed, Marshall expressly distinguished between the means of implementing a power and the ends for which a power is exercised:

> The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. * * * The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

Id. at 411.

Other examples described in *McCulloch* highlight that the Necessary and Proper Clause is limited to implementing the exercise of an enumerated power, not guaranteeing any particular outcome from that

exercise. For example, the powers to prescribe oaths of office, to "punish any violations of its laws," and to carry mail and punish those who steal letters from the post office each implements enumerated powers to hold and create offices, legislate on various matters, and establish post offices and post roads. But those examples of supplemental powers do not include the power to take further steps to ensure good outcomes from the underlying exercise. In each instance, the end to which such supplemental powers are directed is the exercise of some enumerated power, not the further "ends" towards which those powers were directed.

Chief Justice Marshall himself later explained how actions designed merely to make an exercise of power more effective, or to accomplish a goal without undue burden, would not constitute a means of executing a given power. Concerning whether Congress could preempt state taxes in order to increase its ability to collect its own taxes without unduly burdening the populace, Marshall explained:

> Now I deny that a law prohibiting the state legislatures from imposing a land tax would be an "appropriate" means, *or any means whatever*, to be employed in collecting the tax of the United States. It is not an instrument to be so employed. It is not a means "plainly adapted," or conducive to[,]" the end.

A Friend to the Union, *reprinted in John Marshall's Defense of McCulloch v. Maryland* 78, 100 (Gerald Gunther ed., 1969) (emphasis added); *see also United States* v. *DeWitt*, 76 U.S. 41, 44 (1869) (rejecting a ban on intrastate sales of certain products unsuccess-

fully justified as a means to increase demand for other products subject to federal taxation and thereby "aid and support" and make more "effective" the "power of laying and collecting taxes").

More recently, in *Comstock*, Justice Alito emphasized the "carrying into Execution" aspect of the Necessary and Proper Clause when he "agree[d] with the dissent that '[t]he Necessary and Proper Clause empowers Congress to enact only those laws that "carr[y] into Execution" one or more of the federal powers enumerated in the Constitution.' " 130 S. Ct. at 1969 (Alito, J., concurring in the judgment). He correctly recognized that the "The Necessary and Proper Clause provides the constitutional authority for most federal criminal statutes. * * * [I]n order to execute one or more of the powers conferred on Congress, it is necessary and proper to criminalize certain conduct, and in order to do that it is obviously necessary and proper to provide for the operation of a federal criminal justice system and a federal prison system." *Id.* On this view, the law at issue in *Comstock* thus was merely an incidental part of operating a federal prison system, and thus served to execute, by means of effective enforcement, the underlying laws enacted pursuant to Congress's enumerated powers.

In their dissent in *Comstock*, Justices Thomas and Scalia placed an even greater emphasis on the "carrying into Execution" limitation on the Clause: "no matter how 'necessary' or 'proper' an Act of Congress may be to its objective, Congress lacks authority to legislate if the objective is anything other than 'carrying into Execution' one or more of the Federal Gov-

ernment's enumerated powers. Art. I, § 8, cl. 18." 130 S. Ct. at 1972 (Thomas, J., dissenting, joined by Scalia, J.).

Similarly, in *Gonzales* v. *Raich*, this Court viewed the regulation of locally grown marijuana as a necessary means of enforcing the ban on interstate sales "[g]iven the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, * * * and concerns about diversion into illicit channels." 545 U.S. at 22; *see also id.* at 38 (Scalia, J. concurring in the judgment) ("the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective").

Were the Necessary and Proper Clause to be read as the government suggests, the limitation imposed by the "for carrying into Execution" qualifier would be rendered meaningless. Congress may have any number of policy goals and desired outcomes from its exercise of its enumerated powers. The specification of congressional powers does not limit such policy goals, they limit the powers of Congress – the means by which Congress may act in pursuit of whatever goals it deems desirable. Similarly, the goals Congress may have do not delineate its powers. A perfectly valid goal may, nonetheless, be pursued by means that lie beyond Congress's powers, and a foolish goal may be pursued through concededly legitimate means. Conflating the "end" of exercising constitutional power with the goals of such exercise

simply allows the ends to be whatever Congress can imagine or desire.

In this case, for example, Congress desires all persons to have healthcare at an affordable price. If that is the legitimate "end" according to the government, then nothing that furthers that end would be beyond congressional power.[14] The government's claim that it is only exercising this power as part of a larger scheme also utilizing the commerce power to pursue its policy goals is no limitation on the breadth of its interpretation. There is no conceivable goal that could not be pursued in part by one or more of the enumerated powers. Yet under the government's view, once an initial use of such powers has been made, all other powers immediately follow in furtherance of the same policy goal.

The government's sweeping conception of what it means to "carry[] into Execution" Congress's enumerated powers would have other disturbing consequences beyond its application to the commerce power. Insofar as "carrying into Execution" is read to mean achieving the desired outcomes or "ends" of some otherwise valid exercise of an enumerated power, the implicit limits in many other enumerated powers would effectively be eliminated. For example, Congress's power to "provide for the * * * General Welfare of the United States," Art. I, sec. 8, cl. 1, may be exercised with an unlimited number and variety of

---

[14] According to the government, the word "necessary" imposes no meaningful check, and the word "proper" at best incorporates federalism notions that are derived from the Tenth Amendment and the structure of the Constitution. They would provide no independent limits on Congressional power.

goals. But if merely spending money on a particular endeavor was insufficient to reach the desired result – educating the young, assisting battered women – then the petitioners' construction of the Necessary and Proper Clause would allow virtually *any* supplemental means of accomplishing such "ends." Similarly Congress's Power to "promote the Progress of Science and the useful Arts," Art. I, sec. 8, cl. 8, would no longer be limited to granting exclusive rights for limited times. Rather, if legislation granting exclusive rights to writings and discoveries were insufficient to promote progress in the arts and sciences, Congress could adopt whatever further mandates beyond the enumerated powers that it deemed necessary to achieve its end results and policy goals. It could compel people to become writers or inventors. It could compel people to buy writings and discoveries. The authority would seem to be limitless.

Even beyond execution of Congress's enumerated powers, the open-ended construction petitioners advocate for the Necessary and Proper Clause would implicitly expand the analogous "executive Power" of the President. Art. II, sec. 1, cl. 1. If "carrying into Execution" means achieving desirable outcomes from, rather than implementing, valid laws, then the President's power to "take Care that the Laws be faithfully executed," Art. II, sec. 3, could be read as equally broad, granting him extensive authority to act in furtherance of broad Congressional goals far beyond the mere implementation and enforcement of the law.

The above examples may seem absurd, but they are the straightforward implications of the petition-

ers' sweeping construction of the Necessary and Proper Clause.

A correct construction of that Clause would instead look to whether an exercise of an enumerated power requires something further in order to be operative. Thus, there is no doubt that when enacting an actual regulation of commerce, Congress has the power to establish penalties for non-compliance with that regulation, may require reporting and other measures to demonstrate compliance, and may hire persons to monitor and enforce compliance with those regulations. Those further powers indeed carry into execution the underlying power to regulate insofar as an unenforced regulation is effectively no regulation at all. But the power to make an exercise of Congressional authority operative is vastly different than the power to do anything necessary to achieve a desirable result. Congress routinely enacts undesirable or misguided regulations having all sorts of adverse effects, whether anticipated or not. The notion that Congress could thus bootstrap from its own policy failures into unlimited power to correct the consequences of such failures is unlimited and unthinkable.

CONCLUSION

For the reasons above, this Court should affirm the decision below on the unconstitutionality of the Individual Mandate.

Respectfully submitted,

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165
jaffe@esjpc.com

C. DEAN MCGRATH, JR.
MCGRATH & ASSOCIATES
1025 Thomas Jefferson
Street, N.W.
Washington, D.C. 20007
(202) 295-2304
cdm7578@yahoo.com

JOHN HOFF
6471 Wishbone Terrace
Cabin John, MD 20818
(301) 229-1906
johnseaburyhoff@yahoo.com

Counsel for Amici Curiae

Dated: February 13, 2012

AMICUS CURIAE BRIEF

No. 11-398

In the Supreme Court of the United States

SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* ECONOMIC SCHOLARS IN SUPPORT OF PETITIONERS URGING REVERSAL ON THE MINIMUM COVERAGE ISSUE

RICHARD L. ROSEN
Counsel of Record
MICHAEL D. THORPE
AARASH HAGHIGHAT
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
Richard.Rosen@aporter.com

Counsel for Amici Economic Scholars

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE UNIQUE ECONOMICS OF THE HEALTH CARE INDUSTRY MAKE THE MINIMUM COVERAGE PROVISION NECESSARY 6

1. *People cannot avoid medical care with certainty, or be sure that they can pay for the costs of care if uninsured* 7

2. *Other legislation, policy, and common practices require access to a minimum level of health care for all who seek it, even those who cannot pay* 10

3. *Whether one person buys health insurance has cost implications for everyone else* 13

II. SECTION 1501 IS CAREFULLY TAILORED TO ADDRESS THE UNIQUE FEATURES OF HEALTH CARE INSURANCE 18

III. THE DECISION TO FORGO HEALTH CARE INSURANCE DIRECTLY AFFECTS INTERSTATE COMMERCE 21

A. Forgoing Health Care Insurance Is an Economic Decision 21

TABLE OF CONTENTS—CONTINUED

B. The Decision to Forgo Health Care Insurance Has a Material Impact on Interstate Commerce 24

1. *The Amici Economists' analysis is flawed* 25

2. *The Amici Economists ignore the importance of the mandate to the insurance reforms adopted in the Act* 28

CONCLUSION 29

APPENDIX List of *Amici Curiae* 1a

TABLE OF AUTHORITIES

CASES

Florida ex rel. Bondi v. Dep't of Health & Human Services,
780 F. Supp. 2d 1256 (N.D. Fla. 2011) 19, 20
Florida v. Dep't of Health & Human Services,
648 F.3d 1235 (11th Cir. 2011) 4, 5, 19, 21, 26
Gonzales v. Raich,
545 U.S. 1 (2005) 26
Lewis v. Capalbo,
280 A.D.2d 257 (N.Y. App. Div. 2001) 12
Liberty Univ., Inc. v. Geithner,
753 F. Supp. 2d 611 (W.D. Va. 2010) 5, 20
Magana v. Elie,
439 N.E.2d 1319 (Ill. App. Ct. 1982) 12
Mead v. Holder,
766 F. Supp. 2d 16 (D.D.C. 2010) 4, 5
Ricks v. Budge,
64 P.2d 208 (Utah 1937) 13
Saunders v. Lischkoff,
188 So. 815 (Fla. 1939) 12
Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) 4, 5, 20, 21, 24
Thomas More Law Center v. Obama,
651 F.3d 529 (6th Cir. 2011) 4, 5, 23, 24
Thomas More Law Ctr. v. Obama,
720 F. Supp. 2d 882 (E.D. Mich. 2010) 20
Tunkl v. Regents of Univ. of California,
383 P.2d 441 (Cal. 1963) 12
United States v. Lopez,
514 U.S. 549 (1995) 4, 26
Wickard v. Filburn,
317 U.S. 111 (1942) 26

TABLE OF AUTHORITIES—CONTINUED

STATUTES AND REGULATIONS

26 U.S.C. § 5000A 1
26 U.S.C. § 5000A(d) 27
42 U.S.C. § 1395dd 11
42 U.S.C.A. § 300gg(a)(1) 4
42 U.S.C.A. § 300gg-1 4
42 U.S.C.A. § 300gg-3 4
42 U.S.C.A. § 300gg-4(a) 4
42 U.S.C.A. § 300gg-4(b) 4
Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) 1
Patient Protection and Affordable Care Act , Pub. L. No. 111-148, 124 Stat. 119 (2010) 1
Fla. Stat. Ann. § 395.1041(3)(k)(1) 11
Ky. Rev. Stat. Ann. § 216B.400(1) 11
La. Rev. Stat. Ann. § 40:2113.4(A) 11
Nev. Rev. Stat. Ann. § 439B.410 11
S.C. Code Ann. § 44-7-260(E) 11
Tenn. Code. Ann. § 68-140-311(a)(12) 11
Tex. Health & Safety Code Ann. § 311.022(a), (b) 11
Utah Code Ann. § 26-8a-501(1) 11
Wyo. Stat. Ann. § 35-2-115(a) 11

OTHER AUTHORITIES

Agency for Health Care Quality and Research, Medical Expenditure Panel Survey, Summary Data Tables 8, 9, 15
AHIP Ctr. for Policy and Research, Individual Health Insurance (Oct. 2009) 14
Amitabh Chandra, Jonathan Gruber, and Robin McKnight, *The Importance of the Individual Mandate: Evidence from Massachusetts*, New Eng. J. Med., 2011 ..... 22, 29

TABLE OF AUTHORITIES—CONTINUED

Brian K. Bucks et al., *Changes in U.S. Family Financesfrom 2004 to 2007: Evidence from the Survey of Consumer Finances*, Survey of Current Business, Feb. 2009 ..... 8, 10

Brief of Amici Curiae Economists in Support of Appellees/Cross Appellants 3, 9, 14, 25, 26

Brigitte Madrian, *Employment-Based Health Insurance and Job Mobility: Is There Evidence of Job-Lock?*, Quarterly Journal of Economics, 1994, 109(1) 25

Carl E. Schneider, *The Practice of Autonomy: Patients, Doctors, and Medical Decisions* (1998) 13

Charles Rosenberg, *The Care of Strangers: The Rise of America's Hospital System* (Johns Hopkins Univ. Press 1995) 11

Comm'n on the Consequences of Uninsurance, Inst. of Medicine, Health Insurance is a Family Matter (2002) 17

Ctrs. for Medicare and Medicaid Servs., *Historic National Health Expenditure Data*, NHE Web Tables 8

Ctrs. for Medicare and Medicaid Servs., National Health Expenditure Projections 2009-2019 (Sept. 2010) 28

David Cutler and Jonathan Gruber, *The Effect of Expanding the Medicaid Program on Public Insurance, Private Insurance, and Redistribution*, Am. Econ. Review, May 1996 22

David M. Cutler and Mark McClellan, *Is Technological Change in Medicine Worth It?*, Health Affairs, Sept./Oct. 2001 9

David M. Cutler and Sarah Reber, *Paying for Health Insurance: The Trade-off Between Competition and Adverse Selection, Q. J. of Econ.*, May 1998 16

TABLE OF AUTHORITIES—CONTINUED

David Rosner, *A Once Charitable Enterprise: Hospitals and Health Care in Brooklyn and New York* 1885-1915 (Cambridge Univ. Press 1982) 12

Dianna K. Welch & Kurt Giesa, Oliver Wyman, Analysis of Individual Health Coverage in Massachusetts Before and After the July 1, 2007 Merger of the Small Group and Nongroup Health Insurance Markets (June 2010) 23

Families USA, Paying a Premium: The Added Cost of Care for the Uninsured (June 2005) 15

J. Michael McWilliams et al., *Medicare Spending of Previously Uninsured Adults*, Annals of Internal Medicine, Dec. 1, 2009 17

Jack Hadley et al., *Covering the Uninsured in 2008: Current Costs, Sources of Payment, and Incremental Costs*, Health Affairs, Aug. 25, 2008 ..... 15, 16

Janet Currie and Brigitte Madrian, *"Health, Health Insurance and the Labor Market,"* in Orley Ashenfelter and David Card, eds., Handbook of Labor Economics, 1(3), Amsterdam: North-Holland, 1999 24

Jill R. Horwitz, *The Multiple Common Law Roots of Charitable Immunity: An Essay in Honor of Richard Epstein's Contributions to Tort Law*, J. Tort L., Jan. 2010 12

Jonathan Gruber and Ebonya Washington, *Subsidies to Employee Health Insurance Premiums and the Health Insurance Market*, J. of Health Econ., Mar. 2005 ..... 21, 22

Jonathan Gruber and Sara Rosenbaum, *Buying Health Care, The Individual Mandate, and the Constitution*, New Eng. J. Med., July 29, 2010 17

Jonathan Gruber, "Medicaid," in Robert Moffitt, ed., *Means Tested Transfer Programs in the U.S.* Chicago: University of Chicago Press, 2003 27

TABLE OF AUTHORITIES—CONTINUED

Jonathan Gruber, *Health Care Reform Without the Mandate, Replacing the Individual Mandate Would Significantly Erode Coverage Gains and Raise Premiums for Health Care Consumers*, Ctr. for Am. Progress, Feb. 9, 2011 ..... 20, 29

Jonathan Gruber, *Health Insurance and the Labor Market*, in Anthony J. Culyer and Joseph P. Newhouse, eds., Handbook of Health Economics, Volume 1A, Amsterdam: North-Holland, 2000 24

Jonathan Gruber, WD Marder, K. Miller, *Avoiding the Medical Care System? Not Likely*, MIT, Thomson Reuters, Sept. 2011 8

K. Robin Yabroff et al., *Costs of Care for Elderly Cancer Patients in the United States*, J. of the Nat'l Cancer Institute, Apr. 29, 2008 9

Kaiser Family Foundation, Trends in Health Care Costs and Spending (Mar. 2009) 9

Katherine Baicker and Amitabh Chandra, *The Labor Market Effects of Rising Health Insurance Premiums*, J. of Labor Econ., 24(3), July 2006 25

Kenneth Arrow, *Uncertainty and the Welfare Economics of Medical Care*, Am. Econ. Review, Dec. 1963 ..... 6, 7

Kevin N. Rask and Kimberly J. Rask, *Public Insurance Substituting for Private Insurance: New Evidence Regarding Public Hospitals, Uncompensated Care Funds, and Medicaid*, J. of Health Econ., Jan. 19, 2000 22

Leighton Ku, *Health Insurance Coverage and Medical Expenditures of Immigrants and Native-Born Citizens in the United States*, Am. J. of Pub. Health, July 2009 27

Michael Walzer, *Spheres of Justice* (1984) 11

TABLE OF AUTHORITIES—CONTINUED

Mitt Romney, *Health Care for Everyone? We Found A Way*, WALL ST. J., Apr. 11, 2006 3

N. Gregory Mankiw, Principles of Economics (5th ed. 2009) 6, 13

Neeraj Sood, Arkadipta Ghosh, José Escarce, *Employer-Sponsored Insurance, Health Care Cost Growth, and the Economic Performance of U.S. Industries*, Health Services Research, 44(5), Oct. 2009 25

Rosemary Stevens, *In Sickness and in Wealth: American Hospitals in the Twentieth Century* (Johns Hopkins Univ. Press 1999) 11

Ross Winkelman and Syed Mahmud, *A Comparative Analysis of Claims-Based Tools for Health Risk Assessment*, Society of Actuaries (Apr. 20, 2007) 8

Thomas Buchmueller & John Dinardo, *Did Community Rating Induce an Adverse Selection Death Spiral? Evidence from New York, Pennsylvania, and Connecticut*, Am. Econ. Review, 92(1), Mar. 2002 29

U.S. Census Bureau, *People Without Health Insurance Coverage by Selected Characteristics: 2008 and 2009* 14

INTRODUCTION[1]

The *amici curiae* submit this Brief in support of Petitioners, and urge the Court to hold that Congress has the power under the Commerce and Necessary and Proper Clauses of the United States Constitution to enact section 1501 of the Patient Protection and Affordable Care Act ("ACA" or the "Act").[2] That section requires that, with certain exceptions, all Americans who can afford a minimum level of health insurance either purchase such insurance or pay a penalty to the United States Treasury.[3]

INTEREST OF *AMICI CURIAE*

Amici curiae are professors and scholars in economics who have taught, studied, and researched the economic forces operating in and affecting the health care and health insurance markets. The Economic Scholars include internationally recognized scholars in economics, including four Nobel laureates,[4] two recipients of the John Bates Clark Medal for the outstanding American economist aged 40 and under,[5] and former high-ranking economists in a number of prior administrations. *Amici* believe that reform of the health

---

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amici curiae* or *amici*'s counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief in letters submitted to the Court.

[2] Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

[3] 26 U.S.C. § 5000A (minimum coverage provision).

[4] The Nobel Laureates are Dr. Kenneth Arrow (1972), Dr. George Akerlof (2001), Dr. Peter Diamond (2010), and Dr. Eric Maskin (2007).

[5] The winners of the John Bates Clark Medal are Dr. Susan Athey (2007) and Dr. Matthew Rabin (2001).

care system is essential to constraining the growth of health care spending and that broadly-based insurance coverage is essential to any reform of the health care system in this country.

Amici submit this brief to explain both the economic factors that make the provision of health care in the United States unique and how section 1501 directly facilitates Congress' efforts to reform the health care system and to assure virtual universal insurance coverage at affordable rates. Spreading health care costs across the broad spectrum of those who will require health care is essential to any comprehensive regulatory framework that makes health care insurance generally affordable.

SUMMARY OF ARGUMENT

Virtually all Americans will, at some time during their lives, require health care, because of illness, accident, or the wear and tear of age. Because the extremely high costs of health care for all but the most routine treatments and procedures are beyond the means of most Americans, most of us use insurance to finance most of our health care. Section 1501 responds to these basic economic realities by ensuring that all Americans who can afford it will contribute to the costs of their own health care by maintaining reasonable insurance coverage. Otherwise those costs will necessarily be borne by others who do buy insurance, through higher prices imposed by health care providers to cover bad debt, or by taxpayers. As former Massachusetts Governor Romney noted when signing the Massachusetts equivalent of section 1501:

> Some of my libertarian friends balk at what looks like an individual mandate. But remember, someone has to pay for the health care that must, by law, be provided: Either the individual pays or the taxpayers

> pay. A free ride on the government is not libertarian.[6]

The decision to forgo insurance is not "inactivity." Studies demonstrate the decision to forgo insurance is typically not inadvertent but made on a reasoned and conscious basis: to assume the risk that significant medical costs can be avoided and to rely on the safety net of free care if that assumption proves faulty. That decision directly and immediately affects an industry that represents more than 17% of our gross domestic product. Thus, an individual's decision to forgo health insurance has enormous implications for the national economy and is not several steps removed from interstate commerce, as the Court of Appeals found.

Upholding section 1501 will not result in some vast expansion of federal power. The unique characteristics of the health care market – including the unavoidable need for medical care, the unpredictability of that need, the high costs of care (which exceeds the ability of most to pay), the requirement that providers offer care in emergency situations without regard to the ability of those who need the care to pay, and the very significant cost-shifting that underlies the way we pay for health care – distinguish health care from other markets. Thus, few, if any, other markets will require a comparable legislative approach to the one adopted by Congress in addressing the need to reform the health care system in this country.

The effort by the "*Amici* Economists in Support" below ("*Amici Economists*"),[7] and largely accepted by the Court of

---

[6] Mitt Romney, *Health Care for Everyone? We Found A Way*, WALL ST. J., Apr. 11, 2006, at A16, *available at* http://online.wsj.com/article/SB114472206077422547.html?mod=opinion_main_commentaries.

[7] *See* Brief of *Amici Curiae* Economists in Support of Appellees/Cross Appellants, Nos. 11-11021 & 11-11067 (11th Cir. May 11, 2011) ("*Amici* Br.").

Appeals,[8] to minimize the extent of the cross-subsidy which section 1501 was designed, in part, to address is flawed. Their analysis is predicated on flawed data, improperly excludes from the estimates of cost shifting the cost of care for people with chronic illnesses and the cost of care provided to non-resident (but legal) aliens, and rests on the unsupported assumption that all of those eligible for public insurance coverage under Medicaid enroll in that coverage. The analysis also fails to recognize, as noted by the dissenting Judge below[9] and by the United States Courts of Appeals for the Sixth and District of Columbia Circuits,[10] that section 1501 is "an essential part of a larger regulation of economic activity" designed to make health care insurance available to the vast majority of Americans.[11] Without section 1501, the provisions of the Act designed to make health care insurance broadly available, such as community rating[12] and guaranteed issue,[13] would not be feasible.

ARGUMENT

From an economic perspective, the Court of Appeals' decision rests on the faulty premise that the decision to forgo insurance is disconnected from the operation of the

---

[8] *Florida v. Dep't of Health & Human Services*, 648 F.3d 1235 (11th Cir. 2011) (*"Florida v. HHS"*), *cert. granted*, 80 U.S.L.W. 3199 (U.S. Nov. 14, 2011) (No. 11-398).

[9] *Id.* at 1353-59 *et seq.* (Marcus, J., dissenting).

[10] *Seven-Sky v. Holder*, 661 F.3d 1, 18 (D.C. Cir. 2011); *Thomas More Law Center v. Obama*, 651 F.3d 529, 548-49 (6th Cir. 2011) (*"Thomas More Law Center II"*).

[11] *Mead v. Holder*, 766 F. Supp. 2d 16, 31 (D.D.C. 2010) (quoting *United States v . Lopez*, 514 U.S. 549, 561 (1995)), *aff'd sub nom.*, *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011).

[12] 42 U.S.C.A. §§ 300gg(a)(1), 300gg-4(b).

[13] 42 U.S.C.A. §§ 300gg-1, 300gg-3, 300gg-4(a).

unquestionably interstate health care and health care financing system. While the decision to forgo insurance may have the superficial appearance to some of being "inaction" and thus removed from the need for, or provision of, medical care, from an economic perspective, it is nothing of the kind; rather, it is inextricably tied to the manner in which we finance the provision of medical services as a nation and directly affects Congress' ability to assure universal insurance coverage at reasonable rates.

Forgoing insurance is an act that effectively shifts the burden of paying for inevitable medical problems to others, substantially affecting the cost of health care and the overall operation of the interstate health care and health insurance markets. People who choose not to buy insurance are, in effect, choosing to avail themselves of "societal insurance" rather than provide for themselves. Section 1501 is a tailored response designed to ensure that all who can afford it bear a share of the cost of the medical treatments they will inevitably need, rather than imposing those costs largely or entirely on others. As the Sixth Circuit held:

> The activity of foregoing health insurance and attempting to cover the cost of health care needs by self-insuring is no less economic than the activity of purchasing an insurance plan. Thus, the financing of health care services, and specifically the practice of self-insuring, is economic activity.[14]

---

[14] *See Thomas More Law Ctr. II*, 651 F.3d at 544; *accord Florida v. HHS*, 648 F.3d at 1328-71 (Marcus, J., dissenting); *Seven-Sky*, 661 F.3d at 17-18; *Mead*, 766 F. Supp. 2d at 33-34; *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 633 (W.D. Va. 2010).

I. THE UNIQUE ECONOMICS OF THE HEALTH CARE INDUSTRY MAKE THE MINIMUM COVERAGE PROVISION NECESSARY

Economists have long recognized that health care has unique characteristics not found in other markets. Indeed, health care violates almost all of the requirements for markets to yield first best outcomes ("Pareto optimality").[15] One requirement for market optimality is that people know what they need, and have full information about how to obtain it. With health care, by contrast, need is unpredictable, and information – particularly about the costs of treatment – is far from complete.

Moreover, optimality requires that individuals' actions affect only themselves. This is again not true of health care, where individuals' actions have effects far beyond themselves – both directly (by spreading communicable diseases, for example) and indirectly (by not being insured and thus shifting costs to others, for example).

Optimality in a market also requires vigorous competition on the part of providers. Because of substantial market imperfections in medical care, however, medical care providers encounter a variety of constraints, including licensing requirements and the regulation of the provider-patient relationship. Structural factors in the markets for health care, such as the limited number of hospitals and primary care physicians, are also inconsistent with perfect competition. As a result of these market failures, economists do not approach the health care industry with the degree of deference to individual choice or the expectations of optimality that they do in other markets.

---

[15] Kenneth Arrow, *Uncertainty and the Welfare Economics of Medical Care*, Am. Econ. Review, Dec. 1963, at 941-73; N. Gregory Mankiw, Principles of Economics (5th ed. 2009).

These market failures are the foundation for the field of health economics and have been studied for decades. The paper that launched the field nearly a half century ago notes that

> [t]he failure of the market to insure against uncertainties has created many social institutions in which the usual assumptions of the market are to some extent contradicted. The medical profession is only one example, though in many respects an extreme one.[16]

That remains true today. Of particular relevance to this case, economists who have studied health care and health insurance for many decades have concluded that it is incorrect to say that people who do not purchase health insurance do not participate in or affect the markets for medical care and health insurance. Rather, all participate in the markets for medical services and necessarily affect the market for health insurance. This conclusion is based on three observations:

1. *People cannot avoid medical care with certainty, or be sure that they can pay for the costs of care if uninsured*

Everyone gets sick or suffers an injury at some point in life. When they do, they generally need and receive medical care. Sickness, and especially injury, is often unforeseen. People need medical care because of accidents, life situations beyond their control (*e.g.*, cancer, a mental health emergency), unexpected outcomes (*e.g.*, medications fail to stem a disease), or the normal aging process (*e.g.*, joint replacement, Alzheimer's disease, congestive heart failure). Thus, even people who do not intend to use medical care often end up using it anyway. According to the Medical Expenditure Panel Study, the leading source of data on

---

[16] Arrow, *supra* n.15, at 967.

national medical spending, 57 percent of the 40 million people uninsured in all of 2007 used medical services that year.[17] Very few individuals go ten or even five years without accessing medical care.[18] By another metric, even the best risk adjustment systems used to predict medical spending explain only 25 to 35 percent of the variation in the costs different individuals incur;[19] the vast bulk of spending needs cannot be forecast, making it virtually impossible for people to plan for or internalize the costs of their care *ex ante*.

Because medical care is so expensive, the majority of individuals receiving care require funds beyond their own resources in order to afford it. In 2007, the average person used $6,305 in personal health care services,[20] which is over 10 percent of the median family's income that year and approximately 20 percent of the median family's financial assets.[21] Even routine medical procedures, such as MRIs,

---

[17] Agency for Health Care Quality and Research, Medical Expenditure Panel Survey, Summary Data Tables tbl. 1 (hereinafter AHQR Tables), *available at* http://tinyurl.com/uninsuredmedical expenses.

[18] Jonathan Gruber, WD Marder, K. Miller, *Avoiding the Medical Care System? Not Likely*, MIT, Thomson Reuters, Sept. 2011, *available at* http://thomsonreuters.com/content/healthcare/pdf/articles/avoiding_medical_care_system.

[19] Ross Winkelman and Syed Mahmud, *A Comparative Analysis of Claims-Based Tools for Health Risk Assessment*, Society of Actuaries (Apr. 20, 2007), *available at* http://www.soa.org/research/research-projects/health/hlth-risk-assement.aspx.

[20] Ctrs. for Medicare and Medicaid Servs., *Historic National Health Expenditure Data*, NHE Web Tables, *available at* http://www.cms.gov/NationalHealthExpendData/02_NationalHealthAccountsHistorical.asp#TopOfPage.

[21] Brian K. Bucks et al., *Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances*, Survey of Current Business, Feb. 2009, at A2-A56. Houses are not counted toward one's "financial assets."

CT scans, colonoscopies, mammograms, and childbirth, to name a few, cost more than many Americans can afford. While the *Amici Economists* argue that these numbers overstate the medical expenses of the "young, healthy individuals" who are the target of the mandate,[22] even the young and healthy incur medical expenses beyond the means of most Americans. For example, in 2008, the average in-hospital cost for a normal live birth was $7,933, with other physician expenses of $1,380.[23]

Those suffering from many common, but costly, medical problems spend substantially more. For example, medical costs in the year after a colorectal cancer diagnosis average $25,000, even before expensive new medications;[24] pancreatic cancer treatment costs about $57,000;[25] and treatment of a heart attack for 90 days cost over $20,000 in 1998.[26] All told, ranking everyone on the basis of medical spending, including those who did not use any care, the costs for the top one percent of that distribution equaled $85,000 on average.[27] This amount is 46 percent above median family income and nearly three times the financial assets of the median family. Indeed, this amount – $85,000 – exceeds

---

22 *Amici* Br., *supra* n.7, at 13.

23 AHQR Tables, *supra* n.17, at tbl. 3a (2008 Mean Expenses per Person with Care for Selected Conditions by Type of Service), *available at* http://tinyurl.com/meanexpenses.

24 K. Robin Yabroff et al., *Costs of Care for Elderly Cancer Patients in the United States*, J. of the Nat'l Cancer Institute, Apr. 29, 2008, at 630-41.

25 *Id.*

26 David M. Cutler and Mark McClellan, *Is Technological Change in Medicine Worth It?*, Health Affairs, Sept./Oct. 2001, at 11-29.

27 Kaiser Family Foundation, Trends in Health Care Costs and Spending (Mar. 2009), *available at* www.kff.org/insurance/upload/7692_02.pdf; AHQR, *supra* n.17.

the total financial assets of all but the well-to-do.[28] Accordingly, it is very difficult for anyone to commit to paying for medical care on their own, and only the exceptionally wealthy can even consider doing so.

The combination of the uncertainty of need and the high cost of care when needed highlights the fundamental distinction that health economists make between health insurance and medical care. Medical care is the set of services that relieves pain, slows the progress of illness and age-related decline, and delays death. Health insurance is a mechanism for spreading the costs of that medical care across people – so that some people contribute to the cost of providing care to others in return for obtaining that contribution from others when they need care – or over time – mitigating the risk of facing overwhelming costs at a particular time by substituting a lower, regular premium cost over a longer period. The decision to regulate health insurance is not based on any normative view about the benefits of medical care for any particular person but rather the near-certainty that people will need expensive medical care at some point in their life.

2. *Other legislation, policy, and common practices require access to a minimum level of health care for all who seek it, even those who cannot pay*

This country has a longstanding and virtually universal practice of assuring that all Americans have access to at least some minimal level of medical treatment when needed, without regard to ability to pay. This reflects a national consensus that we, as a nation, do not wish to see our fellow Americans suffer great harm as a result of their inability to

---

[28] Bucks et al., *supra*, n.21, at A27. This study reports that the median value of the direct and indirect stock holdings of all families with income below the 90th percentile was $62,000 in 2007. Indirect stock holdings include pooled investment trusts, retirement accounts, and other managed accounts.

afford medical care. This consensus is enshrined in state and federal legislation and government policies,[29] as well as in the custom and practice of health care providers and other institutions of society.[30]

Existing state and federal legislation requires care to be provided to the very sick, even if they cannot pay for it. The Emergency Medical Treatment and Labor Act ("EMTALA")[31] – which mandates that hospitals that accept Medicare, and virtually all do, stabilize patients who come to their emergency rooms with emergency conditions even if they cannot pay for the care they need – is one source of the practice. But even long before EMTALA, hospitals provided this charity care as part of their mission.[32]

---

29 *See, e.g.*, 42 U.S.C. § 1395dd (mandating acceptance and stabilization of emergency patients); Fla. Stat. Ann. § 395.1041(3)(k)(1) (mandating the provision of emergency services to any person requesting such services or care); Wyo. Stat. Ann. § 35-2-115(a) (same); Tex. Health & Safety Code Ann. § 311.022(a), (b) (prohibiting the denial of emergency services based on a person's ability to pay); S.C. Code Ann. § 44-7-260(E) (conditioning hospital licensing on prohibiting the denial of emergency services based on a person's ability to pay); La. Rev. Stat. Ann. § 40:2113.4(A) (mandating the provision of emergency services by any facility that receives state funding); Ky. Rev. Stat. Ann. § 216B.400(1) (prohibiting the denial of admission of an emergency care patient based on a person's ability to pay); Nev. Rev. Stat. Ann. § 439B.410 (same); Tenn. Code. Ann. § 68-140-311(a)(12) (prohibiting the discriminatory provision of emergency care based on, *inter alia*, a person's ability to pay); Utah Code Ann. § 26-8a-501(1) (same).

30 *E.g.*, Michael Walzer, *Spheres of Justice* 86 (1984) ("For the distributive logic of the practice of medicine seems to be this: that care should be proportionate to illness and not to wealth. Hence, there have always been doctors, like those honored in ancient Greece, who served the poor on the side, as it were, even while they earned their living from paying patients.")

31 42 U.S.C. § 1395dd.

32 Rosemary Stevens, *In Sickness and in Wealth: American Hospitals in the Twentieth Century* (Johns Hopkins Univ. Press 1999); Charles

There are many other unique attributes of health care that make it different from other services and require restrictions on private actors in the health care system. Physicians owe their patients a duty to provide care[33] and are not free to contract over the terms of treatment in the same manner as other buyers and sellers.[34] For example, physicians are bound under a common law duty not to abandon their patients. Once a physician-patient relationship is established, the physician has an obligation to provide care throughout an episode of illness and may not terminate the relationship unless specific restrictive conditions are met, such as when the patient either dismisses the physician or the physician gives the patient sufficient notice and opportunity to find alternate, sufficient treatment.[35] These requirements for severing the physician-patient relationship apply even if

---

Rosenberg, *The Care of Strangers: The Rise of America's Hospital System* (Johns Hopkins Univ. Press 1995); David Rosner, *A Once Charitable Enterprise: Hospitals and Health Care in Brooklyn and New York* 1885-1915 (Cambridge Univ. Press 1982).

[33] *See* Jill R. Horwitz, *The Multiple Common Law Roots of Charitable Immunity: An Essay in Honor of Richard Epstein's Contributions to Tort Law*, J. Tort L., Jan. 2010, at 29-33.

[34] *See, e.g., Tunkl v. Regents of Univ. of California*, 383 P.2d 441 (Cal. 1963) (finding that even though a patient may understand the significance of a contract releasing a hospital from potential liability in exchange for medical care, hospitals may not benefit from these exculpatory clauses because of the special way in which health care affects the public interest).

[35] *See, e.g., Saunders v. Lischkoff*, 188 So. 815, 819 (Fla. 1939) (noting that the obligation of continuing treatment can only be terminated "by the cessation of the necessity which gave rise to the relation of physician and patient, or by the discharge of the physician by the patient, or by the physician's withdrawing from the case, after giving the proper notice"); *accord, e.g., Lewis v. Capalbo*, 280 A.D.2d 257 (N.Y. App. Div. 2001); *Magana v. Elie*, 439 N.E.2d 1319 (Ill. App. Ct. 1982).

the patient cannot pay for his care.[36] In addition, while suppliers of goods and services have been required to make disclosures to and counsel their customers in markets where there is information asymmetry between the contracting parties (*e.g.*, credit and packaged food markets) medical care providers are held to particularly high standards in ensuring that their patients give informed consent before treatment.[37]

The obligation to provide medical care without regard to ability to pay necessarily imposes costs that must be borne by others, either through taxes or through cost shifting that increases the costs to those who are able to pay, whether personally or through insurance. Economists variously term these induced costs an externality (a situation where one person's actions or inactions affects others), a free-rider problem (where people obtain a good and leave the costs to others), or a Samaritan's dilemma (where people choose not to prepare for emergencies, knowing that others will care for them if needed). Even basic economics textbooks stress that externalities require government intervention to improve the functioning of the market.[38]

3. *Whether one person buys health insurance has cost implications for everyone else*

The lack of near-universal health insurance affects interstate commerce in real and significant ways that are appreciably different than the impacts of other decisions to forgo goods or other types of insurance. These costs show up in three ways: (1) people who are uninsured and seek medical care impose uncompensated costs that are passed on

---

[36] *See, e.g.*, *Ricks v. Budge*, 64 P.2d 208 (Utah 1937) (finding that the doctor did not give sufficient notice to allow his patient to procure other medical attention).

[37] Carl E. Schneider, *The Practice of Autonomy: Patients, Doctors, and Medical Decisions* 4-5 (1998).

[38] N. Gregory Mankiw, *supra* n.15.

by health care providers to others in the form of higher costs than would otherwise be the case; (2) when healthy individuals do not purchase insurance, the costs of health care must be spread among a smaller and sicker population, thereby increasing insurance premiums for those who are insured; and (3) when previously uninsured people purchase insurance or obtain public insurance, they often require more care than those who have maintained coverage, thus imposing added costs on the system.

Because health care providers are required to care for the sick regardless of whether they have insurance or the means to pay, and because medical care is so expensive, particularly for serious illnesses, the costs incurred by those who are uninsured are necessarily shared with others. The medical care used by each uninsured person costs about $2,000 per year, on average.[39] The uninsured pay only a portion of

---

[39] The *Amici Economists* argue that the targets of the mandate, those between 18 and 34 who are healthy and do not have health insurance, spent only $854 on average for health care in 2010 and only $56 per year on average in total emergency room care. *Amici* Br., *supra* n.7, at 13-14. That argument suffers from several defects in assessing the impact of the minimum coverage requirement. First, the "targets" of the individual mandate are not limited to the healthy under 34. Many over the age of 34 have elected not to purchase insurance. They include, *inter alia*, those who were eligible for an employer-provided plan but decided to not to purchase the insurance and those for whom health insurance is too costly either because (i) they are ineligible to participate in an employer program or (ii) the insurance costs, including only catastrophe coverage, on the open market were beyond their means. For example, in 2008, the average non-group policy for individuals aged 30-34 cost $2,104 and $4,512 for families. AHIP Ctr. for Policy and Research, Individual Health Insurance (Oct. 2009), *available at* www.ahipresearch.org/pdfs/2009IndividualMarketSurveyFinalReport.pdf; U.S. Census Bureau, *People Without Health Insurance Coverage by Selected Characteristics: 2008 and 2009* tbl. 8, *available at* http://www.census.gov/hhes/www/hlthins/data/incpovhlth/2009/tab8.pdf.

Second, the average spent on health care or for an emergency room visit in a year ignores the *actual costs to the individual who requires*

these costs – 35 to 38 percent of this total – directly through out-of-pocket payments.[40]

The remainder is financed in several ways. Thirty-two percent of the total is paid for by providers charging higher prices to the insured, as providers "cost shift"[41] from the uninsured to the insured. The resulting increase in private insurance premiums has been estimated at between 1.7 percent[42] and 8.7 percent.[43] Another 14 percent of the costs of the uninsured are paid for by government, through higher Medicare and Medicaid payments than would otherwise be the case, the VA, TriCare (medical insurance for military personnel and dependents), and workers' compensation. When the government takes on the cost of providing care to the uninsured, those costs too are implicitly borne by the insured, either through higher taxes or through reductions in other government services to offset the higher health care expenses due to the uninsured. Finally, the remaining costs are generally either borne by the health-care providers or covered by philanthropic contributions. The total costs of uncompensated care in 2008 alone were at least $43 billion

---

care. During 2008, the average costs for individuals who visited an emergency room was $1,203 and for those who were hospitalized, the average hospital cost was $7,921. *See* AHQR Tables, *supra* n.17, at tbl. 5 (Hospital Inpatient Services-Median and Mean Expenses per Person with Expense and Distribution of Expenses by Source of Payment (2008)), *available at* http://tinyurl.com/hospitalcosts.

40 AHQR Tables, *supra* n.17; Jack Hadley et al., *Covering the Uninsured in 2008: Current Costs, Sources of Payment, and Incremental Costs*, Health Affairs, Aug. 25, 2008, at w399-w415.

41 Hadley et al., *supra* n.40.

42 *Id.*

43 Families USA, Paying a Premium: The Added Cost of Care for the Uninsured 35 (June 2005), *available at* www.familiesusa.org/assets/pdfs/Paying_a_Premium_rev_July_13731e.pdf.

and will be significantly higher by the time the minimum coverage provision takes effect.[44]

There are two other ways that an individual's decision to go without insurance affects health care costs and what others pay for health insurance. First, when some, relatively healthier people, refrain from buying health insurance, that raises the premiums of those who are insured, a phenomenon termed "adverse selection." Adverse selection causes health insurance premiums to increase due to a smaller and less healthy pool of insured persons. The increased premiums also cause additional people – many of whom are healthy – to opt out of the market, raising prices even higher. The result of this process of individuals opting-out or waiting to purchase health insurance will be significantly lower coverage, and possibly an unraveling of the market as a whole – what is widely termed an adverse selection "death spiral."[45] In most states, insurers attempt to counter adverse selection by discriminating against the ill, through denials of coverage or exclusion of pre-existing conditions. These responses prevent those most in need from accessing the cost-spreading benefits of insurance, thus defeating a fundamental purpose of insurance and further compounding the problem of uncompensated care.

Unfortunately, simply removing these tools from the reach of insurance companies does not solve the problem; insurers respond by raising prices for all market participants to offset their losses from covering the sick. Several states have tried mandating coverage of individuals with pre-

---

[44] Congress used this figure in enacting the ACA based on a Congressional Budget Office report. However, it may understate the actual uncompensated costs in 2008. *See* Hadley, *supra* n.40, at 403 (estimating the cost of total uncompensated care at $56 billion).

[45] David M. Cutler and Sarah Reber, *Paying for Health Insurance: The Trade-off Between Competition and Adverse Selection*, Q. J. of Econ., May 1998, at 433-66.

existing conditions, requiring non-discrimination in insurance pricing, and other similar reforms of their markets for individuals' policies, without the equivalent of a minimum coverage requirement. All of these experiments failed, and the states that tried them are now among the most expensive places to buy non-group insurance.[46] The only economic solution to this dilemma is to ensure near universal participation in insurance pools. The minimum coverage requirement is a reasonable way to do this.

Finally, when people who were previously uninsured for a period of time obtain coverage, they tend to consume more care, resulting in greater costs to the system. They often have delayed seeking primary care or preventive care (such as a mammogram or colonoscopy), and have reduced consumption of chronic care (such as anti-hypertensives or cholesterol-lowering drugs). Thus, they become sicker and costlier over time (for example, when diagnosed with advanced cancer).[47] When acute illness occurs, they may be insured through public or private insurance, thus increasing the amount that those programs spend.

The magnitude of this phenomenon is large. Medicare beneficiaries who were uninsured prior to becoming eligible for Medicare used 21 percent more services than those who were insured prior to Medicare eligibility.[48] In total, insuring the near-elderly would reduce Medicare costs by $98 billion over a decade, or about $10 billion per year.[49]

---

[46] Jonathan Gruber and Sara Rosenbaum, *Buying Health Care, The Individual Mandate, and the Constitution*, New Eng. J. Med., July 29, 2010, at 401-03.

[47] Comm'n on the Consequences of Uninsurance, Inst. of Medicine, Health Insurance Is a Family Matter 106 (2002).

[48] J. Michael McWilliams et al., *Medicare Spending of Previously Uninsured Adults*, Annals of Internal Medicine, Dec. 1, 2009, at 757-66.

[49] *Id.*

These costs are largely paid for by people who are insured, who pay higher taxes for Medicare when they are working, pay higher premiums for Part B coverage when they are enrolled in Medicare, or receive fewer government services because of the higher cost of Medicare.

The impact the uninsured have on medical costs is no less direct simply because the increased costs may not be incurred until some time – often years – after an uninsured individual decides to forgo insurance. And those increased costs are no more speculative than the economic effects of investments in research or in new plant and equipment, which may also be realized years in the future. Economically, the decision to forgo insurance cannot be separated from its economic consequences, and no economic model treats them as separate. The uninsured impose costs on others and these amounts very substantially affect interstate commerce and the medical system as a whole.

II. SECTION 1501 IS CAREFULLY TAILORED TO ADDRESS THE UNIQUE FEATURES OF HEALTH CARE INSURANCE

These unique characteristics of health care demonstrate why upholding the minimum coverage provision will not ineluctably lay the Constitutional predicate for federal interventions in other markets. The combination of the unavoidable need for medical care; the unpredictability of such need; the high cost of care, which frequently far outstrips an individual's or family's ability to pay; the fact that providers cannot refuse to provide care in emergency situations, and pervasive policies and norms leading providers to give care in many other situations; and the very significant cost-shifting that underlies the way medical care

is paid for in this country, combine to create a set of conditions and needs that do not exist in other contexts.[50]

While there are other necessities of life, they do not share the economic characteristics of health care. Because the need for such items is typically relatively certain in amount and time, people do not insure against the risk of not having food or shelter. Rather, they plan for those needs, even when their means are limited. Nor are grocery stores or landlords required to provide free food or housing to the impecunious.

By contrast, medical providers are obligated to provide care,[51] and the costs of much medical care – especially the most-costly care – occur unpredictably in both timing and amount. These expenses cannot be deferred nor can care be provided in other ways. Rather, the costs incurred by the uninsured are largely borne by others.

Similarly, efforts to equate health insurance with other forms of insurance, such as burial, life, supplemental income, credit, casualty, mortgage guarantee, or other

---

[50] The District Court below found that health care was not unique and that other markets shared some of these characteristics. *See Florida ex rel. Bondi v. Dep't of Health & Human Services*, 780 F. Supp. 2d 1256, 1288-89 (N.D. Fla. 2011), *aff'd in part, rev'd in part sub nom*, *Florida v. Dep't of Health & Human Services*, 648 F.3d 1235 (11th Cir. 2011). However, the court focused on these characteristics separately rather than in combination. *Id.* at 1289-90. And, in none of those markets must service be provided to those who cannot pay.

[51] Respondents argued in the lower courts that relying on the obligation of hospitals to provide free medical service is "a bootstrapping argument ... [under which] Congress can enlarge its own powers under the Commerce Clause by legislating a market externality into existence, and then claiming an extra-constitutional fix is required." *Florida v. HHS*, 648 F.3d at 1296 n.101. The argument is inapposite here. As *amici* have shown, the obligation to provide free medical care pre-dates EMTALA and reflects a societal commitment reflected in established federal, state, and medical policies that individuals should not be denied essential emergency services because they cannot afford to pay. There are few, if any, comparable situations outside the health care market.

types,[52] are unavailing. Each of those forms of insurance involves risk-spreading, but none involve the combination of unavoidable need, unpredictable need, unpredictable costs, the obligation to provide service, and the cost shifting that characterizes the health care market. Several provide coverage for risks that may not occur (*e.g.*, mortgage guarantee insurance, casualty loss), and others are a form of savings account (*e.g.*, burial insurance) or a timing bet with an insurance company (*e.g.*, term life). None of these forms of insurance involve the insured bearing costs incurred by those without insurance, as is the case with respect to health care.

Congress enacted the ACA to address failures in the health care market that make it prohibitively difficult for many individuals to afford or obtain health insurance and produce escalating health care costs for consumers and taxpayers.[53] The decision to require most individuals who can afford it to obtain health insurance is a measured and reasonable approach, as a matter of economics, to achieving Congress' objectives in reforming health insurance and creating a fairer and more efficient health care system. Upholding section 1501 will not open the floodgates of unfettered federal power to require individuals to purchase goods and services or engage in activity that may be good for them. As the Court of Appeals for the District of Columbia held:

---

[52] *See, e.g.*, *Florida ex rel. Bondi*, 780 F. Supp. 2d at 1293.

[53] *See Seven-Sky*, 661 F.3d at 4; *Liberty Univ., Inc.*, 753 F. Supp. 2d at 633; *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 886-87 (E.D. Mich. 2010) ("*Thomas More Law Ctr. I*"); *see also* Jonathan Gruber, *Health Care Reform Without the Mandate, Replacing the Individual Mandate Would Significantly Erode Coverage Gains and Raise Premiums for Health Care Consumers*, Ctr. for Am. Progress, Feb. 9, 2011, *available at* http://www.americanprogress.org/issues/2011/02/pdf/gruber_mandate.pdf.

> It suffices for this case to recognize ... that the health insurance market is a rather unique one, both because virtually everyone will enter or affect it, and because the uninsured inflict a disproportionate harm on the rest of the market as a result of their later consumption of health care services.[54]

III. THE DECISION TO FORGO HEALTH CARE INSURANCE DIRECTLY AFFECTS INTERSTATE COMMERCE

A. Forgoing Health Care Insurance Is an Economic Decision

Respondents argued below that the decision to eschew health insurance is not subject to regulation under the Commerce Clause because it is "inactivity." The Court of Appeals found the argument "useful only to a point" in reaching its decision that section 1501 exceed Congressional power.[55] However, the claim is erroneous; a number of studies in health economics show that the decision to forgo purchasing health insurance is not a passive act attributable to the passage of time or inadvertence.[56] Rather, it is a considered decision driven by economic factors. Those studies indicate that the decision whether to purchase health insurance or not responds in a manner strongly predicted by models of forward-looking behavior, and thus that many individuals forgo insurance as a result of strategic thinking.

One finding supporting this view is that about one-quarter of the uninsured reject the offer of employer-sponsored insurance and remain uninsured, despite the

---

[54] *Seven-Sky*, 661 F.3d at 18.

[55] *Florida v. HHS*, 648 F.3d at 1285.

[56] Jonathan Gruber and Ebonya Washington, *Subsidies to Employee Health Insurance Premiums and the Health Insurance Market*, J. of Health Econ., Mar. 2005, at 253-76.

significant subsidies that virtually all employers offer for employer-sponsored insurance.[57] Other studies show that individuals are more likely to remain uninsured when there are more sources of "uncompensated care" available, such as public hospitals or hospitals that have high uncompensated care spending; the availability of free care influences the decision to be covered.[58]

Strategic decision-making is also evidenced by studies showing that when public insurance is expanded to some family members, such as children, families will often drop insurance for all members of the family to take advantage of the partial coverage for children. This exposes the ineligible family members to being uninsured but leads to overall benefits for the family.[59]

Finally, experience with the setting in which a health insurance mandate was imposed, the Commonwealth of Massachusetts, shows that the decision to forgo insurance is an active one. Massachusetts operated a subsidized insurance program for a number of months before the individual mandate became operative in the second half of 2007. It was the sickest individuals who enrolled in this subsidized plan until the mandate was binding; many of the healthy waited for the mandate before enrolling.[60] Even

---

[57] *Id.*

[58] Kevin N. Rask and Kimberly J. Rask, *Public Insurance Substituting for Private Insurance: New Evidence Regarding Public Hospitals, Uncompensated Care Funds, and Medicaid*, J. of Health Econ., Jan. 19, 2000.

[59] David Cutler and Jonathan Gruber, *The Effect of Expanding the Medicaid Program on Public Insurance, Private Insurance, and Redistribution*, Am. Econ. Review, May 1996, at 368-73.

[60] Amitabh Chandra, Jonathan Gruber, and Robin McKnight, *The Importance of the Individual Mandate: Evidence from Massachusetts*, New Eng. J. Med., 2011; 364:293-295, *available at* http://www.nejm.org/doi/full/10.1056/NEJMp1013067.

once the mandate was in place, some people signed up for insurance but terminated their coverage within a year. The individuals who dropped coverage were much sicker than the typical person in the market.[61] The costs of allowing people to opt in and out of coverage – the "adverse selection" – was estimated to increase insurance premiums by 0.5 to 1.5 percent, and ending this loophole – which Massachusetts has done – would lower costs for everyone in the market by 1.2 percent.[62] These data demonstrate that forgoing health insurance is frequently not "inactivity," as Respondents maintain, but an affirmative, rational economic decision.

In *Thomas More Law Center II*, the Sixth Circuit recognized the logical incoherence of the activity/inactivity distinction when it comes to insuring against financial risk in the health care market.[63] As Judge Sutton explained in his concurring opinion:

> [n]o one is inactive when deciding how to pay for health care, as self-insurance and private insurance are two forms of action for addressing the same risk. Each requires affirmative choices; one is no less active than the other; and both affect commerce.[64]

In fact, starting with the basic premise that "inaction *is* action . . . when it comes to financial risk," Judge Sutton observed that "if done responsibly, [self-insuring] requires more action (affirmatively saving money on a regular basis and managing the assets over time) than [buying insurance]

---

[61] Dianna K. Welch & Kurt Giesa, Oliver Wyman, Analysis of Individual Health Coverage in Massachusetts Before and After the July 1, 2007 Merger of the Small Group and Nongroup Health Insurance Markets 2-3 (June 2010), *available at* http://tinyurl.com/welchgiesa-pdf..

[62] *Id.*

[63] *Thomas More Law Center II*, 651 F.3d at 547-48.

[64] *Id.* at 561 (Sutton, J., concurring).

(writing a check once or twice a year or never writing one at all if the employer withholds the premium)."[65]

B. The Decision to Forgo Health Care Insurance Has a Material Impact on Interstate Commerce

The decision to forgo health insurance when considered in the aggregate has a direct and significant impact on interstate commerce; in particular on the cost of medical care. Those without medical insurance still get sick, and use care paid for by others when they do. So too, the decision to forgo some types of care can result in the need for costlier care in the future, after the patient obtains coverage.

The collective effect of individual decisions not to purchase health insurance is reflected directly in the resources that hospitals and other organizations must allocate to emergency services, and from there into the prices charged by medical care providers. In turn, it affects health insurance premiums, the coverage insurance companies can provide at reasonable rates, and the extent to which the costs of caring for the uninsured are borne by others, including taxpayers. As noted above, the total costs of uncompensated care in 2008 alone were at least $43 billion and will be significantly higher by the time the minimum coverage provision takes effect in 2014.

In addition, because health insurance is intimately tied with employment and job mobility, the impact of the minimum coverage requirement and related insurance reforms extends throughout the economy. A large volume of evidence shows that the lack of secure health insurance is a major deterrent to labor market mobility.[66] Because

---

[65] *Id.*; *see also Seven-Sky*, 661 F.3d at 17-18.

[66] *See, e.g.*, Jonathan Gruber, *Health Insurance and the Labor Market*, in Anthony J. Culyer and Joseph P. Newhouse, eds., Handbook of Health Economics, Volume 1A, Amsterdam: North-Holland, 2000; Janet Currie and Brigitte Madrian, *Health, Health Insurance and the Labor Market*, in

coverage is not secure, people feel locked into their current jobs. One study estimates that labor market mobility is reduced by 25% because people fear losing health insurance coverage when they change jobs.[67] Other studies show that there are reduced business startups, and employment of lower wage workers is hindered, as a result of high health care costs and the uncertainty of coverage.[68] These labor market effects are felt everywhere, and dramatically affect interstate commerce.

The minimum coverage requirement and the expansion of coverage it supports are fundamental to both lowering health insurance premiums and making coverage more secure. The provision lowers premiums by reducing the amount that is shifted from the uninsured to the insured. Further, by allowing for guaranteed issue and community rating, the minimum coverage requirement makes it possible for health insurance to be divorced from employment. Thus, the minimum coverage provision will materially positively affect interstate commerce and all economic activity.

1. *The Amici Economists' analysis is flawed*

The "*Amici Economists*" argued that the real uncompensated cost of health care addressed by section 1501 is only $8.1 billion.[69] They arrive at that reduced figure by

---

Orley Ashenfelter and David Card, eds., Handbook of Labor Economics, 1(3), Amsterdam: North-Holland, 1999, 3309-3416.

[67] Brigitte Madrian, *Employment-Based Health Insurance and Job Mobility: Is There Evidence of Job-Lock?*, Q. J. of Econ., 1994, 109(1), 27-54.

[68] Neeraj Sood, Arkadipta Ghosh, José Escarce, *Employer-Sponsored Insurance, Health Care Cost Growth, and the Economic Performance of U.S. Industries*, Health Services Res., 44(5), Oct. 2009, at 1449-1464; Katherine Baicker and Amitabh Chandra, *The Labor Market Effects of Rising Health Insurance Premiums*, J. of Labor Econ., 24(3), July 2006, at 609-634.

[69] *See Amici* Br., *supra* at 11 n.7.

arguing that certain categories of "uncompensated costs ... will not be affected by the individual mandate."[70] Their analysis makes a number of errors in describing those costs, and ignores the interrelationship between the individual mandate and the insurance reforms adopted in the Act. Unfortunately, the Court below accepted much of this analysis, notwithstanding its fundamental flaws, and produced, in *amici's* view, an erroneous result.[71]

The *Amici Economists*' analysis contains at least the following errors:

a. *Amici Economists* exclude from their estimates of the cross-subsidies all of the costs of uncompensated care provided to uninsured individuals with chronic conditions, asserted to amount to $8.7 billion. The *Amici Economists* argue that, because the ACA will make health insurance more broadly available, those individuals will obtain insurance voluntarily. However, this argument presumes that all individuals with any chronic condition are uninsured solely because of a lack of availability, and ignores the likelihood that some in this group – especially given the *Amici Economists*' broad definition of chronic conditions (including asthma, arthritis and high blood pressure) – would choose to remain uninsured even in a reformed market. More importantly, the analysis presumes that market reforms required under the ACA – universal coverage, guaranteed issue, and community rating – can be sustained in the

---

[70] *Id.* Of course, even if the *Amici Economists* were correct, $8.1 billion is still a sufficiently substantial amount of commerce to support Congressional action under the Commerce Clause. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) ("[W]hen 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence'") (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995)); *Wickard v. Filburn*, 317 U.S. 111 (1942) (finding that the aggregate consumption of homegrown wheat has an effect on interstate commerce).

[71] *Florida v. HHS*, 648 F.3d at 1299-1300.

absence of an individual coverage requirement. As discussed below, this is a highly questionable assumption.

b. *Amici Economists* assume that any uncompensated care used by those below 133 percent of the poverty line should be ignored since those individuals will be eligible for free Medicaid care. However, this claim mistakenly assumes that all of these individuals are *uninsured*, when, in fact, some have insurance. Moreover, it falsely assumes that everyone eligible for the expanded Medicaid would choose to accept its coverage. Since there are millions of low income individuals now eligible for free Medicaid coverage who do not sign up,[72] that assumption is unwarranted. Facing a minimum coverage requirement, these individuals would likely be induced to sign up for Medicaid.

c. *Amici Economists* improperly subtract roughly $8.1 billion in uncompensated care allegedly attributable to "illegal aliens and other nonresidents" from the $43 billion in uncompensated costs. This figure, however, is misstated; the question in the Medical Expenditure Panel Survey on which this analysis relies covers care used by all *non-citizens*.[73] As section 1501 includes anyone who is lawfully present in the United States,[74] the $8.1 billion includes lawful residents who are subject to the minimum coverage requirement.

d. *Amici Economists* incorrectly exclude $3.3 billion of uncompensated care due to the insured who do not make their co-payments or other out-of-pocket expenses.

---

72 Jonathan Gruber, "Medicaid," in Robert Moffitt, ed., *Means Tested Transfer Programs in the U.S.* Chicago: University of Chicago Press, 2003, at 15-77.

73 Leighton Ku, *Health Insurance Coverage and Medical Expenditures of Immigrants and Native-Born Citizens in the United States*, Am. J. of Pub. Health, July 2009, at 1322-28.

74 *See* 26 U.S.C. § 5000A(d).

However, the $43 billion includes only costs due to the uninsured, not the bad debt that the $3.3 billion represents.

In addition to these flaws, the analysis ignores the fact that the $43 billion figure reflects 2008 costs. Updating the uncompensated care amounts to account for health care inflation by the time of the mandate's implementation in 2014 would increase the total to perhaps $58 billion, under plausible projections.[75] Given the rise of the uninsured since 2008, which has unquestionably been affected by the economic downturn, the likely figure is probably higher. Consequently, there are serious flaws with the *Amici Economists*' attempt to minimize the significant impact on health care costs attributable to those who would only purchase insurance because of the mandate.

2. *The Amici Economists ignore the importance of the mandate to the insurance reforms adopted in the Act*

More fundamentally, the *Amici Economists*' assertion that the $43 billion can be discounted because of coverage which the Act will make available ignores the interaction of the individual mandate and the guaranteed coverage and community rating provisions of the Act. As discussed above, the decisions as to when and whether to acquire coverage can affect whether these other reforms can be maintained. Thus, for example, the collective effect of individual decisions to purchase insurance once a medical condition arises or on the way to the emergency room or to drop coverage once the condition is resolved, could lead to the "death spiral" discussed above: healthy people drop out of the market, insurance premiums rise, and more people are induced to drop coverage.

---

[75] Ctrs. for Medicare and Medicaid Servs., National Health Expenditure Projections 2009-2019 (Sept. 2010), *available at* http://www.cms.gov/NationalHealthExpendData/downloads/NHEProjections2009to2019.pdf.

One goal of the mandate, as explicitly recognized section 1501(a)(2)(I), is to "broaden the health risk pool" in order to minimize the chances of such unraveling.[76] This is not purely a theoretical possibility: as noted above, the few states that experimented with insurance market reforms of this type without a mandate saw the unraveling of their non-group markets and skyrocketing premiums.[77] Consequently, the validity of the *Amici Economists'* analysis, even assuming *arguendo* that their numbers are correct, turns on the continued availability of the insurance market reforms in the Act. Without the mandate, those reforms may not be sustainable, leaving millions reliant on uncompensated care for their health care needs.[78]

CONCLUSION

For the reasons set forth above, *amici* urge the Court to uphold section 1501. Spreading the costs of medical care across the broad spectrum of the population that will require medical assistance is essential to reforming the health care system in the United States and achieving the legitimate goals of the Act. While the minimum coverage requirement may appear unique, it is, as an economic matter, consistent with other obligations imposed under the Commerce Clause. It regulates economic decisions that have a substantial impact on the national market for health care. Given the unique economic characteristics of health care, upholding this necessary corrective measure will not grant Congress

---

[76] Studies of the Massachusetts experience indicate that the mandate actually encourages healthier individuals to purchase insurance. Chandra et al., *supra* n.60.

[77] Thomas Buchmueller & John Dinardo, *Did Community Rating Induce an Adverse Selection Death Spiral? Evidence from New York, Pennsylvania, and Connecticut*, Am. Econ. Review, 92(1), Mar. 2002, at 280-94.

[78] Gruber, *Health Care Reform Without the Mandate*, *supra* n.53.

unfettered federal power to require individuals to purchase goods and services, to engage in activity that may be good for them, or usurp the police powers of the States.

Respectfully submitted,

RICHARD L. ROSEN
Counsel of Record
MICHAEL D. THORPE
AARASH HAGHIGHAT
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
Richard.Rosen@aporter.com

Counsel for Amici Economic Scholars

January 12, 2012

APPENDIX
LIST OF *AMICI CURIAE*[*]

Dr. David Cutler
Otto Eckstein Professor of Applied Economics
Harvard University

Dr. Henry Aaron
Senior Fellow, Economic Studies
Bruce and Virginia MacLaury Chair
The Brookings Institution

Dr. George Akerlof
Koshland Professor of Economics University of California-Berkeley
2001 Nobel Laureate

Dr. Dr. Stuart Altman
Sol C. Chaikin Professor of National Health Policy
Brandeis University

Dr. Kenneth Arrow
Joan Kenney Professor of Economics and Professor of Operations Research
Stanford University
1972 Nobel Laureate

---

[*] Institutional affiliations are listed for identification purposes only.

Dr. Susan Athey
Professor of Economics
Harvard University
2007 Recipient of the John Bates Clark Medal for the most influential American economist under age 40

Dr. Linda J. Blumberg
Senior Fellow
The Urban Institute, Health
Policy Center

Dr. Leonard E. Burman
Daniel Patrick Moynihan Professor of Public Affairs at the Maxwell School
Syracuse University

Dr. Amitabh Chandra
Professor of Public Policy
Kennedy School of Government
Harvard University

Dr. Michael Chernew
Professor, Department of Health Care Policy
Harvard Medical School

Dr. Philip Cook
ITT/Sanford Professor of Public Policy
Professor of Economics
Duke University

Dr. Peter Diamond
Institute Professor and Professor of Economics
MIT
2010 Nobel Laureate

Dr. Claudia Goldin
Henry Lee Professor of Economics
Harvard University

Dr. Tal Gross
Department of Health Policy and Management, Mailman School of Public Health
Columbia University

Dr. Jonathan Gruber
Professor of Economics
MIT

Dr. Jack Hadley
Associate Dean for Finance and Planning, Professor and Senior Health Services Researcher
College of Health and Human Services George Mason University

Dr. Vivian Ho
Baker Institute Chair in Health Economics and Professor of Economics
Rice University

Dr. John F. Holahan, Ph.D.
Director, Health Policy Research Center
The Urban Institute

Dr. Jill Horwitz
Professor of Law and Co-Director of the Program in Law & Economics
University of Michigan School of Law

Dr. Lawrence Katz
Elisabeth Allen Professor of Economics
Harvard University

Dr. Frank Levy
Rose Professor of Urban Economics Department of Urban Studies and Planning
MIT

Dr. Peter Lindert
Distinguished Research Professor
of Economics
University of California, Davis

Dr. Eric Maskin
Albert O. Hirschman Professor of Social Science at the Institute for Advanced Study
Princeton University
2007 Nobel Laureate

Dr. Alan C. Monheit
Professor of Health Economics
School of Public Health
University of Medicine & Dentistry of New Jersey

Dr. Marilyn Moon
Vice President and Director
Health Program
American Institutes for Research

Dr. Richard J. Murnane
Thompson Professor of Education and Society
Harvard University

Dr. Len M. Nichols
George Mason University

Dr. Harold Pollack
Helen Ross Professor of Social Service Administration
University of Chicago

Dr. Matthew Rabin
Edward G. and Nancy S. Jordan Professor of Economics
University of California-Berkeley
2001 Recipient of the John Bates Clark Medal for the most influential American economist under age 40

Dr. James B. Rebitzer
Professor of Economics, Management, and Public Policy
Boston University School of Management

Dr. Michael Reich
Professor of Economics
University of California at Berkeley

Dr. Thomas Rice
Professor
UCLA School of Public Health

Dr. Meredith Rosenthal
Department of Health Policy and Management
Harvard University, Harvard School of Public Health

Dr. Christopher Ruhm
Professor of Public Policy and Economics
University of Virginia

Dr. Jonathan Skinner
Professor of Economics
Dartmouth College, and
Professor of Community and Family Medicine
Dartmouth Medical School

Dr. Katherine Swartz
Professor
Department of Health Policy and Management
Harvard School of Public Health

Dr. Kenneth Warner
Dean of the School of Public Health and Avedis Donabedian
Distinguished University Professor of Public Health
University of Michigan

Dr. Paul N. Van de Water
Senior Fellow
Center on Budget and Policy Priorities

Dr. Stephen Zuckerman
Senior Fellow
The Urban Institute

AMICUS CURIAE BRIEF

No. 11-398

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *ET AL.*,

Petitioners,

v.

STATE OF FLORIDA, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR *AMICI CURIAE* ECONOMISTS IN SUPPORT OF RESPONDENTS REGARDING INDIVIDUAL MANDATE

STEVEN G. BRADBURY
STEVEN A. ENGEL*
MICHAEL H. PARK
ELISA T. WIYGUL
DECHERT LLP
1775 I Street, NW
Washington, DC 20006
(202) 261-3300
steven.engel@dechert.com

**Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 10

I. THE GOVERNMENT'S RELIANCE ON COST SHIFTING IS UNFOUNDED BECAUSE THE INDIVIDUAL MANDATE HAS LITTLE IMPACT ON UNCOMPENSATED HEALTHCARE COSTS 10

A. There Is No Evidence That Individuals Who Choose To Forgo Insurance Are a Financial Burden on the Healthcare System 12

1. The Individual Mandate Will Contribute Little Toward Recovering the $43 Billion in Uncompensated Healthcare Costs Invoked by the Government 14

2. The Government and Its *Amici* Overstate the Economic Burden that Health Care Imposes on the Voluntarily Uninsured 20

B. The Individual Mandate Was Never About Addressing the Costs of Uncompensated Care 24

TABLE OF CONTENTS
(continued)

Page

II. THE GOVERNMENT CANNOT RELY ON THE "UNIQUE" FEATURES OF THE HEALTHCARE MARKET AS A LIMIT ON THE EXERCISE OF FEDERAL POWER HERE 27

A. The Need for Health Care Is Not Uniquely "Unavoidable." 28

B. The Need for Health Care Is Not Uniquely Unpredictable 29

C. The High Cost of Care Does Not Differentiate the Healthcare Industry from Other Markets 31

D. The Healthcare Market Is Not "Unique" Merely Because the Government Has Legislated Inefficiencies into the Market 32

E. The True Externalities in the Healthcare Market Ultimately Are Local and Fully Subject to the Police Powers of the States 34

CONCLUSION 37

APPENDIX 1a

LIST OF AMICI 1a

METHODOLOGY OF STATISTICAL ANALYSIS 21a

TABLE OF AUTHORITIES

CASES

Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011) ..... *passim*

Kentucky v. King, 131 S. Ct. 1849 (2011) 33

New York v. United States, 505 U.S. 144 (1992) 33

Printz v. United States, 521 U.S. 898 (1997) 34

United States v. Lopez, 514 U.S. 549 (1995) 9, 27

United States v. Marion, 404 U.S. 307 (1971) 33

CONSTITUTION

U.S. Const. art. I, § 8 2

STATUTES AND RULE

15 U.S.C. § 1012 35

26 U.S.C. § 5000A 24

26 U.S.C. § 5000A(d)(3) 17

26 U.S.C. § 5000A(e)(1) 17

26 U.S.C. § 5000A(e)(2) 17

TABLE OF AUTHORITIES
(continued)

Page

42 U.S.C. § 300gg 25

42 U.S.C. § 300gg-1(a) 25

42 U.S.C. § 300gg-3 17

42 U.S.C. § 300gg-3(a) 25

42 U.S.C. § 1395dd 32

42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) 16

42 U.S.C. § 18022(b)(1) 29, 30

42 U.S.C. § 18022(e) 13, 30

42 U.S.C. § 18091(a)(2)(A) 23

42 U.S.C. § 18091(a)(2)(C) 24

42 U.S.C. § 18091(a)(2)(I) 23, 24

42 U.S.C. § 1395dd 32

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) 2

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

American College of Emergency Physicians, *Costs of Emergency Care*, http://www.acep.org/content.aspx?id=25902 (last visited Feb. 11, 2012) 32

TABLE OF AUTHORITIES
(continued)

Page

Brian K. Bucks et al., *Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances*, Federal Reserve Bulletin, Feb. 2009, *available at* http://www.federalreserve.gov/pubs/bulletin/2009/ pdf/scf09.pdf 21

CBO, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act* (Nov. 30, 2009), http://www.cbo.gov/ftpdocs/107xx/doc10781/11-30-Premiums.pdf..... 15, 25, 26

CBO, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* (June 16, 2010), http://www.cbo.gov/ftpdocs/113xx/ doc11379/Eliminate_Individual_Mandate_06_16.pdf..... 26

CBO, *Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act* (Apr. 22, 2010), http://www.cbo.gov/ftpdocs/113xx/doc11355/ Individual_ Mandate_Penalties-04-22.pdf 18, 19, 24

Centers for Medicare & Medicaid Services, National Health Expenditure Projections 2010-2020 (2011), *available at* https://www.cms.gov/NationalHealthExpendData/downloads/proj2010.pdf 14

TABLE OF AUTHORITIES
(continued)

Page

Families USA, *Hidden Health Tax: Americans Pay a Premium* 1 (2009), http://familiesusa2.org/assets/pdfs/ hidden-health-tax.pdf 14

Jonathan Gruber & David Rodriguez, *How Much Uncompensated Care Do Doctors Provide?*, 26 J. Health Econ. 1151 (Dec. 2007) 13

Jack Hadley et al., *Covering the Uninsured in 2008*, Kaiser Commission on Medicaid and the Uninsured, Henry J. Kaiser Family Foundation (Aug. 2008), *available at* http:// kff.org/uninsured/upload/7809.pdf. 12

Daniel P. Kessler, *Cost Shifting in California Hospitals: What Is the Effect on Private Payers?*, California Foundation for Commerce and Education (June 6, 2007), *available at* http://www.cornerstone.com/files/ CaseStudy/9bc04cf2-dd57-4f1d-ab3c-e5e0d5e7c96e/Presentation/CaseStudyFile/ 4796ca54-3a8a-4676-a61c-4c4b9f5a5272/ Kessler_CFCE_Cost_Shift_Study%206-6-07.pdf 18

Amy M. Lischko & Anand Gopalsami, *An Interim Report Card on Massachusetts Heath Care Reform, Part 1: Increasing Access*, A Pioneer Institute White Paper, Jan. 2010, http://www.pioneerinstitute.org/ pdf/100113_interim_report_card1.pdf 35-36

TABLE OF AUTHORITIES
(continued)

Page

John E. McDonough, et al., *A Progress Report On State Health Access Reform*, 27 Health Affairs w105 (Jan. 29, 2008), http://content.healthaffairs.org/content/27/2/w105.full.pdf+html 35

Medical Expenditure Panel Survey ("MEPS"), U.S. Dep't of Health & Human Servs., http://www.meps.ahrq.gov/mepsweb (last visited Feb. 12, 2012) 14

State of Illinois, *Healthcare for All Kids*, http://www.allkidscovered.com (last visited Feb. 13, 2012) 36

Stephen T. Parente, *Health Information Technology and Financing's Next Frontier: The Potential of Medical Banking*, 44 Bus. Econ. 41 (Jan. 2009) 25a

Pew Research Center for the People & the Press and Pew Hispanic Center, *No Consensus on Immigration Problem or Proposed Fixes: America's Immigration Quandry* (Mar. 30, 2006), http://peoplepress.org/reports/pdf/274.pdf. 23a

INTEREST OF THE *AMICI CURIAE*[1]

The undersigned *amici curiae* ("Economist *Amici*") are 215 economists who have studied, researched, and participated in the national policy discussion relating to the healthcare markets. The Economist *Amici* include Nobel laureates, former senior government officials, and faculty from research universities around the country. The Economist *Amici* support the need for reform but believe that the Affordable Care Act ("ACA" or the "Act") will exacerbate, rather than constrain, the inflation in healthcare costs that poses a serious long-term challenge to the U.S. economy. A complete list of the Economist *Amici* can be found in the Appendix, beginning on page 1a.

Many of the Economist *Amici* filed a brief before the Court of Appeals for the Eleventh Circuit regarding the economic bases on which the Government relies in seeking to defend the ACA's individual mandate as a regulation of interstate commerce, and the Eleventh Circuit relied upon the Economist *Amici*'s analysis in finding the mandate unconstitutional. *See Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1299 & nn.108-111, 113 (11th Cir. 2011).

---

[1] No counsel for any party has authored this brief in whole or in part. Several of *amici curiae* are affiliated with the American Action Forum ("AAF"), an independent and nonpartisan research institution, and AAF has made a monetary contribution to the preparation and submission of the brief. Save for AAF, no person other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have consented to the filing of this brief through universal letters of consent on file with the Clerk of this Court.

Before this Court, many of the Economist *Amici* also have filed briefs in support of Petitioners on the severability question and in support of the State Petitioners on the Medicaid expansion question.

The Economist *Amici* submit this brief in support of Respondents' position that the individual mandate is not authorized by the Commerce Clause because it does not substantially affect interstate commerce. The Economist *Amici* seek to assist the Court in understanding more accurately the statistics relied upon by the Government and the economists who have filed an *amicus* brief supporting the Government (the "Government Economists"). A proper understanding of those statistics reveals the individual mandate's true purpose and impact, as well as the shortcomings in the Government's effort to overturn the well-reasoned decision below.

SUMMARY OF ARGUMENT

In section 1501 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), Congress asserted the authority to compel individuals to participate in the market for health insurance. Never before has the Government undertaken such a measure. The question is whether such an unprecedented law is justified as an application of Congress's power to "regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, or as a measure "necessary and proper for carrying into Execution" the commerce power, *id.* art. I, § 8, cl. 18.

In defending the individual insurance mandate, the Government and its supporting *amici*,

the Government Economists, offer a chain of causation that casts individual consumers' decisions to remain outside the health insurance market as an activity that substantially affects interstate commerce by materially increasing the costs of health insurance for all Americans. The Government claims that the individual mandate is necessary to address alleged cost-shifting caused by the millions of Americans who voluntarily decide not to participate in the health insurance market—Americans who, by definition, tend to be younger, healthier, and less poor. As an estimate of this cost-shifting problem, the Government cites a figure of $43 billion, which is identified as the total yearly amount of uncompensated medical costs attributable to uninsured persons in the United States. *See* Gov't Br. at 2, 8, 19.

The court below rightly rejected this argument, relying in part on the Economist *Amici*'s analysis showing that "[i]n reality, the primary persons regulated by the individual mandate are not cost-shifters but *healthy individuals* who forego purchasing insurance. The Act confirms as much" through its findings that the individual mandate is required to prevent adverse selection. *Florida*, 648 F.3d at 1299 (emphasis in original). Indeed, "[t]o the extent the data show anything, the data demonstrate that the cost-shifters are largely persons who either (1) are exempted from the mandate, (2) are excepted from the mandate penalty, or (3) are now covered by the Act's Medicaid expansion." *Id.*

The Government's "cost-shifting" justification for the individual mandate, therefore, does not withstand scrutiny because the economic basis for that justification is demonstrably untrue. The individual

mandate has almost nothing to do with cost-shifting in healthcare markets since the population primarily targeted by the mandate (those who can afford health insurance but voluntarily choose not to purchase it because they reasonably expect the cost of insurance to outweigh their foreseeable medical costs) plays a minimal role in the $43 billion of uncompensated costs identified by the Government. As expressly stated in the ACA's findings, the mandate was actually enacted not to stop cost-shifting, but to compel millions of Americans to pay more for health insurance than they receive in benefits in order to subsidize both the voluntarily insured and the insurers, and thereby to mitigate the steep rise in insurance premiums that would otherwise be caused by the ACA itself. The data belie the Government's claim that the individual mandate is constitutional on the ground that it "regulates economic conduct with a substantial effect on interstate commerce." Gov't Br. at 18, 33.

Indeed, neither the Government nor the Government Economists make any serious effort to support the proposition that the individual mandate will come anywhere close to preventing the alleged $43 billion in cost-shifting, nor do they provide any other estimate of the impact that the individual mandate might actually have on any cost-shifting. There is a reason for this. Even taking the Government Economists' various comments on the Economist *Amici*'s methodology into account and incorporating them into the Economist *Amici*'s analysis, as done below, the mandate continues to have only a marginal impact on cost shifting, far below the $43 billion figure the Government summarily asserts.

Before the Eleventh Circuit, the Government also attempted to justify the ACA's unprecedented mandate forcing individuals to participate in the health insurance market on the ground that "health care and health insurance are factually unique and not susceptible of replication due to: (1) the inevitability of health care need; (2) the unpredictability of need; (3) the high costs of health care; (4) the federal requirement that hospitals treat, until stabilized, individuals with emergency medical conditions, regardless of their ability to pay; (5) and associated cost-shifting." *Florida*, 648 F.3d at 1295. In the face of the Court of Appeals' rejection of such an illusory attempt at a limiting principle, the Government now pointedly avoids using the word "unique," even while it defends the mandate based upon the supposedly distinct "realities of the health care services market, and deeply ingrained societal norms" that purportedly differentiate healthcare markets from other markets. Gov't Br. at 39; *see also id.* at 40.

The Government Economists, less daunted by the decision below, persist in labeling the healthcare industry "unique," because of its high rates of participation, high costs, federal mandates, and the purported uncertainty surrounding the need for care. Econ. Br. at 2, 3, 6-21. This emphasis on the "uniqueness" or the distinctiveness of the market is plainly designed (1) to compensate for the absence of any true limiting principles in their legal argument and (2) to convince the Court that upholding the federal authority to compel market participation here would not do away with the traditional limits on the sweep of Congress's powers in other areas. *See, e.g.*, *id.* at 18-21.

But the healthcare market is "unique" only in the sense that each snowflake is unique. The economic features relied upon by the Government are not unique to health care, but are characteristic of many markets and cannot—whether taken together or separately—provide defensible limits to Congress's power under the Commerce Clause. Indeed, frequently, the cost-related externalities cited by the Government are not even intrinsic to the healthcare market, but rather reflect distortions caused by federal law. Accordingly, these features can serve neither as a justification for expanded federal regulation nor as a genuine limiting principle for the assertion of federal authority represented by the individual mandate.

1. The Government's claim that the voluntarily uninsured, by staying out of the market, impose $43 billion in uncompensated costs has no basis in fact. While the Government repeatedly invokes this figure, it nowhere identifies the specific costs actually imposed by the individuals compelled by the mandate to purchase health insurance. Yet the Government actually collects such information through the authoritative Medical Expenditure Panel Survey ("MEPS"). Those data show that this class's healthcare costs are well below average, and the total amount of uncompensated costs fairly attributable to the targeted population are no more than around $12.8 billion, or *one-half of one percent* of the Nation's $2.4 trillion in annual healthcare costs. *See* Appendix at 27a. In other words, the individual mandate cannot reasonably be justified on the ground that it remedies the costs imposed on the system by the voluntarily uninsured.

The Eleventh Circuit cited this economic analysis in finding the individual mandate unconstitutional. *See Florida*, 648 F.3d at 1299 & nn.108-111, 113. The Government did not challenge this analysis either below or in its opening brief before this Court concerning the individual mandate. *See, e.g.*, Gov't Br. at 2, 8, 19. In its severability brief before this Court, however, the Government adopts the arguments of the Government Economists and takes issue with the Eleventh Circuit's conclusions regarding the effects of the mandate. *See* Gov't Br. (Severability) at 53-54 (citing Econ. Br. at 25-29). For instance, the Government Economists claim that the numbers should use a formula that more clearly excludes legal immigrants, who are not exempt as a class from the mandate. In addition, they contend that the $43 billion figure should not include any uncompensated costs imposed by the insured.

Tellingly, neither the Government Economists nor the Government attempts to provide an alternative to the Economist *Amici*'s analysis. This omission is explained by the fact that even when the Government Economists' suggestions are incorporated into the analysis, the cost figures associated with the target population increase only modestly and still do not approach the $43 billion number relied upon by the Government. At most, the individual mandate potentially affects only a small fraction of the $43 billion figure that the Government and its *amici* trumpet—well under one percent of the total healthcare market. This realization helps to confirm that the asserted cost-shifting rationale offered by the Government is pretextual and that the real purpose of the mandate is to force younger and healthier indiv-

iduals to subsidize the higher costs of health insurance that will be caused by the Act itself.

The Government further fails to show that "average" Americans cannot afford their own healthcare costs and thus the uninsured must *ipso facto* contribute to cost-shifting. While the Government Economists emphasize the approximately $6,300 in healthcare costs incurred by *the average* American per year, they provide no analysis of the costs actually paid by those subject to the mandate. In fact, the undisputed data show that the young, healthy, and uninsured, who are the real targets of the mandate, on average consume less than one-seventh of that figure.

That the individual mandate has little, if anything, to do with uncompensated care only underscores that the real purpose of the mandate is what the Government here labels its "second" function—namely, maintaining "the viability of the Act's guaranteed-issue and community-rating provisions." Gov't Br. at 18.

The ACA prevents health insurers from making the basic actuarial decisions that they make in every other insurance market. Insurers may no longer withhold health insurance from those with preexisting conditions or price insurance premiums to match applicants' known actuarial risks. By requiring health insurers to cover the sick and to set premiums based on average costs, these federal requirements would dramatically increase healthcare premiums for all insured Americans, unless Congress at the same time forces the young and healthy with relatively little need for comprehensive health

insurance to enter the market on terms that are economically disadvantageous.

Whether or not these requirements are good policy, what is clear as a constitutional matter is that Congress is exercising federal power not to regulate "how health care consumption is financed," Gov't Br. at 17, but to compel the voluntarily uninsured to purchase insurance at disadvantageous prices, as a quid pro quo to existing health insurance market participants in exchange for the deleterious effect of new federal requirements. Thus, as the Court of Appeals recognized, "[p]roperly formulated, . . . [the question presented is] whether the federal government can issue a mandate that Americans purchase and maintain health insurance from a private company for the entirety of their lives." *Florida*, 648 F.3d at 1287. As that court correctly noted, the Government has provided no constitutionally principled limitation on the federal government's power if such a mandate is upheld. *See id.* at 1295-97 & nn.101-03; *cf. United States v. Lopez*, 514 U.S. 549, 563-68 (1995).

2. Recognizing the unprecedented exertion of federal authority, and the absence of any true limiting principle, the Government Economists argue that the healthcare industry is "unique" and thus that this Court need not be concerned that upholding the individual mandate will remove any practical limit to Congress's commerce power. This "uniqueness" argument dramatically overstates the distinctive characteristics of the healthcare industry, most of which are routinely found in varying degrees in many other markets.

While the presence of market externalities in the healthcare industry cannot expand the constitutional scope of federal power, the Government's inability to impose the insurance mandate need not doom effective healthcare reform, either at the national or the state level. Health care is typically consumed locally, and health insurance markets themselves primarily operate within the States. The Government's attempt to fashion a singular, universal solution is not necessary to address the local externalities arising in these markets and provides no justification for casting aside the traditional constitutional limitations on federal power.

ARGUMENT

I. THE GOVERNMENT'S RELIANCE ON COST SHIFTING IS UNFOUNDED BECAUSE THE INDIVIDUAL MANDATE HAS LITTLE IMPACT ON UNCOMPENSATED HEALTHCARE COSTS.

The Government contends that section 1501's mandate is necessary because people who do not purchase health insurance substantially "affect" markets for medical services by failing to pay for their own care and thus increase the cost of health care for everyone else. Gov't Br. at 18-19. Most strikingly, the Government contends that the individual mandate is necessary to address more than $43 billion in annualized healthcare costs that the uninsured do not pay. *Id.* at 8, 19. According to the Government, these individuals should be regarded as free-riders who take advantage of health care paid for by others and so may sensibly be compelled to

bear the costs that they otherwise would shift onto others.

As the Government Economists further explain:

> [t]he collective effect of individual decisions not to purchase health insurance .... affects health insurance premiums, the coverage insurance companies can provide at reasonable rates, and the extent to which the costs of caring for the uninsured *are borne by others*, including the taxpayer. As noted above, *the total costs of uncompensated care in 2008 alone were at least $43 billion* ....

Econ. Br. at 24 (emphasis added); *see also id.* at 19 ("[T]he costs incurred by the uninsured are largely borne by others."). The problem with this story is that it is untrue. As a matter of basic economics, the individual mandate has little to do with the alleged $43 billion of uncompensated costs the Government cites. Instead, the mandate is designed to subsidize the dramatic cost increases that the Act itself would otherwise impose on health insurers.

While the Government and its supporting economists take issue with elements of the Economist *Amici*'s analysis, they do not and cannot dispute that the $43 billion figure to which the Government clings is a grossly inflated estimate of any effect the individual mandate might have on uncompensated care. Indeed, before this Court, the Economist *Amici* have incorporated some of the Government Economists' comments, as described below. Even after doing so, the conclusion remains the same: As the

Eleventh Circuit correctly held, the individual mandate would have a minimal impact on the uncompensated care that the $43 billion figure represents. The mandate therefore does not truly address any asserted cost-shifting problem and cannot be upheld on that basis.

A. There Is No Evidence That Individuals Who Choose To Forgo Insurance Are a Financial Burden on the Healthcare System.

The Government's argument that the individual mandate is justified because "the uninsured as a class," Gov't Br. at 19, impose $43 billion on the rest of the economy lacks any support. In fact, only a small fraction of the uninsured—and therefore only a fraction of the costs of uncompensated care—are directly affected by the mandate.

The individual mandate, by definition, targets people who could but *choose* not to purchase health insurance and who will not otherwise be covered by Medicaid or Medicare. These people tend to be younger and healthier.[2] These citizens make the rational economic decision to pay for their relatively modest healthcare expenditures out of pocket, rather than purchasing insurance. Indeed, if they needed health insurance at all, they would require only the relatively inexpensive insurance limited to covering

---

[2] *See* Jack Hadley et al., *Covering the Uninsured in 2008*, Kaiser Commission on Medicaid and the Uninsured, Henry J. Kaiser Family Foundation 60 (Aug. 2008), *available at* http://kff.org/uninsured/upload/7809.pdf.

catastrophic care, a market now foreclosed by the ACA.[3]

There is no good economic evidence that when such people do require medical care, the cost of that care is passed on to others in a manner that increases the costs of health insurance. In fact, those who willfully choose to forgo insurance tend to *overcompensate* the market for their own care relative to other consumers of healthcare services because they generally pay their medical bills and are not able to obtain care at the discounted prices negotiated by insurance providers.[4]

---

[3] Under the ACA, insurers may offer catastrophic coverage plans to those under 30 and other individuals who qualify for certain exemptions under the Act, but even such "catastrophic" plans are far from the plans in the market today that are aimed only at large, truly unexpected expenses: They must still provide "essential health benefits" coverage, as defined under the Act, after a certain threshold has been met, and must also provide for "at least three primary care visits." 42 U.S.C. § 18022(e); *see also Florida*, 648 F.3d at 1255 (describing this modified catastrophic coverage).

[4] Jonathan Gruber & David Rodriguez, *How Much Uncompensated Care Do Doctors Provide?*, 26 J. Health Econ. 1151, 1159-61 (Dec. 2007).

1. The Individual Mandate Will Contribute Little Toward Recovering the $43 Billion in Uncompensated Healthcare Costs Invoked by the Government.

The individual mandate plainly cannot be justified as a solution to the alleged cost-shifting problem. The Government's $43 billion figure comes from analyses of healthcare costs contained in the MEPS dataset,[5] which comprises data from "large-scale surveys of families and individuals, their medical providers, and employers," and is the most complete source of data on healthcare expenditures in the United States.[6] MEPS is collected and maintained under the auspices of the U.S. Department of Health and Human Services.[7]

As a threshold matter, the Government's reliance on the alleged $43 billion in uncompensated care makes a serious impression only until one realizes that the total value of the healthcare market in 2008 was roughly *$2.4 trillion*.[8] As the CBO has

---

[5] *See* Families USA, *Hidden Health Tax: Americans Pay a Premium* 1, 2 (2009), http://familiesusa2.org/assets/pdfs/hidden-health-tax.pdf (other pages of this source cited by Gov't Br. at 7, 8).

[6] Medical Expenditure Panel Survey ("MEPS"), U.S. Dep't of Health & Human Servs., http://www.meps.ahrq.gov/mepsweb (last visited Feb. 12, 2012).

[7] *Id.*

[8] Centers for Medicare & Medicaid Services ("CMS"), National Health Expenditure Projections 2010-2020, at Table 1 (2011), *available at* https://www.cms.gov/NationalHealthExpendData/downloads/proj2010.pdf.

stated, "the total amount of cost shifting in the current health care system appears to be modest relative to the overall cost of health insurance."[9] Thus, even if accurate, the $43 billion in uncompensated care still represents less than 1.8 percent of the overall market.

Even that 1.8 percent, however, is quite misleading because it represents *the totality* of uncompensated care attributable to the uninsured in the healthcare system, not the costs specifically associated with those who are *voluntarily* uninsured and either not exempt from the mandate or not likely to become insured as a result of *other* provisions of the ACA. Indeed, the MEPS data reveal that the actual portion of uncompensated care attributable to those targeted by the individual mandate is vastly smaller, and in fact constitutes less than one-half of one percent of the overall market for health care.

Perhaps the easiest way to see this reality is to start from the $43 billion figure and to subtract from it the uncompensated costs that will not be affected by the individual mandate,[10] as follows:

---

[9] CBO, *An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act* 13 (Nov. 30, 2009), http://www.cbo.gov/ftpdocs/107xx/doc10781/11-30-Premiums.pdf [hereinafter *Premiums*].

[10] The Economist *Amici*'s methodology is explained in the Appendix, beginning at page 21a. These figures reflect weighted estimates based on provider recovery rates (*i.e.*, the amount that providers typically recover after treatment). The Appendix also includes the unweighted numbers, which in fact result in an even smaller amount (reflecting the greater recovery rate from those affected by the mandate).

- *Medicaid Recipients.* An estimated $18.0 billion of the $43 billion reflects care rendered to cost-shifters who are now newly eligible for Medicaid based on the Act's expansion of Medicaid to all individuals and households whose income is at or below 133 percent of the poverty line;[11]

These numbers differ in components from those advanced by the Economist *Amici* before the Eleventh Circuit, largely because they incorporate comments from the Government Economists. In particular, the Government Economists have challenged the exclusion of lawful permanent residents from the uncompensated costs, as well as the uncompensated costs associated with persons who do have health insurance. *See* Econ. Br. at 27-28. The Government Economists have also argued that the baseline population should not be the young, healthy and uninsured, but the healthy and uninsured up to the age of Medicare. *Id.* at 14 n.39.

Because the Government Economists' comments do not significantly alter the model's conclusions, the Economist *Amici* have elected simply to incorporate them into the model, thereby refining the model and minimizing any distracting disputes over the appropriate assumptions. Thus, the Economist *Amici* have adopted a narrower definition of illegal immigrants based on that employed in the scholarly journal cited by the Government Economists, *see id.* at 27 n.73, excluded from the analysis the uncompensated costs from those with health insurance, and taken as the baseline the healthy and uninsured up to the age of Medicare. In addition, the Economist *Amici* have refined their methodology to compare total costs for various populations rather than per capita costs (resulting in more precise numbers where per capita costs vary), and to eliminate overlap to ensure that the costs associated with persons who may fall into more than one of the above categories are not counted twice.

[11] 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII). Most or all of those with income at or below 133 percent of the poverty line will also be exempt from the penalty that is tied to mandate,

- *Illegal Immigrants.* Of the remaining $25 billion, roughly $1.3 billion is attributable to uncompensated care provided to illegal aliens, who will not be subject to the mandate at all;[12] and
- *Preexisting conditions.* From the remaining $23.7 billion, an additional $7.7 billion must be subtracted for uncompensated care rendered to non-Medicaid-eligible, non-illegal immigrant individuals who would purchase health insurance, but whose preexisting conditions prevented them from doing so; under the Act, they would be guaranteed coverage and so would no longer be uninsured.[13]

---

though not the mandate itself, under the exemption for those "who cannot afford coverage," 26 U.S.C. § 5000A(e)(1), and/or the exemption for those who do not file a tax return. *See* 26 U.S.C. § 5000A(e)(2).

[12] 26 U.S.C. § 5000A(d)(3) ("[i]ndividuals not lawfully present" not included in those subject to the mandate).

[13] 42 U.S.C. § 300gg-3. The Government Economists further claim that the analysis should not subtract the entirety of those with chronic conditions, *see* Econ. Br. at 26, but the Government itself argues that most of the uninsured would buy coverage if it were more affordable, Gov't Br. at 44. While it is certainly possible that some with chronic conditions might fail to purchase insurance, it is reasonable to assume that given the guaranteed issue and community rating provisions, an overwhelming number of those individuals will make the economically rational choice to do so (since their healthcare costs would exceed the community-rated premiums), and the Government Economists propose no alternative methodology for determining that number more precisely.

Taking those numbers into account, the *maximum* share of uncompensated care attributable to the mandate's target class would be approximately $16 billion, a far cry from $43 billion.[14]

Yet that number remains over-inclusive because it counts the costs of uncompensated care for those who, despite the law, will not comply with the mandate. The CBO estimates that four million of the currently uninsured who are subject to the penalty linked to the mandate will nonetheless not purchase health insurance when the mandate comes into effect.[15] Accordingly, an appropriate measure of the mandate's impact must exclude the uncompensated costs from those who fail to comply with the mandate.

The Economist *Amici* have estimated that figure by determining that, according to the MEPS data, approximately 17.3 million people are uninsured, healthy, over 133 percent of the poverty line, and not undocumented aliens. The CBO estimates that 90%

---

[14] This analysis is consistent with a recent study of California's healthcare system, which concluded that "[c]ost shifting from the uninsured is minimal" and is far outweighed by cost shifting attributable to patients covered by government insurance programs. Daniel P. Kessler, *Cost Shifting in California Hospitals: What Is the Effect on Private Payers?*, California Foundation for Commerce and Education 1 (June 6, 2007), *available at* http://www.cornerstone.com/files/CaseStudy/9bc04cf2-dd57-4f1d-ab3c-e5e0d5e7c96e/Presentation/CaseStudyFile/4796ca54-3a8a-4676-a61c-4c4b9f5a5272/Kessler_CFCE_Cost_Shift_Study%206-6-07.pdf.

[15] CBO, *Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act* (Apr. 22, 2010), http://www.cbo.gov/ftpdocs/113xx/doc11355/Individual_Mandate_Penalties-04-22.pdf [hereinafter *Penalties*].

percent of those who pay the penalty will have incomes over the poverty line and 75% will have incomes more than twice the poverty line.[16] Those figures are unsurprising given that the healthy and those not eligible for Medicaid are far more likely to make the rational decision to pay the penalty tied to the mandate rather than pay for health insurance. Thus, roughly 80% of those who pay the penalty rather than comply with the individual mandate are likely to be uninsured, healthy and over 133 percent of the poverty line. As a result, the $16 billion figure—which represents the maximum possible reduction in uncompensated care fairly resulting from the mandate—should be further reduced by approximately 20 percent to account for the continued uncompensated care rendered to the voluntarily uninsured who do not comply with the mandate. Thus, the individual mandate will actually have an impact on no more than $12.8 billion of the total $43 billion figure, and this small fraction represents only one-half of one percent of total annual healthcare spending in the United States.[17]

Accordingly, the voluntarily uninsured, who choose to pay their own relatively modest healthcare costs out of pocket, plainly cannot be described as villains who impose significant uncompensated costs on others. The actual amount of cost-shifting fairly at-

---

[16] *Id.* at 2.

[17] Indeed, the true number is lower still, because even without the mandate, the Act's subsidies would induce an additional population from among those currently uninsured to become insured. Excluding the uncompensated costs associated with such individuals would further reduce the actual projected effect of the mandate on uncompensated care.

tributable to the class of uninsured targeted by the mandate is, in truth, only a small fraction of the $43 billion in total uncompensated costs cited by Congress, and it cannot reasonably justify the legislative decision to enact the mandate.

2. The Government and Its *Amici* Overstate the Economic Burden that Health Care Imposes on the Voluntarily Uninsured.

Apart from invoking the $43 billion figure, the Government and its *amici* contend that the voluntarily uninsured must receive uncompensated care because participation in the market is "essentially universal," Gov't Br. at 35, and frequently expensive, *see id.* at 8, 19. The Government Economists offer some specifics. They claim that the "average person" in 2007 used $6,305 in "personal health care services," which is "over 10 percent of the median family's income." Econ. Br. at 8. The Government too emphasizes how this costliness renders the payment of medical bills without insurance so difficult that the mandate is a necessary part of the effort to forestall the inevitable cost-shifting. *See* Gov't Br. at 8, 12.

But statistics designed to show that the "average" person consumes a substantial amount of health care tell the Court nothing about the healthcare costs of those targeted by the mandate. The Government and its *amici* conflate a singular category of healthcare consumers—the young, healthy, and voluntarily uninsured—with the aggregate market, from which the narrower category differs in marked respects.

The mandate is not targeted at the "average" American in the healthcare market. It is meant to address adverse selection, and it is directed at younger, healthier individuals who, in the absence of such a mandate, would make an economically rational choice to forgo health insurance. *See* Gov't Br. at 29 n.6 (quoting 42 U.S.C. § 18091(a)(2)(I)); Econ. Br. at 16. As might be expected, this class consumes only a fraction of the national average in healthcare services per year. In fact, in 2010, the young, healthy, and voluntarily uninsured consumed, on average, only $854 in healthcare services, approximately 14 percent of the claimed "average" healthcare expenditure. *See* Appendix at 22a. That figure, moreover, constitutes less than 1.1 percent of an average family's yearly income based on the most recent available data, a far cry from the 10 percent costs of the "average" American.[18] *Cf.* Econ. Br. at 8. Thus, with regard to the specific class of persons targeted by the mandate, the Government's argument that their health care is too expensive to afford is simply not borne out by the data.

The Government Economists employ similarly flawed logic in arguing that because federal law requires emergency stabilization care, the voluntarily uninsured are an inherent cause of uncompensated care. *See* Econ. Br. at 13. Once again, the data show that the young and healthy targets of the mandate

---

[18] In 2007, the average household earned roughly $84,000. *See* Brian K. Bucks et al., *Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances*, Federal Reserve Bulletin, Feb. 2009, A5, *available at* http://www.federalreserve.gov/pubs/bulletin/2009/pdf/scf09.pdf.

consume *only $56* per year on average in *total* emergency-room care, which includes both the mandated emergency stabilization care (which may still be billed to, and paid by, patients) and the more routine care administered there. *See* Appendix at 22a. The data thus provide no evidence that the voluntarily uninsured are, as a class, receiving significant amounts of uncompensated care such that one could rationally justify the individual mandate as a solution to this purported cost-shifting problem.

The Government Economists argue that even if the average costs to the young, healthy, and uninsured are small, the expenses for such persons who do incur costs may be higher. *See* Econ. Br. at 9 (citing, for instance, $7,933 as the average in-hospital cost for a normal live birth and tens of thousands of dollars as the cost of treating ailments like colorectal cancer, pancreatic cancer, and heart attacks). Those numbers are surely larger than the average per capita cost. But the Government Economists provide no information about how many uninsured people actually *experience* such health events, nor how many fail to pay those costs. Moreover, such an argument points towards requiring insurance for catastrophic costs, not for routine healthcare expenditures. *See infra* at 30-31.

In addition, the Government Economists claim that it is wrong to consider the average costs of the young, healthy, and uninsured, rather than simply the healthy and uninsured, without regard to age. *See* Econ. Br. at 14 n.39. They instead estimate $2,000 in costs per year for the average uninsured person. *Id.* at 14. Notably, that $2,000 annual figure is a far cry from the $6,305 in average expendi-

tures they had previously relied upon. And using an average figure for the uninsured fails to account for the costs incurred by those exempted from the mandate or the penalty, including illegal immigrants and those below the income threshold.

Even so, the young, healthy, and uninsured are the appropriate population to examine in order to understand the costs incurred by the core group that Congress found "would make an economic and financial decision to forego health insurance coverage" in the absence of the mandate. 42 U.S.C. § 18091(a)(2)(A); *see also id.* § 18091(a)(2)(I) ("[I]f there were no requirement, many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums.").[19]

---

[19] As discussed *supra*, the Economist *Amici* did accept the Government Economists' suggestion that when allocating the $43 billion in the total uncompensated costs of the uninsured, the relevant analysis should consider the costs to the healthy and uninsured, without respect to age. That is different from here, where the question concerns the average annual healthcare costs faced by the population most likely to choose voluntarily to remain uninsured. But even if the average healthcare costs of the uninsured population that is healthy, over 133 percent of the poverty line, and not an undocumented alien were considered, that sum would be $1,652, *see* Appendix at 22a, barely one-quarter of the $6,305 figure cited by the Government Economists. *See* Econ. Br. at 8.

B. The Individual Mandate Was Never About Addressing the Costs of Uncompensated Care.

The conclusion that the individual mandate will have little impact on reducing the costs of uncompensated care should not be particularly surprising to anyone, economist or otherwise, who has studied the healthcare markets, because Congress did not enact the individual mandate to target uncompensated care or even to address any market failures caused by the private market for health insurance. *See* 42 U.S.C. §§ 18091(a)(2)(C), 18091(a)(2)(I) (explaining that the mandate forces "healthy individuals" into the market as "new consumers" to reduce premiums). The Government itself acknowledges that the individual mandate "is key to the viability of the Act's guaranteed-issue and community-rating provisions." Gov't Br. at 18.[20]

In purpose and effect, the individual mandate is designed to compensate health insurers for the fundamental distortions caused by the heavy hand of federal regulations under the ACA. In the name of expanding coverage, Congress prohibited insurers from making the basic pricing decisions that they

---

[20] That the ACA was never grounded in an attempt to curb cost-shifting is likewise strikingly clear in Congress's half-hearted commitment to compel compliance. The penalties tied to the mandate are modest enough that many "free riders" would rationally choose to pay them rather than purchase insurance, *see* 26 U.S.C. § 5000A; CBO, *Penalties*, *supra* note 15 (estimating that 4 million people subject to the mandate and not exempt from the penalty will nonetheless fail to buy health insurance), and the Act liberally excuses individuals from the penalty associated with the mandate based on hardship, *see* 26 U.S.C. § 5000A.

otherwise would make as rational economic actors. The ACA requires insurers to provide health coverage to those with preexisting conditions. *See* 42 U.S.C. §§ 300gg-1(a), 300gg-3(a). More significantly, insurers may not price healthcare coverage based on the actuarial risks posed by a class of applicants, but must employ "community-rated" premiums—*i.e.*, premiums based on the average costs of the insurance pool. *See id.* § 300gg.

The ACA's prohibition on traditional means of pricing the insurance pool disrupts the market function of rating insurance premiums based on the probabilities of unexpected medical conditions. The Act makes health insurance an entitlement, which insurers must provide irrespective of individual characteristics. By forcing health insurers to cover those with expensive medical conditions and to set premiums based on average costs, the ACA would cause healthcare premiums for everyone to rise dramatically. The CBO has estimated that before other offsetting reductions including those due to the individual mandate, the ACA's insurance reforms would cause costs for health insurance in the individual market to rise 27 to 30 percent over current levels in 2016.[21]

Congress thus imposed the individual mandate to subsidize health insurers and lower the premiums for voluntary consumers by compelling individuals, no matter how young and healthy, to pay for health insurance they do not want, at premiums that ensure they will pay more than they will likely

---

[21] CBO, *Premiums*, *supra* note 9, at 6 (cited by *Florida*, 648 F.3d at 1298 n.107).

receive in benefits. By forcing consumers to engage in economically disadvantageous transactions, Congress sought to mitigate the regulatory costs imposed on insurers and the sharp rise in healthcare premiums otherwise caused by the ACA.

The CBO estimates that the individual mandate will have the effect of reducing premiums for those currently insured by choice between $28 and $39 billion in 2016 alone.[22] In other words, those subject to the mandate will be forced to purchase health insurance at elevated premiums for the sole purpose of subsidizing the premiums of those who voluntarily enter the private health insurance market. Such a subsidy obviously has no correlation to the alleged cost-shifting practices of the voluntarily insured and everything to do with making more palatable the rise in healthcare premiums that the ACA itself will inevitably impose.

Thus, those subject to the mandate have not contributed materially to the cost-shifting problem identified by the Government. Instead, using the individual mandate as a subsidy, Congress was compensating for the market effects of its own actions. Whatever one might say about such a course as a policy matter, the constitutional implications of permitting such bootstrapping as a valid regulation of interstate commerce are sweeping and unprecedented.

---

[22] CBO, *Premiums*, *supra* note 9, at 5, 6; CBO, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* 2 (June 16, 2010), http://www.cbo.gov/ftpdocs/113xx/doc11379/Eliminate_Individual_Mandate_06_16.pdf; *see also* Private Pet'rs' Br. at 3 (citing Private Pet'rs' Br. (Severability) at 14 & n.15).

II. THE GOVERNMENT CANNOT RELY ON THE "UNIQUE" FEATURES OF THE HEALTHCARE MARKET AS A LIMIT ON THE EXERCISE OF FEDERAL POWER HERE.

The Government Economists argue that the economics of the healthcare industry are "unique" and therefore warrant an unprecedented expansion of Congress's Commerce Clause authority. *See* Econ. Br. at 2, 3, 6-21. The Government, while avoiding that phrase before this Court, still argues based on the "realities" of the supposedly distinct healthcare market. Gov't Br. at 19; *see also Florida*, 648 F.3d at 1295-98 (rejecting the Government's "uniqueness" argument). While the healthcare industry, like all markets, may suffer from externalities and inefficiencies, market failures alone do not free the federal Government from the traditional limitation that it regulate only "*activities* that arise out of or are connected with a commercial transaction." *Lopez*, 514 U.S. at 561 (emphasis added). Yet the Government Economists suggest that because the healthcare market differs so greatly from other markets, this Court need not worry that upholding section 1501 would permit widespread federal regulation of inactivity in other contexts. *See* Econ. Br. at 18-21. Aside from implicitly acknowledging the extraordinary nature of the Government's argument, these claims of "uniqueness" fail on their own terms because they suffer from logical leaps and imprecise economics.

A. The Need for Health Care Is Not Uniquely "Unavoidable."

The Government and its *amici* assert that participation in the healthcare market is "essentially universal," Gov't Br. at 35, and "unavoidable," Econ. Br. 3, 18, 20. Such statements are gross oversimplifications. Health care does not refer to a single physical good—like an apple or a book—but to a complex array of goods and services, the need for and cost of which have changed with medical advances, cultural shifts, and technological developments. A person does not "need" health care in the same way a person "needs" to eat. Indeed, individuals' use of health care can vary dramatically due to their religious beliefs, health profiles, income, geography, and many other factors.

It is generally true that most people receive medical care at some point. At this level of abstraction, however, there are numerous economic markets in which participation may be deemed to be universal. Virtually all Americans will participate in the "transportation" market in one way or another, whether they drive a car, ride a bus, or take a train. Likewise, all Americans will participate in the "food" market insofar as the consumption of food—in contrast to health care—actually does constitute a necessary human activity.

In other words, for the Government to claim that the market for health care is "unavoidable," or even that it is important, is not to say that it is materially distinct from many other markets that are valued and common in modern American life. The healthcare market, like these other markets, remains subject to the basic laws of supply and de-

mand and consumer choice, and it is these laws that will determine the kinds and amounts of goods and services purchased by consumers. Health care involves a wide range of available treatments and costs, and there is hardly an "unavoidable" need for many of the expensive procedures and treatments that some individuals may choose, or that some forms of insurance may cover. Likewise, Congress's labeling of a given procedure or service as "essential" does not necessarily make it so as an economic matter.[23] Thus, at bottom, the assertion that health care is "unavoidable" only raises the question what services "health care" should encompass and what portion of that care, if any, is truly unavoidable.

B. The Need for Health Care Is Not Uniquely Unpredictable.

The Government and its *amici* also assert that health care is unique in that its costs can be unpredictable. *See* Gov't Br. at 19; Econ. Br. at 3, 6, 18-20. But virtually every insurance product is designed to cover the costs of some occurrence that is unpredictable and that may involve risks that are unknown or unexpected. No doubt, medical emergencies or other health crises can unexpectedly result in higher costs. That is why many people would choose to purchase health insurance even without federal intervention in the healthcare insurance market.

---

[23] The ACA actually purports to define "essential" health benefits in a way that includes a host of routine and predictable medical services, including "preventive and wellness services," "prescription drugs," and "pediatric services, including oral and vision care." 42 U.S.C. § 18022(b)(1).

In fact, however, the routine costs of care for most people are fairly predictable. The average expenditures per year per person are calculated and published with regularity.[24] Moreover, most people can assess their own medical expenses and, taking into account past doctor's visits and medication needs, reasonably estimate costs for the coming year. Millions of people do this every year when they elect to use flexible spending accounts as part of a pre-tax benefit. Such accounts are generally "use it or lose it" and thus require participants to commit to the amount for which they plan to seek reimbursement for medical expenses in the coming year. Thus, when the Government and its *amici* assert that the need for healthcare services is unpredictable, all they can really plausibly mean—as the Government Economists implicitly concede, *see* Econ. Br. at 9—is that the need for *catastrophic* care is unpredictable.

Catastrophic loss, however, is hardly unique to the healthcare industry. A family could be more financially devastated by a fire or flood that destroys their home, or by an accident that totals the family car, than by unexpected medical expenses. What is different about the healthcare industry, perhaps, is that the ACA actually disfavors insurance for catastrophic care and instead mandates coverage for "essential" healthcare features that include, in substantial part, routine and predictable healthcare costs. *See* 42 U.S.C. §§ 18022(b)(1) (definition of "essential health benefits"), 18022(e) (restrictions on catastrophic plans); *see also supra* note 3 (describing the

---

[24] *See, e.g.*, CMS, National Health Expenditure Projections 2010-2020 (2011), *available at* https://www.cms.gov/NationalHealthExpendData/downloads/proj2010.pdf.

limited catastrophic insurance plans that the ACA would permit). Thus, the individual mandate can hardly be justified by the proposition that health insurance is needed to handle catastrophic care, and the claim that the Government should have greater authority to regulate the healthcare market because the risk of catastrophic loss is unpredictable suffers from the absence of any limiting principle. *See Florida*, 648 F.3d at 1296 ("Under the government's proposed limiting principles, there is no reason why Congress could not similarly compel Americans to insure against any number of unforeseeable but serious risks."); *see also id.* at 1295-98 & n.103).

The Government's argument that the healthcare market is unique because it is "unpredictable" carries no water: Routine care is, in fact, quite predictable, and the desire for insurance to address catastrophic occurrences is endemic to every market for insurance.

C. The High Cost of Care Does Not Differentiate the Healthcare Industry from Other Markets.

Relatedly, the high cost of modern health care provides no basis for treating the healthcare industry differently from other markets. The Government Economists contend that health care is unique "[b]ecause medical care is so expensive [that] the majority of individuals receiving care require funds beyond their own resources in order to afford it." Econ. Br. at 8; *compare* Econ. Br. before Eleventh Circuit at 11 ("*essentially everyone* must have some access to funds beyond their own resources in order to afford" medical care (emphasis added)). Once again, this argument lacks any limiting principle.

The basis for a constitutional rule cannot turn on a price index or the amount of consumption funded by insurance versus personal funds.

Moreover, as discussed above, this argument depends on misleading statistics that conflate the healthcare costs of all consumers of health care or of all uninsured with the much lower costs of those voluntarily uninsured who will not be exempt from the mandate. Indeed, millions of Americans have demonstrated this fallacy by voting with their wallets and electing to pay for their health care out of pocket for some period of time. Indeed, this group is the very one the individual mandate seeks to regulate.

D. The Healthcare Market Is Not "Unique" Merely Because the Government Has Legislated Inefficiencies into the Market.

In contending that the healthcare market is unique, the Government identifies one feature of the market that is a direct result of federal regulation—consumers receive certain emergency services irrespective of their ability to pay because providers are required to provide certain types of care. *See* 42 U.S.C. § 1395dd.

The federal requirement to provide care applies only to emergency-stabilization care. Emergency care as a whole (of which federally mandated stabilization care is a subset) comprises less than three percent of the total healthcare market, and only about half of that care goes uncompensated.[25] Thus,

---

[25] *See* American College of Emergency Physicians, *Costs of Emergency Care*, http://www.acep.org/content.aspx?id=25902 (last visited Feb. 11, 2012).

the Government's argument rests on a relatively small piece of the healthcare industry.

Even so, this feature of health care is not innate to the market, but is the byproduct of the federal regulatory regime. It is thus circular for the Government to claim authority to regulate a unique type of market externality that it has itself created. As the Brief for the Private Plaintiffs-Respondents explains, the Government cannot justify the expansion of federal power under the Necessary and Proper Clause as necessary to cure the adverse impact of federal regulations. *See* Private Resp'ts' Br. at 43-46.

To take another analogy, it is well established that a law enforcement officer may not create an exigency and then use it as an excuse for failure to obtain a warrant. *See, e.g.*, *Kentucky v. King*, 131 S. Ct. 1849, 1858 (2011). Likewise, a prosecutor may not delay a prosecution and then seek relief from the Speedy Trial Clause of the Sixth Amendment. *See, e.g.*, *United States v. Marion*, 404 U.S. 307, 325 (1971). Nor may the federal Government spend years neglecting the disposal of hazardous nuclear waste and then coerce the States to take title to the waste. *See New York v. United States*, 505 U.S. 144, 150-52, 188 (1992). These cases recognize the common-sense proposition that the Government may not *enlarge* its powers in order to fix a mess of its own making.

While there may be good reasons underlying many federal regulations of the healthcare industry, the Government may not point to externalities created by those regulations as supplying the justification for regulations outside its traditional enumerated powers. The impact of federally required emer-

gency stabilization care thus cannot form the basis for expanding the federal power to regulate activity beyond Congress's enumerated powers.

E. The True Externalities in the Healthcare Market Ultimately Are Local and Fully Subject to the Police Powers of the States.

The mere fact that the healthcare market suffers from certain externalities cannot alone justify the expansion of federal power to regulate a decision not to participate in the healthcare market. *See Printz v. United States*, 521 U.S. 898, 933 (1997) ("'[T]he Constitution . . . divides power among sovereigns . . . precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.'" (quoting *New York*, 505 U.S. at 187)). Even so, the Court of Appeals' conclusion that Congress may not compel market participation under the Commerce Clause will not leave the States without their traditional powers to regulate healthcare services.

Indeed, the States have the full power to address such externalities because the markets at issue are fundamentally local in nature. The "national health care market" that the Government describes, Gov't Br. at 2, is nothing more than an aggregation of disparate *local* healthcare markets. The majority of healthcare providers service consumers of care within a specific geographical area. Health insurers are subject to stringent state regulation limiting, among other things, insurers' ability to sell health insurance across state boundaries. The business of

insurance, of course, has traditionally been regulated by the States. *See, e.g.*, 15 U.S.C. § 1012.[26]

As the Government and its *amici* emphasize, the individual mandate is a policy that was first adopted in certain States, such as Massachusetts. *See, e.g.*, Gov't Br. at 16, 30. Those States have employed a myriad of approaches to solving challenges arising from the healthcare market, including by expanding existing public programs, providing incentives for small businesses to offer private insurance, subsidizing premiums, requiring employers to offer insurance, and mandating individual insurance, to name a few. In these and other policies, the States have formulated various solutions to address the general problems associated with rising healthcare costs and the specific externalities and distortions affecting local markets.[27]

---

[26] Several non-Plaintiff States have filed an *amicus* brief supporting the Government arguing, inter alia, that States are curtailed in their ability to effect healthcare reform because insurers or residents might leave for neighboring States if they dislike a new reform. *See* State *Amici* Br. at 20-23. But, once again, this provides no limiting principle, as individuals and businesses are always free to leave a State that institutes a policy that will be costly to those individuals, for instance a dramatic tax increase. That does not mean Congress has the power to interfere with States' tax rates, nor does the portability across state lines of healthcare providers and insurers make Congress's attempted conscription of *non*-consumers of insurance constitutional.

[27] For a comprehensive survey of state healthcare reform legislation, see, for example, John E. McDonough, et al., *A Progress Report On State Health Access Reform*, 27 Health Affairs w105 (Jan. 29, 2008), http://content.healthaffairs.org/content/27/2/w105.full.pdf+html; *see also* Amy M. Lischko & Anand Gopalsami, *An Interim Report Card on Massachusetts*

Although many States have made this case in challenging the individual mandate, several have filed an *amicus* brief supporting the Government. In support of the Government's position, State *Amici* argue that the ACA is a blueprint for model cooperation between the federal government and the States. *See, e.g.*, State *Amici* Br. at 29-36. This portrayal ignores the unconstitutionally coercive Medicaid expansion the Act foists on States, as well as the fact that the ACA imposes a particular purported solution—the individual mandate and associated insurance reforms—to attempt to solve a complex problem that States have attempted to address in diverse ways. The fact remains that the States within our constitutional system have both the traditional power and the practical ability to enact meaningful healthcare reform. Accordingly, a decision by this Court to reaffirm the traditional constitutional boundaries on Congress's power to regulate commerce will encourage and promote State-sponsored and -administrated solutions that reflect the appropriate workings among the laboratories of democracy in our federal system.

Heath Care Reform, Part 1: Increasing Access, A Pioneer Institute White Paper, Jan. 2010, at 12, http://www.pioneerinstitute.org/pdf/100113_interim_report_card1.pdf (concluding that "the reform has been successful at insuring more Massachusetts residents"); State of Illinois, *Healthcare for All Kids*, http://www.allkidscovered.com (last visited Feb. 13, 2012) (guaranteeing health insurance to all children in the Illinois).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

Steven G. Bradbury
Steven A. Engel
Counsel of Record
Michael H. Park
Elisa T. Wiygul
DECHERT LLP
1775 I Street, NW
Washington, DC 20006
(202) 261-3300
steven.engel@dechert.com

February 13, 2012 *Counsel for Amici Curiae*

Appendix

LIST OF *AMICI*

Douglas Holtz-Eakin
American Action Forum
Former Director, Congressional Budget Office

Edward C. Prescott
Arizona State University
Nobel Prize Winner in Economics

Vernon L. Smith
Chapman University, George Mason University
Nobel Prize Winner in Economics

June O'Neill
Baruch College, CUNY
Former Director, Congressional Budget Office

James C. Miller III
George Mason University, Hoover Institution
Former Director, Office of Management and Budget

Arthur B. Laffer
Laffer Associates
First Chief Economist, Office of
Management and Budget

Larry Lindsey
The Lindsey Group
Former Director, National Economic Council

William Poole
University of Delaware
Former President, Federal Reserve Bank of St. Louis

Phil Gramm
UBS Investment Banking
Former U.S. Senator

James D. Adams
Rensselaer Polytechnic Institute

Richard M. Adams
Oregon State University

Douglas K. Adie
Ohio University

Lee C. Adkins
Oklahoma State University

Richard Agnello
University of Delaware

Gordon J. Alexander
University of Minnesota

Scott W. Altas
Stanford Medical School

Joshua Archambault
Pioneer Institute of Public Policy Research

J. J. Arias
Georgia College and State University

Nathan J. Ashby
University of Texas at El Paso

Charles Baird
California State University, East Bay

Peter M. Basciano
Augusta State University

Stacie E. Beck
University of Delaware

Lawrence J. Belcher
Taylor University

Donald Bellante
University of South Florida

Bruce Bender
University of Wisconsin-Milwaukee

Daniel K. Benjamin
Clemson University

Richard E. Bernstein
Temple University

Sanjai Bhagat
University of Colorado

Robert G. Bise
Orange Coast College

Michael Bond
University of Arizona

Carlos Bonilla
Washington, D.C.

Robert A. Book
HSI Network

Karl J. Borden
University of Nebraska

George H. Borts
Brown University

Eleftherios Botsas
Oakland University

John H. Boyd
University of Minnesota

William J. Boyes
Arizona State University

Ike Brannon
American Action Forum

Edgar K. Browning
Texas A&M University

Todd Buchholz
Two Oceans Management

Richard V. Burkhauser
Cornell University

Thomas D. Burns
University of Hawaii

Charles W. Calomiris
Columbia University

James C. Capretta
Ethics and Public Policy Center

Richard J. Cebula
Jacksonville University

Barry R. Chiswick
University of Illinois, Chicago

R. Morris Coats
Nicholls State University

Warren Coats
Alexandria, VA

John P. Cochran
Metropolitan State College of Denver

John H. Cochrane
University of Chicago

Robert Collinge
University of Texas at San Antonio

Peter F. Colwell
University of Illinois Urbana-Champaign

Michael Connolly
University of Miami

Christopher Conover
Duke University

Cathleen J. Coolidge
California State University, Chico

Kathleen B. Cooper
Southern Methodist University

Roy Cordato
John Locke Foundation

Mike Cosgrove
University of Dallas

Jim F. Couch
University of North Alabama

Nicole V. Crain
Lafayette College

Ward S. Curran
Trinity College

Carl Dahlman
RAND Corp.

Albert L. Danielsen
University of Georgia

Antony Davies
Duquesne University

Stephen J. Dempsey
University of Vermont

Harold Demsetz
University of California, Los Angeles

Christopher DeMuth
Hudson Institute

Allan DeSerpa
Arizona State University

Phoebus J. Dhrymes
Columbia University

Floyd H. Duncan
Virginia Military Institute

Joseph W. Duncan
Micro Mite

Lanny Ebenstein
University of California, Santa Barbara

Francis J. Egan
Trinity College

Stephen J. Entin
Institute for Research on the Economics of Taxation

Richard E. Ericson
East Carolina University

Dorla A. Evans
University of Alabama in Huntsville

Frank Falero Jr.
California State University

W. Ken Farr
Georgia College and State University

Nicole Fisher
HSI Network

Fred Foldvary
Santa Clara University

James Forcier
Hult International Business School

Eric W. Ford
University of North Carolina, Greensboro

William F. Ford
Federal Reserve Bank of Atlanta

Murray Z. Frank
University of Minnesota

Ralph R. Frasca
University of Dayton

Douglas C. Frechtling
The George Washington University

Luke Froeb
Vanderbilt University

Diana Furchtgott-Roth
Manhattan Institute

Dave Garthoff
University of Akron

James F. Gatti
University of Vermont

Wendy Lee Gramm
Mercatus Center

Richard J. Grant
Lipscomb University

R.W. Hafer
Southern Illinois University, Edwardsville

J. Daniel Hammond
Wake Forest University

Gary Hansen
University of California, Los Angeles

Stephen Happel
Arizona State University

William R. Hart
Miami University

Kevin Hassett
American Enterprise Institute

N. Mike Helvacian
New Jersey Institute of Technology

David R. Henderson
Hoover Institution, Stanford University

James W. Henderson
Baylor University

John Hoehn
Michigan State University

Arlene Holen
Technology Policy Institute

Daniel Houser
George Mason University

C. Thomas Howard
University of Denver

Paul Howard
Manhattan Institute

James L. Huffman
Lewis & Clark Law School

Michael C. Jensen
Harvard University

Garett Jones
George Mason University

Tim Kane
Washington, DC

David L. Kendall
The University of Virginia's College at Wise

Joseph V. Kennedy
Georgetown University

Anne Krueger
Johns Hopkins University

Corinne Krupp
Duke University

Richard La Near
Missouri Southern State University

Deepak Lal
University of California, Los Angeles

Don R. Leet
California State University, Fresno

Norman B. Lefton
Southern Illinois University Edwardsville

Thomas E. Lehman
Indiana Wesleyan University

Phil I. Levy
Columbia University

Stan Liebowitz
University of Texas, Dallas

Jody W. Lipford
Presbyterian College

John R. Lott, Jr.
University of Maryland, College Park

Donald L. Luskin
Trend Macrolytics LLC

R. Ashley Lyman
University of Idaho

Glenn MacDonald
Washington University in St. Louis

Robert S. Main
Butler University

Yuri N. Maltsev
Carthage College

Henry G. Manne
George Mason University

Michael L. Marlow
California Polytechnic State University

Timothy Mathews
Kennesaw State University

John McArthur
Wofford College

Bennett McCallum
Carnegie Mellon University

Martin C. McGuire
University of California, Irvine

W. Douglas McMillin
Louisiana State University

Roger Meiners
University of Texas, Arlington

William Melick
Kenyon College

Allan Meltzer
Carnegie Mellon University

Enrique G. Mendoza
University of Maryland, College Park

James D. Mietus
Retired, Office of Management and Budget

Eugenio J. Miravete
University of Texas, Austin

James Moncur
Hawaii at Manoa

Michael R. Montgomery
University of Maine

Velma Montoya
Regent Emerita, University of California System

Michael Morrisey
University of Alabama, Birmingham

John E. Murray
Rhodes College

David B. Mustard
University of Georgia

Steven C. Myers
University of Akron

James Nelson
East Carolina University

George R. Neumann
University of Iowa

Robert D. Niehaus
Robert D. Niehaus Inc.

James O'Neill
University of Delaware

Lydia Ortega
San Jose State University

Donald J. Oswald
California State University, Bakersfield

Walton Padelford
Union University

Stephen T. Parente
University of Minnesota

Donald Parsons
George Washington University

Douglas Patterson
Virginia Tech

Mark J. Perry
University of Michigan, Flint

G. Michael Phillips
California State University, Northridge

Mark Pingle
University of Nevada, Reno

Ivan Pongracic
Hillsdale College

John Powers
University of Cincinnati

R. L. Promboin
University of Maryland, University College

Richard W. Rahn
Cato Institute

Michael J. Ramlet
American Action Forum

R. David Ranson
H. C. Wainwright & Co. Economics Inc.

Jon Reisman
University of Maine, Machias

Thomas A. Rhee
California State University, Long Beach

Christine P. Ries
Georgia Institute of Technology

Nancy H. Roberts
Arizona State University

Larry L. Ross
University of Alaska, Anchorage

Timothy P. Roth
The University of Texas at El Paso

Paul H. Rubin
Emory University

Thomas Rustici
George Mason University

Anthony B. Sanders
George Mason University

Thomas Saving
Texas A&M University

Robert Haney Scott
California State University, Chico

John J. Seater
North Carolina State University

Richard T. Selden
The University of Virginia

Sol S. Shalit
University of Wisconsin

Alan C. Shapiro
University of Southern California

Judy Shelton
Atlas Economic Research Foundation

Mark H. Showalter
Brigham Young University

Cameron Smith
American Action Forum

James F. Smith
EconForecaster, LLC

Lawrence Southwick
University at Buffalo

Chester Spatt
Carnegie Mellon University

Frank Spreng
McKendree University

Craig A. Stephenson
Babson College

Derek Stimel
Menlo College

Richard J. Sweeney
Georgetown University

Robert Tamura
Clemson University

John A. Tatom
Indiana State University

Teresa Tharp
Valencia College

Richard Timberlake
University of Georgia

Stephen A. Tolbert, Jr.
Montgomery County Community College

William N. Trumbull
West Virginia University

T. Norman, Van Cott
Ball State University

Larry Van Horn
Vanderbilt University

David VanHoose
Baylor University

Richard Vedder
Ohio University, American Enterprise Institute

John Vernon
University of North Carolina

Richard E. Wagner
George Mason University

Leon Wegge
University of California, Davis

Brian S. Wesbury
First Trust Portfolios, LP

Douglas Wills
University of Washington, Tacoma

Gary Wolfram
Hillsdale College

Gene C. Wunder
Washburn University

Nancy A. Yonge
Center for American Strength

John S. Zdanowicz
Florida International University

Kate Zhou
University of Hawaii

Joseph Zoric
Franciscan University of Steubenville

Benjamin Zycher
American Enterprise Institute

Appendix

METHODOLOGY OF STATISTICAL ANALYSIS

The statistics cited by the Economist *Amici* were calculated using the Medical Expenditure Panel Survey (MEPS) dataset according to the following methodology:

- **Spending by the Young, Healthy, and Uninsured:** The "young, healthy, and uninsured" population was derived from the following MEPS dataset variables for the 2008 Household panel survey using SAS software:

  NOT
  - ASTHDXY2=1 OR (has asthma)
  - ARTHDXY2=1 OR (has arthritis)
  - DIABDXY2=1 OR (has diabetes)
  - CHBRON5 =1 OR (has bronchitis)
  - EMPHDXY2=1 OR (has emphysema)
  - CHDDXY2 =1 OR (has coronary heart disease)
  - BPMLDXY2=1 OR (has high blood pressure)
  - CANCERY2 NE (has history of any cancer)

  AND
  - Age between 21 and 35

  AND
  - PRVEVY2 ne 1 (no private health insurance in 2008)
  - PUBAPY2X ne 1 (no public health insurance in 2008)

These variables yield a total population of approximately 11,970,000 with aggregate health spending of about $10,226,000,000. The average healthcare costs of this class may be expressed as:

($10,226,000,000) / (11,970,000) = $854

The aggregate emergency room spending for this population was $676,000,000. Thus, the average costs of emergency care are:

($676,000,000) / (11,970,000) = $56

Additionally, the Economist *Amici* calculated the population and total costs associated with the healthy and uninsured who were not under 133 percent of the federal poverty level, nor undocumented aliens. The aggregate health spending for that population of 17,268,000 was $28,535,000,000. The average healthcare costs of this class may be expressed as:

($28,535,000,000) / (17,268,000) = $1,652

The aggregate emergency room spending for this population was $1,553,000,000. Thus, the average costs of emergency care are:

($1,553,000,000) / (17,268,000) = $90

- **Uncompensated Care**: Based on $43 billion per year in total uncompensated care to the uninsured, that sum was apportioned among the various populations contributing to uncompensated care.

  First, the following subsets of the total population of patients who had no insurance when

their healthcare provider billed them were identified from the MEPS dataset:

- Undocumented aliens;[1]
- Individuals or households earning less than 133 percent of the federal poverty level and who were not undocumented aliens;
- Individuals with previously existing conditions who earned more than 133 percent of the federal poverty level and were not undocumented aliens; and
- Healthy individuals who earned more than 133 percent of the federal poverty

---

[1] Because MEPS does not directly track survey participants' immigration status, estimating the costs associated with undocumented aliens requires applying certain assumptions. In response to the Government Economists' objection that the Economist *Amici* should use a measure that excludes legally resident immigrants, the Economist *Amici* recalibrated their method of attempting to isolate illegal immigrants, in part using the methodology suggested by the article relied upon by the Government Economists (even though that methodology may well understate the uncompensated costs imposed by illegal immigrants). *See* Econ. Br. at 27 & n.73 (citing Leighton Ku, *Health Insurance Coverage and Medical Expenditures of Immigrants and Native-Born Citizens in the United States*, Am. J. of Pub. Health, July 2009, at 1322-28). The Economist *Amici* also drew from estimates of the illegal immigrant population in Pew Research Center for the People & the Press and Pew Hispanic Center, *No Consensus on Immigration Problem or Proposed Fixes: America's Immigration Quandry* (Mar. 30, 2006), http://peoplepress.org/reports/pdf/274.pdf.

level and were not undocumented aliens.[2]

These data yielded the following unweighted findings:

Population	Uncompensated Care $ (millions)	Percentage of $43 billion
Undocumented aliens:	$1,283	3.0%
Less than 133% of the poverty line, not undocumented aliens:	$16,154	37.6%
Previously existing condition, more than 133% of poverty line, not undocumented:	$10,367	24.1%
Healthy, more than 133% of poverty line, not undocumented:	$15,196	35.3%
TOTAL	~$43,000	100%

[2] To ensure that these populations encompassed all uninsured individuals but did not double-count any individuals, the Economist *Amici* eliminated overlap (*i.e.*, costs associated with persons who fell into more than one category). This procedure could have been done in a different order, but the ultimate conclusion regarding the cost of care rendered to those subject to the mandate—the healthy, non-poor, non-undocumented—would remain the same.

The raw data thus establish about $15.2 billion in uncompensated costs for the target category. Population-specific recovery rates then were calculated for each sub-population based on market data in Stephen T. Parente, *Health Information Technology and Financing's Next Frontier: The Potential of Medical Banking*, 44 Bus. Econ. 41 (Jan. 2009). The weighted recovery rates are as follows, along with the adjusted yield by population:

Population	Adjusted Recovery Rate	Adjusted Uncompensated Care $ (millions)	Percentage of $43 billion
Undocumented aliens:	0.2	$1,272	3.0%
Less than 133% of the poverty line, not undocumented aliens:	0.1	$18,015	41.9%
Previously existing condition, more than 133% of poverty line, not undocumented:	0.4	$7,708	17.9%
Healthy, more than 133% of poverty line, not undocumented:	0.15	$16,005	37.2%
TOTAL		~$43,000	100%

The approximately $16 billion in adjusted uncompensated costs from the healthy, non-poor, non-undocumented, and uninsured can be expressed as a

percentage of the overall healthcare market of $2.4 trillion as:

($16,000,000,000) (100) / ($2,400,000,000,000) = 0.67%

In addition, because approximately 4 million people are projected to be subject to the mandate yet to remain uninsured, the amount of uncompensated care that is likely to be affected by the mandate must be further reduced by approximately 20% (rounding down from 4 million divided by the 17.3 million people in the final category in the charts above), *see supra* at 18-19, to roughly $12.8 million, which can be expressed as a percentage of the overall healthcare market of $2.4 trillion as:

($12,800,000) (100) / ($2,400,000,000,000) = 0.53%

AMICUS CURIAE BRIEF

No. 11-398

In the Supreme Court of the United States

Department of Health and Human Services, et al.,
Petitioners,

v.

State of Florida, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF ON BEHALF OF THE 1851 CENTER FOR CONSTITUTIONAL LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS (MINIMUM COVERAGE PROVISION)

CHRISTOPHER P. FINNEY
Counsel of Record
Of Counsel,
1851 CENTER FOR CONSTITUTIONAL LAW
FINNEY, STAGNARO, SABA & PATTERSON CO., LPA
2623 ERIE AVENUE
CINCINNATI, OH 45208
(513) 533-2980
cfinney@fssp-law.com

CURT C. HARTMAN
Of Counsel,
1851 CENTER FOR CONSTITUTIONAL LAW
THE LAW FIRM OF CURT C. HARTMAN
3749 FOX POINT COURT
AMELIA, OH 45102
(513) 752-8800
hartmanlawfirm@fuse.net

MAURICE THOMPSON
1851 CENTER FOR CONSTITUTIONAL LAW
208 E. STATE STREET
COLUMBUS, OHIO 43215
(614) 340-9817
mthompson@OhioConstitution.org

February 13, 2012

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES. iii

AMICUS CURIAE BRIEF OF 1851 CENTER FOR CONSTITUTIONAL LAW IN SUPPORT OF RESPONDENTS. 1

STATEMENT OF AMICUS INTERESTS. 1

SUMMARY OF ARGUMENT. 2

ARGUMENT. 3

I. The mandate is not "proper" for carrying into execution Congressional Commerce Power because it impermissibly transgresses state sovereignty, where states have almost universally rejected individual health insurance mandates in favor of freedom of choice. 3

A. To be upheld, the mandate must be "proper.". 3

B. A federal enactment is not "proper" where it violates the constitutional principles of state sovereignty. 4

C. The mandate destroys state sovereignty by displacing a right that nearly every state protects. 10

D. The mandate displaces liberties protected by the states in an area where states have historically been sovereign.. 17

i. Health care, health insurance, and insurance contracts are traditional concerns of the states.. 17

ii. Protection of ordered liberty is a traditional concern of the states. . . . 20

II. "The Spirit and Letter of the Constitution" is undermined where implied federal powers eviscerate state law that secures liberty. 21

A. The Constitution and its Federalist design exist to secure liberty. 23

B. Freedom from compulsion to purchase "minimum essential coverage" is the type of liberty federalism is designed to protect. 26

C. The "Spirit and Letter" of the Constitution embraces a recognition that the Ninth Amendment favors state protection of ordered liberty over federal exercise of implied powers. 30

CONCLUSION. 40

TABLE OF AUTHORITIES

Cases

Arnold v. Cleveland, (1993),
67 Ohio St.3d 35, 616 N.E.2d 163..... 20, 29, 30

Atascadero State Hospital v. Scanlon,
473 U.S. 234, 105 S.Ct. 3142 (1985)..... 24

Bond v. United States,
131 S.Ct 2355 (2011)..... 23, 25

Bowers v. DeVito,
686 F.2d 616 (7th Cir.1982)..... 26

Bowers v. Hardwick,
478 U.S. 186 (1986)..... 11

California v. Greenwood (1988),
486 U.S. 35, 108 S.Ct. 1625,
100 L.Ed.2d 30..... 29

Cruzan v. Director, Missouri Dept. of Health,
497 U.S. 261 (1990)..... 18, 27

Direct Plumbing Supply v. City of Dayton (1941),
138 Ohio St. 540, 38 N.E.2d 70..... 20, 21

Garcia v. San Antonio Metropolitan Transit Authority,
469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016
(1985)..... 4, 6, 16, 22, 24

Gonzales v. Raich,
545 U.S. 1, 125 S.Ct. 2195 (2005)..... 4, 22

Gregory v. Ashcroft,
426 U.S. 833. . . . . 3, 8, 24, 25

Griswold v. Connecticut,
381 U.S. 479 (1965). 28

Harris v. McRae,
448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784
(1980). 26

Houston v. Moore,
18 U.S. (5 Wheat.) 1 (1820). 35

Jackson v. City of Joliet,
715 F.2d 1200 (7th Cir.1983).. 26

Jacobson v. Commonwealth of Massachusetts
(1905),
197 U.S. 11, 25 S.Ct. 358. . . . . 14, 18

Kentucky Dept. of Corr. v. Thompson,
490 U.S. 454, 109 S. Ct. 1904 (1989). 31

Lawrence v. Texas,
123 S. Ct. 2472 (2003). 10, 11

Lawson v. Steele,
152 U. S. 133, 38 L.Ed. 385. 19

Linder v. United States,
268 U.S. 5 (1925). 18

Maryland v. Wirtz,
392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020
(1968). 2, 3

McCulloch v. Maryland,
4 Wheat. 316 (1819).. 22

Meyer v. Nebraska,
262 U.S. 390 (1923). 30

NLRB v. Jones & Laughlin Steel Corp.,
301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937). . 5

National League of Cities v. Usery,
426 U.S. 833, 96 S.Ct. 2465 (1976). 17

New State Ice Co. v. Liebmann,
285 U.S. 262, 52 S.Ct. 371 (1932). 16

New York v. United States,
505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120
(1992). 5, 17, 23

Olim v. Wakinekona,
461 U.S. 238, 103 S. Ct. 1741 (1983). 31

Palmer v. Tingle (1896),
55 Ohio St. 423, 45 N.E. 313. 26

People v. Marx,
99 N.Y. 377, 2 N.E. 29. 26

Pierce v. Society of Sisters,
268 U.S. 510 (1925). 27, 30

Printz v. United States,
521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914
(1997). 5, 6

PruneYard Shopping Ctr. v. Robbins (1980),
447 U.S. 74, 100 S.Ct. 2035,
64 L.Ed.2d 741. 29

Roe v. Wade,
410 U.S. 113 (1973). 18

Roper v. Simmons,
43 U.S. 551, 125 S.Ct. 1183. 11

Sugarman v. Dougall,
413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853
(1973). 8

United States v. Comstock,
130 S.Ct. 1949 (2010). 7, 8, 21

United States v. Coombs,
12 Pet. 72, 9 L.Ed. 1004 (1838). 4

United States v. Lopez,
514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626
(1995). . . . . *passim*

United States v. Morrison,
529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658
(2000). . . . . *passim*

United States v. Troxel,
530 U.S. 57 (2000). 30, 39

U.S. Term Limits v. Thornton,
514 U.S. 779 (1995). 23

Washington v. Glucksberg,
521 U.S. 702 (1977). 18, 38

Whalen v. Roe,
429 U.S. 589 (1977). 18

Constitutions

U.S. Const. amend IX. . . . . *passim*

U.S. Const. amend X. . . . . *passim*

U.S. Const. amend XIV. 10, 31

Ohio Const. amend XXI. . . . . *passim*

Other Authorities

2 Annals of Cong. 1951 (1791). 32

Brennan,
State Constitutions and the Protection of Individual Rights (1977). 29

Calvin Massey,
The Anti-Federalist Ninth Amendment and its Implications for State Constitutional Law, 1990 Wis. L. Rev. 1229. 36

http://ballotpedia.org/wiki/index.php/California_Proposition_166,_Mandatory_Health_Insurance_(1992).. 15

http://www.governing.com/blogs/politics/Move-Over-Missouri-Iowa.html. 12, 13

http://healthcarereform.procon.org/view.resource.php?resourceID=004182. 14

http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1780842/?page=1. 14

http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2011results/20111108Issue3.aspx. 12

http://www.sos.state.oh.us/sos/upload/ballotboard/2011/3-argument-for.pdf. 12, 28

http://www.sos.state.oh.us/sos/upload/ballotboard/2011/3-fulltext.pdf. 12, 28

James Madison,
Speech in Congress Opposing the National Bank (Feb. 2, 1791). 33, 35

James Madison,
Speech in Congress Proposing Constitutional Amendments (June 8, 1789). 32

Joseph Story,
Commentaries on the Constitution of the United States 712 (Carolina Academic Press 1987) (1833). 35

Kurt T. Lash,
The Lost Jurisprudence of the Ninth Amendment,
83 TEXAS L. REV. 597 (2005). 33, 35, 37

Randy Barnett, Why the Personal Mandate to Buy Health Insurance is Unprecedented and Unconstitutional, December 9, 2009 13

Russell Caplan,
The History and Meaning of the Ninth Amendment,
69 VA. L. REV. 223, at 227 (1983). 37

St. George Tucker,
View of the Constitution of the United States, in 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND THE COMMONWEALTH OF VIRGINIA 141 (St. George Tucker ed., Augustus M. Kelley 1969) (1803). 34

Stuart M. Butler,
Assuring Affordable Health Care for All Americans, October 2, 1989. 14

The Federalist No. 51 (C. Rossiter ed. 1961). 25

The Federalist No. 28 (C. Rossiter ed. 1961). 24

The Federalist No. 45 (C. Rossiter ed. 1961).. 3

Wilmarth,
The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power, 26 Am. Crim. L. Rev. 1261, 1297-98 (1989). 36

AMICUS CURIAE BRIEF OF 1851 CENTER FOR CONSTITUTIONAL LAW IN SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 37.3, 1851 Center for Constitutional Law respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Respondents.[1]

STATEMENT OF AMICUS INTERESTS

Amicus 1851 Center for Constitutional Law is Ohio's premier advocate for advancement of the human condition through protection of constitutional liberties. The 1851 Center has developed particular expertise in Ohio constitutional law and the proper role of state constitutional liberties in our federalist system of government. Through this expertise, the 1851 Center has published research, achieved favorable results for Ohioans in numerous state constitutional law cases, and utilized core features of Ohio's sovereignty, the state's constitutionally-enshrined initiative process, to protect Ohioans liberties through Ohio's Bill of Rights.

Of particular importance in this matter, the 1851 Center drafted the 21st Section of Ohio's Bill of Rights ("preservation of freedom to choose health care and health care coverage"), and represented citizen-initiated efforts to enact that constitutional liberty

---

[1] Counsel for 1851 Center affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than 1851 Center made a monetary contribution to the preparation or submission of this brief. Parties have consented to the filing of amicus briefs.

through popular vote. This Amendment which carried 66 percent of the popular vote statewide, provides that no "law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system." This expression of constitutional liberty and sovereignty stands in tension with the "minimum essential coverage requirement." This brief is offered on behalf of the 2,268,470 Ohioans who voted to preserve that liberty and sovereignty.

SUMMARY OF ARGUMENT

The imposition of the Minimum Essential Coverage requirement ("the mandate") on the people of each state is not "proper" for carrying into execution Congressional Commerce Power. First, it impermissibly transgresses state sovereignty, where states have almost universally rejected individual health insurance mandates, many unmistakably so, in favor of protecting the freedom to choose one's own path in financing health care. Second, the mandate is not proper because it violates the "spirit and letter" of the Constitution by thwarting the purpose of federalism - - limitation of federal power and state protection of liberty - - and ignoring the intended influence of the Ninth and Tenth Amendments.

In *Maryland v. Wirtz,* the Court reaffirmed that "the power to regulate commerce, though broad indeed, has limits" that "[t]he Court has ample power" to enforce.[2] And these limits are predicated on the

---

[2] *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968).

sovereignty of the states to protect the liberties of their citizens, particularly in areas of traditionally local concern such as health care. As James Madison put it: [t]he powers delegated by the proposed Constitution to the federal government are few and defined . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people. . .'"[3]

ARGUMENT

I. The mandate is not "proper" for carrying into execution Congressional Commerce Power because it impermissibly transgresses state sovereignty, where states have almost universally rejected individual health insurance mandates in favor of freedom of choice.

A. To be upheld, the mandate must be "proper."

The Commerce Clause permits congressional regulation of three categories: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that "substantially affect" interstate commerce.[4] The

---

[3] *Gregory v. Ashcroft*, 426 U.S. 833, 96 S.Ct 2465, citing The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961).

[4] *Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195 (2005) (Scalia, concurring), citing *United States v. Morrison*, 529 U.S. 598, 608-609, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000); *United States v.*

abstention from buying health insurance, if an "activity" at all, is neither interstate nor commerce. Consequently, this case turns on application of this Court's "substantially affects" test. "[A]ctivities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, as this Court has acknowledged since at least 1838, Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."[5]

B. A federal enactment is not "proper" where it violates the constitutional principles of state sovereignty.

The outward boundary of authority asserted under the Necessary and Proper Clause is limited by inquiry into whether that authority displaces state laws protecting liberty. Cases such as *Printz v. United States*, and *New York v. United States*, affirm that a law is not " ' *proper* for carrying into Execution the

---

Lopez, 514 U.S. 549, 558-559, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

[5] *United States v. Coombs*, 12 Pet. 72, 9 L.Ed. 1004 (1838); See also *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 584-585, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (O'CONNOR, J., dissenting) (explaining that it is through the Necessary and Proper Clause that "an intrastate activity 'affecting' interstate commerce can be reached through the commerce power").

Commerce Clause' " "[w]hen [it] violates [a constitutional] principle of state sovereignty."[6] Accordingly, something more than mere assertion is required when Congress purports to have power over even local *activity*, much less inactivity, whose connection to an interstate market is not self-evident -- otherwise, the Necessary and Proper Clause will always be a back door for unconstitutional federal regulation.[7]

This state sovereignty test demands that this Court enforce the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment, thereby maintaining the distribution of power fundamental to our federalist system of government.[8] For this reason, "fundamental structural concerns about dual sovereignty animate *** Commerce Clause cases,"[9] and "state autonomy is a relevant factor in assessing the means by which

---

[6] *Printz v. United States,* 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997); *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

[7] *Printz*, *supra*, at 923 (the Necessary and Proper Clause is "the last, best hope of those who defend ultra vires congressional action").

[8] *United States v. Lopez*, 514 U.S. 549, 557, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 S.Ct. 615, 81 L.Ed. 893 (1937).

[9] *Lopez, supra, at 583, 115 S.Ct. 1624 (KENNEDY, J., concurring); see also Morrison, supra, at 617-619, 120 S.Ct. 1740.*

Congress exercises its powers" under the Commerce Clause.[10]

In *Printz,* this Court affirmed that Congress cannot properly claim an *incidental* power to reach wholly *intrastate* activity under the Necessary and Proper Clause when doing so would interfere with the exercise of state sovereign powers.[11] *Printz* held that, although the Commerce Clause authorized Congress to *enact* legislation concerning handgun registration, the Brady Act's *direction of the actions of state executive officials* was not constitutionally valid as a law "necessary and proper" to the execution of Congress's Commerce Clause power to regulate handgun sales, because when "a 'La[w] ... for carrying into Execution' the Commerce Clause violates the principle of state sovereignty *** it is not a 'La[w] ... *proper* for carrying into Execution the Commerce Clause.'"[12]

Later, in *Lopez,* this Court affirmed the principle that exercise of commerce power is judged by whether it may "displace state policy choices."[13] Thus, several years later in *Morrison,* this Court has "emphasized" that "Congress' regulatory authority" under the Commerce Clause "is not without effective bounds,", and "'may not be extended ... [to] effectually obliterate

---

[10] *Garcia*, 469 U.S., at 586, 105 S.Ct. 1005 (O'CONNOR, J., dissenting).

[11] *Printz*, *supra*, at 937.

[12] *Printz*, *supra*, at pp. 923–924, 117 S.Ct. 2365.

[13] *Lopez*, 514 U.S. at 561 n.3 (internal quotations and citation omitted).

the distinction between what is national and what is local and create a completely centralized government,'"[14] In both *Lopez* and *Morrison*, the Court took account of principles of federalism and State sovereignty in holding that the federal laws at issue exceeded Congress' Commerce Power.[15] This case likewise "requires [the Court] ... to appreciate the significance of federalism in the whole structure of the Constitution."[16]

More recently, in *United States v. Comstock*, it was observed that "[i]t is correct in one sense to say that if the National Government has the power to act under the Necessary and Proper Clause then that power is not one reserved to the States. *But the precepts of federalism embodied in the Constitution inform which powers are properly exercised by the National Government in the first place.*"[17] Thus, the test for this

---

[14] *United States v. Morrison,* 529 U.S. 598, 608 (2000), citing *Lopez,* 514 U.S. at 556-57 (1995).

[15] *See Lopez*, 514 U.S. at 564 (rejecting Commerce Clause theories that would extend federal power to areas "where States historically have been sovereign"); *id.* at 567 (Kennedy, J., concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern ... the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."); *Morrison*, 529 U.S. at 618 (VAWA concerned "the police power, which the Founders denied the National Government and reposed in the States").

[16] *Lopez*, 514 U.S. at 575 (Kennedy, J., concurring).

[17] *United States v. Comstock*, 130 S.Ct. 1949, Justice KENNEDY, concurring in the judgment, citing *Lopez*, 514 U.S., at 580–581, 115 S.Ct. 1624 (KENNEDY, J., concurring).

Court to apply is "*whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause*; if so, that is a factor suggesting that *the power is not one properly within the reach of federal power.*"[18]

This test reaffirms the principles of *Gregory v. Ashcroft*, where this Court affirmed that Congressional interference with the decision of the people of Missouri, defining their constitutional officers, even within the context federal age discrimination prohibitions, "would upset the usual constitutional balance of federal and state powers."[19] The *Gregory* Court reaffirmed "the unique nature of state decisions that "go to the heart of representative government."[20]

If this power of the State applies to the sovereignty to elect and otherwise control "officers who participate directly in the formulation, execution, or review of broad public policy" because they "perform functions that go to the heart of representative government," then it must also apply to the public policies themselves, whether promulgated by these elected leaders, or even moreso, by the people themselves by amending their own state's constitution:

---

[18] *Id.*, at 1968.

[19] *Gregory v. Ashcroft*, 426 U.S. 833, 96 S.Ct 2465.

[20] *Gregory v. Ashcroft*, 426 U.S. 833, 96 S.Ct 2465, citing *Sugarman v. Dougall*, 413 U.S. 634, 647, 93 S.Ct. 2842, 2850, 37 L.Ed.2d 853 (1973), observing the understanding that "[s]uch power inheres in the State by virtue of its obligation, already noted above, 'to preserve the basic conception of a political community.'"

> Not only * * * can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."[21]

But upholding the mandate would yield eminently *destructible* states: states with little or nothing to say regarding health insurance and health care contracting within their states, or whether their citizens may be forced to buy private health care products, jog on a treadmill, or visit a physician.

Thus, even when applying the explicit guarantees of *the Equal Protection Clause*, which clearly provides a check on state authority, this Court has throttled its reading of federal power in favor of state autonomy: "our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives."[22] If this rule of construction respects state sovereignty even within the context of the Fourteenth Amendment which (1) secures liberty; and (2) was "designed as an intrusion on state sovereignty," then it must respect state

---

[21] *Id.*

[22] *Id.*, at 648.

sovereignty even more where the exercise of *implied* powers under the Necessary and Proper Clause are invoked.[23] Where implied powers are wielded to eviscerate state sovereignty and our dual system of government, their exercise is anything but "proper."

C. The mandate destroys state sovereignty by displacing a right that nearly every state protects.

Federalism analysis may not be the same in every case, "for it depends on the regulatory scheme at issue and the federalism concerns implicated."[24] These federalism considerations are most poignant where the states have clearly spoken.[25] Thus, current practices of the states are significant.[26]

When the extent of federal protection of rights as against state power becomes unclear, this Court often turns to patterns and practices of the states for guidance. In Eighth Amendment cases, for instance, the Court has been guided by "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to

---

[23] *Id.*

[24] See generally *Lopez*, 514 U.S., at 567, 115 S.Ct. 1624; *id.*, at 579, 115 S.Ct. 1624 (KENNEDY, J., concurring).

[25] *Lawrence v. Texas*, 123 S. Ct. 2472, 2480 (2003).

[26] *Lawrence*, 123 S. Ct. at 2480. *See* App. B, *infra* (describing State laws).

executions."[27] Elsewhere, the *Lawrence* Court noted that, when the Court had decided *Bowers v. Hardwick*, 478 U.S. 186 (1986), "[twenty-four] States and the District of Columbia had sodomy laws."[28] By the time a similar challenge to sodomy laws arose in *Lawrence* in 2004, only thirteen states had maintained their sodomy laws, and there was a noted "pattern of nonenforcement."[29] The Court observed that "laws once thought 'necessary and proper' in fact serve only to oppress."[30]

Principles of state sovereignty and federalism demand that when the situation above is inverted, i.e. when state protection of rights is weighed against federal power possibly implied under the Necessary and Proper Clause, the patterns and practices of the states similarly cannot be ignored. Just as the *Lopez* Court considered the displacement of state policy choices and the *Lawrence* Court considered the number of states that retained laws that prohibited sodomy, so too this Court cannot ignore the number of state that have expressly protected or deliberated abstained from violating the freedom to choose whether to purchase government-defined private health insurance.

---

[27] See *Roper v. Simmons*, 43 U.S. 551, 125 S.Ct. 1183.

[28] *Lawrence, supra*, at 572, citing 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986).

[29] *Id.* at 573.

[30] *Id.* at 579.

Here, exercising powers cutting to the core of their sovereignty - - protecting fundamental rights, the state have, one way or another, universally come to their own conclusions about the difficult and sensitive question of whether their citizens should be compelled to buy private health care insurance. Most prominently, in 2011, 66 percent of voters in the quintessential bellwether state of Ohio[31] added a 21st Section to Ohio's Bill of Rights,[32] explicitly affirming that no "law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system."[33] The measure, clearly in tension with a federal mandate to purchase government-defined health insurance, was approved overwhelmingly in each of Ohio's 88 counties. In approving this state constitutional amendment, Ohioans reviewed and approved of the following language, which appeared on their ballots: "The freedom *to not be forced* to purchase government-defined private health insurance is a fundamental right, implicit in the concept of ordered liberty and deeply rooted in our history and tradition."[34] Moreover, in approving this Amendment, Ohio and its citizens exercised a power central to its sovereignty:

---

[31] See http://www.governing.com/blogs/politics/Move-Over-Missouri-Iowa.html, last checked on February 1, 2012.

[32] See http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2011results/20111108Issue3.aspx.

[33] http://www.sos.state.oh.us/sos/upload/ballotboard/2011/3-fulltext.pdf.

[34] http://www.sos.state.oh.us/sos/upload/ballotboard/2011/3-argument-for.pdf.

the protection of fundamental rights through a citizen-initiated constitutional amendment - - a procedure preserved in its state constitution since 1851.

In 2010, the people of Arizona and Oklahoma, also through appeal to the sovereign powers enshrined in the states' respective constitutions, placed similar protections of their citizens' rights in their states' constitutions. That same year, in the bellwether state of Missouri,[35] over 70 percent of citizens approved a similar safeguard, also through statewide vote. Since just March of 2010, nine other states - - Virginia, Georgia, Idaho, Tennessee, Utah, New Hampshire, North Dakota, Kansas, and Louisiana - - have enacted similar statutory protections of the liberty of their citizens to not be compelled to purchase private government-defined health care insurance.

Meanwhile, people of 36 of the remaining 37 states have preserved this liberty through resisting a mandate, rather than through affirmative legislation. The failure of these states to enact a mandate cannot be explained away as mere oversight or happenstance: these states have abstained from instituted a mandate since their admission to the union, despite (1) widespread belief that states may enact nearly any such regulation under the auspices of their police powers;[36] (2) 105 years of Supreme Court precedent

---

[35] See http://www.governing.com/blogs/politics/Move-Over-Missouri-Iowa.html.

[36] See Randy Barnett, Why the Personal Mandate to Buy Health Insurance is Unprecedented and Unconstitutional, December 9, 2009 (observing that the states maintain "an effectively unlimited police power").

affirming that states may compel vaccination, i.e. health care, and thus *a fortiori* the purchase of health care insurance;[37] and (3) over 70 years of robust debate since California originally proposed that his state compel all personal earning less than $3,000 per year (then 90 percent of population) to purchase private health insurance.[38]

Moreover, the concept of a health insurance mandate has been *vigorously* debated nationwide for at least 22 years: "the concept of the individual health insurance mandate originated [sic] in 1989 at the conservative Heritage Foundation * * *."[39] Despite this, in this nation's history, no state other than Massachusetts has enacted an individual health insurance mandate. And since Massachusetts enacted a model in 2006, setting forth a blue print and perhaps heightening awareness of the capacity to impose a

---

[37] See *Jacobson v. Commonwealth of Massachusetts* (1905), 197 U.S. 11, 25 S.Ct. 358 (affirming the power of Massachusetts to compel its citizen to receive vaccines against their will, as against any federal constitutional right).

[38] See http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1780842/?page=1.

[39] See http://healthcarereform.procon.org/view.resource.php?resourceID=004182, last checked on November 28, 2011 (also noting that On October 2, 1989, the Heritage Foundation, extensively discussed the notion that a state government may wish to compel the purchase of health insurance, proclaiming "neither the federal government *nor any state* requires households to protect themselves from the potentially catastrophic costs of a serious accident or illness. Under the Heritage plan, there would be such a requirement," citing *Assuring Affordable Health Care for All Americans*, by Stuart M. Butler, published October 2, 1989.

mandate, no state has followed suit. This abstention in the face of over 100 years of Supreme Court permission, 70 years of vigorous public dialogue, and the Massachusetts "blueprint" demonstrates that 49 states *deliberately* refused to institute a private health insurance mandate (legislation introduced in many of these states has been consistently rejected).

Even further evidence that this refusal is deliberate is illustrated by the fact that several states, such as Vermont (the "Health Care Affordability Act") and Maine (the "Dirigo Health Reform Act") have enacted the equivalent of universal health care since 2006, without imposing an individual health insurance mandate. Meanwhile even in California, the state that originally proposed an individual mandate in 1939, voters expressly rejected this deprivation of their liberty in 1992, with 69 percent of Californians voting "no" on Proposition 166, a ballot measure that would have imposed an individual health insurance mandate.[40]

Thus, the states have overwhelmingly spoken on the propriety of forced purchase of government-defined health insurance. These exercises of sovereignty would be displaced if the mandate were imposed, and if federalism is to play its proper role in this constitutional analysis, the displacement of these policy choices cannot be ignored as this Court considers whether imposition of the mandate is "proper."

---

[40] See http://ballotpedia.org/wiki/index.php/California_Proposition_166,_Mandatory_Health_Insurance_(1992), last checked February 1, 2012.

Furthermore, upholding the mandate would disable the key auxiliary benefit of federalism is disabled. One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[41] The mandate displaces state policy choices and precludes states from serving as 50 laboratories for social and economic experiments without risk to the rest of the county, instead adopting the experiment of only *one state* on a highly-contentious issue where vastly different views prevail amongst the citizens of the states. And this even though many consider the Massachusetts experiment to be a failure: Massachusetts health care premiums continue to be the highest in the country, and government health care spending continues to sky-rocket. Yet the mandate forces Oklahomans, Ohioans, and Arizonans, very much against their will and better judgment, all under Massachusetts' health care policy. Because "state autonomy is a relevant factor in assessing the means by which Congress exercises its powers" under the Commerce Clause,[42] the mandate may not stand.

---

[41] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371 (1932) (Brandeis, J., dissenting).

[42] *Garcia*, 469 U.S., at 586, 105 S.Ct. 1005 (O'CONNOR, J., dissenting).

D. The mandate displaces liberties protected by the states in an area where states have historically been sovereign.

In considering the breadth of permissible Commerce power by way of the Necessary and Proper Clause, courts must "inquire whether the exercise of national power seeks to intrude upon an area of state concern,"[43] and be mindful of "traditional aspects of state sovereignty."[44] Accordingly, when adjudicating the outward boundaries of Congressional commerce power, *Lopez* found relevance in the finding that "it is well established that education is a traditional concern of the States."[45]

i. Health care, health insurance, and insurance contracts are traditional concerns of the states.

Likewise, regulation, or resistance to overregulation, of health care insurance, insurance contracts, and mandated insurance are all within the protected sphere of state sovereignty. States have "primary authority" in defining and enforcing laws

---

[43] *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring).

[44] See *National League of Cities v. Usery*, 426 U.S. 833, 841, 849, 96 S.Ct. 2465, 2469, 2473(1976); see also *New York v. United States*, *supra*, at 156-157.

[45] *Lopez*, at 581.

that protect the health, safety, and medical treatment of their citizens.[46]

In *Jacobson v. Massachusetts*, the Supreme Court rejected a constitutional challenge to a Massachusetts law requiring compulsory vaccinations, confirming that States may enact wholly intrastate measures to protect public health.[47] In *Jacobson*, the Supreme Court specifically recognized "the authority of a state to enact quarantine laws and '*health laws of every description*;'" alongside "all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states."[48]

It would be a perverse outcome, given that the purpose of federalism is to secure liberty (see *infra*), if this authority were to now be limited to only those laws which impose state power upon its citizens, rather than also recognizing those which protect the

---

[46] *Washington v. Glucksberg*, 521 U.S. 702 (1977) (the State has an "'unqualified interest in the preservation of human life'"); *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 281 (1990) ("choice between life and death is a deeply personal decision [and] the State may legitimately seek to safeguard the personal element of this choice"); *Roe v. Wade*, 410 U.S. 113, 156 (1973) ("responsibility for the health of the community" lies with the States); *Whalen*, 429 U.S. at 602-603 (State has inherent "interests in protecting health and potential life"); *Linder v. United States*, 268 U.S. 5, 18 (1925) ("direct control of medical practice in the states is beyond the power of the federal government").

[47] *Jacobson v. Massachusetts*, 197 U.S. 11(1905).

[48] *Id.*

public by ensuring the health care freedom of its citizens. And if "the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety," then some deference must be given to a state's determination that the public health is best protected by ensuring the health care freedom and choice of citizens of the state.[49] Indeed, when the purpose of government is to "safeguard the public health," this Court holds that "the mode or manner in which those results are to be accomplished is within the discretion of the state."[50]

Thus, "because fundamental structural concerns about dual sovereignty animate Commerce Clause cases, it is relevant that this case involves the interplay of federal and state regulation in areas * * * where 'states lay claim by right of history and expertise.'"[51] Consequently, any doubts regarding the extent of congressional commerce power within the domain of health care regulation must be resolved in favor of preserving state sovereignty and limiting federal intrusion.

---

[49] See *Lawson* v. *Steele*, 152 U. S. 133, 38 L.Ed. 385, 14 Sup. Ct. Rep. 499.

[50] *Id.*

[51] *Lopez*, *supra*, at 583, 115 S.Ct. 1624 (KENNEDY, J., concurring); see also *Morrison*, *supra*, at 617-619, 120 S.Ct. 1740.

ii. Protection of ordered liberty is a traditional concern of the states.

Further, were this court to imply federal power so as to override state protections of negative liberties, it would interfere with core state sovereignty. For instance, the independence of the state constitutions would be undermined, as that independence is currently understood within the states. Take Ohio, for instance, where the state supreme court affirms:

> [W]e believe that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are *unrestricted* in according greater civil liberties and protections to individuals and groups.[52]

The Ohio Supreme Court's 1941 ruling in *Direct Plumbing Supply v. City of Dayton* evidences the aforementioned tradition. In that case, the Court lauded the protections of the Ohio Constitution as central to the state's sovereignty in our federalist structure: "*** Ohio is a sovereign state and that the fundamental guaranties of the Ohio Bill of Rights have

---

[52] *Arnold v. Cleveland* (1993), 67 Ohio St.3d 335.

undiminished vitality. Decision here may be and is bottomed on those guaranties.[53]

However, if this Court upholds imposition of the federal mandate, displacing state policy, the result will be a state bill of rights that has vastly *diminished* rather than *un*diminished vitality - - one that leaves as an open question the seemingly axiomatic principle that "Ohio is a sovereign state." And the same is true of at least 12 other states.

In *United States v. Comstock*, this Court reiterated the limits of the Necessary and Proper Clause, referencing factors including: "the long history of federal involvement" and "the statute's accommodation of state interests."[54] The utter failure to accommodate state interest in an area of traditional state authority[55] requires this Court must strike the mandate and avoid displacing state guarantees of health care freedom.

II. "The spirit and letter of the constitution" is undermined where implied federal powers eviscerate state law that secures liberty.

The use of implied federal power to contravene state protections of fundamental liberties within the

---

[53] *Direct Plumbing Supply v. City of Dayton* (1941), 138 Ohio St. 540, 38 N.E.2d 70.

[54] *United States v. Comstock*, 130 S. Ct. 1949, 1965 (2010).

[55] These factors distinguish this case from *Raich*, where the statute under review was not an enumeration of fundamental liberty under a state constitution, and where illicit drug regulation originated at the federal level.

domain of health care is inconsistent with the purpose of the federal Constitution: the preservation of ordered liberty. As Chief Justice Marshall wrote, congressional enactments premised on the Necessary and Proper Clause, to be "proper," must be "consistent with the letter and spirit of the constitution."[56] Thus, Congress must exercise its authority under the Necessary and Proper Clause in a manner consistent with basic constitutional principles: when regulating through reliance on the attenuated "substantial effects" test, "the end chosen by Congress must not contravene the spirit of the Constitution."[57] And as Justice Scalia recognizes, "***that authority must be used in a manner consistent with the notion of enumerated powers-a structural principle that is as much part of the Constitution as the Tenth Amendment's explicit textual command."[58]

Thus, in assessing the propriety of implied federal power, this Court must take account of "the significance of federalism in the whole structure of the Constitution"[59] and our "dual system of government," which "*secures to citizens the liberties that derive from*

---

[56] *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819).

[57] *Garcia, supra*, 469 U.S., at 585, 105 S.Ct. 1005 (O'CONNOR, J., dissenting) ("It is not enough that the 'end be legitimate'; the means to that *end* chosen by Congress must not contravene the spirit of the Constitution").

[58] *Gonzales v. Raich*, at 2218-2219 (opinion concurring in judgment).

[59] *Lopez, supra*.

the diffusion of sovereign power."[60] This system of dual sovereignty denies "any one government complete jurisdiction over all the concerns of public life."[61] Instead, it empowers "[s]tates to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power."[62] Because the mandate displaces 49 state policies that clearly *protect* ordered liberty, many expressly so, the mandate would frustrate the very purpose for which federalism was devised.

A. The Constitution and its Federalist design exist to secure liberty.

"[T]he Constitution divides authority between federal and state governments *for the protection of individuals*. State sovereignty is not just an end in itself: '[r]ather, *federalism secures to citizens the liberties that derive from the diffusion of sovereign power.*'"[63] Put another way, "[t]he 'constitutionally mandated balance of power' between the States and

---

[60] *New York v. United States*, *supra*; *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995).

[61] *Bond v. United States*, 131 S.Ct. 2355 (2011).

[62] *Id.*

[63] *New York v. United States*, *supra*.

the Federal Government was adopted by the Framers *to ensure the protection of 'our fundamental liberties.'*"[64]

Accordingly, an interpretation of federal power that implies that which is not expressly granted, so as to swallow express state protections of ordered liberty, is antithetical to the reason this balance of power. This reason has been further expressed as follows "[j]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[65] With respect to these fronts, Alexander Hamilton explained to the people of New York that the new federalist system would suppress completely "the attempts of the government to establish a tyranny": "Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and *these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.*"[66]

---

[64] *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 3147 (1985), quoting *Garcia*, *supra*.

[65] *Gregory v. Ashcroft*, 426 U.S. 833, 96 S.Ct 2465.

[66] The Federalist No. 28, pp. 180-181 (C. Rossiter ed. 1961). (Emphasis added).

James Madison reverberated this principle, observing "In the compound republic of America, *** a *double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.*"[67] If this "double security to the rights of the people" is to be anything other than pyrrhic, "there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. *In the tension between federal and state power lies the promise of liberty.*"[68]

This past term, in *Bond v. United States*, the Court unanimously reiterated this principle, explaining, "[f]ederalism is more than an exercise in setting the boundary between different institutions of government for their own integrity . . . *Federalism secures the freedom of the individual.*"[69] If federalism exists to secure the freedom of the individual, than it must, at minimum as a rule of construction, favor state protections of liberty, and particularly those enshrined in state constitutions, when determining the extent of implied federal power that would eviscerate those rights.

---

[67] *Id.*, No. 51, p. 323.

[68] *Gregory v. Ashcroft, supra.*

[69] *Bond, supra.*

B. Freedom from compulsion to purchase "minimum essential coverage" is the type of liberty federalism is designed to protect.

Even amongst the normative overtones of our modern day, the word "liberty," retains readily ascertainable meaning when invoked in our constitutional calculations: state and federal courts have recognized "[t]he word 'liberty,' * * * does not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, * * *."[70] This "freedom from" view of liberty is consistent with federal courts' recognition that the federal Constitution is "a charter of negative rather than positive liberties."[71] And a "negative liberty" is freedom from state interference or intrusion -- in effect, "being let alone by the state."[72] Thus, the brand of federalism embraced by the spirit and letter of the federal constitution is oriented toward *advancing* the cause of "being let alone by the state;" and an expansive interpretation of federal power that shreds state law advancing this cause is antithetical to that spirit and letter.

---

[70] *Palmer v. Tingle* (1896), 55 Ohio St. 423, 45 N.E. 313, citing *People v. Marx*, 99 N. Y. 377, 2 N. E. 29. (Emphasis added.)

[71] *Jackson v. City of Joliet*, 715 F.2d 1200, 1203-04 (7th Cir.1983), citing *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir.1982).

[72] *Jackson*, 715 F.2d at 1204.

And there can be no doubt that express state protections of the right to be free from forced purchase of private government-qualified health insurance is in the spirit of this view of the constitution as a "charter of negative liberties." First, referring to the protected "substantive sphere of liberty," Justice Stephens wrote: "[w]hatever the outer limits of the concept may be, it definitely includes protection for matters 'central to personal dignity and autonomy.' It includes the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny." It is difficult to imagine a decision more important to one's destiny then that of how one will allocate a limited health care budget to provide for his or her health care needs, and perhaps that of his or her family. Indeed, forced health care expenditures in one arena necessarily limit the financial capacity, and thus disallow the dignity and autonomy, to obtain health care in another arena (even if that alternative arena may be more appropriate in protecting one's life, health, or welfare).

Second, if the less specific Due Process Clause protects "the traditional right of an individual to refuse unwanted lifesaving medical treatment,"[73] then an explicit state right protecting a citizen from having to pre-purchase that same medical treatment, at the risk of not being able to afford a preferential type or method of treatment, or even outcome, must also be protected. This protection of choice as against uniformity has already been upheld in the educational context: *Pierce v. Society of Sisters* struck a statute stating "those who fail or neglect or refuse to send

---

[73] *Cruzan*, *supra*, at 278-279.

their children to a public school. . . shall be guilty of a misdemeanor." Similarly here, the mandate imposes a one-size fits all solution in a sphere of life, health care, where choice is no less important. Indeed, The Supreme Court has acknowledged the sanctity of the physician-patient relationship in numerous substantive due process cases, beginning with *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Thus, Section 21 of Ohio's Bill of Rights, just like the other 12 explicit state protections, protects precisely the type of negative liberties federalism was designed to protect: it provides "No federal, state, or local law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system."[74] Clearly, protection from the compulsion to participate in a health care system, by virtue of a government mandate to purchase private health care insurance is a "freedom from state interference," with the effect of advancing the cause of "being let alone by the state." To reinforce this that this they type of liberty federalism exists to protect, Ohioans, in approving this state constitutional amendment, reviewed and affirmed the following: "The freedom *to not be forced* to purchase government-defined private health insurance is a fundamental right, implicit in the concept of ordered liberty and deeply rooted in our history and tradition."[75] Other state protections of this

---

[74] http://www.sos.state.oh.us/sos/upload/ballotboard/2011/3-fulltext.pdf.

[75] http://www.sos.state.oh.us/sos/upload/ballotboard/2011/3-argument-for.pdf

liberty share the key features of Ohio's constitutional safeguards.

Affirmation of the federal mandate's constitutionality would shred these safeguards, even though the very purpose of our federalist design would be obliterated were it to result in the thwarting, rather than recognition, of state attempts to preserve liberty. Indeed, this Court recognizes that federalism means that the United States Constitution provides a floor, not a ceiling, for individual rights enjoyed by state citizens.[76] The understanding recognizes that while "states may not deny individuals or groups the minimum level of protections mandated by the federal Constitution, there is no prohibition against granting individuals or groups *greater or broader protections*."[77] Yet if this Court to uphold the federal mandate, it would impose the very thing that federalism exists to guard against: "a prohibition against granting individuals or groups greater or broader protections" under state constitutions. This, although the United States Supreme Court has repeatedly reminded states that they are free to construe their state constitutions so as to provide different, and broader, protections of individual liberties than those offered by the federal Constitution.[78]

---

[76] *PruneYard Shopping Ctr. v. Robbins* (1980), 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741.

[77] Brennan, *State Constitutions and the Protection of Individual Rights* (1977).

[78] *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, citing, *e.g.*, *California v. Greenwood* (1988), 486 U.S. 35, 43, 108 S.Ct. 1625, 1630, 100 L.Ed.2d 30, 39 ("Individual States may

And states have responded by doing so, observing that "state courts are *unrestricted* in according greater civil liberties and protections to individuals and groups.[79] Consequently, this Court must avoid a construction of federal power that displaces state guarantees, constitutional and otherwise, of negative liberties.

C. The "Spirit and Letter" of the Constitution embraces a recognition that the Ninth Amendment favors state protection of ordered liberty over federal exercise of implied powers.

This Court recognizes that liberties not enumerated in the federal Constitution can be as fundamental as those enumerated.[80] Use of the Necessary and Proper Clause to transgress these fundamental unenumerated rights is inconsistent with the "spirit and letter" of the constitution, and not "proper." If the Ninth Amendment is to have *any* meaning, it protects "unenumerated" rights that are *actually enumerated* in state constitutions, such as Ohio's Health Care Freedom Amendment, alongside those of other states,

---

surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution.").

[79] *Arnold*, *supra*.

[80] See, *e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right of parents to educate their children in the German language); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right of parents to send their children to private Catholic school); *United States v. Troxel*, 530 U.S. 57 (2000) (right of parents to make decisions concerning care).

and prevents a construction of federal power that eviscerates these rights.

First, this court acknowledges the historic role of states and their constitutions as guardians of fundamental rights. In *Morisson,* this Court cited Rufus King's explanation during the ratification debates of the commonly-held view that "the fundamental rights of individuals are secured by express provisions in the state constitutions."[81] Indeed, constitutionally-protected liberty interests "may arise from two sources-the Due Process Clause itself and the laws of the States."[82] Meanwhile, "cases demonstrate that a State *creates* a protected liberty interest by placing substantive limitations on official discretion."[83] Lastly, this Court has cited the Ninth Amendment in support of the proposition that there is a "substantive sphere of liberty," entitled to protection, that extends beyond "the Bill of Rights [or] the specific practices of States at the time of the adoption of the Fourteenth Amendment."

Secondly, historical evidence supports a construction of the Ninth Amendment as a bulwark for protecting liberties enumerated under state law from an expansive interpretation of the Necessary and Proper Clause. Madison explained that, while the Tenth Amendment "exclude[s] every source of power

---

[81] *Morrison*, citing 1 Farrand 493.

[82] *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S. Ct. 1904, 1908 (1989).

[83] *Olim v. Wakinekona*, 461 U.S. 238, 249, 103 S. Ct. 1741, 1747 (1983).

not within the Constitution itself," the Ninth Amendment "guard[s] against a latitude of interpretation" of those enumerated powers.[84] Thus, whereas the Tenth Amendment limits Congress to its delegated powers, the Ninth Amendment prohibits an unduly broad interpretation of these powers. To this end, Madison explained the Ninth Amendment in terms that connect it directly with Federalist objections to the Bill of Rights:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration, and it might follow by implication, *that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that may be guarded against.* I have attempted it, as gentlemen may see by turning to the [Ninth Amendment].[85]

Thus, the Ninth Amendment exists to guard against "rights not singled out" in the federal Bill of Rights, such as health care freedom.

---

[84] 2 Annals of Cong. 1951 (1791) (referring to the 11th and 12th articles proposed to the States for ratification).

[85] James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in James Madison, Writings, *infra* note 32, at 437, 439. (Emphasis added.)

Further, state conventions that insisted on adding a Bill of Rights specifically suggested the addition of two separate amendments: one declaring the principle of enumerated federal power with all nondelegated power being reserved to the states, and the second declaring a rule of construction *limiting the interpretation of enumerated federal power.*[86] In fact, the Virginia Assembly was not convinced that federal power would be sufficiently limited, and delayed its ratification of the Bill of Rights due to its concern that the demand for a rule limiting the interpretation of enumerated federal power had been ignored.[87] While the Bill remained pending in Virginia, James Madison delivered a speech on the floor of the House of Representatives in which he explained the origin and meaning of the Ninth and Tenth Amendments.

According to Madison, these amendments were intended to limit the federal government's ability to interfere with rights protected by the states. The Ninth Amendment in particular, Madison explained, prohibited any *"latitude of interpretation" unduly extending the powers of the federal government into matters retained by the people of the several states.*[88] In response, Virginia abandoned its objections to the Ninth Amendment and ratified what we know as the

---

[86] Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEXAS L. REV. 597, 609 (2005).

[87] Lash, *The Lost Original Meaning*, *supra*, at 371-375.

[88] *Id.* at 384-93, citing James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), *reprinted in* WRITINGS, *supra* note 11, at 489.

Bill of Rights.[89] Thus the Ninth Amendment is a tool for limiting federal intrusion into matters believed best left under local control. Otherwise, enumerated federal power could be so broadly construed as to allow the federal government to regulate all matters not specifically placed out of bounds by the Bill of Rights, including rights protected under state law. The Ninth Amendment addressed this concern by ensuring that neither the language used in delegating powers nor the express rights enumerated in the Bill of Rights would be construed as the *only* limits on federal power. Instead, the intended effect of the Ninth Amendment is to prevent any interpretation of enumerated federal power that would allow federal authority to extend into legitimate rights protected by the states.

Accordingly, in 1803 St. George Tucker, author of the most authoritative treatise just subsequent to the Constitution's enactment, wrote that state governments "retain every power, jurisdiction and right not delegated to the United States, by the constitution, nor prohibited by it to the states."[90] According to Tucker, the principles of the Ninth and Tenth Amendments required that "the powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of

---

[89] *Id.* at 379-84.

[90] St. George Tucker, *View of the Constitution of the United States*, in 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND THE COMMONWEALTH OF VIRGINIA 141 (St. George Tucker ed., Augustus M. Kelley 1969) (1803).

the people, either collectively, or individually, may be drawn in question."[91]

Consequently, Justice Story's opinion in *Houston v. Moore* describes the Ninth Amendment as limiting the interpreted scope of federal power in order to preserve state autonomy.[92] This echoes James Madison's description of the Ninth as "guarding against a latitude of interpretation of federal power to the injury of the people's retained rights."[93]

Thus, "determining the scope of exclusive federal power must be guided by the letter and spirit of the Ninth Amendment."[94] And the Ninth Amendment "like the rest of the Bill of Rights, was in essence a device to ensure that the national government would be disabled from intruding upon the fundamental rights of its citizenry * * * It accomplishes this by endeavoring to preserve * * * rights located in state law (created or preserved by the people in the act of

---

[91] *Id.*, at 154. (Emphasis added.)

[92] *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 49 (1820) (Story, J., dissenting).

[93] James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), *reprinted in* WRITINGS, *supra* note 11, at 489.

[94] Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEXAS L. REV. 597, 609 (2005), citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 712 (Carolina Academic Press 1987) (1833).

state political union."[95] Put another way, "the Ninth Amendment prevents Congress from using its delegated powers to contravene an unenumerated federal right contained within a state constitution."[96]

In fact, the Ninth Amendment, alongside the remainder of the Bill of Rights, came about in response to the concern, raised by George Mason, that "the supremacy clause would [otherwise] render all federal laws paramount to State Bills of Rights."[97] Thus, "[t]he Ninth Amendment was originally intended to allow the people of each state to define unenumerated rights under their own constitution and laws, free from federal interference."[98] To this end, "[t]he Ninth Amendment *incorporates into the federal constitution state constitutional rights*, and secures them against federal invasion in the same way that the Constitution protects other federal constitutional rights."[99] Accordingly, even scholars who favor a highly-constrained application of the Ninth Amendment concede that "the ninth amendment is not a cornucopia of undefined federal rights, but rather . . . is limited to

---

[95] Calvin Massey, *The Anti-Federalist Ninth Amendment and its Implications for State Constitutional Law*, 1990 Wis. L. Rev. 1229, at 1232.

[96] Massey, *supra*, at 1232.

[97] *Id.*

[98] Wilmarth, *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 Am. Crim. L. Rev. 1261, 1297-98 (1989).

[99] Massey, *supra*, at 1254.

a specific function, well-understood at the time of its adoption: the maintenance of rights guaranteed by the law of the states."[100]

Scholars acknowledge this "Federalism Model of the Ninth Amendment" as "one that justifies a narrow or strict construction of enumerated federal powers, especially powers implied under the Necessary and Proper Clause."[101] Pursuant to this understanding, "although the Ninth and Tenth Amendments both limited federal power, they did so in different ways. The Tenth insured that the federal government would exercise only those powers enumerated in the Constitution. The Ninth Amendment went further, however, and *prohibited an expanded interpretation* of those enumerated powers."[102] This, at minimum, would "view the Ninth as a judicially enforceable rule of construction limiting the power of the federal government to interfere with the retained right of the people to local self-government."[103]

Here, the People of Ohio expressly determined that "The freedom *to not be forced* to purchase government-defined private health insurance is a fundamental right, implicit in the concept of ordered liberty and deeply rooted in our history and tradition." Accordingly, Ohio and numerous other states have

---

[100] See Russell Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, at 227, 228 (1983).

[101] See Lash, *Lost Original Meaning*, *supra*, note 10, at 355.

[102] Lash, *supra*, at 399.

[103] Lash, *supra*, at 346.

carefully defined, through sovereign political process established in their state constitutions, the fundamental rights of their citizens as including the right to be free from forced participation in any health care system – a right which clearly includes freedom from individual health insurance mandates. Protection of this right, as against a permissive interpretation of the Necessary and Proper Clause, is *the very thing* that the Ninth Amendment seeks to accomplish. Thus, this Court could not affirm the constitutionality of the mandate and shred these state rights, without ignoring the Ninth Amendment, and thereby ignoring the "spirit and letter" of the constitution in the process. Consequently, the mandate is not "proper."

Finally, the judicial concerns associated with protecting unenumerated rights, i.e., tension with results of the democratic process ("public debate" and "legislative action"), is not present where those rights are *enumerated* by states, which have carefully defined fundamental rights through legislative and public debates, and public elections, and then enshrined those rights in their states' constitutions.[104] In other words, the rationale for avoiding recognition of unenumerated rights, as against federal power, is of no force where states have carefully defined a

---

[104] See *Glucksberg*, 521 U.S. at 720, 117 S.Ct. 2258 (stating that the Court must restrain the expansion of substantive due process "because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended" and because judicial extension of constitutional protection for an asserted substantive due process right "place[s] the matter outside the arena of public debate and legislative action."

fundamental right as implicit in the concept of ordered liberty.[105]

In his dissent in *Troxel,* Justice Scalia observed that it is "entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the state has no power to interfere with parents' authority over the rearing of their children."[106] But *equally true here*, then, it is "entirely compatible with the commitment to representative democracy" for the People of a State, acting through the initiative process, to declare that a particular liberty - especially one that could not otherwise claim a long tradition of *judicial* protection - is fundamental and for this Court to acknowledge and defer to their judgment. Where the People, or their representatives in state legislatures, act to protect a particular liberty, this provides invaluable guidance to judges who must distinguish rights deserving of Ninth Amendment protection.

Consequently, the "spirit and letter" of the constitution demands that infringements upon fundamental liberties enumerated under state law call for heightened scrutiny of the means by which Congress exercises even its *enumerated* powers. And infringements on these liberties by way of implication of the Necessary and Proper Clause is not "proper" because it violates the purpose for which the Ninth Amendment was drafted – a purpose, in this matter,

---

[105] See, *e.g.*, *Troxel*, 530 U.S. at 91 (Scalia, J., dissenting).

[106] *Id.*

embodied by the states' protection of health care freedom.

CONCLUSION

Unless this Court wishes to frustrate the purposes of federalism - the protection of liberty and capacity for state experimentation, it must affirm the judgment below.

Respectfully submitted,

Christopher P. Finney
Counsel of Record
Of Counsel,
1851 Center for Constitutional Law
Finney, Stagnaro, Saba
& Patterson Co., LPA
2623 Erie Avenue
Cincinnati, OH 45208
(513) 533-2980
cfinney@fssp-law.com

Curt C. Hartman
Of Counsel,
1851 Center for Constitutional Law
The Law Firm of Curt C. Hartman
3749 Fox Point Court
Amelia, OH 45102
(513) 752-8800
hartmanlawfirm@fuse.net

Maurice Thompson
1851 Center for Constitutional Law
208 E. State Street
Columbus, Ohio 43215
(614) 340-9817
mthompson@ohioconstitution.org

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

No. 11–398

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *ET AL.*,
Petitioners,

v.

STATE OF FLORIDA, *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* EMPLOYER SOLUTIONS STAFFING GROUP IN SUPPORT OF RESPONDENTS ON THE *MINIMUM COVERAGE QUESTION*

REBECCA J. LEVINE
Counsel of Record
THIEL, CAMPBELL, GUNDERSON, ANDERSON AND LEVINE PLLP
7300 Metro Blvd, Suite 630
Edina, Minnesota 55439
(952) 920-8444
rlevine@thielfirm.com

Counsel for *Amicus Curiae*

QUESTION PRESENTED

Amicus will address the following question, which corresponds to Question 1 (the Minimum Coverage Question) in the petition for a writ of certiorari:

Does a conclusion that Congress' enactment of the minimum coverage provision of the Patient Protection and Affordable Care Act is a valid exercise of its legislative power under the interstate Commerce Clause provision thereby, *ipso facto,* give Congress a general police power under the Constitution, without any objective limiting principles, despite this Court's unbroken line of precedents holding that no such power is constitutionally appropriated to Congress?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....6

INTEREST OF AMICUS.....11

SUMMARY OF ARGUMENT.....14

ARGUMENT—

THE MINIMUM COVERAGE PROVISION IS NOT A VALID EXERCISE OF CONGRESS' COMMERCE CLAUSE POWER.....18

I. Petitioners' argument that the minimum coverage provision is a constitutionally permissible means of addressing Congress' legitimate concerns, even though it seeks to regulate "inactivity" (failure to purchase minimum coverage), lacks any foundation in the

Page

Constitution's text or the Court's precedents 18

II. If the word "commerce" is to retain any meaning within our constitutional vocabulary, it must remain moored to the inherent root meaning of activity of some kind—a volitional choice to *do* something 23

III. The deference to congressional activity that follows from a vague, general Commerce Clause oversight test likely would result in the rise of a strong, overarching national police power that would confine the regulatory authority of the states merely to congressionally overlooked interstices of government inherent in their sovereignty 29

IV. By nullifying existing Commerce Clause jurisprudence, the Court's logic would threaten the proper limits on Congress' commerce power and allow Congress to exercise police powers that

the Constitution reserves to the States 34

CONCLUSION 38

TABLE OF AUTHORITIES

Cases: **Page**

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 19

Carter v. Carter Coal Co., 298 U.S. 238 (1936) 27,35

Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241 (1964) 24

Hosanna-Tabor Lutheran Church and School v. *Equal Employment Opportunity Commission*, 565 U.S. ___ (2012) 30

Jacobellis v. Ohio, 378 U.S. 184 (1964) 30

Jacobson v. Commonwealth, 197 U.S. 11 (1905) 25

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 25

License Cases, 5 How. 504 (1847) 29

Osborne v. Ohio, 495 U.S. 103 (1990) 22

Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011)..... 28

Swift & Co. v. United States, 196 U.S. 375 (1905)..... 21, 24

United States v. Darby Lumber Co., 312 U.S. 100 (1941)..... 27

United States v. E. C. Knight Co., 156 U.S. 1 (1895)..... 23, 27

United States v. Jones, 565 U.S. ___, ___ (2012) (Alito, J., *concurring in the judgment*)..... 30

United States v. Lopez, 514 U.S. 549 (1995)..... 21

United States v. Morrison, 529 U.S. 598 (2000)..... 26

Utah Highway Patrol Assn v. American Atheists, Inc., 565 U.S. ___, ___ (2011) (Thomas, J., *dissenting from denial of writ of certiorari*)..... 30

Wickard v. Filburn, 317 U.S. 111 (1942).....22, 25

Constitution and Statutes:

U.S. Const. Art. I,

Sec. 8

Cl. 3

(Commerce Clause).....*passim*

U.S. Const. Art. VI,

Cl.2.....31

Longshore and Harbor Workers' Compensation

Act of 1972, 33 U.S. C. § 901 *et seq*.....19

Patient Protection and Affordable Care Act,

Pub. L. No. 111-148, 124 Stat. 119, 26 U.S.C.A.

5000A(a).....*passim*

Miscellaneous:

"The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents, December 12, 1787." Web. http://www.constitution.org/afp/pennmi00.htm. Retrieved on Jan 20, 2011.....32

"The Address and reasons of dissent of the minority of the convention, of the state of Pennsylvania, to theirconstituents." Page 2. Philadelphia : Printed by E. Oswald ..., [1787]. Signed on p. [3] by Nathaniel Breading and twenty others; followed by the vote of the convention on ratification of the Constitution. Dated: Philadelphia, Dec. 12, 1787. Library of Congress Collection. Web.

http://memory.loc.gov/cgi-bin/query/D?rbpebib:2:./temp/~ammem_5cWX::@@@mdb=mcc,gottscho,detr,nfor,wpa,aap,cwar,bbpix,cowellbib,calbkbib,consrvbib,bdsbib,dag,fsaall,gmd,pan,vv,presp,varstg,suffrg,nawbib,horyd,wtc,toddbib,mgw,ncr,ngp,musdibib,hlaw,papr,lhbumbib,rbpebib,lbcoll,alad,hh,aaodyssey,magbell,bbc,dcm,raelbib,runyon,dukesm,lomaxbib,mtj,gottlieb,aep,qlt,coolbib,fpnas,aasm,denn,relpet,amss,aaeo,mff,afc911bib,mjm,mnwp,rbcmillerbib,molden,ww2map,mfdipbib,afcnyebib,klpmap,hawp,omhbib,rbaapcbib,mal,ncpsbib,ncpm,lhbp

rbib,ftvbib,afcreed,aipn,cwband,flwpabib,wpapos,cmns,psbib,pin,coplandbib,cola,tccc,curt,mharendt,lhbcbbib,eaa,haybib,mesnbib,fine,cwnyhs,svybib,mmorse,afcwwgbib,mymhiwebib,uncall,afcwip,mtaft,manz,llstbib,fawbib,berl,fmuever,cdn,upboverbib,mussm,cic,afcpearl,awh,awhbib,sgp,wright,lhbtnbib,afcesnbib,hurstonbib,mreynoldsbib,spaldingbib,sgproto,scsmbib,afccalbib,mamcol.
Retrieved on Jan 20, 2011.....32

"The Emperor's New Clothes," Hans Christian Andersen (1837).....29

Macbeth, act 5, scene 5, line 23.....35

Variant Texts of the Virginia Plan, Presented by Edmund Randolph to the Federal Convention, May 29, 1787. Texts A, B and C. The Avalon Project, Lillian Goldman Law Library, Yale Law School. Web. http://avalon.law.yale.edu/18th_century/vatexta.asp
Retrieved on Jan. 20, 2011.....37

INTEREST OF AMICUS CURIAE[1]

Employer Solutions Staffing Group LLC ("ESSG") submits this brief pursuant to Rule 37.3 as Amicus Curiae in support of Respondents on Question 1 (Minimum Coverage Question) in the petition for a writ of certiorari.

ESSG is a temporary employment staffing company, located in suburban Minneapolis, Minnesota, that operates in over 25 states in the United States. In 2011, ESSG employed over 17,000 individuals across the U.S. on a temporary basis.

Temporary and contract staffing firms play a vital role in the U.S. economy by providing employment flexibility for employees and businesses. Staffing firms recruit, screen, select and employ workers and assign them to support or supplement the work force of their clients in various situations, such as employee absences, skill shortages, seasonal workloads and special assignments or projects. Employees work in virtually every job category, including industrial labor, office support, health care,

---

[1] The blanket consents of Petitioners and Respondents for the filing of this brief are on file with the Clerk of Court. Pursuant to Rule 37.6, Amicus certifies that no part of this brief was authored or provided by a counsel for any party, nor did any such counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief.

engineering, information technology, and various professional and managerial positions.

Staffing firms generally are the employers of record for the workers they assign to clients and are responsible for paying their wages, withholding and remitting employment taxes (including Social Security and unemployment insurance) and providing workers' compensation coverage.

High employee turnover and the limited availability to staffing firms of health insurance products for temporary workers will create major challenges for staffing firms seeking to comply with the Patient Protection and Affordable Care Act.

The unpredictable nature of temporary work and low employee participation in staffing firm current health plans present serious underwriting challenges for health insurance carriers. As a result, the only health plans most staffing firms have been able to offer practically to date are so called "mini med" plans. If those plans are abolished in 2014, it will be virtually impossible for staffing firms to offer temporary workers minimum essential coverage unless alternative insurance plans can be designed to meet the unique needs of those workers.

In addition, a serious potential obstacle to covering temporary workers, whether in the private health insurance market or through state exchanges, is the Patient Protection and Affordable Care Act's nondiscrimination provisions. Those provisions prohibit insured group health plans from discriminating in favor of highly compensated individuals with respect to eligibility and benefits.

Employers that violate the rules face heavy penalties.

Because staffing firms have few practical or economic options for providing health coverage to their temporary workers, they are more exposed than most employers to tax penalties under the employer-shared responsibility provisions of the Act.

Without an exception to the imposition of such penalties, a staffing firm could be assessed a penalty on all of its full-time headquarters and branch staff employees irrespective of whether they are getting subsidies and even if they are covered under the firm's group health plan. Such "double payments" would create a major disincentive to offering coverage to any workers.

A corollary to any exclusion of temporary workers from the offer of coverage provisions is an exclusion from the auto enrollment requirement. Mandated automatic enrollment in employer health plans for workers who come and go with such high frequency and unpredictability, and who will mostly opt out in any event, would be virtually impossible to administer and would impose administrative and compliance costs on staffing firms with no meaningful benefit to workers.

The employer tax penalties in the Act will increase employer costs and drive up the price of goods and services. Job losses are inevitable and likely will total hundreds of thousands by the most conservative estimate, mostly affecting low income workers. The actual toll may not be known for some time, but the specter of those penalties, and the

uncertainty regarding their financial impact, will be a significant present damper on economic activity and job creation.

SUMMARY OF ARGUMENT

Constitutional law is not indifferent to considerations of degree. Here, it cannot be indifferent to them without an expansion of the Commerce Clause that would absorb or imperil the reserved powers of the states.

Petitioners argue that a national health care problem requires a governmentally imposed solution and that whatever solution Congress chooses to enact is, *ipso facto*, constitutional because it is chosen by Congress. But, even an acknowledged national exigency does not create constitutional authority where none exists.

Their argument that the minimum coverage provision is a constitutionally permissible means of addressing Congress' legitimate concerns, even though it seeks to regulate "inactivity" (failure to purchase minimum coverage), lacks any foundation in the Constitution's text or the Court's precedents.

Congress regulated an act (the *purchase* of essential minimum coverage) to compel performance of a future act (*payment* of future health care expenses) that *might* result from another potential future act (*seeking and consuming* health care services). The causal linkage between the compelled act (purchasing coverage) and the two potential future acts is so attenuated as to make the basis of

any congressional assertion of Commerce Clause power tangential, at best.

The Commerce Clause grants Congress the power to "regulate" *something*. But the thing to be regulated still must *be* "something" and that "something" cannot be inactivity, which, by definition and logic, is the absence of a requisite "something," here some kind of *commercial activity*.

If the word "commerce" is to retain any meaning within our constitutional vocabulary, it must remain moored to the inherent root meaning of activity of some kind—a volitional choice to *do* something. It does not represent or convey the absence of activity or the possibility, or even inevitability, of future activity.

The only defensible, objective link between the Commerce Clause and Congress' power to legislate under that enumerated power is the condition precedent of some sort of recognizable volitional commercial activity by an individual or entity. Such volitional acts, in a manner akin to the criminal common-law concept of *actus reus,* show objective indicia evidencing an individual or entity's *engagement in* an activity that makes imposition of Commerce Clause-based legislation on such activity consonant with traditional notions of federalism.

Petitioners appear to argue that because Congress concluded that, almost to a certainty, nearly every American someday would consume health care services, and thereby voluntarily enter the stream of commerce, it constitutionally could exert Commerce Clause authority over every

American citizen and resident national now, even before the allegedly inevitable activity occurs. But a logical, or even practical, certainty about a future event does not empower Congress to exercise an enumerated power before the activity, or any related part of it, actually occurs.

The refusal to purchase a privately sponsored and offered product or service (even one that may likely or, possibly, even inevitably, be necessary) is not "commerce" in the constitutional sense, nor is the aggregation of such refusal by any number of similarly-situated individuals "commerce." Moreover, the gross or net effect on the national economy of such refusal, whether considered in its individual or aggregate effect, is not "commerce" either.

To sanction such congressional regulation in this area would be to allow Congress to appropriate to itself an immense degree of national power not intended by the Founders or established in the text of the Constitution. It would represent a significant diminution in the balance between federalism and a centralized national governmental power.

If the Court decides that the minimum coverage provision is sustainable under the existing Commerce Clause framework, it must then squarely address the resulting constitutional issue: whether the federal government then has either a *de facto* or *de jure* police power in the area of national health and health care regulation, and, perhaps, other areas, as well.

Reversal of the court of appeals' decision here could very well remove any constitutional limit on

Congress' Commerce Clause power. No textually-based, objectively articulable confirmatory test would then be available. Reason-guided objectivity of disputes over Congress' interstate Commerce power would be a mirage. Crafting even such a vague oversight test would likely prove very difficult.

The deference to congressional activity that follows from any such vague, general oversight test likely would result in the rise of a strong, overarching national police power that would confine the regulatory authority of the states merely to congressionally overlooked interstices of government inherent in their sovereignty.

The decision to grant what amounts to a general police power to Congress under the Commerce Clause also must be judged by its practical consequences.

If Congress constitutionally may compel the purchase of health care insurance may Congress not also under the same theory compel the same individuals to donate their body tissues and organs once the conscripted donor becomes a hopelessly, irretrievably unconscious patient so that those tissues and organs can be used to restore the otherwise hopelessly ill, but still salvageable individual? This method would be cheaper than manufacturing artificial tissue and organs and would, therefore, reduce the aggregate economic cost of health care nationally.

What is to stop Congress from requiring individuals to donate their tissues and organs once the donors become hopelessly unconscious patients

because those tissues and organs are greatly needed for study and experimental trial to help those other Americans who can be salvaged? This method would be cheaper on an aggregate basis nationally than having to raise animals and use their tissue and organs or to manufacture synthetic tissue and organs.

The same can be said for mandatory donation of embryonic stem cells after the expiration of a set period of non-use.

By nullifying existing Commerce Clause jurisprudence, the Court's logic would threaten the proper limits on Congress' commerce power and allow Congress to exercise police powers that the Constitution reserves to the States.

ARGUMENT—

THE MINIMUM COVERAGE PROVISION IS NOT A VALID EXERCISE OF CONGRESS' COMMERCE CLAUSE POWER

I. Petitioners' argument that the minimum coverage provision is a constitutionally permissible means of addressing Congress' legitimate concerns, even though it seeks to regulate "inactivity" (failure to purchase minimum coverage), lacks any foundation in the Constitution's text or the Court's precedents.

Congress enacted the Patient Protection and Affordable Care Act, which includes a requirement for "minimum essential coverage" for health care, 26 U.S.C.A. 5000A(a) (the minimum coverage provision) (Reprinted in Pet. Br. on Minimum Coverage Issue, at 1a), to address an admittedly serious and persistent crisis in the market for health care, which accounts for more than 17% of the nation's gross domestic product. Millions of Americans do not have health insurance, but, nonetheless, participate to varying degrees as consumers in the health care market. They consume health care services for which they often do not or cannot pay, and thus shift the cost of paying for such health care services to other market participants. The result is higher insurance premiums, which, in turn, make insurance potentially unaffordable to even more people.

Petitioners argue that this national problem requires a governmentally imposed solution and that whatever solution Congress chooses to enact is, *ipso facto,* constitutional because it is chosen by Congress. (Pet. Br. on Minimum Coverage Issue, at 35-37) Petitioners' illogical syllogism is: 1. There is a problem; 2. The problem requires a constitutional solution by Congress; 3. Therefore, whatever solution Congress chooses is constitutionally permissible.

But, Petitioners' argument that the minimum coverage provision is a constitutionally allowable means of addressing Congress' legitimate concerns, even though it seeks to regulate "inactivity" (failure to purchase minimum coverage), lacks any foundation in the Constitution's text or the Court's precedents.

Even an acknowledged national exigency does not, *sua sponte*, create constitutional authority where none exists. "Extraordinary conditions do not create or enlarge constitutional power." *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 528 (1935). The mere desire, or even need, for a remedy to an acknowledged crisis, however great the practical difficulty of shaping a proper remedy may be, cannot be the trigger for a non-existent constitutional power to arise Phoenix-like from ashes that never even existed. An economic emergency, no matter how urgent, cannot justify the exercise of "extraconstitutional authority." *Id.,* at 529.

Petitioners contend that Congress *did* regulate an activity in the Patient Protection and Affordable Care Act—the future consumption of health care services by persons who likely will be unable to pay for such services. "[T]he uninsured as a class are active in the market for health care, which they regularly seek and obtain." (Pet. Br. on Minimum Coverage Issue, at 50) They argue that individuals must pre-purchase minimum health care coverage because "there is no practical way to limit an insurance requirement to those 'who do not pay for a portion of their health care.'" (Pet. Br. on Minimum Coverage Issue, at 43)[2]

---

[2] This requirement is akin, for instance, to that which applies to employers that hire maritime workers subject to the Longshore and Harbor Workers' Compensation Act of 1972, 33 U.S. C. § 901 *et seq*. Such employers must adequately secure their potential future obligations for work-related injury compensation and health care services by pre-purchasing approved workers' compensation

But the purported activity regulated (consumption of health care services) is, in fact, potential future activity that is two steps removed from the actual behavior that is compelled by congressional action. Congress regulated an act (the *purchase* of essential minimum coverage) to compel performance of a future act (*payment* of future health care expenses) that *might* result from another potential (Petitioners argue, "inevitable") (Pet. Br. on Minimum Coverage Issue, at 35-37) future act (*seeking and consuming* health care services). The causal linkage between the compelled act (purchasing coverage) and the two potential future acts is so attenuated as to make the basis of any congressional assertion of Commerce Clause power tangential, at best.

The Commerce Clause grants Congress the power to "regulate" *something*. In the text of the relevant clause that "something" is stated to be "commerce"—thus, *Congress may regulate commerce.* But the thing to be regulated still must *be* "something" and that "something" cannot be

---

insurance coverage or by "furnishing satisfactory proof to the Secretary of . . . financial ability to pay such compensation and receiving an authorization from the Secretary to pay such compensation directly." 33 U.S.C. § 932(a)

But in this situation, the individual or corporate entity willingly has donned the cap of "employer" by actively *hiring* individuals to work in covered maritime employment. This is quintessential volitional activity, which Congress has the power to regulate under the Commerce clause.

inactivity, which, by definition and logic, is the absence of a requisite "something," here some kind of *commercial activity*. It is the plain text of the Commerce Clause itself that requires more than some kind of hypothetical, inchoate activity for Congress to focus its "regulating" power on.

This is not the kind of nitpicking that the Court has shown its impatience with in the past. *See United States v. Lopez*, 514 U.S. 549, 569-571 (1995) (Kennedy, J., *concurring*) (noting that the Court's commerce cases have rejected "semantic or formalistic categories" in favor of "broad principles of economic practicality"). *See also Swift & Co. v. United States*, 196 U.S. 375, 398 (1905). ("[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.") Instead, the requirement is an *a priori* textual hurdle that must be surmounted before Congress can act under the Commerce Clause. Such an insistence on some degree of allegiance to the text of the Constitution is not a mere formalistic division of activity and inactivity. It is what the Constitution itself demands.

II. If the word "commerce" is to retain any meaning within our constitutional vocabulary, it must remain moored to the inherent root meaning of activity of some kind—a volitional choice to *do* something. It does not represent or convey the absence of activity

or the possibility, or even inevitability, of future activity.

There is a fundamental philosophical, logical, practical and constitutional difference between *compelling* behavior in the first instance and *regulating* volitional behavior. That is, there is a fundamental difference between making people do things and regulating what they already have voluntarily chosen to do.

If the word "commerce" is to retain any meaning within our constitutional vocabulary, it must remain moored to the inherent root meaning of activity of some kind; that is, it must relate in some real sense to a transaction, the movement of persons and things, communication, the transmission of intelligence, negotiation, acquisition and possession, and the like. Each of these discrete undertakings constitutes an activity—a volitional choice to do something; none represents or conveys the absence of activity or the possibility, or even inevitability, of future activity.

The only defensible, objective link between the Commerce Clause and Congress' power to legislate under that enumerated power is the condition precedent of some sort of recognizable volitional commercial activity by an individual or entity. At the extreme, attenuated end of the spectrum of such triggering activity would be, for instance, *growing* a small amount of wheat for home and farm consumption (*Wickard v. Filburn*, 317 U.S. 111 (1942)) or *acquiring and possessing* child pornography solely for personal use (*Osborne v. Ohio*, 495 U.S. 103 (1990)).

These are at least volitional acts that, in a manner akin to the criminal common-law concept of *actus reus,* show objective indicia evidencing an individual or entity's *engagement in* an activity that makes imposition of Commerce Clause-based legislation on such activity consonant with traditional notions of federalism.[3]

Craftspersons, for instance, who choose not to produce and market their customary wares are not engaging in a type of negative or potential commercial activity. They are not participating in any activity at all. (The exception, of course, may be the craftsperson who refuses to produce or sell their wares as a form of a market-directed boycott, in protest of price-controls or distribution restrictions, for instance, like the French and Belgian diary farmers who dump their milk in protest at low prices. But that is not suggested here as a basis for a person's refusal to purchase mandated health coverage.) To call the withdrawal from or refusal to participate in activity a form of commerce is to drain the word of any recognizable constitutional meaning.

---

[3] The Court has rejected an intent or *mens rea* bright-line test for determining when Congress' Commerce Clause power becomes operative on an activity. *See United States v. E. C. Knight Co.,* 156 U.S. 1, 13 (1895). ("[T]he intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce.")

An individual or entity may wholeheartedly throw itself into the stream of interstate commerce, and, of course, be subject to regulation by Congress under the Commerce Clause. An individual or entity may even carry out activities that have a direct and substantial effect on the stream of commerce but fall short of full immersion in it. This activity is also regulable. *E.g., Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964) And, in a few rare instances, an individual or entity may undertake an activity that may cause only miniscule ripples, however infinitesimal and undetectable, in the stream of commerce and still be legitimately regulated by Congress under the Commerce Clause. *E.g., Wickard v. Filburn*, 317 U.S. 111 (1942). "[The] current thus existing is a current of commerce among the States, and the [activity] . . . is a part and incident of such commerce." *Swift & Co. v. United States, supra,* 196 at U.S. at 398-399. But where the absence of any current, or even ripples, in the stream of commerce is the result of the inactivity of an individual or entity, Congress is impotent to exert any power under the Commerce Clause.

Petitioners appear to argue that because Congress concluded that, almost to a certainty, nearly every American someday would consume health care services (Pet. Br. on Minimum Coverage Issue, at 43), and thereby voluntarily enter the stream of commerce, it constitutionally could exert Commerce Clause authority over every American citizen and resident national now, even before the allegedly inevitable activity occurs. But a logical, or even practical, certainty about a future event does not empower Congress to exercise an enumerated

power before the activity, or any related part of it, actually occurs.

While Congress may view the health of the body politic as a valuable and essential national resource, it may not thereby bootstrap its authority to regulate the field without identifying a legitimate enumerated power in the constitution that condones such regulation. *Jacobson v. Commonwealth*, 197 U.S. 11, 22 (1905) (Congress may assert legislative power only when it acts under "powers . . . expressly granted in the body of the Constitution and such as may be implied from those so granted.").

The refusal to purchase a privately sponsored and offered product or service (even one that may likely or, possibly, even inevitably, be necessary) is not "commerce" in the constitutional sense, nor is the aggregation of such refusal by any number of similarly-situated individuals "commerce." Moreover, the gross or net effect on the national economy of such refusal, whether considered in its individual or aggregate effect, is not "commerce" either. The simple or exponential multiplication of zero, is still zero.

The Court has noted that "Congress' power to regulate interstate commerce may be restricted by considerations of federalism and state sovereignty." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 n. 13 (1979). "[T]he concern... that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between

national and local authority seems well founded." *United States v. Morrison*, 529 U.S. 598, 615 (2000).[4]

---

[4] That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State.

...

It is vital that the independence of the comercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States, as required by our dual form of government, and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.

Additionally, the Court has cautioned that

> to a constitutional end, many ways are open, but to an end not within the terms of the Constitution, all ways are closed. . . . [S]ince every addition to the national legislative power to some extent detracts from or invades the power of the states, it is of vital moment that, in order to preserve the fixed balance intended by the Constitution, the powers of the general government be not so extended as to embrace any not within the express terms of the several grants or the implications necessarily to be drawn therefrom.
>
> *Carter v. Carter Coal Co.*, 298 U.S. 238, 291, 294-295 (1936), *limited in other respects by, United States v. Darby Lumber Co.*, 312 U.S. 100, 123 (1941).

To sanction such congressional regulation in this area would be to allow Congress to appropriate to itself an immense degree of national power not

---

United States v. E. C. Knight Co., supra, 156 U.S. at 12-13.

intended by the Founders or established in the text of the Constitution. It would represent a significant diminution in the balance between federalism and a centralized national governmental power.

III. The deference to congressional activity that follows from a vague, general oversight test likely would result in the rise of a strong, overarching national police power that would confine the regulatory authority of the states merely to congressionally overlooked interstices of government inherent in their sovereignty.

Nonetheless, if the Court decides that the minimum coverage provision is sustainable under the existing Commerce Clause framework, it must then squarely address the resulting constitutional issue: whether the federal government then has either a *de facto* or *de jure* police power in the area of national health and health care regulation, and, perhaps, other areas, as well.

Petitioners conceded at oral argument before the Court of Appeals for the District of Columbia in *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011) (and, presumably will do so at oral argument before this Court) the "lack of any doctrinal limiting principles", *id.*, at 13, to "congressional mandates that any American purchase any product or service in interstate commerce." *Id.*, at 14.

To call Petitioners' position on Congress' Commerce Clause power anything other than an earnest desire for the Court to recognize a general police power allowing Congress to impose "a direct requirement for most Americans to purchase any product or service", *id.*, at 16, is to engage in a sort of collective denial (*à la* "The Emperor's New Clothes" fairytale) that the Commerce Clause itself is still the actual topic of analysis. The general police power, after all, is

> nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same powers -- that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates . . ..
>
> *License Cases*, 5 How. 504, 583 (1847).

Reversal of the court of appeals' decision here could very well remove any constitutional firewall on Congress' Commerce Clause power. Adoption of Petitioners' argument throws Pandora's box wide open. No textually-based, objectively articulable confirmatory test would then be available. Only something akin to Justice Stewart's subjective essay: The "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it" test. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., *concurring*). *See also United States v. Jones,* 565 U.S. ___, ___ (2012) (Alito, J., *concurring in the judgment*) ("We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed . . .." Slip op. at 13)

Reason-guided objectivity of disputes over Congress' interstate Commerce power would be a mirage. The Court's only hope of effective oversight would be to develop some broad, generally-articulable test to prevent complete autonomy by Congress over regulation of national life. Crafting even such a vague test would likely prove as difficult as that which has been faced by the Court in its efforts to develop and apply a usable objective test relating to the public exhibition of religious symbols by governmental entities. *See Utah Highway Patrol Assn v. American Atheists, Inc.*, 565 U.S. ___, ___- ___ (2011) (Thomas, J., *dissenting from denial of writ of certiorari*). *See also Hosanna-Tabor Lutheran Church and School v. Equal Employment Opportunity Commission,* 565 U.S. ___, ___ (2012) ("We are reluctant, however, to adopt a rigid formula

for deciding when an employee qualifies as a minister." Slip op. at 15)

Likewise, an attempt to provide a limiting principle on congressional reach under such a police power by relying on the clause of the Constitution that provides that only laws "which shall be made in Pursuance" of the Constitution are sustainable as "the supreme Law of the Land," Art. VI, cl. 2, is unlikely to effectively provide a guidepost for evaluating congressional overreaching. Even while the Constitution was being debated during ratification, however, the fecklessness of such a circular control on congressional power was decried.

> It has been alledged [sic] that the words "pursuant to the constitution," are a restriction upon the authority of Congress, but when it is considered that by other sections they are invested with every efficient power of government, and which may be exercised to the absolute destruction of the state governments, without any violation of even the forms of the constitution this seeming restriction, as well as every other restriction in it, appears to us to be nugatory and delusive; and only introduced as a blind upon the real nature of the government. In our opinion, "pursuant to the

> constitution," will be co-extensive with the will and pleasure of Congress, which, indeed, will be the only limitation of their powers.

"The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents, December 12, 1787." Web. http://www.constitution.org/afp/pennmi00.htm. Retrieved on Jan. 20, 2011. *See also* "The Address and reasons of dissent of the minority of the convention, of the state of Pennsylvania, to their constituents." Page 2. Philadelphia : Printed by E. Oswald ..., [1787]. Signed on p. [3] by Nathaniel Breading and twenty others; followed by the vote of the convention on ratification of the Constitution. Dated: Philadelphia, Dec. 12, 1787. Library of Congress Collection. Web. http://memory.loc.gov/cgi-bin/query/D?rbpebib:2:./temp/~ammem_5cWX::@@@mdb=mcc,gottscho,detr,nfor,wpa,aap,cwar,bbpix,cowellbib,calbkbib,consrvbib,bdsbib,dag,fsaall,gmd,pan,vv,presp,varstg,suffrg,nawbib,horyd,wtc,toddbib,mgw,ncr,ngp,musdibib,hlaw,papr,lhbumbib,rbpebib,lbcoll,alad,hh,aaodyssey,magbell,bbc,dcm,raelbib,runyon,dukesm,lomaxbib,mtj,gottlieb,aep,qlt,coolbib,fpnas,aasm,denn,relpet,amss,aaeo,mff,afc911bib,mjm,mnwp,rbcmillerbib,molden,ww2map,mfdipbib,afcnyebib,klpmap,hawp,omhbib,rbaapcbib,mal,ncpsbib,ncpm,lhbprbib,ftvbib,afcreed,aipn,cwband,flwpabib,wpapos,cmns,psbib,pin,coplandbib,cola,tccc,curt,mharendt,lhbcbbib,eaa,haybib,mesnbib,fine,cwnyhs,svybib,mmorse,afcwwgbib,mymhiwebib,uncall,afcwip,mtaft,manz,llstbib,fawbib,berl,fmuever,cdn,upboverbib,mussm,cic,afcpearl,awh,awhbib,sgp,wright,lhbtnbib,afcesnbib,hur

stonbib,mreynoldsbib,spaldingbib,sgproto,scsmbib,affccalbib,mamcol
Retrieved on Jan. 20, 2011.

The deference to congressional activity that follows from any such vague, general oversight test likely would result in the rise of a strong, overarching national police power that would confine the regulatory authority of the states merely to congressionally overlooked interstices of government inherent in their sovereignty.

IV. By nullifying existing Commerce Clause jurisprudence, the Court's logic would threaten the proper limits on Congress' commerce power and allow Congress to exercise police powers that the Constitution reserves to the States.

Apart from the constitutional analysis, the decision to grant what amounts to a general police power to Congress under the Commerce Clause also must be judged by its practical consequences.

If Congress constitutionally may compel the purchase of health care insurance by individual citizens and nationals, under the theory that the nation's physical and mental health is a public policy that merits congressional attention and action, as it affects in a substantial way the national economy, may Congress not also under the same theory compel the same individuals to donate their body tissues and

organs once the conscripted donor becomes a hopelessly, irretrievably unconscious patient so that those tissues and organs can be used to restore the otherwise hopelessly ill, but still salvageable individual? Surely, this method would be cheaper than manufacturing artificial tissue and organs and would, therefore, reduce the aggregate economic cost of health care nationally.

And, what is to stop Congress from requiring individuals to donate their tissues and organs once the donors become hopelessly unconscious patients because those tissues and organs are greatly needed for study and experimental trial to help those other Americans who can be salvaged? This method would be cheaper on an aggregate basis nationally than having to raise animals and use their tissue and organs or to manufacture synthetic tissue and organs.

The same can be said for mandatory donation of embryonic stem cells after the expiration of a set period of non-use.

By nullifying existing Commerce Clause jurisprudence, the Court's logic would threaten the proper limits on Congress' commerce power and allow Congress to exercise police powers that the Constitution reserves to the States.

Although slippery slope arguments are often fallacious, nonetheless, where the occurrence of each step in the argument's suggested progression makes the next step significantly more likely than the previous one (after step *n*, step *n+1* must be more likely to occur than step *n* was after step *[/b]n-1[/b]*

had occurred), then the argument must be confronted as facially valid.

That is the case here. The grant of an apparently limitless general police power to Congress would begin the "way to dusty death" (*Macbeth*, act 5, scene 5, line 23) for constitutional Commerce Clause jurisprudence, and, the more important issue of federalism, as well.

The Court has cautioned on this point before—

> Every journey to a forbidden end begins with the first step, and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain.
>
> *Carter v. Carter Coal Co.*, *supra*, 298 U.S. at 295-296.[5]

---

[5] The Constitutional Convention rejected the Virginia Plan (also called the Randolph Plan), which

arguably would have allowed the federal government to regulate any activity under a general police power. The three variants of the relevant portion of the Virginia Plan, paragraph 6, put forward by Virginia Governor Edmund Randolph, read as follows:

Text A--Resolved . . .; that the National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress bar [sic] the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; . . . .

Text B--Resolved, That . . .the national legislature ought to be empowered to enjoy the legislative right vested in congress, by the confederation; and moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several States, contravening in the opinion of the national legislature, the articles of union, or any treaty subsisting under the authority of the union; . . ..

Text C-- 6. Resolved,. . . that the National Legislature ought to be empowered to enjoy, the *Legislative rights vested in Congress.* [sic] by the Confederation, and moreover to Legislate all cases to which the Separate States are incompetent; or in which the harmony of the United States may be

CONCLUSION

The judgment of the court of appeals should be affirmed, at least insofar as it declared the essential minimum coverage provision of the Patient Protection and Affordable Care Act, 26 U.S.C.A. 5000A(a), to be unconstitutional under the Commerce Clause.

Respectfully submitted,

REBECCA J. LEVINE
Counsel of Record
THIEL, CAMPBELL, GUNDERSON,
ANDERSON AND LEVINE PLLP
7300 Metro Blvd, Suite 630
Edina, MN 55439
(952) 920-8444
rlevine@thielfirm.com

---

interrupted, by the exercise of individual Legislation- to negative all Laws passed by the several States, contravening, in the opinion of the National Legislature, The articles of Union; or any Treaty subsisting under the Authority of the Union-, ... (emphasis in original)

See Variant Texts of the Virginia Plan, Presented by Edmund Randolph to the Federal Convention, May 29, 1787. Texts A, B and C. The Avalon Project, Lillian Goldman Law Library, Yale Law School. Web. http://avalon.law.yale.edu/18th_century/vatexta.asp Retrieved on January 20, 2011.

Counsel for Amicus Curiae

February 2012

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 13 2012
OFFICE OF THE CLERK

No. 11-398

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF FORMER U.S. DEPARTMENT OF JUSTICE OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS (Minimum Coverage Provision)

TERENCE J. PELL
MICHAEL E. ROSMAN
CENTER FOR INDIVIDUAL RIGHTS
1233 20th Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 833-8400

THEODORE B. OLSON
Counsel of Record
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

JOSHUA S. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105
(415) 393-8200

Counsel for Amici Curiae

QUESTION PRESENTED

Whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision of the Patient Protection and Affordable Care Act.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE PLAIN LANGUAGE OF THE COMMERCE CLAUSE DOES NOT AFFORD CONGRESS THE POWER TO COMPEL COMMERCE 4

A. At The Time Of The Framing, The Power To "Regulate" Was Not Ordinarily Defined To Encompass The Power To "Compel" 5

B. The Constitution Distinguishes Between "Regulate" And "Compel" 6

C. Contemporaneous Usage Confirms The Distinction Between "Regulation" And "Compulsion" 9

D. This Court's Early Decisions Use "Regulate" Only In Connection With Activity That Is Already Taking Place 12

II. THE PURPOSE OF THE COMMERCE CLAUSE WAS TO REMOVE TRADE BARRIERS AMONG THE STATES, NOT TO EMPOWER CONGRESS TO SOLVE ALL NATIONAL PROBLEMS 14

A. Framing-Era Documents Recognize The Narrow Purpose Of The Commerce Clause 15

B. This Court's Early Decisions Confirm The Narrow Purpose Of The Commerce Clause 17

III. THIS COURT HAS NEVER INTERPRETED THE COMMERCE CLAUSE AS AUTHORIZING CONGRESS TO COMPEL INVOLUNTARY COMMERCE 19

A. Even Under This Court's "Substantial Effects" Test, Congress May Regulate Only Preexisting Economic Activity 19

B. Authorizing Congress To Compel Involuntary Commercial Activity Would Eliminate Virtually All Remaining Limitations On The Commerce Power 23

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

CASES

Alaska Airlines, Inc. v. Brock,
480 U.S. 678 (1987) 26

Burlington N. & Santa Fe Ry. Co. v. White,
548 U.S. 53 (2006) 8

City of Boerne v. Flores,
521 U.S. 507 (1997) 5

Cohens v. Virginia,
19 U.S. (6 Wheat.) 264 (1821) 13, 14

Cooley v. Bd. of Wardens,
53 U.S. (12 How.) 299 (1852) 13, 18

District of Columbia v. Heller,
554 U.S. 570 (2008) 5

Gibbons v. Ogden,
22 U.S. (9 Wheat.) 1 (1824) 9, 12, 13, 17, 18

Gonzales v. Raich,
545 U.S. 1 (2005) 20, 21, 22, 25

Heart of Atlanta Motel, Inc. v. United States,
379 U.S. 241 (1964) 21

Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 24

Kansas v. Colorado,
206 U.S. 46 (1907) 25

Katzenbach v. McClung,
379 U.S. 294 (1964) 21

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 7

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819).....20

Minturn v. Larue,
64 U.S. (23 How.) 435 (1860).....13

NLRB v. Federbush Co.,
121 F.2d 954 (2d Cir. 1941) 8

NLRB v. Jones & Laughlin Steel Corp.,
301 U.S. 1 (1937).....21

Ogden v. Saunders,
25 U.S. (12 Wheat.) 213 (1827).....13

Russello v. United States,
464 U.S. 16 (1983).....8

Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011).....15, 22, 25

Thomas More Law Ctr. v. Obama,
720 F. Supp. 2d 882 (E.D. Mich. 2010).....24

U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439 (1993) 8

United States v. Darby,
312 U.S. 100 (1941).....20, 21

United States v. Lopez,
514 U.S. 549 (1995).....21, 24, 25

United States v. Morris,
23 U.S. (10 Wheat.) 246 (1825).....13

United States v. Morrison,
529 U.S. 598 (2000).....20, 21, 23, 24

United States v. Sprague,
282 U.S. 716 (1931) 5

Virginia ex rel. Cuccinelli v. Sebelius,
728 F. Supp. 2d 768 (E.D. Va. 2010) 21

West Lynn Creamery, Inc. v. Healy,
512 U.S. 186 (1994) 16

Wickard v. Filburn,
317 U.S. 111 (1942) 21, 22

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 5, cl. 1 7

U.S. Const. art. I, § 8, cl. 3 ..... 2, 4, 5, 19

U.S. Const. art. I, § 8, cl. 5 7

U.S. Const. art. I, § 8, cl. 12 7

U.S. Const. art. I, § 8, cl. 13 7

U.S. Const. art. I, § 8, cl. 14 7

U.S. Const. amend. V 8

STATUTES

26 U.S.C. § 5000A 3

42 U.S.C. § 18091 ..... 4, 23

OTHER AUTHORITIES

Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*,
5 N.Y.U. J.L. & Liberty 581 (2010) 20

Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847 (2003) 11, 12

Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001) 6, 8, 11

William Blackstone, *Commentaries* 10

Clarence S. Brigham, *History and Bibliography of American Newspapers, 1690–1820* (1947) 12

Charles E. Clark & Charles Wetherell, *The Measure of Maturity: The* Pennsylvania Gazette, *1728–1765*, 46 Wm. & Mary Q. 279 (1989) 12

Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* (1994) 23

The Debates in the Several State Conventions on the Adoption of the Federal Constitution (Jonathan Elliot ed., J.B. Lippincott Co. 1891) 11, 15

Federal Farmer No. 16 (Jan. 20, 1788) 10

The Federalist No. 11 (Alexander Hamilton) 15, 17

The Federalist No. 22 (Alexander Hamilton) 15

The Federalist No. 42 (James Madison) 16

The Federalist No. 78 (Alexander Hamilton) 10

H.R. Rep. No. 103-711 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 1839 24

Andrew Jackson, *Bank Veto* (July 10, 1832), *in* The Addresses and Messages of the Presidents of the States, from Washington to Harrison 418 (1841) 7

Thomas Jefferson, *Opinion on the Constitutionality of a National Bank* (Feb. 15, 1791), *in* 6 The Works of Thomas Jefferson 197 (Paul Leicester Ford ed., 1904) 9

Thomas Jefferson, *To The Secretary of the Treasury* (Oct. 13, 1802), *in* 9 The Works of Thomas Jefferson 398 (Paul Leicester Ford ed., 1904) 10

Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785). 5, 6

The Records of the Federal Convention of 1787 (Max Farrand ed., 1911) 16

Ilya Somin, *Federalism & Separation of Powers: The Individual Health Insurance Mandate and the Constitutional Text*, Engage, Mar. 2010, at 49 17

St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* (1803) 10, 15

BRIEF OF FORMER U.S. DEPARTMENT OF JUSTICE OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS (Minimum Coverage Provision)

INTEREST OF *AMICI CURIAE*[1]

Amici are former officials of the U.S. Department of Justice who believe that the minimum coverage provision of the Patient Protection and Affordable Care Act is an unprecedented and unconstitutional expansion of federal power under the Commerce Clause. Based on their decades of combined experience representing the United States, *amici* have concluded that the provision has no foundation in the text, history, or purpose of the Commerce Clause, and impermissibly intrudes on the right of individuals to decide for themselves whether to enter into a commercial transaction. *Amici* are:

John Ashcroft, Attorney General of the United States, 2001-2005.

William P. Barr, Attorney General of the United States, 1991-1993; Deputy Attorney General, 1990-1991; Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, 1989-1990.

Timothy E. Flanigan, Assistant Attorney General, Office of Legal Counsel, U.S. Department of

---

[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Justice, 1992-1993; Principal Deputy Assistant Attorney General, 1990-1992.

Edwin Meese III, Attorney General of the United States, 1985-1988.

Michael B. Mukasey, Attorney General of the United States, 2007-2009.

SUMMARY OF ARGUMENT

The Eleventh Circuit correctly held that the minimum coverage provision exceeds Congress's power under the Commerce Clause. The Commerce Clause gives Congress the authority to "*regulate* Commerce," U.S. Const. art. I, § 8, cl. 3 (emphasis added), not to compel Americans to engage in commercial transactions against their will.

At the time of the Framing, the most widely accepted definition of the verb "to regulate" was to formulate and adjust the rules governing *existing* entities and activities. This definition stood in sharp contrast to the definitions of "compel" and "mandate." Indeed, the Constitution itself uses the terms "regulate" and "compel" in a manner that reinforces the distinction between the two concepts: "Regulations" govern entities and activities already in existence, but they cannot "compel" something into existence or mandate an activity that otherwise would not occur. If the power to regulate encompassed the power to compel, a number of constitutional provisions would be superfluous.

The use of "regulate" in other Framing-era materials confirms this understanding of the term. Whether appearing in the Framers' correspondence, the records of the state ratification debates, the writings of Blackstone, or the pages of the most popular eighteenth-century newspaper, the word "regulate"

consistently referred to making or adjusting rules for an activity that was already taking place. Federalists and anti-Federalists alike—as well as this Court itself—used the word to that effect, and would all have recognized the incongruity of "regulating" commerce in health insurance by forcing unwilling Americans to purchase insurance.

This reading of the Commerce Clause is consistent with the provision's underlying history and purpose. The Commerce Clause was intended to remove barriers to *existing* trade among the States—not to authorize Congress to mandate the involuntary consumption of goods and services. In fact, until now, Congress has *never* attempted to force commerce on unwilling Americans. Nor has this Court ever suggested that the commerce power extends so far. A decision upholding this unprecedented expansion of Congress's authority under the Commerce Clause would disregard the text, history, and purpose of that provision, and eliminate any meaningful constraints on the reach of federal power.

ARGUMENT

The minimum coverage provision of the Patient Protection and Affordable Care Act requires all "applicable individual[s]," defined to include nearly all U.S. taxpayers, to purchase and maintain "minimum essential [health-insurance] coverage." 26 U.S.C. § 5000A(a) (2010). The provision further requires any "taxpayer" who "fails to meet the requirement" to pay a "penalty" known as a "[s]hared responsibility payment." *Id.* § 5000A(b)–(c). Although the minimum coverage provision allows for certain exemptions, there is no exemption for individuals who desire not to purchase health-insurance coverage for non-religious reasons. *Id.* § 5000A(d)–(e).

There is no question that, by requiring certain Americans to purchase health-insurance coverage against their will, the minimum coverage provision does more than merely regulate *preexisting* health-insurance transactions. Indeed, in enacting the minimum coverage provision, Congress specifically found that "[t]he requirement . . . will add millions of *new* consumers to the health insurance market." 42 U.S.C. § 18091(a)(2)(C) (emphasis added). And the United States concedes that the Act compels Americans into the health-insurance market who would prefer to "go without insurance based on what they think is a 'rational' choice." Pet. Br. 44; *see also id.* (noting that there are "uninsured non-elderly individuals [who] say they have 'no need for insurance'").

The question for this Court is whether this compulsion of *new* commerce falls within Congress's enumerated power to "regulate Commerce." U.S. Const. art. I, § 8, cl. 3. The text, history, and purpose of the Commerce Clause make clear that Congress lacks such far-reaching authority.

I. THE PLAIN LANGUAGE OF THE COMMERCE CLAUSE DOES NOT AFFORD CONGRESS THE POWER TO COMPEL COMMERCE.

A wide range of historical sources—including dictionaries, newspapers, and this Court's early opinions—make clear that, at the time the Constitution was ratified, the Framers and the public understood that Congress's power to "regulate" commerce authorized legislation governing existing commercial transactions, but did not extend to congressional measures compelling Americans to engage in commerce against their will.

A. At The Time Of The Framing, The Power To "Regulate" Was Not Ordinarily Defined To Encompass The Power To "Compel."

The Commerce Clause grants Congress the power to "*regulate* Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3 (emphasis added). As with any constitutional analysis, this Court must begin with the text of this provision. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("In assessing the breadth of [a constitutional] power, we begin with its text."). "In interpreting this text, [the Court is] guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (second alteration in original) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

As understood at the time of the Framing, the power to "regulate" commerce did not encompass the authority to "compel" or "mandate" commerce that was not already taking place. Samuel Johnson's dictionary principally defined the verb "[t]o regulate" as "[t]o adjust by rule or method," and secondarily as "[t]o direct." 2 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785). The verb "[t]o direct," in turn, had multiple meanings, but in the specific context of regulation (the third usage listed) it was similarly defined as "to adjust." 1 *id.*[2] "To adjust" was defined, in the context of regulation (the

---

[2] The fifth and final usage of the verb "to direct" is defined as "[t]o order; to command," but there is a special notation explaining that, when used in this context, "to *direct* is a softer term than to *command*." 1 *id.*

first usage listed), as "to put in order; to settle in the right form." 1 *id.*

Accordingly, the plain language of the Commerce Clause empowers Congress to "adjust" commerce "by rule or method," "put[ting] [commerce] in order" by "settl[ing] [it] in the right form." A Framing-era reader would have found it nonsensical to speak about "regulation" of commerce that was not already taking place. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 139 (2001) ("The power to regulate is, in essence, the power to say, 'if you want to do something, here is how you must do it.'").

By contrast, the Framing-era definitions of "to compel" and "to mandate" differed sharply from the meaning of "to regulate." "To compel" meant "[t]o force to some act; to oblige; to constrain; to necessitate; to urge irresistibly." 1 Johnson, *supra*. And "to mandate" meant to "command." 2 *id.* Thus, unlike with "regulate," it would have made perfect sense to "compel" or "mandate" a person to engage in an activity that the person otherwise would not have undertaken. A "regulator" of baseball, for example, might decide how many strikes comprise an out, or how far the pitcher must stand from home plate, but he would not force children to play.

B. The Constitution Distinguishes Between "Regulate" And "Compel."

The Constitution itself uses the terms "regulate" and "compel" in distinct manners illustrative of their differing meanings: "Regulations" prescribe rules to govern something that already exists or an activity that is already taking place, whereas "compulsion" creates something that otherwise would not exist or results in an activity that otherwise would not occur.

Outside the Commerce Clause, the body of the Constitution uses the verb "regulate" one other time, giving Congress the power "To coin Money, [and] regulate the Value thereof." U.S. Const. art. I, § 8, cl. 5. As that provision makes clear, Congress can only "regulate" the value of money after the money has been "coined"—*i.e.*, after it has come into existence. *See* Andrew Jackson, *Bank Veto* (July 10, 1832), *in* The Addresses and Messages of the Presidents of the States, from Washington to Harrison 418, 427 (1841) ("Congress have established a mint to coin money and passed laws to regulate the value thereof."). In fact, if the power to "regulate" money encompassed the authority to create money in the first place, the separate power to "coin" money would be rendered mere surplusage. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("[I]t cannot be presumed that any clause in the constitution is intended to be without effect.").

The Constitution's use of the related terms "regulated" and "regulation" confirms that Congress may only regulate activity that is already taking place. For example, Congress has the power "to make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14. But that power is separate and distinct from the power "To raise and support Armies" and the power "To provide and maintain a Navy." *Id.* § 8, cls. 12–13. If the power to regulate the land and naval forces encompassed the power to create those forces in the first instance, those separate provisions would be superfluous.

By comparison, the word "compel" also appears once each in the body of the Constitution and in the Bill of Rights. *See* U.S. Const. art. I, § 5, cl. 1 ("Each House . . . may be authorized to compel the Attend-

ance of absent Members . . . ."); *id.* amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself . . . ."). In both instances, the word describes forcing someone to take action he otherwise would not take, whether attending a session of Congress or testifying against himself.

The drafters of the Constitution knew how to "compel" something into existence, they knew how to "regulate" something already in existence, and they recognized the important distinction between the two. As this Court has emphasized, "text consists of words living 'a communal existence,' in Judge Learned Hand's phrase, the meaning of each word informing the others and 'all in their aggregate tak[ing] their purport from the setting in which they are used.'" *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993) (alteration in original) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941)); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) ("We normally presume that, where words differ as they differ here, 'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). With respect to commerce, the Framers chose to give Congress the power only to regulate—not the power to compel. "A pure regulation of commerce, then, is a set of rules that tells people, 'If you want to trade or exchange with others, here is how you must go about it.'" Barnett, *supra*, 68 U. Chi. L. Rev. at 139.

C. Contemporaneous Usage Confirms The Distinction Between "Regulation" And "Compulsion."

"[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824). Framing-era usage of the term "regulate"—both in discussing the scope of the Commerce Clause and in other contexts—compels the conclusion that, as understood by the Framers and their contemporaries, it was only possible to regulate activity that was already taking place.

Thomas Jefferson perhaps put it best when arguing against the formation of a national bank in 1791:

> To erect a bank, and to regulate commerce, are very different acts. He who erects a bank, *creates* a subject of commerce in its bills; so does he who makes a bushel of wheat, or digs a dollar out of the mines; yet neither of these persons *regulates* commerce thereby. To make a thing which may be bought and sold, is not to prescribe regulations for buying and selling.

Thomas Jefferson, *Opinion on the Constitutionality of a National Bank* (Feb. 15, 1791), *in* 6 The Works of Thomas Jefferson 197, 198–99 (Paul Leicester Ford ed., 1904) (emphasis added).

A decade later, Jefferson reiterated the point, writing that "the power to regulate commerce does not give a power to build piers, wharves, open ports, clear the beds of rivers, dig canals, build warehouses, build manufacturing machines, set up manufactories, [or] cultivate the earth." Thomas Jefferson, *To*

The Secretary of the Treasury (Oct. 13, 1802), *in* 9 The Works of Thomas Jefferson 398, 399. Indeed, the definition of "regulate" appears to be a rare area of agreement between Hamilton and Jefferson. *See The Federalist No. 78*, at 430 (Alexander Hamilton) (E.H. Scott ed., 1898) ("Periodical appointments, *however regulated, or by whomsoever made*, would, in some way or other, be fatal to their necessary independence.") (emphasis added). Even anti-federalists agreed. *See Federal Farmer No. 16* (Jan. 20, 1788), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch14s32.html ("The people by adopting the federal constitution, give congress general powers to *institute* a distinct and new judiciary, new courts, *and to regulate* all proceedings in them . . . .") (emphases added).

Blackstone's *Commentaries* are also replete with passages in which the term "regulate" refers to directing the course of activity that is already taking place, as opposed to compelling activity that would not otherwise occur. *See, e.g.*, 1 William Blackstone, *Commentaries* *156 (explaining that Parliament "can regulate or new model the succession to the crown; as was done in the reign of Henry VIII and William III"); *id.* at *120 ("[A]bsolute rights . . . were vested in [individuals] by the immutable laws of nature; but . . . the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals."); *see also* 2 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* app. at 21 (1803) ("[L]aws to regulate, must, according to the true interpretation of that word, impose rules, or regulations, not before imposed . . . .").

Analysis of the state ratification debates underscores this understanding of the power to "regulate." As one scholar concludes, "the term 'regulate' is used with stunning uniformity" in the state ratification debates. Barnett, *supra*, 68 U. Chi. L. Rev. at 142.

> The term "regulate" appears fifty-five times in all the records we have of the deliberations in the states. In every case where the context makes the meaning clear, the term connotes "subject to a rule" or "make regular" in the sense that "if you want to do something, here is how you should do it."

Id. (footnote omitted). Whether the debates used the term in the context of commerce (5 times), elections (18), jury trials (6), courts (5), trade (2), militias (2), contracts (1), taxes (1), treaties (1), or the deliberations of the Senate (1), the term "regulate" consistently referred to making or adjusting rules for something already in existence. *Id.* at 142 & n.197; *see also, e.g.*, 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 137 (Jonathan Elliot ed., J.B. Lippincott Co. 1891) (statement of Patrick Henry) ("There are certain maxims by which every wise and enlightened people will regulate their conduct.").

Similarly, a thorough analysis of the *Pennsylvania Gazette* from 1728 and 1800—in which the words "regulate" and "regulation" appear 803 times—confirms that, to the eighteenth-century literate public, "the paradigm meaning of the term 'to regulate' was . . . 'to make regular.'" Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 863–65 (2003). In other words, "a pure regulation was a rule that says, 'If you

want to do X, here is how you must do it.'" *Id.* at 863.[3]

D. This Court's Early Decisions Use "Regulate" Only In Connection With Activity That Is Already Taking Place.

This Court's early case law—both in the Commerce Clause setting and elsewhere—provides further evidence that the power to "regulate" was understood at the Framing to mean only the power to prescribe rules for activity that was already taking place.

In *Gibbons v. Ogden*, for example, Chief Justice Marshall, writing for the Court, explained that "the power to regulate" is the power "to prescribe the rule by which commerce is to be governed." 22 U.S. (9 Wheat.) at 196. Justice Johnson's concurrence further elaborated on this definition, explaining that "[t]he 'power to regulate commerce,' here meant to be granted, was that power to regulate commerce which previously existed in the States[,] . . . [and] amounts to nothing more than a power to limit and restrain it

---

[3] As Professor Barnett explains, "The *Pennsylvania Gazette*, which from 1729 to 1766 was published by Benjamin Franklin, 'in its essential character, although not in its unusual longevity, . . . was representative of the great majority of the newspapers of the provincial period.'" *Id.* at 857 (alteration in original; footnotes omitted) (citing 2 Clarence S. Brigham, *History and Bibliography of American Newspapers, 1690–1820*, at 933–34 (1947); and quoting Charles E. Clark & Charles Wetherell, *The Measure of Maturity: The* Pennsylvania Gazette, *1728–1765*, 46 Wm. & Mary Q. 279, 280 (1989)). Thus, "[w]ere the term ['regulate'] to have had a readily understood broad meaning, one would expect it to have made its appearance in this typical newspaper whose publication spanned the colonial and post-colonial period." *Id.*

at pleasure." *Id.* at 227 (Johnson, J., concurring). Twenty-six years later, this Court reaffirmed that interpretation of "regulation" in the Commerce Clause context, explaining that "the power to regulate commerce includes the regulation of navigation, . . . [which] is the power to prescribe rules in conformity with which navigation must be carried on." *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 315–16 (1852). Under each of these definitions, "regulation" refers to rules governing preexisting commerce, not the compulsion of new commercial activities.

This Court's early decisions used "regulate" to similar effect outside the Commerce Clause context. The Court stated, for example, that "[t]he right to regulate contracts" comprised only the right to "prescribe rules by which they shall be evidenced, [and] to prohibit such as may be deemed mischievous." *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 347 (1827) (Marshall, C.J.). In fact, on multiple occasions, this Court explicitly differentiated between "regulating" something already in existence and creating or establishing something new. In interpreting a town charter, this Court stated that "[t]he power conferred is to make (meaning to establish) *and* regulate ferries." *Minturn v. Larue*, 64 U.S. (23 How.) 435, 438 (1860) (emphasis added). The Court also referred to Congress's power to "create *and* regulate" certain rights in *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 296 (1825) (emphasis added). And in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), the Court analyzed a federal law granting the local government of Washington, D.C., the power "to regulate *and* establish markets" within the city, "to establish *and* regulate fire wards and fire companies, [and] to regulate *and* establish the size of bricks that

are to be made and used in the City." *Id.* at 272–73 (emphases added); *see also id.* at 275 (referring to the "power to establish *and* regulate the inspection of flour, tobacco, and salted provisions") (emphasis added).

* * *

The meaning of the term "regulate" in the Commerce Clause is plain and unambiguous. Framing-era dictionaries, other provisions of the Constitution, contemporary writings, and this Court's precedent all make clear that the power to "regulate" authorizes Congress to establish rules governing existing activity but does not extend to requiring persons to undertake activity in which they would not otherwise engage. The minimum coverage provision is not a "regulation" of commerce because it compels Americans who do not want to participate in the health-insurance market to purchase insurance against their will. The Commerce Clause does not countenance such congressional intrusion on individual liberties.

II. The Purpose Of The Commerce Clause Was To Remove Trade Barriers Among The States, Not To Empower Congress To Solve All National Problems.

Consistent with the plain meaning of the Commerce Clause, the Framers' purpose in granting Congress the authority to "regulate Commerce . . . among the several States" was to authorize Congress to enact rules governing existing interstate commerce. In fact, the Framers had one specific, overriding purpose in mind when they drafted the Commerce Clause: removing the barriers to interstate trade that had "fettered, interrupted, and narrowed"

the flow of commerce under the Articles of Confederation. *The Federalist No. 11*, at 65 (Alexander Hamilton) (E.H. Scott ed., 1898). Contrary to the views of some lower courts, the Commerce Clause was not meant to be a grant of sweeping congressional authority "to forge national solutions to national problems" through any and all legislative means. *Seven-Sky v. Holder*, 661 F.3d 1, 20 (D.C. Cir.), *petition for cert. filed*, No. 11-679 (2011); *see also id.* (upholding the minimum coverage provision).

A. Framing-Era Documents Recognize The Narrow Purpose Of The Commerce Clause.

Among the many "defect[s] of the former confederation" that the Constitution aimed to solve was "the regulation of the commerce between the several states, and the inconveniences resulting from it"—especially "the bur[d]ens which might be imposed by some of the states, on others, whose exports and imports must necessarily pass through them." 1 Tucker, *supra*, app. at 249. New York's delegate to the Constitutional Convention complained about "[t]he languishing situation of our commerce [that] has . . . been attributed to the impotence of Congress" under the Articles of Confederation. 2 *The Debates in the Several State Conventions*, *supra*, at 218 (statement of John Lansing). And, Alexander Hamilton explained that "[t]he want of a power to regulate commerce" was one of the "defects" that rendered the Articles of Confederation altogether "unfit for the administration of the affairs of the Union." *The Federalist No. 22*, at 117 (Alexander Hamilton) (E.H. Scott ed., 1898).

The Commerce Clause was designed to correct this imbalance of power by shifting the authority to

regulate existing interstate commerce from the States to the federal government—thereby eliminating the ability of individual States to hinder trade across their borders. As this Court recently described, this "aspect of the Commerce Clause" was particularly important to "the 'father of the Constitution,' James Madison." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994). "In one of his letters, Madison wrote that the Commerce Clause 'grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government.'" *Id.* (quoting 3 *The Records of the Federal Convention of 1787*, at 478 (Max Farrand ed., 1911)). In Madison's words, "[a] very material object of this power [granted by the Commerce Clause] was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter." *The Federalist No. 42*, at 235 (James Madison) (E.H. Scott ed., 1898). Madison therefore emphasized that the Commerce Clause would transfer, from the States to Congress, the power "to regulate *the* trade between State and State"—using the definite article to confirm that such commerce must preexist regulation. *Id.* (emphasis added).

The Framers anticipated that the Commerce Clause would foster growth in commerce, but that such growth would be the result of eliminating dissonant state regulation—not requiring Americans to engage in commerce against their will. Alexander Hamilton, for example, predicted that "[a]n unrestrained intercourse between the States themselves," made possible by the Commerce Clause, "will ad-

vance the trade of each, by an interchange of their respective productions." *The Federalist No. 11*, *supra*, at 65. The dramatic growth in trade that Hamilton foresaw, in which "[t]he veins of commerce in every part will be replenished, and will acquire additional motion and vigor," was, in his view, the inevitable byproduct of "a free circulation of the commodities of every part." *Id.* "[T]here is no evidence," however, "that the framers or ratifiers of the Constitution ever envisioned that the power to regulate interstate commerce could be used to force people to engage in commerce, interstate or otherwise." Ilya Somin, *Federalism & Separation of Powers: The Individual Health Insurance Mandate and the Constitutional Text*, Engage, Mar. 2010, at 49, 49. Indeed, "[i]f they had attributed such a meaning to the Clause, the Constitution would probably never have been ratified, since many state governments would have feared that Congress could force their residents to purchase the products of other states, thus creating monopolies over important markets." *Id.*

B. This Court's Early Decisions Confirm The Narrow Purpose Of The Commerce Clause.

This Court's early decisions similarly recognize that the overriding purpose of the Commerce Clause—indeed, one of the principal justifications for the Constitution as a whole—was eliminating barriers to existing trade among the States. "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Gibbons*, 22 U.S. (9 Wheat.) at 231 (Johnson, J., concurring). As Justice Johnson emphasized, the Framers' concerns about the facili-

tation of interstate commerce were the direct outgrowth of the failed regime that preceded it:

> For a century the States had submitted, with murmurs, to the commercial restrictions imposed by [England]; and now, finding themselves in the unlimited possession of those powers over their own commerce, which they had so long been deprived of, and so earnestly coveted, that selfish principle . . . began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the States, and fatal to their commercial interests abroad.
>
> This was the immediate cause, that led to the forming of a convention.

Id. at 224 (Johnson, J., concurring); *see also Cooley*, 53 U.S. (12 How.) at 316–17 (discussing "the general subject of commerce with foreign nations and among the several states, over which it was one main object of the Constitution to create a national control"); *id.* ("Conflicts between the laws of neighboring States, and discriminations favorable or adverse to commerce with particular foreign nations, might be created by State laws regulating pilotage, deeply affecting that equality of commercial rights, and that freedom from State interference, which those who formed the Constitution were so anxious to secure, and which the experience of more than half a century has taught us to value so highly.").

The power to establish and adjust the rules of interstate commerce—ensuring that trade flows freely among the States and creating a regulatory environment that allows voluntary commercial transac-

tions to flourish—is far different from compelling Americans to purchase health insurance against their will. The historical record makes clear that neither the Framers themselves—nor the public who ratified the Constitution—ever intended the Commerce Clause to be used for such a radical purpose.

III. This Court Has Never Interpreted The Commerce Clause As Authorizing Congress To Compel Involuntary Commerce.

This Court has always adhered to the original understanding of the term "regulate" in the Commerce Clause and has never suggested that Congress may invoke that provision to compel involuntary commercial activity. The limitless interpretation of the Commerce Clause urged by the United States finds no support in this Court's precedent.

A. Even Under This Court's "Substantial Effects" Test, Congress May Regulate Only Preexisting Economic Activity.

Over the past century, this Court has developed a somewhat flexible approach to interpreting the phrase "Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Even under the Court's modern Commerce Clause jurisprudence, however, allowing Congress to "regulate" the health-insurance market by compelling Americans to purchase health insurance against their will would represent an unprecedented expansion of federal power.

In the midst of the New Deal, this Court's Commerce Clause jurisprudence began to focus on whether the statute in question regulates "'economic activity [that] substantially affects interstate commerce,'" and no longer required that the measure

regulate interstate commerce directly. *Gonzales v. Raich*, 545 U.S. 1, 25 (2005) (quoting *United States v. Morrison*, 529 U.S. 598, 610 (2000)); *see also United States v. Darby*, 312 U.S. 100, 118 (1941) ("The power of Congress over interstate commerce is not confined to the regulation of commerce among the states."). The principal question for this Court became whether the congressional enactment at issue involved regulation of "those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Darby*, 312 U.S. at 118; *see also Raich*, 545 U.S. at 17 ("Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce.").[4]

Under this approach, the Court has affirmed Congress's power to regulate economic activities through measures that do not directly regulate inter-

---

[4] When the Court first announced the "substantial effects" test in *Darby*, it cited the analysis of the Necessary and Proper Clause in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). *See Darby*, 312 U.S. at 118–19. Various commentators have therefore noted that "the substantial effects doctrine is not a pure application of the Commerce Clause, but is actually an assertion of the Necessary and Proper Clause to reach activity that is neither interstate nor commerce." Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & Liberty 581, 604 (2010); *see also Raich*, 545 U.S. at 34 (Scalia, J., concurring in judgment) ("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce . . . derives from the Necessary and Proper Clause.").

state commerce. *See, e.g.*, *Raich*, 545 U.S. at 17; *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Wickard v. Filburn*, 317 U.S. 111, 128 (1942); *Darby*, 312 U.S. at 114; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). And it has struck down statutes attempting to regulate non-economic activities that do not have a substantial effect on interstate commerce. *See Morrison*, 529 U.S. at 613; *United States v. Lopez*, 514 U.S. 549, 567 (1995). But the Court has never expanded the meaning of the word "regulate." *See Lopez*, 514 U.S. at 574 (Kennedy, J., concurring) (the Commerce Clause provides "congressional power to *regulate transactions* of a commercial nature") (emphasis added).

In all of these "substantial effects" cases, the object of Congress's enactment has been a preexisting activity in which an individual has freely engaged. *See Morrison*, 529 U.S. at 601–02 (perpetrating violence against women); *Lopez*, 514 U.S. at 551 (possessing a gun); *McClung*, 379 U.S. at 296 (operating a restaurant); *Heart of Atlanta Motel*, 379 U.S. at 243 (operating a hotel); *Darby*, 312 U.S. at 111 (manufacturing lumber); *NLRB*, 301 U.S. at 26 (manufacturing steel). "Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity"—namely, the growing of wheat. *Lopez*, 514 U.S. at 560; *see also Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 781 (E.D. Va. 2010) ("Every application of Commerce Clause power found to be constitutionally sound by the Supreme Court involved some sort of action, transac-

tion, or deed placed in motion by an individual or legal entity.").[5]

The opinions upholding the application of the Controlled Substances Act in *Raich* are consistent with this long line of precedent. That case also involved voluntary activity—growing and consuming marijuana. *Raich*, 545 U.S. at 7. And, as Justice Scalia explained in his concurrence, there are "two general circumstances" in which "the regulation of intrastate *activities* may be necessary to and proper for the regulation of interstate commerce." *Id.* at 35 (emphasis added). Both circumstances presuppose the existence of some *activity* to be regulated: either (1) "activities ha[ving] a substantial effect on interstate commerce" or (2) "an intrastate activity . . . essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself 'substantially affect' interstate commerce." *Id.* at 35, 37. Neither Justice Scalia nor any other Member of the Court in *Raich* even hinted that Con-

---

[5] In the D.C. Circuit's decision upholding the minimum coverage provision, the court suggested that "*Wickard* . . . comes very close to authorizing a mandate similar to" the minimum coverage provision because the Agricultural Adjustment Act "'force[d] some farmers into the market to buy what they could provide for themselves.'" *Seven-Sky*, 661 F.3d at 17 (second alteration in original) (quoting *Wickard*, 317 U.S. at 129). But the Agricultural Adjustment Act did not require any farmer to purchase wheat (or any other crop) on the open market; a farmer who had reached his statutorily prescribed limit on wheat production could simply decide not to purchase additional wheat without penalty. In contrast, an uninsured person who decides not to purchase health insurance is subject to a penalty under the Patient Protection and Affordable Care Act and is therefore compelled to purchase insurance to avoid that penalty.

gress has the power to "regulate" commerce by compelling *new* economic activity.

B. Authorizing Congress To Compel Involuntary Commercial Activity Would Eliminate Virtually All Remaining Limitations On The Commerce Power.

Upholding the minimum coverage provision would require this Court to break new constitutional ground by concluding for the first time that Congress has the power to compel involuntary economic activity under the guise of "regulating" commerce. The result would be another drastic expansion of Congress's authority under the Commerce Clause—at the expense of individual freedom and state sovereignty.

As the Congressional Budget Office recognized during prior legislative health-care debates, "[t]he government has never required people to buy any good or service as a condition of lawful residence in the United States." Cong. Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* 1 (1994). In an attempt to fit such unprecedented legislation within this Court's existing Commerce Clause jurisprudence, Congress purported to make a "finding" that the minimum coverage provision "regulates activity that is commercial and economic in nature." 42 U.S.C. § 18091(a)(2)(A). According to Congress, the "activity" in question is "economic and financial decisions about how and when health care is paid for, and when health insurance is purchased," including a "decision to forego health insurance coverage" altogether. *Id.*

Such a congressional "finding" on a purely legal issue is entitled to no weight. *See Morrison*, 529 U.S.

at 614 ("'[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.'") (quoting *Lopez*, 514 U.S. at 557 n.2). For that reason, this Court gave no deference to similar congressional "findings" in *Lopez* or *Morrison*. *See* H.R. Rep. No. 103-711, at 385 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853 (finding that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce"); *Lopez*, 514 U.S. at 557 n.2 ("'[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'") (alteration in original) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring in judgment)); *Morrison*, 529 U.S. at 614 (quoting same language from *Lopez*).

Moreover, Congress's definition of "activity" makes a farce of this Court's Commerce Clause jurisprudence, delivering a final and fatal blow to the remaining limits on the commerce power. Under Congress's expansive reasoning, any economic or financial decision—even a decision *not* to engage in commerce—is itself an activity that can be regulated. *See Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 894 (E.D. Mich. 2010) ("While plaintiffs describe the Commerce Clause power as reaching economic *activity*, the government's characterization of the Commerce Clause reaching economic *decisions* is more accurate."). Under such limitless logic, Congress could "regulate" an individual's decision *not* to buy a car by compelling every American to buy a Ford, to aid the ailing U.S. automotive industry.

Congress could compel all Americans to subscribe to home delivery of a daily newspaper to forestall the decline of print journalism. Or it could mandate that households' uninvested savings be used to purchase equity in domestic corporations, to bolster the share price and fiscal soundness of the Nation's businesses.

Congress may very well determine all of these seemingly preposterous obligations to be plausible "national solutions to national problems." *Seven-Sky*, 661 F.3d at 20. That should not mean—and, in fact, under this Court's jurisprudence, has never meant—that the Commerce Clause authorizes Congress to compel these involuntary commercial transactions. *See Kansas v. Colorado*, 206 U.S. 46, 89 (1907) ("[T]he proposition that there are legislative powers affecting the Nation as a whole which belong to [Congress], although not expressed in the grant of powers, is in direct conflict with the doctrine . . . of enumerated powers."). "[O]ur Commerce Clause's boundaries simply cannot be defined as being commensurate with the national needs or self-consciously intended to let the Federal Government defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Such a formulation of federal power is no test at all: It is a blank check." *Lopez*, 514 U.S. at 602 (Thomas, J., concurring) (alteration in original; internal quotation marks omitted); *see also Raich*, 545 U.S. at 45 (O'Connor, J., dissenting) ("[A]llowing Congress to set the terms of the constitutional debate in this way . . . is tantamount to removing meaningful limits on the Commerce Clause.").

The Commerce Clause is not a blank check. It is a specific and circumscribed grant of power that allows Congress to "regulate" ongoing commercial activity. The minimum coverage provision falls well

outside the bounds of that congressional authority because it compels Americans to engage in commerce against their will. Nothing in the Commerce Clause—or any other provision of the Constitution—authorizes such a startling federal intrusion on individual rights and state prerogatives.[6]

---

[6] The minimum coverage provision cannot be severed from the remainder of the Patient Protection and Affordable Care Act. Indeed, the United States concedes that "[t]he minimum coverage provision is integral to the Affordable Care Act's insurance reforms." Pet. Br. 24; *see also id.* at 29 ("[T]he minimum coverage provision is indispensable to the viability of the Act's guaranteed-issue and community-rating reforms . . . ."). Accordingly, the Act must be struck down in its entirety. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (when part of a statute is invalid, it cannot be severed from the remainder of the statute unless "what is left is fully operative as a law") (internal quotation marks omitted).

CONCLUSION

This Court should invalidate the minimum coverage provision and strike down the Patient Protection and Affordable Care Act in its entirety.

Respectfully submitted.

TERENCE J. PELL
MICHAEL E. ROSMAN
CENTER FOR INDIVIDUAL RIGHTS
1233 20th Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 833-8400

THEODORE B. OLSON
Counsel of Record
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

JOSHUA S. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105
(415) 393-8200

Counsel for Amici Curiae

February 13, 2012

AMICUS CURIAE BRIEF

No. 11-398

IN THE

Supreme Court of the United States

UNITED STATES DEPT. OF HHS, et al.,
Petitioners,

v.

STATES OF FLORIDA, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for
the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW, IN SUPPORT OF RESPONDENTS, ADDRESSING MINIMUM COVERAGE PROVISION

ROY S. MOORE
JOHN A. EIDSMOE*
BENJAMIN D. DUPRÉ
FOUNDATION FOR MORAL LAW
Amicus Curiae
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com

*Counsel of Record

Attorneys for *Amicus Curiae*

February 13, 2012

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED FOR REVIEW

1. Whether the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (hereafter the "ACA") violates the Tenth Amendment to the U.S. Constitution by imposing mandates on the states on matters that are reserved to the states.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THIS COURT SHOULD BE GUIDED IN THIS CASE BY THE ORIGINAL MEANING OF THE CONSTITUTIONAL TEXTS AT ISSUE 3

II. THE CONSTITUTION ESTABLISHES A FEDERAL GOVERNMENT WITH ENUMERATED POWERS DELEGATED TO THIS FEDERAL GOVERNMENT AND ALL OTHER POWERS RESERVED TO THE STATES OR TO THE PEOPLE 6

III. THE TAXING AND SPENDING POWER, FOUND IN THE GENERAL WELFARE CLAUSE OF ARTICLE I § 8, DOES NOT AUTHORIZE CONGRESS TO MANDATE THAT STATES EXPAND THEIR MEDICAID PROGRAMS 8

IV. THE AFFORDABLE CARE ACT MAY FORCE STATES TO VIOLATE THEIR OWN STATE CONSTITUTIONS 14

CONCLUSION 19

TABLE OF CITED AUTHORITIES

Page

CASES

Gibbons v. Ogden, 22 U.S. 1 (1824) 4

District of Columbia v. Heller, 128 S. Ct. 2783 (2008) 5

Holmes v. Jennison, 39 U.S. (14 Peters) 540 (1840) 5

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316. .....7, 8, 10

Printz v. United States, 501 U.S. 898 (1997).....3, 10

South Carolina v. United States, 199 U.S. 437 (1905) 5

South Dakota v. Dole, 483 U.S. 203 (1987) 11, 12, 13, 14

United States v. Butler, 297 U.S. 1 (1936).....10, 11, 12

United States v. Sprague, 282 U.S. 716 (1931) 5

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I § 8 .....2, 8, 11

U.S. Const. Art VI § 2.....18

U.S. Const. amend X 2

U.S. Const. amend XXI 11

Alabama Constitution Art. I § 2 17

Alabama Constitution Art. I § 35 .....17, 18

STATUTES

Public Law 111-148 .....1, 2

Public Law 111-152 2

23 U.S.C. § 158 .....11, 12

OTHER AUTHORITIES

Alabama Medicaid Agency, *"Legislators Cut an Additional $9.7 Million from Medicaid Budget,"* May 31, 2011; http://medicaid.alabama.gov/ news_detail.aspx?ID=5151 13

The Federalist No. 45 (James Madison) (Carey & McClellan eds., 2001).....6, 7, 15, 16

The Federalist No. 81 (Alexander Hamilton) (Carey & McClellan eds. 2001).....18

Henry J. Kaiser Foundation, *Federal and State Share of Medicaid Spending, FY2009* (2010); The President's Budget for Fiscal Year 2012, Historical Tables 8.5 13

James Madison, Letter to Henry Lee (June 25, 1824), *in Selections from the Private Correspondence of James Madison from 1813-1836* (J.C. McGuire ed., 1853) 4

James Madison, Letter to Thomas Ritchie, September 15, 1821, III *Letters and Other Writings of James Madison* (Philip R. Fendall ed., 1865) 3, 4

James Madison, *Congressional Record*, January 1794, p. 170 8

Grover Cleveland, Veto Message, February 16, 1887, *Congressional Record*, 49 Cong., 2d Sess., vol. XVIII Pt II, 1887, p. 1875 9

Franklin Pierce, Veto Message, May 3, 1854, http://www.lonang.com/exlibris?misc/1854-pvm.htm 8, 9

Richard P. Sanders and Barbara Mahoney, "Restoration of Limited State Constitutional Government: A Dissenter's View," *New York University Annual Survey of American Law 2003*, 59 N.Y.U. Ann. Surv. Am. L. 269 ..... 14, 15, 16

Joseph Story, *A Familiar Exposition of the Constitution of the United States* (1840) 4, 5

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Foundation for Moral Law, Inc.[1] ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the Godly principles of law upon which this country was founded. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice systems.

The Foundation has an interest in this case because it believes the basic framework of our governmental system, as set forth in the Constitution, involves a delegation of limited enumerated powers to the federal government, with all other powers reserved to the states or to the people. Recognizing that the fallibility of human nature results in abuse and corruption of power, the Framers designed this system so that state and federal governments would check each other's power and, in the process, preserve the liberty of the people. The Foundation believes the Patient Protection and Affordable Care Act, Pub. L.

---

[1] *Amicus curiae* Foundation for Moral Law, Inc., files this brief with blanket consent from both Petitioners and Respondents. Counsel for *amicus* authored this brief in its entirety. No person or entity—other than *amicus*, its supporters, or its counsel—made a monetary contribution to the preparation or submission of this brief.

No. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (hereafter the "ACA"), is an infringement upon the powers reserved to the states or to the people and is therefore dangerous to individual liberty.

SUMMARY OF ARGUMENT

The text is paramount in constitutional interpretation, and properly interpreting the text requires reading it with an eye toward what it meant by common understanding at the time of its enactment. The plain meaning of the Constitution's text should also guide the Court in this case.

The Tenth Amendment to the U.S. Constitution sets in concrete what the Framers already intended and assumed that the Constitution meant: that the federal government had only the powers delegated to it by the people through the Constitution, and powers not delegated to the federal government through the Constitution are reserved to the states or to the people. The General Welfare Clause of Article I, § 8 authorizes Congress to tax and spend for the "general" welfare, but the word "general" is a restrictive adjective, meaning Congress may tax and spend for the general welfare of the nation as a whole but not for the "specific" welfare of individuals, regions, or socioeconomic groups. Likewise, the Commerce Clause of Article I § 8 authorizes Congress to regulate interstate commerce, international commerce, and commerce with and among Indian nations, but not intrastate commerce, manufacturing, or production.

The ACA mandate that states must require individuals to purchase medical insurance is not within the enumerated powers delegated to Congress. According to the Tenth Amendment, the powers not delegated to the federal government, nor prohibited to the states, are reserved to the states respectively, or to the people.

The power to give or withhold unlimited benefits, like the power to tax, is the power to destroy. Just as Congress has no authority to force the states to require their citizens to purchase medical insurance, so Congress has no authority to condition receipt of billions of dollars in federal Medicaid payments upon the states imposing such a requirement. Nor, according to *Printz v. United States,* can the Congress "commandeer" the states and require them to perform federal functions.

Finally, by mandating that states require their citizens to purchase medical insurance, Congress may be requiring states to enact legislation that is prohibited by or not authorized by their respective state constitutions.

ARGUMENT

I. THIS COURT SHOULD BE GUIDED IN THIS CASE BY THE ORIGINAL MEANING OF THE CONSTITUTIONAL TEXTS AT ISSUE.

James Madison wrote that, "As a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself."

James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison*, at 228 (Philip R. Fendall, ed., 1865). This is almost axiomatic when dealing with any legal instrument, let alone a constitution. A textual reading of the Constitution, Madison said, requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), *in Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853).

Chief Justice Marshall confirmed that this was the proper method of interpretation:

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824).

Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just

> and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

"In expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840). In *Heller* this Court reaffirmed the premise that the meaning of the Constitution was not solely the province of federal judges and lawyers:

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."

District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 2788 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Id.* at 2821.

"The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 448 (1905). In contrast to this Court's amorphous General Welfare Clause and Commerce Clause precedents, the "written instrument" has remained unchanged from its original, ratified, and popularly approved form. The Court should return to the words of the United States Constitution in deciding constitutional cases

II. THE CONSTITUTION ESTABLISHES A FEDERAL GOVERNMENT WITH ENUMERATED POWERS DELEGATED TO THIS FEDERAL GOVERNMENT AND ALL OTHER POWERS RESERVED TO THE STATES OR TO THE PEOPLE.

James Madison wrote concerning federal powers,

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce, with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the State.

Federalist No. 45. This Court, while recognizing that the enumerated powers include powers impliedly delegated as well as expressly delegated, nevertheless affirmed in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 405 (1819), that

> "This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted."[2]

Nothing in the enumerated powers of Article I, § 8 or any other portion of the Constitution authorizes

---

[2] *McCulloch* is often assumed to stand for a broad interpretation of the Necessary and Proper Clause, but actually *McCulloch* was much more fact-specific. In determining that the creation of a national bank was impliedly authorized by the Necessary and Proper Clause, Chief Justice Marshall noted that the first Congress (1789-91) had established a national bank. *McCulloch* at 401: "The power now contested was exercised by the first congress elected under the present constitution." Therefore, the first Congress understood the Necessary and Proper Clause as authorizing a national bank, and the first Congress had good insight into the intent of the Framers. The impact of *McCulloch* as a precedent, then, should be limited to the issue of the constitutionality of a national bank and should not be interpreted to stand for a broad interpretation of the Necessary and Proper Clause generally.

Congress, expressly or impliedly, to adopt a mandate that states must require their citizens to purchase medical insurance.

III. THE TAXING AND SPENDING POWER, FOUND IN THE GENERAL WELFARE CLAUSE OF ARTICLE I § 8, DOES NOT AUTHORIZE CONGRESS TO MANDATE THAT STATES EXPAND THEIR MED-ICAID PROGRAMS.

James Madison, called by many the Architect or Father of the Constitution, objected in Congress to a bill that would provide aid for French refugees. Madison was sympathetic to the refugees' plight but concerned that the bill was unconstitutional and would set a bad precedent. He declared,

> I cannot undertake to lay my finger on that article of the Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents.

Congressional Record, p. 170, Jan. 1794.

In 1854 President Franklin Pierce vetoed a bill to provide federal lands for the treatment of the insane. In his veto message he declared,

> I readily and, I trust, feelingly acknowledge the duty incumbent on us all as men and citizens, and as among the highest and holiest of our duties, to provide for those who, in the mysterious order of Providence, are subject to want and to disease of body or mind; but I can not find any authority in

> the Constitution for making the Federal Government the great almoner of public charity throughout the United States. To do so would, in my judgment, be contrary to the letter and spirit of the Constitution and subversive of the whole theory upon which the Union of these States is founded.

Franklin Pierce, Veto Message, May 3, 1854. http://www.lonang.com/exlibris/misc/1854-pvm.htm.

In 1887 President Grover Cleveland vetoed a bill that would have appropriated $10,000 to purchase seed and distribute it among farmers who faced hardship because of a drought. In his veto message he stated,

> I can find no warrant for such an appropriation in the Constitution; and I do not believe that the power and duty of the General Government ought to be extended to the relief of individual suffering which is in no manner properly related to the public service or benefit. A prevalent tendency to disregard the limited mission of this power and duty should, I think, be steadily resisted, to the end that the lesson should be constantly enforced that, though the people support the Government, the Government should not support the people.

Grover Cleveland, Veto Message, February 16, 1887, *Congressional Record*, 49 Cong., 2d Sess., vol. XVIII, Pt. II, 1887, p. 1875.

Nor does the taxing and spending clause authorize Congress to mandate that states expand their

Medicaid programs or regulate how those programs must be operated. In *Printz v. United States,* 521 U.S. 898 (1997), this Court struck down the provisions of the Brady Handgun Violence Prevention Act that commanded state and local law enforcement officers to conduct background checks on prospective handgun purchasers, noting that, as Madison had said in *Federalist No. 39,* when the states delegated certain powers to the federal government they retained "a residuary and inviolable sovereignty."

In *McCulloch v. Maryland* the Court had said that "the power to tax involves the power to destroy," 17 U.S. (4 Wheat.) at 431. And in *U.S. v. Butler,* 297 U.S. 1 (1936), this Court invalidated the Agricultural Adjustment Act of 1933, which provided federal subsidies to farmers who agreed to set aside certain acres from production, holding that just as Congress could not expressly limit the acres a farmer could cultivate, nor could Congress achieve the same end by granting or withholding subsidies. The Court noted that the Act was, at best, "a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states." *Id.* at 72. The Court continued, "Is a statute less objectionable which authorizes expenditure of federal moneys to induce action in a field in which the United States has no power to intermeddle? *The Congress cannot invade state jurisdiction to compel individual action; no more can it purchase such action.*" *Id.* at 73 (emphasis added). Furthermore, the Court said,

> If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing

> and spending power as a means to accomplish the same end, clause 1 of section 8 of article 1 would become the instrument for total subversion of the governmental powers reserved to the individual states.

Id. at 75. The Court concluded that

> Hamilton himself, the leading advocate of broad interpretation of the power to tax and to appropriate for the general welfare, never suggested that any power granted by the Constitution could be used for the destruction of local self-government in the states. Story countenances no such doctrine. It seems never to have occurred to them, or to those who have agreed with them, that the general welfare of the United States (which has aptly been termed 'an indestructible Union, composed of indestructible States,') might be served by obliterating the constituent members of the Union.

Id. at 77.

In *South Dakota v. Dole,* 483 U.S. 203 (1987), this Court considered the constitutionality of 23 U.S.C. § 158, which requires the Secretary of Transportation to withhold a percentage of federal highway funds from states that allow the purchase of alcoholic beverages by persons under the age of 21. The Court seemed to acknowledge that Congress could not simply require the state to raise its drinking age, because the Twenty-First Amendment reserved to the states the right to regulate alcoholic beverages. But Secretary Dole argued that 23 U.S.C. § 158 did not prohibit the

states from having a lower drinking age; it just threatened loss of federal funds if they did.

South Dakota argued, based on *Butler,* that the power to give or withhold federal highway funds had the effect of coercing the states to enact the federally-recommended drinking age. However, Chief Justice Rehnquist, writing for the majority, distinguished *Dole* from *Butler*. He wrote,

> When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact.

Id. at 211.

Amicus agrees with the dissenting opinions of Justices Brennan and O'Connor.[3] However, Chief Justice Rehnquist tailored his opinion to the facts of the case—a threatened withholding of only five percent of the federal highway funds. He clearly recognized that under some circumstances withholding of funds could be coercive:

> Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point

---

[3] Possibly Justice O'Connor's prior experience as an Arizona state legislator helped her to appreciate the coercive effect of even a partial denial of federal funds.

> at which "pressure turns into compulsion." Steward Machine Co. v. Davis, supra, at 59.

Id.

The case at hand does not involve a loss of a mere five percent of federal highway funds, nor even a loss of five percent of federal Medicaid funds. Under the ACA, states that do not completely surrender to the new federal requirements will lose **all** federal Medicaid funds. This amounts to more than 40% of all federal funds granted to the states, 7% of all federal spending, more than $276 billion in 2011.[4]

On May 25, 2011, the Alabama State Legislature passed a budget of $1.77 billion, of which approximately $640.5 million is for Medicaid. This $640.5 million constitutes Alabama's share of Medicaid funding, which is 32 percent of total Medicaid funding.[5] The federal government pays the other 68% of Medicaid funding, or $2.08 billion.

The threatened loss of $2.08 billion in federal Medicaid funds—$410 million more than the total Alabama State budget—clearly crosses the line from inducement to coercion. Even following the rationale

---

[4] Henry J. Kaiser Foundation, *Federal and State Share of Medicaid Spending, FY2009* (2010); The President's Budget for Fiscal Year 2012, Historical Tables, Table 8.5.

[5] Alabama Medicaid Agency, "Legislators Cut an Additional $9.7 Million from Medicaid Budget," May 31, 2011; http://medicaid.alabama.gov/news_detail.aspx?ID=5151.

of the majority in *South Dakota v. Dole,* this is an unconstitutional infringement on the powers reserved to the states.

IV. THE AFFORDABLE CARE ACT MAY FORCE STATES TO VIOLATE THEIR OWN STATE CONSTITUTIONS.

In contrast to the federal government which has only delegated enumerated powers, it is often assumed that the state governments have plenary power that is limited only by prohibitions in the U.S. Constitution and in their respective state constitutions.

But this view is far from unanimous. Washington Supreme Court Justice Richard B. Sanders, writing with Attorney Barbara Mahoney for the New York University Annual Survey of the Law in 2003, argues that "the people have retained all powers of government except those expressly relinquished by the ratification of their respective state and federal constitutions."[6] They continue,

> [S]tate constitutions prescribe the nature and limits of the people's consent to be governed. They are contracts between the people and their state government, delegated limited authority to exercise certain powers not otherwise retained by the people. To the extent a state government exercises its power to undertake activities beyond those

---

[6] Richard B. Sanders and Barbara Mahoney, "Restoration of Limited State Constitutional Government: A Dissenter's View," *New York University Annual Survey of American Law 2003,* 59 N.Y.U. Ann. Surv. Am. L. 269.

> necessary to protect and maintain individual rights, courts must look for specific manifestations of the people's consent that evidence constitutional grants of that authority. But, where a legislature acts without express or necessarily implied authorization of the constitution, it exceeds its authority – even if there is no constitutional provision barring such actions.[7]

The Framers of the American system of government had wrestled with the tyranny and oppression that resulted from unlimited government power in Great Britain. Justice Sanders and Atty. Mahoney ask,

> Why would the people who were so protective of their liberty confer upon their own state governments the virtually unlimited power of the British Parliament? Given the preoccupation with the corruptive influence of power in the eighteenth and nineteenth centuries, when most of our state constitutions were drafted, is it not more likely the powers conferred upon the state were few and surrendered reluctantly?[8]

Justice Sanders and Atty. Mahoney note James Madison's statement in *Federalist No. 45*, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." However, they contend, this does not mean state governments have unlimited power, for

---

[7] *Id.* 270.

[8] *Id.* 272.

> the Federalist papers address the relationship of the states to the federal government, not the relationship of the people to their respective state. Federalist Number 45 merely describes the powers the people may confer upon their state legislatures; it does not delineate powers inherent to state governments."[9]

Amicus notes that the Tenth Amendment reserves power "to the States, or to the people." *Federalist No. 45* addresses what powers the people *may delegate* to their respective state governments; it does not address what powers the people *have actually delegated* to their state governments.

Justice Sanders and Atty. Mahoney say the "oft-repeated proposition" that state legislatures have plenary power "is seldom if ever justified by reasoned analysis."[10] In contrast to the theory that state governments have plenary power, Justice Sanders and Atty. Mahoney note that "virtually every state in the Union has a constitutional provision memorializing the fact that 'all just authority in the institutions of political society is derived from the people, and established with their consent.'"[11]

---

[9] *Id.* 272-73.

[10] *Id.* 271. In fn. 11 they note that numerous cases "recite the presumption without articulating a basis for it."

[11] *Id.* 269. In fn. 3 they cite the following state constitutional provisions that recognize state government is by the consent of the governed: Del. Const. pmbl; see also Ala. Const. § 2; Alaska Const. art. I, § 2; Ariz. Const. art. II,

Even in states in which the courts have held that the legislature has plenary power, those powers are subject to limitations by the federal and state constitutions. For example, Art. I § 2 of the Constitution of Alabama of 1901 states:

> That all political power is inherent in the people, and all free governments are founded on their authority and instituted for their benefit; and that, therefore, they have at all times an inalienable and indefeasible right to change their form of government in such manner as they may deem expedient.

And Art. I § 35 states:

> That the sole object and only legitimate end of government is to protect the citizens in the

---

§ 2; Ark. Const. art. II, § 1; Cal. Const. art. II, § 1; Conn. Const. art. I, § 2; Fla. Const. art. 1, § 1; Ga. Const. art. I, § 2, P ii; Haw. Const. art. I, § 1; Idaho Const. art. I, § 2; Ill. Const. art. 1, § 1; Ind. Const. art. I, § 1; Iowa Const. art. I, § 2; Kan. Const. Bill of Rights § 2; Ky. Const. § 4; La. Const. art. I, § 1; Me. Const. art. I, § 2; Md. Const. Decl. of Rights art. 1; Mass. Const. art. 5; Mich. Const. art. I, § 1; Minn. Const. art. 1, § 1; Miss. Const. art. III, § 5; Mo. Const. art. I, § 1; Mont. Const. art. II, § 1; Neb. Const. art. I, § 1; Nev. Const. art. I, § 2; N.H. Const. art. I; N.J. Const. art. I, P 2; N.M. Const. art. II, § 2; N.D. Const. art. I, § 2; Ohio Const. art. I, § 2; Okla. Const. art. II, § 1; Or. Const. art. I, § 1; Pa. Const. art. I, § 2; R.I. Const. art. I, § 1; S.C. Const. art. I, § 1; S.D. Const. art. 6, § 1; Tenn. Const. art. I, § 1; Tex. Const. art. I, § 2; Utah Const. art. I, § 2; Vt. Const. ch. I, art. 6; Va. Const. art. I, § 2; Wash Const. art. I, § 1; W. Va. Const. art. II, § 2; Wis. Const. art. I, § 1; Wyo. Const. art. I, § 1.

> enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression.

If some or all of the A.C.A. mandates require a state to perform expanded Medicaid functions that go beyond those authorized by that state's constitution, the effect would be that the A.C.A..forces states to violate their own constitutions. Although one could argue that the Supremacy Clause, U.S. Constitution, Art. VI § 2, makes federal statutes superior to state constitutions, the Framers who drafted the Constitution clearly intended that the state governments be sovereign and undisturbed in the conduct of their own domestic affairs. Even Alexander Hamilton, the Federalist who favored a strong central government more than most of the Framers, stated in *Federalist No. 81,* "[T]he plan of the [Constitutional] convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States."

Amicus recognizes that this may seem a novel argument, but the concept that state governments have *delegated* rather than plenary powers is consistent with the views and designs of the Framers of our constitutional republic and of those who designed the various state constitutions. *Amicus* therefore respectfully asks the Court to consider this argument but notes that the validity of arguments I, II, and III do not depend upon the validity of argument IV.

CONCLUSION

The mandates of the A.C.A. not only violate the U.S. Constitution and the constitutions of the various states; they so expand the national government and intrude upon the legitimate domains of the states as to fundamentally alter the nature and scope of the American system of government. This is a fundamental sea-change that should be accomplished, if at all, only by a constitutional amendment. *Amicus* therefore urges this Court to hold that these mandates are unconstitutional.

Respectfully submitted,

ROY S. MOORE
JOHN A. EIDSMOE*
BENJAMIN D. DUPRÉ
**Counsel of record*
FOUNDATION FOR MORAL LAW
Amicus Curiae
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com

February 13, 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-398

FILED
JAN 13 2012
OFFICE OF THE CLERK

In The
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

AMICUS BRIEF OF THE GOVERNOR OF WASHINGTON CHRISTINE GREGOIRE IN SUPPORT OF PETITIONERS (MINIMUM COVERAGE PROVISION)

KRISTIN HOUSER*
ADAM J. BERGER
REBECCA J. ROE
WILLIAM RUTZICK
SCHROETER, GOLDMARK & BENDER
810 Third Avenue, Suite 500
Seattle, Washington 98104
Telephone: (206) 622-8000
E-Mail: houser@sgb-law.com

Counsel for Amicus Curiae
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congress

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

WASHINGTON'S BUDGET AND ECONOMY HAVE SUFFERED FROM SPIRALING HEALTH CARE AND INSURANCE COSTS AND THE COSTS OF CARING FOR THE UNINSURED 3

THE GOVERNOR SOUGHT THE ACT AS A NECESSARY FEDERAL RESPONSE TO AN INTRACTABLE NATIONAL PROBLEM 8

THE MINIMUM COVERAGE PROVISION IS A NECESSARY AND PROPER EXERCISE OF FEDERAL POWER UNDER THE COMMERCE CLAUSE TO ADDRESS INTERSTATE ECONOMIC PROBLEMS, INCLUDING THE COSTS OF THE UNINSURED, THAT CANNOT BE SOLVED BY STATES ACTING ALONE 10

A. Washington Experienced A Death Spiral In Its Individual Insurance Market When It Enacted Reforms Without A Minimum Coverage Provision, Underscoring The Need For The Provision In The ACA 11

TABLE OF CONTENTS – Continued

Page

B. The Uninsured Are Born, Get Sick or Injured, And Use The Health Care Market: The Cost Of Their Care Significantly Burdens The State And Its Citizens 14

C. Uninsured Individuals Cross State Lines To Receive Care, Resulting In Interstate Transfers Of Funds And Economic Burdens For The Cost Of Their Care 22

D. The State Needs The ACA To Reduce The Burden Of The Disproportionately High Cost Of Caring For The Uninsured On Everyone Else 25

1. The Costs Of Health Care For The Uninsured Are Exacerbated By Their Reduced Access To Primary, Preventive, And Chronic Disease Care 27

2. The Minimum Coverage Provision Is Necessary To Alleviate The Unfair Burdens Placed On Employers, Insured Individuals, Health Care Providers, And The State By The Costs Of The Uninsured 33

CONCLUSION 38

TABLE OF AUTHORITIES

Page

CASES

Florida v. Department of Health and Human Services, 648 F.3d 1235 (11th Cir. 2011).....13, 20

Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528 (1985).....8

Gonzales v. Raich, 545 U.S. 1 (2005).....21

United States v. Comstock, ___ U.S. ___, 130 S. Ct. 1949 (2010).....22

United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944).....21

University of Washington Medical Center v. Sebelius, 634 F.3d 1029 (9th Cir. 2011).....25, 34

West Virginia Univ. Hosps., Inc. v. Rendell, 2007 WL 3274409 (M.D. Pa. Nov. 5, 2007).....23

West Virginia Univ. Hosps., Inc. v. Rendell, 2009 WL 3241849 (M.D. Pa. Oct. 2, 2009).....23

Wickard v. Filburn, 317 U.S. 111 (1942).....8

STATUTES

26 U.S.C. § 5000A.....20

42 U.S.C. § 264.....15

42 U.S.C. § 1303(c).....19

42 U.S.C. § 1395dd(b)(1).....18

42 U.S.C. § 1396n(k).....9

42 U.S.C. § 18022.....28

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. §§ 18091(a)(2)(H)-(J) 21

RCW 43.06.155 9

1993 Wash. Laws Ch. 492, §§ 283-286 11

2000 Wash. Laws. Ch. 79 12

REGULATIONS

42 C.F.R. § 70.2 15

Wash. Admin. Code 284-10-050 11

LEGISLATIVE HISTORY

Washington Senate Bill Rep. E2SSB 6067, 56th Leg. (2000) 12, 22

OTHER AUTHORITIES

Agency for Healthcare Research and Quality, *Medical Expenditure Panel Survey, Statistical Brief # 203* 16

Baker Institute Policy Report, *The Economic Impact of Uninsured Children on America* (2009) 31

Bindman *et al.*, *Medicaid Re-Enrollment Policies and Children's Risk of Hospitalizations for Ambulatory Care Sensitive Conditions*, 46 Medical Care 1049 (2008) 16

TABLE OF AUTHORITIES – Continued

Page

Braveman, *et al.*, *Adverse Outcomes and Lack of Health Insurance Among Newborns in an Eight-County Area of California, 1982-1986*, 321 NEJM 503-13 (1989) 17

Business Round Table, *Trade Creates Jobs for Washington* (January 1, 2010) (http://businessroundtable.org/studies-and-reports/trade-creates-jobs-for-washington/) 6

Chaikind, *et al.*, Congressional Research Service, *Private Health Insurance Provisions in PPACA (P.L. 111-148)*, CRS Rep. R40942 (Apr. 15, 2010) 20

Christakis, *et al.*, *Is Greater Continuity of Care Associated with Less Emergency Department Utilization?*, 103 Pediatrics 738 (1999) 31

Davenport, Holin, & Feder, Center for American Progress, *The "Dual Eligible" Opportunity: Improving Care & Reducing Costs for Individuals Eligible for Medicare & Medicaid* (Dec. 2010) (http://www.americanprogress.org/issues/2010/12/pdf/dual-eligibles.pdf) 28

Email from Jim Keogh, Economic Policy Analyst, Washington Office of Insurance Commissioner (December 23, 2011) (citing Washington Medical Expenditure Panel Survey data) (on file with counsel) 36

Email from Ken Callaghan, Chief, Office of Rates Management, DSHS (January 6, 2011) (on file with counsel) 27

TABLE OF AUTHORITIES – Continued

Page

Garrett, *et al.*, Urban Institute, *The Cost of Failure to Enact Health Reform: 2010-2020* (Mar. 2010) (http://www.rwjf.org/files/research/49148.pdf) 4

Hall, *Constitutional Mortality: Precedential Effects of Striking the Individual Mandate*, Wake Forest Univ. Legal Studies Paper No. 1959612 (Nov. 14, 2011) 15

Harborview Medical Center/University of Washington Medicine Response, Public Disclosure Request (December 2010) 23, 24

Harborview Medical Center/University of Washington Medicine Response, Public Disclosure Request (January 2011) 24, 34

Harborview Medical Center/University of Washington Medicine Responses, Public Disclosure Request (June 2010) 23

http://healthaffairs.org/blog/2009/10/20/are-higher-value-care-models-replicable 29

http://hrsa.dshs.wa.gov/applehealth/ 32

http://hrsa.dshs.wa.gov/HospitalPymt/Trauma/RateFiles/TraumaClaims/1stQtr2011ClaimsDetail.pdf 19

http://hscdataonline.s-3.com/hhsurvey.asp 16

http://www.childrensalliance.org/resource-center/fact-sheet-federal-bonus-apple-health-kids 32

http://www.medicare.gov/longtermcare/static/home.asp 30

TABLE OF AUTHORITIES – Continued

Page

http://www.oecd.org/document/16/0,3343,en_2649_34631_2085200_ 1_1_1_1,00.html 25

http://www.statehealthfacts.org/profileind.jsp?cat=4&sub=47&rgn=49 34

http://www.statehealthfacts.org/profileind.jsp?cmprgn=1&cat=5&rgn=49&ind=595&sub=143 35

http://www.wsma.org/files/Downloads/NewsEvents/ReportsPreceptor/may-june_reports10.pdf (May/June 2010) 28

Institute of Medicine, *America's Children: Health Insurance and Access to Care* (1998) 31

Institute of Medicine, *America's Uninsured Crisis: Consequences for Health and Health Care* (2009) 16, 17, 27, 35

Jonathan Seib, Executive Policy Advisor, Governor of Washington's Executive Policy Office (email comm. March 7, 2011) 32

Kaiser Commission for Medicaid & the Uninsured, *Low-Income Adults Under Age 65* (June 2009) (http://www.kff.org/healthreform/upload/7914.pdf) 25

King County Steps to Health, http://www.kingcounty.gov/healthservices/health/chronic/steps.aspx 29

Kirk, *Riding the Bull: Experience with Individual Market Reform in Washington, Kentucky, and Massachusetts*, Journal of Health Politics, Policy and Law 25(1) (Feb. 2000) 12

TABLE OF AUTHORITIES – Continued

Page

Lorenz, *et al.*, Agency for Healthcare Research & Quality, *End-of-Life Care & Outcomes: Summary,* Evidence Report/Technology Assessment No. 110 (Nov. 2004) (http://www.ahrq.gov/clinic/epcsums/eolsum.pdf) 15

Martin, *et al.*, Centers for Disease Control & Prevention, *Births: Final Data for 2009,* National Vital Statistics Reports 60(1):13 (Nov. 2011) (http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_01.pdf) 15

McWilliams, *"Health Consequences of Uninsurance Among Adults in the United States: Recent Evidence and Implications,"* 87 Millbank Quarterly 443 (June 2009) 28

Meropol, *et al.*, *Cost of Cancer Care: Issues and Implications*, 25 J. Clin. Oncol. 180 (2007) 17

National Foundation for Trauma Care, *Trauma's Golden Hour* (http://www.traumafoundation.org/restricted/tinymce/jscripts/tiny_mce/plugins/filemanager/files/About%20Trauma%20Care_Golden %20Hour.pdf) 18

National Foundation for Trauma Care, *U.S. Trauma Center Crisis* (May 2004) (http://www.traumafoundation.org/publications.htm) 19

Organization for Economic Cooperation & Development, *OECD Health Data 2011: How Does the United States Compare* (http://www.oecd.org/dataoecd/46/2/38980580.pdf) 6

TABLE OF AUTHORITIES – Continued

Page

Pauly & Pagan, *Spillovers and Vulnerability: The Case of Community Uninsurance*, 26 Health Affairs 1304 (2007) 35

Peppe, *et al.*, Kaiser Family Foundation, *Characteristics of Frequent Emergency Dep't Users* (Oct. 2007) (http://www.kff.org/insurance/upload/7696.pdf) 23, 26

Press Release of Senator Cantwell (June 12, 2009) (http://cantwell.senate.gov/news/record.cfm?id=314410) 10

Shen & Washington, *Disparities in Outcomes Among Patients With Stroke Associated With Insurance Status*, 38 Stroke 1010 (2007) 16

Squires, The Commonwealth Fund, *State Trends in Premiums & Deductibles, 2003-2010: The Need for Action to Address Rising Costs.* (November 2011) (http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2011/Nov/State%20Trends/1561_Schoen_state_trends_premiums_deductibles_2003_2010.pdf) 6

Steps to Health King County: Summary Evaluation Report March 2009 (http://www.kingcounty.gov/healthservices/health/chronic/steps.aspx) 30

Szilagyi, *et al.*, *The Scientific Evidence for Health Insurance*, 9 Acad. Pediatr. 4 (2009) 31

TABLE OF AUTHORITIES – Continued

Page

U.S. Census Bureau, *2010 American Community Survey*, 1-Year Estimates Selected Characteristics of the Uninsured in the United States, Washington Table (http://www.census.gov/acs/www/) 5

Washington Alliance for a Competitive Economy, Competitiveness Br. 08-03, *The Healthcare Spending Squeeze* (July 28, 2008) (http://www.researchcouncil.org/docs/PDF/WASHACEBusinessClimate/TheHCSpendingSqueeze.pdf) 3

Washington Department of Social & Health Services, *Coordinating Care for Washington State Dual Eligibles* (Sept. 2011) 30, 31

Washington Research Council, Policy Brief 00-2 (May 15, 2000) (http://www.researchcouncil.org/docs/PDF/WRCBusinessClimate/SomeGains4Bus2000.pdf) 12

Washington State Blue Ribbon Commission On Health Care Costs And Access (January 2007) 9

Washington State Department of Health, *Washington State 2000 Charity Care in Washington Hospitals* (July 2002) (http://www.doh.wa.gov/EHSPHL/hospdata/CharityCare/Reports/2000CharityCareinWashingtonState.doc) 34

Washington State Employment Security Dep't, *2003 Employee Benefits Survey* (March 2004) 36

TABLE OF AUTHORITIES – Continued

Page

Washington State Employment Security Department, *2010 Washington State Employee Benefits Survey* (August 2011) (https://fortress.wa.gov/esd/employmentdata/docs/occupational-reports/2010-employee-benefits-report.pdf) 7, 36

Washington State Office of the Insurance Commissioner, *A Problem We Can't Ignore: The Hidden and Rapidly Growing Costs of the Uninsured and Underinsured in Washington State* (Nov. 2009) (http://www.insurance.wa.gov/publications/agency_reports.shtml) 5, 36

Washington State Office of the Insurance Commissioner, *State of the Uninsured: Health Coverage in Washington State* (December, 13, 2011) (http://www.insurance.wa.gov/legislative/uninsured-washington.shtml) 5, 37

INTEREST OF AMICUS CURIAE[1]

The Governor of Washington, Christine Gregoire, is the chief executive officer of her State. As such, she is responsible for the administration and budgeting of the numerous state health care programs and initiatives affected by the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 (collectively, "ACA," or the "Act"). Governor Gregoire supports the reforms embodied in the Act and believes the minimum coverage provision is an appropriate use of federal power under the Interstate Commerce Clause to achieve a more rational system of paying for the consumption of health care, in particular by individuals who are now uninsured. For years, the State has grappled with the problem of increasing health care costs for State residents, clients of State agencies, and public employees. Rising health care costs also threaten the economic vitality of the State, which relies not only on interstate commerce, but also heavily on international trade. Given the immense scope of the problem and the interstate nature of the health insurance and health care markets, the Governor sought federal assistance in crafting a broader, more effective solution than states would be able to

---

[1] Written consents from all parties to the filing of amicus curiae briefs are on file with the Clerk. Counsel for amicus represents that it entirely authored this brief and no party, its counsel, or any other entity but amicus and its counsel made a monetary contribution to fund the brief's preparation or submission.

implement on their own. The Governor participated in the political process that led to passage of the Act and believes it is a reasonable and necessary response to these shared state and federal goals.

SUMMARY OF ARGUMENT

The Governor of Washington believes that the minimum coverage provision of the ACA is a constitutional exercise of Congress's power under the Commerce Clause to regulate the interstate market in health care and insurance. Washington's experience with implementing health insurance reforms such as those in the ACA directly refutes the majority opinion in the court below that Congress could not reasonably find that the minimum coverage provision was a reasonable and necessary adjunct to health insurance reform. In Washington, similar reforms without universal coverage led only to a death spiral in the individual insurance market. Without the insurance reforms contained in the ACA, and specifically, the minimum coverage provision, Washington will continue to suffer the effects of an inequitable and irrational system of providing and paying for the health care of the uninsured, a system that is national in scope and can only be reformed at the national level. As home to a leading regional trauma center, Washington also has experience with the phenomenon of interstate travel by the uninsured to obtain medical care and the financial burdens this places on the economy and institutions of the State. Finally, in Washington, promising efforts are underway to

reform the delivery of health care so as to improve the health of consumers and lower the cost of their care; broad access to affordable insurance, which will only be possible with the minimum coverage provision of the ACA, is critical to the success of these efforts. It is on the strength of these experiences in Washington that the Governor supports the Act's minimum coverage provision and concurs in its constitutionality.

ARGUMENT

WASHINGTON'S BUDGET AND ECONOMY HAVE SUFFERED FROM SPIRALING HEALTH CARE AND INSURANCE COSTS AND THE COSTS OF CARING FOR THE UNINSURED

The state agencies for which the Governor is responsible are major purchasers of both health care and health insurance, including programs that provide insurance, services, or prescription drugs to low-income adults, a large percentage of children in the state, state employees, and injured workers. As a result, the State's budget has been severely impacted by the spiraling costs of services and insurance and declining access to affordable care. In recent years, health-related costs have accounted for up to one-third of the State's general spending.[2]

[2] Washington Alliance for a Competitive Economy, Competitiveness Br. 08-03. *The Healthcare Spending Squeeze* (July 28,

(Continued on following page)

Despite these expenditures, the State has suffered significant difficulties in meeting the health care needs of its citizens. The scope of the unmet need is illustrated by the State's Basic Health program, which provides subsidized coverage for low-income, childless adults who typically do not qualify for Medicaid. Approximately 160,000 citizens who want to access Basic Health coverage cannot, due to State budget constraints.[3] Studies project that shortfalls in state programs to cover the uninsured such as Basic Health would only worsen in the absence of national health care reform.[4]

The high cost of health insurance, resulting in part from cost shifting to pay for care for the uninsured, has also hampered economic growth in the State and the ability to participate effectively in interstate and international commerce. A recent report by Washington's Insurance Commissioner estimates that each insured family in Washington pays an additional $1,017 per year in medical bills to help cover the costs of the uninsured, compared to

---

2008) (http://www.researchcouncil.org/docs/PDF/WASHACE BusinessClimate/TheHCSpendingSqueeze.pdf).

[3] Budget shortfalls have forced the Governor to propose elimination of this program several times. In response, the Legislature moved to reduce enrollment, most recently by 17,000. Further reductions, or complete elimination, will only exacerbate the problem of the uninsured in Washington and the need for a federal solution.

[4] Garrett, *et al.*, Urban Institute, *The Cost of Failure to Enact Health Reform: 2010-2020* (Mar. 2010), at 2 (http://www.rwjf.org/files/research/49148.pdf).

$917 last year.[5] This figure has been steadily rising as the proportion of the population without insurance increases. By the end of 2011, 14.5% of Washingtonians were projected to be uninsured, up from 12% just two years ago.[6] Among working-age adults, the figure is 19.7%.[7] The situation has deteriorated even faster in rural areas of the state, with the percentage of uninsured exceeding 20% in five rural Washington counties in 2010.[8] But for the fact that baby boomers are reaching the age of Medicare eligibility and that many students are now covered on their parents' plans as a result of the ACA, these number would be even higher.[9] Likewise, the cost of charity care in Washington rose a staggering 36% from 2008 to 2010, largely due to the increase in the uninsured population.[10]

---

[5] Washington State Office of the Insurance Commissioner, *State of the Uninsured: Health Coverage in Washington State* (December, 13, 2011) (http://www.insurance.wa.gov/legislative/uninsured-washington.shtml) ("2011 OIC Report"); Washington State Office of the Insurance Commissioner, *A Problem We Can't Ignore: The Hidden and Rapidly Growing Costs of the Uninsured and Underinsured in Washington State* (Nov. 2009), at 3 (http://www.insurance.wa.gov/publications/agency_reports.shtml) ("2009 OIC Report").

[6] 2011 OIC Report, at 1.

[7] U.S. Census Bureau, *2010 American Community Survey*, 1-Year Estimates Selected Characteristics of the Uninsured in the United States, Washington Table (http://www.census.gov/acs/www/).

[8] 2011 OIC Report, at 3.

[9] *Id.* at 4.

[10] *Id.* at 1.

As an inevitable result, the cost to businesses of employee health benefits has risen apace: premiums rose 42% for individuals and 54% for families between 2003 and 2010, far outstripping the overall inflation rate of 18.5% for that same time period.[11] In states like Washington, where more than 20% of jobs derive from international trade, these increases cause grave concern that businesses will be increasingly unable to compete in the international economy.[12] For example, Washington's closest competitors and trading partners include Canada and Japan.[13] Both have *per capita* expenditures on health care 55% or less than those borne by businesses and workers in the United States.[14] Similarly, America's *per capita* health care costs range between 89% and 128% higher than costs in the European countries where Airbus, the

---

[11] Squires, The Commonwealth Fund, *State Trends in Premiums & Deductibles, 2003-2010: The Need for Action to Address Rising Costs*. (November 2011), at 18 (http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2011/Nov/State%20Trends/1561_Schoen_state_trends_premiums_deductibles_2003_2010.pdf).

[12] Business Round Table, *Trade Creates Jobs for Washington* (January 1, 2010) (http://businessroundtable.org/studies-and-reports/trade-creates-jobs-for-washington/)

[13] *Id.*

[14] Organization for Economic Cooperation & Development, *OECD Health Data 2011: How Does the United States Compare* (http://www.oecd.org/dataoecd/46/2/38980580.pdf).

main competitor of Washington's largest exporter, Boeing, has its manufacturing plants.[15]

Uncontrolled health care costs, in part due to the high cost of uncompensated care, have stifled the growth of small businesses, created a disincentive for hiring new employees, and dramatically reduced the availability of affordable insurance through employer group plans. Increasing numbers of small employers in Washington have dropped health care coverage for their employees or have increased their employees' share of health care costs as a result of unpredictable rate spikes in the small group markets.[16]

Finally, the State has directly suffered from the high cost of uncompensated care caused by the lack of affordable insurance for large portions of its citizenry. The problem of the uninsured has impacted the State budget and economy in numerous ways, including: the shifting of costs through increased premiums paid by the State as an employer and increased charges paid by the State for the care of disabled workers; subsidization by the State of hospitals providing uncompensated care, including to uninsured patients from other states; the huge cost of long-term care for the many disabled and elderly who are uninsured for

---

[15] *Id.*

[16] 2009 OIC Report, at 4; Washington State Employment Security Department, *2010 Washington State Employee Benefits Survey* (August 2011), at 6-8 (https://fortress.wa.gov/esd/employmentdata/docs/occupational-reports/2010-employee-benefits-report.pdf).

this form of care; and the lost productivity of workers due to preventable illness and disability.

THE GOVERNOR SOUGHT THE ACT AS A NECESSARY FEDERAL RESPONSE TO AN INTRACTABLE NATIONAL PROBLEM

Because of the severe challenges to the State's budget and economy, the Governor welcomed a federal solution that would expand coverage, including to many whose health care has been wholly funded by the states, and increase competition and affordability in the insurance market. Governor Gregoire also advocated federal action to reform the nation's health care system with a focus on delivery models that would provide less costly care and lead to better outcomes through, *inter alia*, making disease prevention and chronic disease management more accessible to low-income individuals. The Act is a product of the political dynamic in the federal system, in which Congress properly moved to address a problem that proved beyond the reach of the states alone, building upon the previous efforts of the states as "laboratories for social and economic experiment." *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 546 (1985). In short, this is a national rather than a local problem, which falls well within the parameters of the Interstate Commerce Clause. *See Wickard v. Filburn*, 317 U.S. 111 (1942).

For years, the Governor pursued state-level initiatives to address these issues. Her Blue Ribbon

Commission on Health Care Costs and Access led to a number of major initiatives, including using the State's purchasing power to support development of the "medical home" model of coordinated care, as well as financial incentives based on improved health outcomes, rather than on the number of procedures performed.[17] The State also has its Basic Health program, whose purpose is to offer affordable health coverage to low-income Washington residents. *See* RCW 43.06.155. These efforts, while significant, informed the Governor's recognition that implementation of reform on a national level was necessary to realize their full benefits.

In fact, many ACA provisions parallel and complement aspects of state programs and initiatives, including in the areas of care coordination, insurance market reforms, and expansion of publicly funded care to childless, low-income adults. The Act builds on the experiences of the states, such as Massachusetts' experiment (under a Medicaid waiver) with universal coverage. As a further example, the Act creates incentives for states to "rebalance" their Medicaid long-term care systems away from institutional care to home and community-based settings, where appropriate. *See* 42 U.S.C. § 1396n(k). This provision was based on Washington's experience with

---

[17] Washington State Blue Ribbon Commission On Health Care Costs And Access (January 2007), at 5 (http://www.leg.wa.gov/JointCommittees/HCCA/Documents/Final%20Report.pdf).

such rebalancing.[18] The policy choices embodied in the Act, including the provisions on universal coverage and funding for developing less costly, more effective models of care, were the result of a political process in which the states and their citizens had ample opportunity to be heard and in which the role of the states as laboratories for innovation was honored.

THE MINIMUM COVERAGE PROVISION IS A NECESSARY AND PROPER EXERCISE OF FEDERAL POWER UNDER THE COMMERCE CLAUSE TO ADDRESS INTERSTATE ECONOMIC PROBLEMS, INCLUDING THE COSTS OF THE UNINSURED, THAT CANNOT BE SOLVED BY STATES ACTING ALONE

The Governor supports the minimum coverage provision of the ACA, and believes that provision directly serves federalism by protecting her State from costs that otherwise would be imposed on Washington's budget and health care system, not just by its own uninsured, but by uninsured residents of other states seeking care in Washington facilities. The Governor further believes that actions of the uninsured with significant economic costs – such as accessing care late in the course of a disease, at more expensive levels of care, because of the unavailability of primary care, or at state-funded trauma centers

---

[18] Press Release of Senator Cantwell (June 12, 2009) (http://cantwell.senate.gov/news/record.cfm?id=314410).

when they suffer injury from unpredictable catastrophic events – must be addressed by a federal regulatory scheme that rationalizes payment and aligns incentives with less expensive, more effective care. As Washington's experience shows, the minimum coverage provision is essential to the success of that scheme.

A. Washington Experienced A Death Spiral In Its Individual Insurance Market When It Enacted Reforms Without A Minimum Coverage Provision, Underscoring The Need For The Provision In The ACA.

The Governor's support of the ACA is informed by Washington's attempt to implement insurance reforms in the absence of minimum required coverage. Washington actually experienced the "death spiral" that can occur in the private insurance market when coverage for preexisting conditions is required without universal coverage. In 1993, the State adopted regulations governing individual health plans that prohibited denying enrollment because of health status and limited waiting periods for new enrollees to three months. *See* 1993 Wash. Laws Ch. 492, §§ 283-286; Wash. Admin. Code 284-10-050 (July 1, 1994). Within a few years, insurance carriers began reporting significant market losses and premiums began to rise. As in other states that attempted similar reforms, the major carriers in Washington

stopped selling individual plans, leading to the virtual destruction of the individual insurance market.[19]

In 2000, the legislature was forced to restructure underwriting for the private market: preexisting condition waiting periods were extended, and insurers were allowed to screen out the most costly individuals. 2000 Wash. Laws. Ch. 79.[20] The State revived its dormant high-risk pool to provide those individuals with coverage. In making these changes, the legislature specifically identified the problem of eliminating barriers to access without requiring universal participation:

> *Generally, as rates increase without incentives for healthy people to maintain continuous coverage, the possibility exists that adverse selection will occur,* where healthy people who least expect to need expensive care choose not to have health coverage, or choose to enter the market only when needing major medical care and dropping coverage after receiving medical treatment.

Washington Senate Bill Rep. E2SSB 6067, 56th Leg. (2000) ("WSB Rep. 6067") (emphasis added).

---

[19] Kirk, *Riding the Bull: Experience with Individual Market Reform in Washington, Kentucky, and Massachusetts,* Journal of Health Politics, Policy and Law 25(1): 133, 138-47 (Feb. 2000).

[20] *See also* Washington Research Council, Policy Brief 00-2 (May 15, 2000), at 3-4 (http://www.researchcouncil.org/docs/PDF/WRCBusinessClimate/SomeGains4Bus2000.pdf).

In overturning Congress's decision to adopt the minimum coverage requirement, the Eleventh Circuit relied heavily on research by certain economists purportedly showing that the requirement is not necessary for insurance reforms to work. *Florida v. Department of Health and Human Services*, 648 F.3d 1235, 1299 (11th Cir. 2011). Thus, went the reasoning of that Court, deference should not be granted to Congressional findings that the minimum coverage requirement is an important component of overall reform of the health insurance market; in the Eleventh Circuit's judgment, the link between that provision and the desired goal, a more rational payment system for health care in this country, is too attenuated for it to be a valid exercise of Congress's powers under the Commerce Clause. *Id.* at 1300-02.

However, the reality of Washington's experience – as opposed to abstract projections by those engaged in the "dismal science" of economics – directly supports Congress's finding that the ACA's minimum coverage provision is a necessary and proper adjunct to other reforms of the insurance market. Interestingly, in dismissing the need for an individual mandate as part of the remedy for cost shifting by the uninsured, the Eleventh Circuit pointed to the ACA's prohibition of coverage denials to people with pre-existing conditions as taking care of a significant portion of the problem. *Id.* at 1299. However, this is precisely what did *not* work in Washington: enabling those with pre-existing conditions to have access to health insurance in the absence of a requirement that

healthy individuals participate in the insurance risk-sharing pool. The Eleventh Circuit ignores the risk of the insurance death spiral that can – and in Washington did – result from such an approach, but Congress did not. It reasonably concluded that, without universal coverage, other reforms that are intended to rationalize the market and increase access to affordable insurance for all Americans will instead have the opposite effect. The ACA thus builds on the experiences of Washington and other states to avoid the consequences that doomed individual state reform initiatives.

B. The Uninsured Are Born, Get Sick or Injured, And Use The Health Care Market: The Cost Of Their Care Significantly Burdens The State And Its Citizens.

Plaintiffs have portrayed the minimum coverage provision as forcing activity on citizens who choose to stay out of the marketplace. However, as Congress reasonably concluded, the need for health care at some stage of life is an almost universal condition of existence and is often unpredictable.[21]

---

[21] The Governor agrees with the appellants that the choice of how to pay for health care is not "inactivity." However, even if it were considered inactivity, the Governor does not believe that the federal government inherently lacks power to regulate "inactivity" when necessary for the health and safety of the nation. For example, if a nationwide pandemic were causing disruption of interstate commerce, like the Spanish flu of 1918,

(Continued on following page)

At the outset of life, 98.9% of all births in the United States take place in a hospital.[22] Thus, virtually every citizen of every state, including Washington, starts out as a consumer of health care. At the other end of life, people are living longer with chronic conditions that typically result in the utilization of health care resources.[23] For example, 91.5% of the population 65 and over has been diagnosed with a chronic condition such as diabetes, hypertension, or

---

which each state lacked the capacity to address on its own, Congress would have authority under the Interstate Commerce Clause to impose such measures as vaccination and screening on a national basis. *See* 42 U.S.C. § 264; 42 C.F.R. § 70.2 ("Whenever the Director of the Centers for Disease Control and Prevention determines that the measures taken by health authorities of any State or possession . . . are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary. . . ."); *see generally*, Hall, *Constitutional Mortality: Precedential Effects of Striking the Individual Mandate,* Wake Forest Univ. Legal Studies Paper No. 1959612 (Nov. 14, 2011). Penalties for noncompliance in such a situation would likely far exceed the fine that is the only consequence of refusing to buy insurance under the Act.

[22] Martin, *et al.*, Centers for Disease Control & Prevention, *Births: Final Data for 2009*, National Vital Statistics Reports 60(1):13 (Nov. 2011) (http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_01.pdf).

[23] Lorenz, *et al.*, Agency for Healthcare Research & Quality, *End-of-Life Care & Outcomes: Summary*, Evidence Report/Technology Assessment No. 110 (Nov. 2004), at 1 (http://www.ahrq.gov/clinic/epcsums/eolsum.pdf).

cancer.[24] Based on 2007 national data, only 6% of all individuals over 65 avoided a visit to a doctor's office in the previous twelve months.[25] Given these rates of consumption at the beginning and end of life, it is clear that almost no one is exempt from participation in the health care market.

The Governor has a legitimate concern regarding how and when such acts of consumption are paid for, particularly for the uninsured portion of the population. When lack of coverage results in inadequate care, she also has a significant concern about the resulting future consumption of costly health care resources. For example, uninsured children with serious health conditions, such as asthma and diabetes, that are not timely diagnosed or who do not have continuous medical coverage are more likely to incur avoidable hospitalizations.[26] Adults who delay care for chronic conditions such as high blood pressure are at higher risk of developing strokes requiring lengthy hospital stays.[27] Thus, the decisions of individuals

---

[24] Agency for Healthcare Research and Quality, *Medical Expenditure Panel Survey, Statistical Brief # 203*.

[25] http://hscdataonline.s-3.com/hhsurvey.asp.

[26] Institute of Medicine, *America's Uninsured Crisis: Consequences for Health and Health Care* (2009), at 71 ("IOM Report"); Bindman *et al.*, *Medicaid Re-Enrollment Policies and Children's Risk of Hospitalizations for Ambulatory Care Sensitive Conditions*, 46 Medical Care 1049, 1052-54 (2008).

[27] Shen & Washington, *Disparities in Outcomes Among Patients With Stroke Associated With Insurance Status*, 38 Stroke 1010-16 (2007).

about how to finance health care coverage for themselves and their families and when to access services can have profound impacts on the overall costs of care that affect price, demand, and supply across the market.

Moreover, while plaintiffs characterize this as a matter of freedom, or choice, the use of health care resources by the uninsured often is not subject to individual control. Children's health is significantly affected by lack of insurance,[28] yet children have no control over their insurance status. Further, the need for critical health care is frequently unplanned. There are, for example, unplanned births to uninsured individuals. Studies have found that poor birth outcomes are significantly higher in newborns with no insurance than those with private insurance, often leading to long, costly hospital stays and untold suffering by the children and families affected.[29] People do not plan to get cancer; when they do, the cost of chemotherapeutic drugs can be very substantial.[30]

Perhaps the most dramatic examples of unplanned use of health care resources result from

---

[28] IOM Report, at 58-63.

[29] Braveman, *et al.*, *Adverse Outcomes and Lack of Health Insurance Among Newborns in an Eight- County Area of California, 1982-1986*, 321 NEJM 503-13 (1989).

[30] Meropol, *et al.*, *Cost of Cancer Care: Issues and Implications*, 25 J. Clin. Oncol. 180, 182 (2007).

automobile crashes, gunshot wounds, falls, and other catastrophic events. Severely injured victims may be unconscious and unable to make decisions, yet trauma research demonstrates that care within the first hour is critical to survival and recovery.[31] Plaintiffs, including the Attorney General of Washington, do not explain what they would have trauma centers do when the voluntarily uninsured present as trauma victims; would they advocate refusing treatment because such individuals made the decision not to buy insurance? Or would they advocate that everyone else pay for the medical care that these people need but do not have the funds or insurance coverage to pay for? While plaintiffs might not expressly advocate for this kind of re-distribution of income, that is currently how the system works and will continue to operate if the pre-Act status quo is reinstated.

Turning away people who are suffering and can be helped is contrary to our societal values. Indeed, federal law prohibits such a response. The Emergency Medical Treatment and Active Labor Act ("EMTALA") requires hospitals to provide sufficient treatment to stabilize all patients who present at their emergency departments with an emergency medical condition, or transfer them to a facility that can do so, regardless of insurance status. 42 U.S.C. § 1395dd(b)(1). The

---

[31] National Foundation for Trauma Care, *Trauma's Golden Hour* (http://www.traumafoundation.org/restricted/tinymce/jscripts/tiny_mce/plugins/filemanager/files/About%20Trauma%20Care_Golden%20Hour.pdf).

ACA specifically retains this requirement. *See* 42 U.S.C. § 1303(c).

Like other Level I trauma centers, Harborview Medical Center, the Level I center in Washington, takes all trauma patients transferred to it regardless of insurance status or ability to pay.[32] State and federal funding covers a portion of the cost of care for the 18% of trauma patients who are uninsured – but not all.[33] The Governor urged passage of the ACA in part because she supports the more rational system of funding trauma care that would result if most patients were insured.

The per-patient cost for care in a trauma center is $14,896.[34] Figures for Washington's Level I center indicate that claims paid by the State for trauma care for the most severely injured are frequently in the $50,000 to $125,000 range, or higher.[35] It was reasonable for Congress to infer that individuals who choose not to purchase minimum coverage, especially on the basis of alleged economic hardship, would not be able

---

[32] National Foundation for Trauma Care, *U.S. Trauma Center Crisis* (May 2004), at 9 (http://www.traumafoundation.org/publications.htm). Level I centers provide the highest level of trauma care.

[33] *Id.* at 4 (reporting that only 8% of costs of caring for the uninsured are recovered).

[34] *Id.*

[35] http://hrsa.dshs.wa.gov/HospitalPymt/Trauma/RateFiles/TraumaClaims/1stQtr2011ClaimsDetail.pdf.

to afford the cost of such unexpected care.[36] Under the pre-ACA system, if uninsured individuals are in a car accident, develop cancer, or have a serious fall or a stroke, they receive care, *i.e.*, consume medical goods and services, and society pays what they cannot. In other words, those individuals, whose "freedom" plaintiffs seek to protect, are receiving a benefit – maintenance of an acute care system that is available to all – but are unwilling to pay their fair share of the cost of that benefit. They are getting "something for nothing" and the rest of society subsidizes them.

The high cost of such unpredictable, catastrophic events demonstrates the flaw in the Eleventh Circuit's second-guessing of Congress's factual findings. While the majority expressed concern that the minimum coverage requirement will be imposed on the healthy uninsured, who, in its view, are not contributing to the problem of health care costs being shifted to the insured, in fact, even healthy individuals are only one trauma or cancer diagnosis away from being cost-shifters themselves. *Florida v. Department of Health and Human Services*, 648 F.3d at 1299-1300.

---

[36] Truly low-income persons are excluded under 26 U.S.C. § 5000A from tax penalties for failing to procure minimum essential coverage. For others, the cost of coverage pales in comparison to the potential cost for trauma care. *See* Chaikind, *et al.*, Congressional Research Service, *Private Health Insurance Provisions in PPACA (P.L. 111-48)*, CRS Rep. R40942 (Apr. 15, 2010), at 22 (calculating that the maximum annual out-of-pocket premium for qualifying coverage for a family of four at 400% of the Federal Poverty Level would be $8,379).

For example, a thirty-five year old uninsured, employed male may be perfectly healthy at the time he gets on a motorcycle, but require massive intervention from a trauma hospital moments later. Such an individual quite likely could have afforded insurance premiums, but cannot afford the tens or hundreds of thousands of dollars of medical costs resulting from his severe injuries. What the Eleventh Circuit ignores is the moral hazard created by the elimination of the pre-existing condition exclusion and other barriers to access. The minimum coverage requirement provides the incentive for such healthy individuals to make the investment in their own health care security.

Congress certainly reasonably could have found that continuation of the current system of payment for the care of such individuals would increase health care costs and interfere with the viability of health insurance, which are part of interstate commerce. *See* 42 U.S.C. §§ 18091(a)(2)(H)-(J). Thus, it was well within Congress's constitutional authority to enact penalties in order to change the economic behavior of the healthy uninsured who do have sufficient income to purchase insurance, thereby alleviating the burden on interstate commerce resulting from their failure to do so. *Gonzales v. Raich*, 545 U.S. 1, 19 (2005) (concluding the failure to regulate home-consumed marijuana would have a substantial effect on supply and demand "in the national market for that commodity").

Moreover, it is undisputed that Congress relied on *United States v. South-Eastern Underwriters Association,* 322 U.S. 533 (1944), as authority for the

ACA and that the Supreme Court confirmed therein that the insurance industry is subject to regulation under the Commerce Clause. Congress thus can properly regulate health insurance, *inter alia*, by prohibiting insurance companies from denying enrollment because of health status in order to ensure universal access to affordable insurance. But, as Washington's experience in the 1990s illustrates, such a system is doomed to fail when people are free to "choose to enter the market only when needing major medical care and dropping coverage after receiving medical treatment." WSB Rep. 6067, *supra*. This inter-relationship – between ensuring access to coverage and keeping such coverage affordable – also supports Congress's authority under the Necessary and Proper clause to adopt the minimum coverage requirements as a corollary to the ACA's access to coverage provisions. *United States v. Comstock*, ___ U.S. ___, 130 S. Ct. 1949 (2010). The United States Constitution, as interpreted by this Supreme Court in the above cases, permits such a balanced approach to remedy this pressing interstate problem.

C. Uninsured Individuals Cross State Lines To Receive Care, Resulting In Interstate Transfers Of Funds And Economic Burdens For The Cost Of Their Care.

Much of the argument has focused on local economic activity and its effect on interstate commerce, but the uninsured and underinsured also cross state lines to obtain care. Many uninsured individuals, who

often utilize hospital emergency departments as their primary care provider,[37] travel to nearby states seeking care at safety net hospitals without barriers to access. Residents of southwestern Pennsylvania, for example, rely on access to West Virginia University Hospital ("WVUH"), *see West Virginia Univ. Hosps., Inc. v. Rendell*, 2009 WL 3241849, *14 (M.D. Pa. Oct. 2, 2009), and make over 1,500 emergency room visits there each year, *West Virginia Univ. Hosps., Inc. v. Rendell*, 2007 WL 3274409, *2 (M.D. Pa. Nov. 5, 2007).

Similarly, Harborview Medical Center, operated by the University of Washington, is the only Level I trauma center for the four-state region of Washington, Alaska, Montana, and Idaho. Uninsured individuals who suffer catastrophic injuries from accidents and other unpredictable events are transported to Harborview for the care it can uniquely provide. During the five year period from 2006 to 2009, Harborview cared for 11,700 patients from states in the region outside of Washington; of those admitted to the hospital, over 11% were uninsured.[38] The uncompensated care provided by Harborview to patients from

---

[37] Peppe, *et al.*, Kaiser Family Foundation, *Characteristics of Frequent Emergency Department Users* (Oct. 2007), at 7, 17 (http://www.kff.org/insurance/upload/7696.pdf).

[38] Harborview Medical Center/University of Washington Medicine Responses, Public Disclosure Request (June 2010; December 2010) (on file with counsel).

these states totaled over $7,500,000 for FY 2010.[39] Many more were on Medicaid, which pays only a portion of hospital care costs.[40] In the last five years, Alaska alone has paid Harborview $15,493,603 for Medicaid patients from that state who received inpatient care.[41] Nor is Harborview's experience unique. The National Foundation for Trauma Care notes, "[A] significant number of trauma patients covered by Medicaid are injured or transported out of state for treatment, but their home State's Medicaid program often refuses or otherwise attempts to avoid payment."[42]

Uninsured individuals have a dramatic impact on interstate commerce regardless of whether they receive treatment within their own or another state. These examples merely demonstrate that it is unrealistic to suppose that the states can address these economic impacts on a state-by-state basis. The reality is quite different: geographic proximity and the location of specialized medical centers, rather than state borders, are key factors in determining the place of care. And when trauma strikes, any person

---

[39] Harborview Medical Center/University of Washington Medicine Response, Public Disclosure Request (January 2011) (on file with counsel).

[40] *U.S. Trauma Center Crisis*, *supra*, at 10.

[41] Harborview Medical Center/University of Washington Medicine Response, Public Disclosure Request (December 2010) (on file with counsel).

[42] *U.S. Trauma Center Crisis*, *supra*, at 10.

may unexpectedly be transported to another state for care. The magnitude of such activity, involving the consumption of health care services by those who are unable to pay their full cost, is another reason the Governor welcomes the ACA as a federal solution that will both rationalize payment for such care and relieve some of the burden on State resources.

D. The State Needs The ACA To Reduce The Burden Of The Disproportionately High Cost Of Caring For The Uninsured On Everyone Else.

It is generally acknowledged that health care expenditures in America are the highest in the world, without achieving correspondingly good health outcomes.[43] For the uninsured, the problem is particularly severe because many individuals without insurance delay care until their conditions become more difficult and expensive to treat.[44] *See University of Washington Medical Center v. Sebelius,* 634 F.3d 1029, 1030 n.2 (9th Cir. 2011). The uninsured are also more likely to obtain a greater proportion of their medical care from emergency departments, the most expensive level of care, than those with private

---

[43] http://www.oecd.org/document/16/0,3343,en_2649_34631_2085200_1_1_1_1,00.html.

[44] Kaiser Commission for Medicaid & the Uninsured, *Low-Income Adults Under Age 65* (June 2009), at 12 (http://www.kff.org/healthreform/upload/7914.pdf); IOM Report, at 5-8, 57-83.

insurance.[45] Under the current system, the heightened cost of care for the uninsured is borne in substantial part by the State, businesses and insured individuals who must pay higher charges from health care providers seeking to make up for the cost of caring for the uninsured.

The ACA addresses these issues in two ways: first by promoting universal insurance coverage through the minimum coverage provision and other measures that make private insurance more accessible and affordable to all; and second, by promoting improved systems for the delivery of preventive, chronic, and long-term care through investment and realignment of payer incentives. These measures work hand in hand and demonstrate the interconnection between the minimum coverage provisions and the Act's larger goals of reforming and rationalizing the health care and insurance markets. More efficient and effective provision of preventive, chronic, and long-term care will reduce the costs of caring for the uninsured, as well as other patients, by reducing their need for and reliance on more expensive forms of health care services. At the same time, the full impact of these innovations will be realized only if individuals have the insurance coverage to access such care in the first place.

---

[45] Peppe, *et al.*, at 7, 17.

1. The Costs Of Health Care For The Uninsured Are Exacerbated By Their Reduced Access To Primary, Preventive, And Chronic Disease Care.

As one would expect, uninsured individuals nationally and in Washington receive less treatment for their conditions than those with insurance, often with serious consequences.[46] For example, untreated or undertreated hypertension and diabetes are more likely to result in stroke, leading to hospitalization, and stroke victims who did not receive adequate treatment for their underlying conditions are also more likely to suffer long-term neurologic impairment following a stroke.[47] Many individuals with neurologic impairment are not able to live independently in their own homes, but require long-term care in skilled nursing facilities or adult family homes. Such care, regardless of quality, is extremely expensive; in Washington, it costs an average of approximately $60,000 per year to support a patient in a long-term care facility.[48] For those without private insurance, a substantial portion of the cost of such care frequently

---

[46] IOM Report, at 74-75; 2009 OIC Report, at 7.

[47] IOM Report, at 76.

[48] Email from Ken Callaghan, Chief, Office of Rates Management, DSHS (January 6, 2011) (on file with counsel).

falls to the State under Medicaid or State-funded safety net programs.[49]

Efforts are underway in Washington to intervene in this trajectory of untreated or undertreated chronic disease leading to acute crises requiring expensive care – and devastation wrought on individual lives. However, key to the success of these efforts is ensuring individuals have the means to access effective care earlier in the course of their diseases.[50] The ACA's minimum coverage requirement, which includes primary, preventive and chronic disease care, *see* 42 U.S.C. § 18022, would provide the means and, consequently, reduce the burden on the State and its citizens of paying for care when the need becomes the most extreme and most expensive.

A recent pilot program for Boeing employees with chronic disease shows what is possible if the means are provided.[51] There, employees and spouses with severe chronic diseases such as diabetes and congestive heart failure, were enrolled in a "medical home."

---

[49] Davenport, Holin, & Feder, Center for American Progress, *The "Dual Eligible" Opportunity: Improving Care & Reducing Costs for Individuals Eligible for Medicare & Medicaid* (Dec. 2010), at 3 (http://www.americanprogress.org/issues/2010/12/pdf/dual-eligibles.pdf).

[50] McWilliams, *Health Consequences of Uninsurance Among Adults in the United States: Recent Evidence and Implications*, 87 Millbank Quarterly 443, 476 (June 2009).

[51] http://www.wsma.org/files/Downloads/NewsEvents/Reports Preceptor/may-june_reports10.pdf 1, 3 (May/June 2010).

The medical homes, based in three primary care clinics, provided intensive outpatient care, extensive evaluation, screening and diagnostic testing, and a care plan administered by a clinic team, including a nurse care manager. In the first 12 months of the study, health care costs for this population fell by 20%, due mostly to reduced emergency room visits and hospitalizations.[52] Further, workdays missed by patients assigned to this program declined by 56.5%, with obvious implications for their productivity as well as that of their employer.[53]

King County, the most populous county in the State, is attempting to address the needs of a similar population in terms of disease burden (those with diabetes, asthma and obesity) in an area where 30% of the population is low income. This population has limited access to primary care, and those with diabetes and asthma are hospitalized at twice the rate of those with the same conditions in the rest of the County.[54] Through the Steps to Health Program, the County supported clinics in taking a comprehensive approach to these patients, including use of case managers and home visits to educate patients in self-management of their conditions. Results of the program were promising: emergency room visits declined

---

[52] http://healthaffairs.org/blog/2009/10/20/are-higher-value-care-models-replicable.

[53] *Id.* at 4.

[54] *King County Steps to Health,* http://www.kingcounty.gov/healthservices/health/chronic/steps.aspx.

by 40% in the population that was provided case management services, and hospitalizations for asthma declined four times more in the target area than in King County as a whole.[55] The funding provided by the CDC for this program has ended, but its approach to care for at-risk individuals could be carried forward and made available to other low-income individuals if they had insurance.

The Governor has a strong interest in seeing that the consumption of health care services by Washington residents with severe chronic disease occurs in a way that better meets their needs and avoids, where possible, costly hospitalizations and long-term care. Too often, under the current system, the State pays for care for uninsured individuals who do not get the right care in time to avoid the hospital or nursing home. Even those with Medicare coverage often must turn to programs funded in whole or part by the State if they have long-term care needs, because Medicare does not cover such care.[56] In FY 2009 in Washington, over 126,000 individuals were eligible for Medicare, but still required state funding for coverage of long-term care needs.[57] The State spent $2 billion in FY

---

[55] *Steps to Health King County: Summary Evaluation Report* March 2009, at 8, 18 (http://www.kingcounty.gov/healthservices/health/chronic/steps.aspx).

[56] *See* http://www.medicare.gov/longtermcare/static/home.asp

[57] Washington Department of Social & Health Services, *Coordinating Care for Washington State Dual Eligibles* (Sept. 2011). These individuals comprise "some of the sickest and poorest patients in our nation's health care system." Davenport,

(Continued on following page)

2009 on care for such individuals who did not have private long-term care insurance.[58] Thus, the State has a strong economic interest in a requirement that residents carry insurance that covers preventive care and chronic disease management.

Twenty percent (20%) of children are also afflicted with chronic illness, including asthma, persistent ear infections, allergies, and diabetes.[59] National studies show that access to preventive and primary care reduces hospital admissions for such conditions, which can be more effectively treated in the outpatient setting if caught early and addressed by a continuous source of care.[60] The cost in Washington of the average pediatric hospital admission for just one of those conditions, asthma, is over $3,000, while the

---

supra, at 1. They are often referred to as "dual eligibles" because they qualify for Medicare by reason of age or disability and for Medicaid on the basis of low income. *Id.*

[58] *Washington* Department of Social & Health Services, *Coordinating Care for Washington State Dual Eligibles* (Sept. 2011).

[59] Institute of Medicine, *America's Children: Health Insurance and Access to Care* (1998), at 120.

[60] Szilagyi, *et al.*, *The Scientific Evidence for Health Insurance*, 9 Acad. Pediatr. 4-6 (2009); Christakis, *et al.*, *Is Greater Continuity of Care Associated with Less Emergency Department Utilization?*, 103 Pediatrics 738-42 (1999); Baker Institute Policy Report, *The Economic Impact of Uninsured Children on America* (2009), at 4, 5.

average cost of a primary or preventive care visit ranges from $83 to $92.[61]

Washington's Apple Health for Kids program, created in 2008, streamlines enrollment for children in state-administered insurance plans.[62] As a result, thousands of previously uninsured children now have access to primary and preventive care. Washington's efforts to maintain coverage for children are supported, in significant part, by a federal grant awarded to states annually based on performance.[63] However, the success of a program like Apple Health should not depend on a yearly grant process. Rather, the Governor endorses the approach embodied in the ACA, which would provide reliable coverage to the most children and ensure ongoing access to care in the most appropriate setting, from the perspective of both cost and the health of the children.

---

[61] http://www.childrensalliance.org/resouce-center/fact-sheet-federal-bonus-apple-health-kids; Jonathan Seib, Executive Policy Advisor, Governor of Washington's Executive Policy Office (email comm. March 7, 2011) (on file with counsel).

[62] http://hrsa.dshs.wa.gov/applehealth/.

[63] http://www.childrensalliance.org/resource-center/fact-sheet-federal-bonus-apple-health-kids.

2. The Minimum Coverage Provision Is Necessary To Alleviate The Unfair Burdens Placed On Employers, Insured Individuals, Health Care Providers, And The State By The Costs Of The Uninsured.

Given the inevitability of the need for health care and its high cost, the notion that individuals can choose to opt out of the health care market or simply "pay as they go" is a fallacy. Instead, by deciding not to purchase insurance, the uninsured shift the costs of their health care to other participants in the health care market, including the State, health care providers, and businesses and individuals who do purchase insurance. In Washington, uncompensated care provided by hospitals and other providers totaled approximately $1 billion in 2011.[64] These costs impose substantial burdens on families and employers, because of cost shifting to insured patients, and on State government, which provides significant subsidies to hospitals and clinics with large volumes of uninsured patients. *See University of Washington Medical Center v. Sebelius*, 634 F.3d at 1032 & n.4 (describing the State's subsidization of hospital care for the uninsured).

State and federal subsidies to hospitals with large numbers of such patients are provided through the "disproportionate share" program ("DSH"). *See*

---

[64] 2011 OIC Report, at 1, 10.

University of Washington Medical Center v. Sebelius, 634 F.3d at 1031-32 (describing operation of DSH payments). The cost of these payments is substantial: total state and federal funding for DSH payments to Washington hospitals in FY 2009 was over $190 million.[65] However, despite DSH payments, the volume of uncompensated care is becoming increasingly unsustainable for providers, particularly public safety net hospitals. For example, Harborview went from providing $27,041,000 in charity care in 2000 to $186,733,000 in FY 2010, of which only a portion is offset by DSH payments.[66]

Of additional concern is the "spillover effect" that high levels of uninsurance can have on the supply and quality of health care available to all residents, whether insured or not. Research has shown that even insured individuals in communities with high levels of the uninsured are less likely to have a regular doctor and experience more difficulty accessing specialty and emergency room care than individuals

---

[65] http://www.statehealthfacts.org/profileind.jsp?cat=4&sub=47&rgn=49.

[66] Washington State Department of Health, *Washington State 2000 Charity Care in Washington Hospitals* (July 2002), at 10 (http://www.doh.wa.gov/EHSPHL/hospdata/CharityCare/Reports/2000CharityCareinWashingtonState.doc); Harborview Medical Center/University of Washington Medicine Response, Public Disclosure Request (January 2011).

in communities where more people are insured.[67] Moreover, reports from both primary care providers and specialists indicate that the higher the uninsurance rate in their community, the less able they are to deliver high quality care to all residents.[68] These effects have been attributed, in part, to the problem of capital investment and providers being more likely to move toward more affluent communities, with a resulting negative effect on capacity in communities with high uninsurance rates to provide care to all patients.[69]

Families and businesses who purchase insurance also shoulder the burden of the present system. As mentioned above, each insured family in Washington pays an estimated $1,017 per year more in medical bills to help defray the cost of caring for the uninsured.[70] The increases in premiums and health care costs that have occurred, in significant part to pay for the uninsured, are staggering. Between 1991 and 2004, health care costs in the State grew at an average rate of 7.3% per year.[71] In 2009, 1.2 million insured Washingtonians spent more than 10% of their

---

[67] Pauly & Pagan, *Spillovers and Vulnerability: The Case of Community Uninsurance,* 26 Health Affairs 1304, 1309-10 (2007).

[68] *Id.*

[69] IOM Report, at 10.

[70] 2011 OIC Report, at 1.

[71] http://www.statehealthfacts.org/profileind.jsp?cmprgn=1&cat=5&rgn=49&ind =595&sub=143.

pre-tax income on health care.[72] The mounting cost of insurance has had an inevitable and debilitating effect on the number of employers offering insurance and the number of individuals buying it. While 76% of employers in Washington insured their full-time employees in 2003, by 2011, only 53.5% of firms did.[73] According to the Washington Insurance Commissioner, the determining factor in whether a person has insurance is their income level, *i.e.*, whether they can afford the high cost of insurance.[74] Among those in the wage-earning sector in Washington, the breakpoint is at approximately $35,000 in annual income: with wages above that level, most employees have insurance through their employers, whereas below that level, most do not.[75]

Thus, companies in Washington that voluntarily provided health benefits to their employees in the past have been forced out of the market by premium increases driven in part by the high spillover costs of caring for the uninsured. Even when employers offer

---

[72] 2009 OIC Report, at 9.

[73] Washington State Employment Security Department, *2003 Employee Benefits Survey* (March 2004); *2010 Washington State Employee Benefits Survey*, at 7.

[74] 2009 OIC Report, at 5.

[75] Email from Jim Keogh, Economic Policy Analyst, Washington Office of Insurance Commissioner (December 23, 2011) (citing Washington Medical Expenditure Panel Survey data) (on file with counsel).

insurance, it has become increasingly unaffordable for their employees.

In sum, the cost of caring for the uninsured creates a downward spiral in which the unaffordability of insurance leads to increasing numbers of the middle class joining the ranks of the uninsured. This has created a situation in Washington in which most affluent persons have health insurance and most children and elderly persons are covered through a combination of public programs and private insurance, but a large portion of the wage-earning sector of the population is left out in the cold.[76] The minimum coverage provision is necessary to rectify this situation and achieve a functioning, national insurance market that is not distorted by either the exclusionary practices of the insurance companies, on the one hand, or the decisions of individuals to forego health care coverage unless and until they need health care treatment, on the other. Without the minimum coverage and related insurance reforms under the ACA, Washington State, its health care providers, employers, and insured residents would be forced to bear ever greater costs of treatment for uninsured people who suffer catastrophic medical events or fail to get preventive care that could avoid the development of significant medical conditions.

---

[76] 2011 OIC Report, at 6, 8.

CONCLUSION

For the reasons stated above, the Governor believes that the ACA's minimum coverage provision is a legitimate regulation of economic activity and a necessary and proper exercise of Congressional authority to address the economic impacts of the uninsured on the interstate health care and health insurance markets.

Respectfully submitted,

KRISTIN HOUSER*
ADAM J. BERGER
REBECCA J. ROE
WILLIAM RUTZICK
SCHROETER, GOLDMARK & BENDER
810 Third Avenue, Suite 500
Seattle, Washington 98104
Telephone: (206) 622-8000

Counsel for Amicus Curiae
**Counsel of Record*

AMICUS CURIAE BRIEF

No. 11-398

In The
Supreme Court of the United States

DEPARTMENT OF HEALTH
AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

**On Writ Of Certiorari to the
United States Court Of Appeals
for the Eleventh Circuit**

BRIEF OF HEALTH CARE FOR ALL, INC., HEALTH LAW ADVOCATES, INC., THE MASSACHUSETTS HOSPITAL ASSOCIATION, INC., THE MASSACHUSETTS LEAGUE OF COMMUNITY HEALTH CENTERS, INC., GREATER BOSTON INTERFAITH ORGANIZATION, INC., AND COMMUNITY CATALYST, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS URGING REVERSAL ON THE MINIMUM COVERAGE PROVISION ISSUE

WENDY E. PARMET
(*Counsel of Record*)
NORTHEASTERN UNIVERSITY
SCHOOL OF LAW
400 Huntington Ave.
Boston, MA 02115
617-373-2019
w.parmet@neu.edu

LORIANNE M. SAINSBURY-WONG
30 Winter St., Suite 1004
Boston, MA 02108
617-275-2987
sainsbury_wong@hla-inc.org

QUESTION PRESENTED

Massachusetts's experience with health reform demonstrates that health care and health insurance are inherently interstate activities that cannot be successfully regulated without federal involvement.

The question presented is whether the minimum coverage provision is a valid exercise of Congress's powers under Article I of the Constitution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. Massachusetts health care reform was the model for the Patient Protection and Affordable Care Act and has been remarkably effective in increasing insurance coverage and improving access to care..... 5

II. Health care and health insurance markets constitute interstate commerce and are affected by the decisions of out-of-state residents to forgo insurance 11

A. Out-of-state residents regularly seek cross-border care in Massachusetts 11

B. Due to New England's integrated economy, out-of-state commuters make up a significant portion of the Massachusetts workforce and obtain health services in Massachusetts 16

C. Each year Massachusetts hosts millions of tourists and business visitors, who may require emergency or other health care services during their visit 17

TABLE OF CONTENTS – Continued

Page

D. Federal law forbids most hospitals from discriminating based on residency and insurance status when providing emergency medical services 21

E. The burden of in-state health care for uninsured or underinsured out-of-state residents falls on Massachusetts 24

III. Due to ERISA, Massachusetts has a limited ability to regulate certain employer-sponsored group health insurance plans..... 26

IV. The interstate nature of the health insurance and health care markets will cause problems for other states that try to achieve affordable, universal access to care 31

CONCLUSION..... 34

TABLE OF AUTHORITIES

Page

CASES

Aetna Health Inc. v. Davila, 542 U.S. 200 (2004) 27, 28

Doe v. Bolton, 410 U.S. 179 (1973) 12, 22

FMC Corp. v. Holliday, 498 U.S. 52 (1990) 28

Ingersoll-Rand v. McClendon, 498 U.S. 133 (1990) 27

Roberts v. Galen of Va., Inc., 525 U.S. 249 (1999) 21

Shaw v. Delta Airlines, 463 U.S. 85 (1983) 27

CONSTITUTIONAL PROVISIONS

Art. I, Section 8, Cl. 3 (the Commerce Clause) .... *passim*

STATUTES

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ..... *passim*

26 U.S.C.A. 5000A 6

29 U.S.C. 1101 27

29 U.S.C. 1132(a) 27

29 U.S.C. 1144 27

42 U.S.C. 1115 7

Emergency Medical Treatment and Active Labor Act, 42 U.S.C. 1395dd, *et seq*. 21, 22, 26

42 U.S.C.A. 18031 6

TABLE OF AUTHORITIES – Continued

Page

An Act Providing Access to Affordable, Quality, Accountable Health Care, ch. 58, 2006 Mass. Acts 77 ..... *passim*

Mass. Gen. Laws ch. 111, § 70E 22

Mass. Gen. Laws ch. 111M, *et seq.* 6, 14

Mass. Gen. Laws ch. 118E, § 9A 6

Mass. Gen. Laws ch. 118G, § 18B 7

Mass. Gen. Laws ch. 118G, § 39(a)(1) 25

Mass. Gen. Laws ch. 118H, § 2 7

Mass. Gen. Laws ch. 118H, § 3 30

Mass. Gen. Laws ch. 176Q 6, 12

GOVERNMENT REPORTS

Centers for Medicare & Medicaid Servs., *Section 1115 Medicaid Demonstration Fact Sheet* (Dec. 14, 2011), http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Downloads/MassHealthFactSheet.pdf 7

Dept. of Banking, Ins., Secs., & Health Care Admin., *Vermont Hospital Migration Report* (Mar. 2010), www.bishca.state.vt.us/sites/default/files/2008VTHospMigrationReport.pdf 13, 14

Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *403 Payer Utilization (HSD11)* (2011) 20, 21

TABLE OF AUTHORITIES – Continued

Page

Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *Emergency Department Clinical Classifications Software Information (HSD19)* (2011), www.mass.gov/eohhs/researcher/physical-health/health-care-delivery/hcf-data-resources/hospital-summary-utilization/fiscal-year-2010-hsudf.html.....20

Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *Emergency Department Top 40 Zip Codes (HSD23)* (2011), www.mass.gov/eohhs/researcher/physical-health/health-care-delivery/hcf-data-resources/hospital-summary-utilization/fiscal-year-2010-hsudf.html 15, 19, 23

Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *Emergency Department Top 20 Clinical Classifications Software by Hospital (HSD22)* (2011), www.mass.gov/eohhs/researcher/physical-health/health-care-delivery/hcf-data-resources/hospital-summary-utilization/fiscal-year-2010-hsudf.html.....20

Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs. *Employers with 50 or More Employees Using Subsidized Care* (2010), http://www.mass.gov/eohhs/docs/dhcfp/r/pubs/10/50-plus-employers-appendices-5-and-6.pdf 29, 30

TABLE OF AUTHORITIES – Continued

Page

Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *Health Care in Massachusetts: Key Indicators* (May 2011), www.mass.gov/eohhs/docs/dhcfp/r/pubs/11/2011-key-indicators-may.pdf 9, 11, 28

Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *Field Description Listing by File (HSD24)* (2011) 15

Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *Health Insurance Coverage in Massachusetts: Results from the 2008-2010 Massachusetts Health Insurance Surveys* (Dec. 2010), www.mass.gov/eohhs/docs/dhcfp/r/pubs/10/mhis-report-12-2010.pdf 8

Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *Hospital Summary Utilization Data* (2011) 25

Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *Outpatient Observation Top 40 Zip Codes (HSD18)* (2011), www.mass.gov/eohhs/researcher/physical-health/health-care-delivery/hcf-data-resources/hospital-summary-utilization/fiscal-year-2010-hsudf.html 15, 16

Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *Preventable/Avoidable Emergency Department Use in Massachusetts: Fiscal Years 2004 to 2008* (2010), www.mass.gov/eohhs/researcher/physical-health/health-care-delivery/dhcfp-publications.html 23

TABLE OF AUTHORITIES – Continued

Page

Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *Statewide Map of Massachusetts Hospitals* (2011), www.mass.gov/eohhs/consumer/physical-health-treatment/quality-cost/data/hospitals/regional-maps/statewide.html 14, 15

Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *Top 40 Zip Codes (HSD09)* (2011), www.mass.gov/eohhs/researcher/physical-health/health-care-delivery/hcf-data-resources/hospital-summary-utilization/fiscal-year-2010-hsudf.html 15, 16

Econ. & Labor Mkt. Info. Bureau, N.H. Emp't Sec., *Rockingham County Commuting Patterns* (2004), http://www.nh.gov/nhes/elmi/pdfzip/specialpub/commpatt/Rockingham%20County.pdf 17

Amy M. Lischko, Mass. Exec. Office of Health & Human Servs., *Health Insurance Status of Massachusetts Residents Report, Fifth Edition: December 2006* (2006), www.mass.gov/eohhs/docs/dhcfp/r/survey/res-06-report-5th.pdf 8

Mass. Office of Travel & Tourism, *2010 Annual Report* (2010), http://www.massvacation.com/research/2010_annual_report.pdf 18

Office of Medicaid, Mass. Exec. Office of Health & Human Servs., *Section 1115 Waiver Amendment Proposal* (May 1, 2006), http://www.mass.gov/eohhs/docs/eohhs/cms-waiver-2006/amendment.pdf 8

TABLE OF AUTHORITIES – Continued

Page

U.S. Census Bureau, *Health Insurance Historical Tables* (Nov. 8, 2011), http://www.census.gov/hhes/www/hlthins/data/historical/HIB_tables.html 23

U.S. Census Bureau, *Historical Census of Housing Tables: Vacation Homes* (last revised Oct. 31, 2011), http://www.census.gov/hhes/www/housing/census/historic/vacation.html 18

U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2006* (Aug. 2007), http://www.census.gov/prod/2007pubs/p60-233.pdf 32

U.S. Census Bureau, *Percent Without Health Insurance Coverage – United States – States; and Puerto Rico* (2010), factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_GCT2701.US01PR&prodType=table%20 ..... 9, 32

U.S. Census Bureau, *Small Area Health Insurance Estimates* (2009), www.census.gov/did/www/sahie/ 24

U.S. Census Bureau, *U.S. Census Bureau Announces 2010 Census Population Counts* (Dec. 21, 2010), www.2010.census.gov/news/releases/operations/cb10-cn93.html 27

U.S. Census Bureau, *U.S. Census Uninsured: Utah* (last revised Dec. 23, 2011), http://quickfacts.census.gov/qfd/states/49000.html 33

TABLE OF AUTHORITIES – Continued

Page

JOURNAL AND PERIODICAL ARTICLES

Amitabh Chandra, et al., *The Importance of the Individual Mandate – Evidence from Massachusetts*, 364 New Eng. J. Med. 293 (2011).....9, 10

Les Christie, *Number of People Without Health Insurance Climbs*, CNN Money, Sept. 13, 2011 27

Chelsea Conaboy, *US Extends State's Medicaid Waiver: Deal Changes How Some Hospitals are Paid*, Boston Globe, Dec. 21, 2011, at B1.....7

Lisa Selin Davis, *Still Alternative After All These Years*, N.Y. Times, Jan. 22, 2009, at D3.....18

Paul Fronstin, Cal. HealthCare Found., *California's Uninsured* (December 2010).....33

Jenny Gold, *The Underinsurance Problem Explained*, Kaiser Health News, Sept. 28, 2011 10

Jon Kingsdale, *Implementing Health Reform in Massachusetts: Strategic Lessons Learned*, 28 Health Affairs w588 (2009).....24

Leighton Ku et al., Kaiser Comm'n on Medicaid & the Uninsured, *How Is the Primary Care Safety Net Faring in Massachusetts: Community Health Centers in the Midst of Health Reform* (Mar. 2009) 8, 25

Anne B. Martin et al., Trends, *Health Spending by State of Residence, 1991-2004*, 26 Health Affairs w651 (2007) (web exclusive), http://content.healthaffairs.org/content/26/6/w651.full.pdf+html 12, 13

TABLE OF AUTHORITIES – Continued

Page

Kevin Outterson, *Health Care, Technology and Federalism*, 103 W. Va. L. Rev. 504 (2001) 25

Lorianne Sainsbury-Wong & Elizabeth G. Ryland, *Protecting Consumers: The Elimination of Lifetime and Annual Limits on Health Insurance Benefits*, Mass. Bar Ass'n Law. J. (June 2011) 10

Cathy Schoen et al., *Affordable Care Act Reforms Could Reduce the Number of Underinsured US Adults by 70 Percent*, 30 Health Affairs 1762 (2011) 28

Top 10 U.S. Business Destinations, CNN Travel (Sept. 11, 2007), http://www.cnn.com/2007/TRAVEL/09/10/city.guides/index.html 18

Hulyun Xiang et al., *Skiing- and Snowboarding-Related Injuries Treated in U.S. Emergency Departments, 2002*, 58 J. Trauma 112 (2005) 18

OTHER AUTHORITIES

Center for American Progress, *Dramatic Increase in Uninsured Rate in Every State* (May 2009) 9

Best Hospitals in Boston, MA, U.S. News Health (last visited Jan. 9, 2012), http://health.usnews.com/best-hospitals/area/boston-ma 22

Blue Cross Found., *Assessing the Results* (Oct. 2011), bluecrossfoundation.org/health-reform/~/media/Files/Health%20Reform/Health%20Reform%20Results%20Monitoring%20Reform%20Oct%202011.pdf 9, 11

TABLE OF AUTHORITIES – Continued

Page

Center for Health Policy Research, Okla. Med. Research Found., *Lessons Learned from Hawaiian Health Care Reform* (Feb. 1992), http://www.coph.ouhsc.edu/coph/HealthPolicyCenter/Pubs/1992/chpr9202h.pdf 33

Sarah R. Collins, Commonwealth Fund, *The Problem of Underinsurance in the United States: What It Means for Working Families and How Health Reform Will Help* (2009), http://www.commonwealthfund.org/~/media/Files/Publications/Testimony/2009/Oct/1331_Collins_growing_problem_underinsurance_house_energy_commerce_testimony_10152009.pdf 29

The Dartmouth Atlas of Health Care, Dartmouth Inst. for Health Policy & Clinical Practice, *Data by Region* (last visited Jan. 6, 2012), http://www.dartmouthatlas.org/data/region/ 31, 32

John Holahan & Stan Dorn, Robert Wood Johnson Found., *What is the Impact of the Patient Protection and Affordable Care Act (PPACA) on the States?* 2 (June 2010), http://www.rwjf.org/files/research/65049.pdf 26

Mass. Dept. of Revenue, *Who Must File* (2011), http://www.mass.gov/dor/individuals/filing-and-payment-information/guide-to-personal-income-tax/filing-requirements/who-must-file.html 16

TABLE OF AUTHORITIES – Continued

Page

Kaiser Family Found., *Health Insurance Coverage of the Total Population, States (2009-2010)* (last visited Jan. 9, 2012), http://www.statehealthfacts.org/comparetable.jsp?ind=125&cat=3 32

Holy Family Hospital, Steward Health Care System, http://www.stewardhealth.org/Holy-Family-Hospital (last visited Jan. 6, 2012).....14

Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits Annual Survey* (2011), http://ehbs.kff.org/pdf/2011/8225.pdf.....28, 29

Mass. Inst. for a New Commonwealth, *Mass. commuting* (Oct. 2004), http://www.massinc.org/~/media/Files/Mass%20Inc/Research/Full%20Report%20PDF%20files/mass_commuting.ashx 17

Second Report to the House and Senate Committees on Ways and Means 5 (Nov. 2005).....25

Target Corp., *2010 Annual Report* (2010), http://investors.target.com/phoenix.zhtml?c=65828&p=irol-reportsannual.....30

Wal-mart Stores Inc., *2011 Annual Report* (2011), http://walmartstores.com/sites/AnnualReport/2011/financials/2011_Notes.pdf.....29

INTERESTS OF *AMICI CURIAE*[1]

Health Care For All, Inc. (HCFA) was a key advocate for the enactment of the 2006 Massachusetts state health reform law and has been extensively involved with many aspects of the implementation of health care reform in Massachusetts. Health Care For All empowers Massachusetts consumers to learn more about the State's health care system, and to become involved in changing it. Health Care For All provides services enabling Massachusetts consumers, particularly the vulnerable members of society, to connect with necessary health resources. The organization uses policy analysis, personal and legal advocacy, community organizing and public education to achieve the goal of creating a consumer-centered health care system that provides comprehensive, affordable, accessible, culturally competent, high quality and consumer driven care to everyone, particularly the most vulnerable. HCFA also has research and legislative staff that work to advance state law in the best interest of consumers. HCFA has established and organized The Affordable Care Today (ACT!!) Coalition, which is a group of seventy-five organizations including community and religious organizations, labor

---

[1] This brief is submitted with the consent of the parties, as lodged with the Clerk per the Docket Sheets. Pursuant to Rule 37.6, counsel represent that this brief was not authored in whole or in part by counsel for any party. All expenses of *amici* have been borne by their own resources and by *pro bono* support from the Health Law Program at Boston University School of Law, without support from any party.

unions, doctors, hospitals, community health centers, public health advocates, and consumers who are committed to implementing the Massachusetts comprehensive health care reform act.

Health Law Advocates, Inc. is a public interest law firm whose mission is to provide *pro bono* legal representation to Massachusetts residents experiencing difficulty accessing or paying for needed medical care. This litigation experience gives Health Law Advocates a unique perspective on the need for adequate health insurance and related issues with health reform in Massachusetts. Health Law Advocates is committed to ensuring universal access to quality health care in Massachusetts, particularly for those who are most at risk due to race, national origin, alienage, gender, disability, age or geographic factors. Health Law Advocates combines legal expertise with grassroots organizing to advance the statewide movement for universal health care access.

The Massachusetts Hospital Association, Inc. (MHA) is a voluntary, not-for-profit organization comprised of hospitals and health systems, related organizations, and other members with a common interest in promoting the good health of the people of the Commonwealth. Through leadership in public advocacy, education, and information, MHA represents and advocates for the collective interests of its members and supports their efforts to provide high quality, cost effective and accessible care.

The Massachusetts League of Community Health Centers, Inc. is the state's primary care association, and as such, represents and serves the needs of Massachusetts's fifty community health center organizations. The League's work includes state and federal health policy analysis, providing training and education for health center staff and boards of directors, and working with local advocacy organizations to create and support health centers in their communities in order to expand access to healthcare.

Greater Boston Interfaith Organization, Inc. works to organize the Greater Boston community for the public good, by developing local leadership and fighting for social justice. Currently, the Greater Boston Interfaith Organization's health care initiative focuses on ensuring that Massachusetts's most vulnerable residents do not bear the burden of paying for health care reform, and encouraging State leaders to remain committed to funding health reform.

Community Catalyst, Inc. is a national nonprofit consumer advocacy organization which is dedicated to quality and affordable health care for all. Community Catalyst is located in Boston, Massachusetts, and works in partnership with national, state and local organizations, policymakers, and foundations, providing leadership and support to improve the health of communities and to change the health care system so that it serves everyone.

SUMMARY OF ARGUMENT

In 2006 the Commonwealth of Massachusetts, with the support of the federal government, implemented a health reform law requiring Massachusetts residents to maintain affordable and comprehensive health insurance. The Commonwealth's experience provides an important context for assessing the constitutionality of the minimum coverage provision in the Patient Protection and Affordable Care Act (the Act).

Health reform efforts in Massachusetts have been very effective in expanding insurance coverage within the State, but only with substantial federal support through a Medicaid demonstration waiver.

The Commonwealth's experience also illustrates that the health insurance and health care markets are inherently interstate commerce. Decisions by out-of-state residents to forgo insurance, the very decisions subject to the Act's minimum coverage provision, have imposed substantial externalities on the Commonwealth's health care system. Each year, out-of-state residents continue to seek and receive millions of dollars in uncompensated care in Massachusetts hospitals, limiting the State's efforts to improve its health care system through the elimination of uncompensated care. These externalities directly affect Massachusetts health care providers, and indirectly, Massachusetts taxpayers and premium payers. In addition, the federal Employee Retirement Income Security Act (ERISA) limits the Commonwealth's ability to

regulate employer-sponsored health plans. Each of these issues results in gaps in health care reform that Massachusetts cannot fill with its own laws, creating barriers to achieving the full magnitude of health care reform for its residents.

These barriers to state reform are not unique to Massachusetts. Any state seeking to reform its health care and health insurance systems will face similar issues. States cannot solve these problems entirely on their own. As such, the federal government must have the power to help address these problems; otherwise, one state's desire to create workable health care reform would be held captive to the decisions made by out-of-state individuals and surrounding states. The Commerce Clause was designed to remedy just such problems.

ARGUMENT

I. Massachusetts health care reform was the model for the Patient Protection and Affordable Care Act and has been remarkably effective in increasing insurance coverage and improving access to care.

In 2006, former Governor Mitt Romney signed into law An Act Providing Access to Affordable, Quality, Accountable Health Care (Chapter 58). Ch. 58, 2006 Mass. Acts 77. Chapter 58 has been largely successful in reducing the number of uninsured individuals, thereby reducing the costs associated with providing

uncompensated "free" care and creating more representative and better balanced insurance risk pools. The experience of Massachusetts, however, illustrates the need for federal involvement to accommodate the interstate nature of the health care and health insurance markets. The states cannot solve the problems facing their health care systems alone and must rely on the federal government's authority to do so.

The Patient Protection and Affordable Care Act (the Act), Pub. L. No. 111-148, 124 Stat. 119, mirrors many of the provisions present in the Massachusetts health reform effort. For example, both reforms regulate the individual and small group markets and establish insurance exchanges in which consumers can compare and access insurance plans. Compare 42 U.S.C.A. 18031 with Mass. Gen. Laws ch. 176Q. In addition, both Massachusetts and federal reform efforts include provisions imposing a financial penalty if individuals fail to maintain adequate health insurance. Compare 26 U.S.C.A. 5000A (the minimum coverage provision penalty) with Mass. Gen. Laws ch. 111M, § 1 (defining qualifying credible coverage). Massachusetts thus imposes a minimum coverage provision on its residents quite similar to the Act's minimum coverage provision.

In order to ensure affordable access to care, Chapter 58 utilizes several strategies, in addition to the minimum coverage provision, that were subsequently paralleled in the Act. For example, Chapter 58 expands MassHealth (the State's Medicaid program), Mass. Gen. Laws ch. 118E, § 9A; encourages

employers to provide health insurance to their employees, Mass. Gen. Laws ch. 118G, § 18B; and through the Commonwealth Care program, provides sliding scale premium subsidies to residents with incomes up to 300 percent of the federal poverty level (FPL), pursuant to Mass. Gen. Laws ch. 118H, § 2.

These expansions of coverage were made possible in part because the federal Department of Health and Human Services approved, pursuant to 42 U.S.C. 1115, a Medicaid demonstration waiver permitting the State to expand MassHealth eligibility and receive significant federal financial support for the implementation of its health care reform. Centers for Medicare & Medicaid Servs., *Section 1115 Medicaid Demonstration Fact Sheet* 1-2 (Dec. 14, 2011) (*Section 1115 Fact Sheet*).

The federal Medicaid waiver, a key source of funding for the 2006 reform, expired on June 30, 2011, and was reapproved on December 21, 2011, after nearly a year and a half of negotiations between the State and federal government. Chelsea Conaboy, *US Extends State's Medicaid Waiver: Deal Changes How Some Hospitals are Paid*, Bos. Globe, Dec. 20, 2011, at B1; *Section 1115 Fact Sheet* 1. If the federal waiver and the additional funds thereunder had not been renewed, Massachusetts might have been unable to sustain Chapter 58's insurance coverage expansion efforts.

Massachusetts further financed Chapter 58's expanded access to insurance by replacing the

Uncompensated Care Pool, through which the State had paid hospitals for care for eligible uninsured residents and provided health care to residents and nonresidents, with a modified program called the Health Safety Net. Leighton Ku et al., Kaiser Comm'n on Medicaid & the Uninsured, *How Is the Primary Care Safety Net Faring in Massachusetts?: Community Health Centers in the Midst of Health Reform* 7 (Mar. 2009). In enacting Chapter 58, the legislature decided that the State's resources would be better utilized by providing residents with insurance so that they could receive appropriate medical care in outpatient settings, rather than by incurring the costs of uninsured patients in hospitals. See Office of Medicaid, Mass. Exec. Office of Health & Human Servs., *Section 1115 Waiver Amendment Proposal* 7 (May 1, 2006) (stating that the funding for the State's Health Safety Net reimbursement program will decrease proportionally with the increase in funding for insurance premium assistance).

The reforms established by Chapter 58 have successfully reduced the number of uninsured individuals and expanded access to care. In 2004, prior to Chapter 58, 7.4% of Massachusetts residents were uninsured. Amy M. Lischko, Mass. Exec. Office of Health & Human Servs., *Health Insurance Status of Massachusetts Residents Report, Fifth Edition: December 2006*, at 3 tbl.1 (2006). By 2010, four years after Chapter 58 was passed, the uninsured population had dropped to just 1.9%. Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs.,

Health Insurance Coverage in Massachusetts: Results from the 2008-2010 Massachusetts Health Insurance Surveys 8 (Dec. 2010) (*Health Insurance Surveys*). Overall, insurance access was expanded to 411,722 Massachusetts residents. Div. of Health Care Fin. & Policy, Exec. Office of Health & Human Servs., *Health Care in Massachusetts: Key Indicators* 3 (May 2011) (*Key Indicators*). Insurance coverage gains in Massachusetts were particularly significant among population groups most likely to lack health insurance, including Hispanic individuals and persons below 150% FPL. See *id.* at 13-14.

Significant decreases in the uninsurance rate among Massachusetts residents are in stark contrast to the national uninsurance rate, which increased from 14.9% in 2004 to 16.3% in 2010, Blue Cross Found., *Assessing the Results* 9 (Oct. 2011) (*Assessing the Results*), reaching 21.3% in Florida and 23.7% in Texas as of 2010, U.S. Census Bureau, *Percent Without Health Insurance Coverage – United States – States; and Puerto Rico* (*U.S. Census Uninsured*). The number of uninsured nonelderly adults increased in all forty-nine other states between 2007 and 2009. Center for American Progress, *Dramatic Increase in Uninsured Rate in Every State* (May 2009).

Researchers have credited the Massachusetts minimum coverage provision with helping to increase the Commonwealth's rate of insurance as well as improving the actuarial balance of the State's risk pools. See, e.g., Amitabh Chandra et al., Perspective, *The Importance of the Individual Mandate – Evidence*

from Massachusetts, 364 New Eng. J. Med. 293, 295 (2011). States seek to improve the balance or mix of patients in their risk pools so that the costs of health care can be spread over a broader group of individuals; this helps to maintain the affordability of premiums. *Id.* at 293. The same researchers also noted a large increase in enrollment in Massachusetts health plans by healthy individuals immediately after the minimum coverage provision went into effect, suggesting that the law directly improved the actuarial balance in the State's risk pools. *Id.* at 295 (showing that enrollment increased, including enrollment by healthy individuals in Commonwealth Care increased from about 2,500 in November 2007 to 6,000 in December 2007).

Chapter 58 also improved the access to medical care enjoyed by Massachusetts residents and reduced the number of residents with inadequate health insurance. Underinsurance arises when individuals have cost sharing which is commonly typified by high out-of-pocket expenses as a result of unaffordable deductibles or co-payments, or significant limitations on coverage, such as annual or lifetime limits and excluded conditions. Jenny Gold, *The 'Underinsurance' Problem Explained*, Kaiser Health News, Sept. 28, 2011; see also Lorianne Sainsbury-Wong & Elizabeth G. Ryland, *Protecting Consumers: The Elimination of Lifetime and Annual Limits on Health Insurance Benefits*, Mass. Bar Ass'n Law. J. (June 2011) (showing that despite robust reform in Massachusetts, residents would benefit from the additional protections of the

Act with respect to lifetime and annual limits). The Massachusetts reform reduced the overall population of non-elderly adults who suffered high out-of-pocket health costs. Blue Cross Found., *supra* at 24 (explaining that between 2006 and 2009, the percentage of adults reporting out-of-pocket costs in excess of 10% of family income decreased from 10% to 4%). The number of uninsured and insured adults reporting that cost posed an obstacle to needed care declined from 79% and 32%, respectively, to 66% and 28%, respectively. *Key Indicators* at 15. In 2009, 78% of Massachusetts residents reported having a preventive care visit within the year, an increase from 71% prior to the reform. Blue Cross Found., *supra* at 28. All of this was achieved during a period when the national rate of people lacking health insurance continued to rise. *Assessing the Results* at 9.

In short, the Massachusetts model for federal health reform has been remarkably effective, but success required both the minimum coverage provision and a strong state-federal partnership.

II. Health care and health insurance markets constitute interstate commerce and are affected by the decisions of out-of-state residents to forgo insurance.

A. Out-of-state residents regularly seek cross-border care in Massachusetts.

Massachusetts's experience with health reform underscores the interstate nature of both the health

care and the health insurance markets. Although Massachusetts successfully implemented Chapter 58, that reform depended in part upon federal action: federal financial support for Massachusetts health reform includes the award of the Section 1115 demonstration waiver, which authorized the expansion of MassHealth and related reform initiatives such as the Commonwealth Care program, which is a sliding scale state-subsidized insurance program established under Mass. Gen. Laws chs. 118H and 176Q. Even with strong federal support and its own comprehensive reform, the Massachusetts health system continues to be affected by the decisions of uninsured and underinsured people from other states who seek care in Massachusetts but remain outside the scope of many of the Commonwealth's reform laws, including its minimum coverage provision. Although individual states can implement broad health care reforms pursuant to their traditional state police powers, a state may not "limit to its own residents the general medical care available within its borders." *Doe v. Bolton*, 410 U.S. 179, 200 (1973) (holding that the Privileges and Immunities Clause protects non-residents seeking medical care within another state).

Patient traffic is never entirely contained within the borders of an individual state. Indeed, for many years the Centers for Medicare and Medicaid Services (CMS) published a metric, the net-flow ratio, to measure the net flow of patients across state borders for the purpose of using health care providers. See Anne B. Martin et al., Trends, *Health Spending by State of*

Residence, 1991-2004, 26 Health Affairs w651, w658 (2007) (web exclusive) (including a copy of the government's most recent net-flow table in Exhibit 5). The New England region, as a whole, is a net exporter of health care services, meaning that it provides more services than its own population consumes. *Id.* at w659, exh. 5. New England's status as a net exporter is caused in no small part by Massachusetts's production of more health care services than its residents use. Of the six states in New England, only Massachusetts and Rhode Island are net exporters of health care services. *Id.*

Massachusetts serves as a destination for inbound patients from many other states, including people seeking care at several prestigious Massachusetts hospitals. For example, in 2004, the last year CMS published net-flow ratios, Massachusetts had the ninth-lowest ratio in the nation, whereas neighboring Vermont had the fifth-highest ratio. *Id.* Inpatient hospital discharge data published by the Vermont Department of Banking, Insurance, Securities, and Health Care Administration indicates that, in 2008, Massachusetts hospitals discharged 1,034 Vermont residents from inpatient care. Dept. of Banking, Ins., Secs., & Health Care Admin., *Vermont Hospital Migration Report* 13 (Mar. 2010). During that same period, Vermont hospitals discharged 211 inpatient patients from Massachusetts, only one-fifth as many. *Id.* In addition, Vermont inpatients discharged from Massachusetts hospitals had three times the average charge per visit as Vermont inpatients discharged

from Vermont hospitals. *Id.* at 15. In short, many higher-cost out-of-state patients come to Massachusetts for care and Massachusetts cannot require that they first comply with the health insurance coverage provisions under Chapter 58. See Mass. Gen. Laws ch. 111M, § 2 (applying the minimum coverage provision to "residents" and individuals who become residents "within 63 days").

Out-of-state patients from neighboring states constitute a sizeable portion of the patient flow for many Massachusetts hospitals and other health care providers. Twenty-three Massachusetts hospitals are located within ten miles of an interstate border. See Div. of Health Care Fin. & Policy, *Statewide Map of Massachusetts Hospitals*, Mass. Exec. Office of Health & Human Servs. (2011) (*Statewide Map*) (*amici* used GoogleMap software in conjunction with the hospital addresses to calculate the distances between hospitals and state borders). Some health care providers near the Massachusetts border hold themselves out as the main provider for residents just across the state line. For example, the website for the Steward Holy Family Hospital, located in Methuen, Massachusetts, characterizes the provider as "serv[ing] some 450,000 individuals and their families in 20 communities throughout the Merrimack Valley *and southern New Hampshire*" (emphasis added). *Holy Family Hospital*, Steward Health Care System. Hospital summary utilization data compiled by Massachusetts's Executive Office of Health and Human Services demonstrate how large a portion of a border hospital's total

patient population out-of-state patients are. See Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *Hospital Summary Utilization Data* (2011). Every year, the Office publishes the most frequent 40 zip codes of patient origin for Massachusetts hospitals, indicating what percentage of the hospitals' total patient populations each zip code represents. Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *Top 40 Zip Codes (HSD09)* (2011) (*Top 40 Inpatient*); Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *Outpatient Observation Top 40 Zip Codes (HSD18)* (2011) (*Top 40 Outpatient*); Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *Emergency Department Top 40 Zip Codes (HSD23)* (2011) (*Top 40 ED*). Analysis of these data collections demonstrates that hospitals near the state border have a high percentage of patients coming from outside the state boundaries.[2] For instance, for Steward Holy Family Hospital, mentioned *supra*, approximately 17% of its inpatient visits, see *Top 40 Inpatient*, 21% of its outpatient visits, see *Top 40 Outpatient*, and 12% of its emergency department visits, see *Top 40 ED*, originated outside of

---

[2] The approximate proportion of visits by out-of-state residents may be determined by selecting all visits by a particular hospital in "column A," eliminating Massachusetts zip codes in "column E," and then calculating the sum of "column G." See also Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *Field Description Listing by File (HSD24)* (2011) (providing definitions of field terms for each data set).

Massachusetts in 2010. Two other hospitals located near the Massachusetts border that provide care to a high percentage of out-of-state patients are Fairview Hospital and Steward Saint Anne's Hospital. Both hospitals reported that approximately 12% of inpatient visits and 11% of outpatient visits were by patients from outside Massachusetts in 2010. See *Top 40 Inpatient*, and *Top 40 Outpatient*.

B. Due to New England's integrated economy, out-of-state commuters make up a significant portion of the Massachusetts workforce and obtain health services in Massachusetts.

The Massachusetts health care market is further exposed to out-of-state externalities through its regionally integrated labor force.[3] As of 2000, out-of-state residents commuting into Massachusetts for work constituted 5.5% of the entire Massachusetts

---

[3] Under Chapter 58, the Massachusetts minimum coverage provision applies to any individual who files a Massachusetts resident income tax return. Mass. Gen. Laws ch. 111M, § 2 (limiting the minimum coverage provision to "residents" and individuals who become residents "within 63 days"). Residents are primarily defined as individuals filing resident income tax returns in Massachusetts. *Id.* at §1. Even though nonresidents whose Massachusetts gross income exceeds $8,000 per year are required to file a nonresident income tax return, they are not subject to the minimum coverage provision. See Mass. Gen. Laws ch. 111M, § 1; Mass. Dept. of Revenue, *Who Must File* (2011).

workforce. Mass. Inst. for a New Commonwealth, *Mass.commuting* 29 (Oct. 2004) (*Mass.commuting*). Of the 176,741 out-of-state residents commuting into Massachusetts, 81,490, or 46.1%, were from New Hampshire. *Id.* These factors are particularly significant in Rockingham County, New Hampshire, where nearly one-third of the county's 148,703 employed residents commute to Massachusetts for work. Econ. & Labor Mkt. Info. Bureau, N.H. Emp't Sec., *Rockingham County Commuting Patterns* 1 (2004). Similar situations exist near the Massachusetts borders with other states such as Rhode Island, and, to a lesser extent, Maine, Vermont, Connecticut and New York. See *Mass.commuting* 30. These interstate labor markets, which may have many other economic advantages, create difficulties for an individual state which seeks to manage its health care and health insurance markets.

C. Each year Massachusetts hosts millions of tourists and business visitors who may require emergency or other health care services during their visit.

The Massachusetts health care system is further affected by the need to provide for the health care of the significant number of people who visit Massachusetts each year from across the country and indeed around the world. According to the Massachusetts Office of Travel and Tourism, approximately 16.7 million out-of-state residents visit Massachusetts each year for recreational activities, leisure, and business

trips, among other reasons. Mass. Office of Travel & Tourism, *2010 Annual Report* 10 (2010). Tourists are drawn to historic and cultural features such as Boston's revolutionary-era landmarks and to natural landscapes such as the beaches of Cape Cod and the Islands. Business visitors are also attracted to the State; indeed, Boston ranks as one of the nation's top destinations for business travelers. *Top 10 U.S. Business Destinations*, CNN Travel (Sept. 11, 2007). In addition, many out-of-state residents own vacation homes in Massachusetts. As of 2000, 3.6% of all Massachusetts homes were for "seasonal, recreational, or occasional use." Hous. & Household Econ. Statistics Div., U.S. Census Bureau, *Historical Census of Housing Tables: Vacation Homes* (last revised Oct. 31, 2011). Many of these homes were owned or rented by residents of neighboring states. Lisa Selin Davis, *Still Alternative After All These Years*, N.Y. Times, Jan. 22, 2009, at D3 (quoting a realtor stating that in Leverett, Massachusetts, many "second-home owners come from New York City").

The skiing industry figures prominently in the tourism economies of Vermont and New Hampshire, but also to an extent in Massachusetts. Because skiing is an activity with inherent safety risks, see Hulyun Xiang et al., *Skiing- and Snowboarding-Related Injuries Treated in U.S. Emergency Departments, 2002*, 58 J. Trauma 112, 113 (2005) (study finding that 139,300 skiers and snowboarders nationwide received treatment in hospital emergency rooms during 2002), and is often performed in relatively

rural environments, it is unsurprising that hospitals are located in close proximity to major ski areas in Massachusetts. Compare *Statewide Map* with *Massachusetts Ski Resort and Ski Area Locator Map*, AlpineZone.com.

The rural town of Great Barrington, Massachusetts, with 7,104 residents, U.S. Census Bureau, *Interactive Population Map* (follow "Total Population"; then follow "County Subdivision"; then search "Great Barrington, MA"), illustrates the impact that tourists and out-of-state second home owners can have on the health care services in many Massachusetts communities. Great Barrington and its surrounding communities are served by Fairview Hospital which is situated within eight miles of both Butternut and Catamount Ski areas and within twelve miles of the Connecticut and New York borders. *Id.* Because of these characteristics, Fairview Hospital's emergency department case mix reflects above-average numbers of visits by out-of-state patients, for medical issues relating to accidents and physical injuries, who lack public or private insurance. In 2010, 1,279 emergency room patients at Fairview Hospital were out-of-state residents, a figure comprising 10.89% of total emergency room visits at the hospital. *Top 40 ED* (calculating sum of "column F" and "column G," respectively, for visits to Fairview Hospital by non-Massachusetts zip codes). The clinical classifications (CCS) of these visits to Fairview Hospital were disproportionately related to fractured limbs and contusions, as compared with statewide hospital emergency room averages.

Compare Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *Emergency Department Top 20 Clinical Classifications Software by Hospital (HSD22)* (2011) with Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *Emergency Department Clinical Classifications Software Information (HSD19)* (2011) (contrasting Fairview Hospital's percentage of emergency visits with statewide averages for upper limb fracture, 2.82% to 1.73%, lower limb fracture, 1.44% to 0.88%, and contusion, 10.42% to 5.78%). Moreover, 7% of emergency room patients at Fairview attempt to finance their visit through "self-pay" methods due to lack of private or public coverage. See Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *403 Payer Utilization (HSD11)* (2011) (*Payer Utilization*) (after dividing total overall emergency visits in "column BO" by total emergency self-pay visits in "column BU," the proportion of self-pay ED visits is found; the results indicate that only six other hospitals in Massachusetts had a higher proportion of self-pay ED visits than Fairview). Statewide, six of the ten hospitals with the highest rate of emergency room patients lacking insurance were located within a ten-mile radius of an interstate border. *Id.*

D. Federal law forbids most hospitals from discriminating based on residency and insurance status when providing emergency medical services.

Massachusetts hospitals frequently provide emergency care to uninsured, or underinsured, out-of-state patients. See Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *403 Payer Utilization (HSD11)* (2011) (*Payer Utilization*) (demonstrating that Massachusetts hospitals with above-average out-of-state patient populations tend to have higher numbers of "self-pay" patients). The federal Emergency Medical Treatment and Active Labor Act (EMTALA) prohibits a hospital participating in Medicare from refusing emergency treatment to a patient due to residency, insurance, or other listed categories. EMTALA, 42 U.S.C. 1395dd; *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 252 (1999) (holding that all Medicare participating hospitals cannot discriminate against patients based on their ability to pay when providing emergency services). Because EMTALA ensures access to emergency medical treatment, participating Massachusetts hospitals must conduct medical screenings and examinations, including ancillary services routinely available at the emergency room, for any person, including an out-of-state resident, who presents with an emergency medical condition. *Id.* at 1395dd(a). Whenever such an emergency condition exists, Massachusetts hospitals must stabilize the condition or transfer the patient to another facility with appropriate services. *Id.* at 1395dd(b)(1). Many

specialized Massachusetts hospitals, such as Children's Hospital Boston or the Massachusetts Eye and Ear Infirmary, *Best Hospitals in Boston, MA*, U.S. News Health, must accept medically needed transfers in situations where they are the only providers who can adequately care for a specific emergency condition. *Id.* at 1395dd(g). EMTALA preempts state laws that conflict with EMTALA's mandated emergency treatment requirements for eligible hospitals. *Id.* at 1395dd(f).

Even without EMTALA, most Massachusetts hospitals would have to provide emergency care to non-residents. Mass. Gen. Laws ch. 111, § 70E (granting patients the right to emergency treatment without discrimination based on the ability to pay). In addition, denying emergency care to non-residents would run counter to the key mission of charitable health providers and would raise federal tax exemption issues for non-profit hospitals. Rev. Rul. 56-185, 1956-1 C.B. 202, *modified by* Rev. Rul. 69-546, 1969-2 C.B. 117 (holding that charitable hospitals exempt from federal income taxation "must not, however, refuse to accept patients in need of hospital care who cannot pay for such services."). Hospitals also cannot easily refuse to treat non-emergency patients from outside the Commonwealth because discrimination against out-of-state residents may well be unconstitutional. See *Doe v. Bolton*, *supra* at 200.

The impact on the Commonwealth and Massachusetts hospitals regarding their obligation to treat non-residents in their emergency rooms is not trivial.

At least 38,937 out-of-state residents made an emergency visit to a Massachusetts hospital in 2010, of which over 35,227 were out-of-state residents from other New England states. *Top 40 ED* (calculating the sum of total statewide visits in "column I" for each non-Massachusetts zip code). Assuming just one emergency visit per non-resident and that their visits resulted in the average cost of an emergency room visit, out-of-state residents used about 19.9 million dollars' worth of health care services for emergency room visits alone. See Div. of Health Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs., *Preventable/ Avoidable Emergency Department Use in Massachusetts: Fiscal Years 2004 to 2008*, at 11 (2010) (finding that the average cost for an emergent ED visit was $510).

While the Massachusetts health reforms resulted in a decrease in uninsured state residents from 7.4% to 1.9% between 2006 and 2010, the rates of uninsurance in bordering states have increased or remained largely static during the same time period. See U.S. Census Bureau, *Health Insurance Historical Tables* (Nov. 8, 2011) (rates of uninsurance in Connecticut: 10.9% in 2004, 9.1% in 2010; in Maine: 8.9% in 2004, 10.1% in 2010; in New Hampshire: 10.1% in 2004, 11.1% in 2010; in Vermont: 10.5% in 2004, 8.0% in 2010). By themselves, residents of Salem, New Hampshire, accounted for over 7% of all emergency visits to Steward Holy Family Hospital in Methuen, Massachusetts. *Top 40 ED*; see *supra* note 2. Eleven percent of residents of Rockingham County, New

Hampshire, in which Salem is located, lack health insurance, a much higher percentage than the Massachusetts uninsurance rate. U.S. Census Bureau, *Small Area Health Insurance Estimates* (Oct. 2011).

E. The burden of in-state health care for uninsured or underinsured out-of-state residents falls on Massachusetts.

Chapter 58 attempted to finance the expansion of health insurance and improve the affordability and quality of health care in the State by reducing reliance on expensive, uncompensated emergency room care in favor of insured, appropriate, out-patient care. In particular, the State anticipated that with the expansion of health insurance, it could achieve dramatic reductions in uncompensated care, resulting in savings that could be used to expand insurance coverage. Post-reform experience, however, has demonstrated that due, in part, to the State's inability to impose its minimum coverage provision on out-of-state residents, Massachusetts taxpayers and premium payers still incur costs as uninsured patients continue to seek and receive health care in the State. See Jon Kingsdale, *Implementing Health Reform in Massachusetts: Strategic Lessons Learned*, 28 Health Affairs w588, w589-90 (2009) (web exclusive). This is not a problem that the State can solve readily, as any attempt to apply the Massachusetts minimum coverage provision on residents of other states could run afoul of limitations under the Commerce Clause. See

Kevin Outterson, *Health Care, Technology and Federalism*, 103 W. Va. L. Rev. 504, 515-21 (2001).

In Massachusetts, the reimbursement of medically necessary services consumed by uninsured or underinsured residents is regulated by the Commonwealth's Health Safety Net Care Pool (HSN), the successor to a program established in 1985 to help compensate providers for care given to individuals without adequate health insurance or ability to pay. *Second Report to the House and Senate Committees on Ways and Means* 5 (Nov. 2005). Prior to 2006, out-of-state patients were eligible to receive certain medically necessary services based on a showing of financial hardship. *Id.* at 49. For example, in fiscal year 2004, reimbursement on behalf of uninsured out-of-state patients cost the State $36.95 million. *Id.* at 60. As part of the Chapter 58 health care reform effort, however, the State reduced its support for uncompensated care, seeking to redirect its resources toward enabling its residents to obtain and maintain affordable and comprehensive insurance. Leighton Ku et al., *supra* at 7-8. To help pay for the reduction, the State denies benefits under HSN to out-of-state residents. Mass. Gen. Laws ch. 118G, § 39(a)(1) ("Reimbursements for health services provided to residents of other states and foreign countries shall be prohibited.")

When the Commonwealth does not pay for inadequately insured out-of-state residents, the bad debt burden continues to fall on Massachusetts providers such as physicians, community health centers, and hospitals. As noted above, hospitals cannot avoid the

costs associated with uninsured out-of-state patients by merely refusing to provide emergency care. See, e.g., EMTALA, 42 U.S.C. 1395dd. Indeed, *amici* strongly advocate for access to medically necessary care regardless of one's state of residence. However, the costs of care provided to out-of-state uninsured patients are passed along to the residents of Massachusetts, either through their taxes or through the premiums and cost-sharing they pay when attaining the coverage required by the State. John Holahan & Stan Dorn, Robert Wood Johnson Found., *What is the Impact of the Patient Protection and Affordable Care Act (PPACA) on the States?* 2 (June 2010) (finding that state spending on uncompensated care, and state-funded health care programs, is substantial, and that states spent 17.2 billion on the uninsured in 2008). As a result, the State's ability to reform its health care market, control hospital costs, and provide affordable care to nearly all of its residents is limited by its inability to regulate the decisions of out-of-state residents to forgo health insurance. Only Congress, which has the sole power to regulate interstate commerce, can address this problem, as it did when it enacted the Act and imposed a national minimum coverage provision.

III. Due to ERISA, Massachusetts has a limited ability to regulate certain employer-sponsored group health insurance plans.

States such as Massachusetts that attempt to achieve universal health care also face constraints in

their ability to regulate the health insurance of their own residents due to the Employee Retirement Income and Security Act of 1974 (ERISA), which regulates employer-sponsored benefit plans, including group health insurance plans. 29 U.S.C. 1101; *Shaw v. Delta Air Lines*, 463 U.S. 85, 90 (1983). ERISA was enacted by Congress in part to "minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 142 (1990). To free employers from that burden, ERISA includes a broad preemption provision that prevents many state regulations of employer-sponsored group health plans. 29 U.S.C. 1144. In addition, although ERISA "saves" state laws that regulate insurance, ERISA makes clear that self-funded plans are wholly exempt from state insurance laws. *Id.* at 1144(b)(2)(b). ERISA also blocks state common law remedies for improper denials of health insurance coverage. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208-09 (2004). Indeed, ERISA establishes an exclusive federal remedy for claims against employer-sponsored plans. *Id.* at 218; 29 U.S.C. 1132(a).

ERISA's impact on a state's ability to reform its own health insurance market is significant. In the United States, 55.3% of the population is covered by employer-sponsored group health benefit plans. Les Christie, *Number of People Without Health Insurance Climbs*, CNN Money, Sept. 13, 2011; U.S. Census Bureau, *U.S. Census Bureau Announces 2010 Census Population Counts* (Dec. 21, 2010). In Massachusetts,

79% of insured residents receive their insurance through such employer-sponsored plans. *Key Indicators* 4. Moreover, as of 2011, 60% of ERISA plans in the nation were self-funded, Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits Annual Survey* 151 (2011) (*Annual Survey*), and therefore fully beyond the reach of state regulation. *Aetna Health*, 542 U.S. at 208; *FMC Corp. v. Holliday*, 498 U.S. 52, 65 (1990) (holding that ERISA preempted Pennsylvania's Motor Vehicle Financial Responsibility Law's application to self-funded health benefit plans).

A state's limited ability to regulate employer-sponsored group health plans, especially self-funded plans, impedes its capacity to comprehensively reform its health care and health insurance markets. In particular, ERISA makes it difficult for states to address the problems faced by employees who have insurance through work but remain underinsured, due to high deductibles, high co-pays or other limitations in their coverage. These problems only become more challenging as the number of underinsured employees increases. For example, the underinsured are more likely to be covered by high-deductible health plans. See Cathy Schoen et al., *Affordable Care Act Reforms Could Reduce the Number of Underinsured US Adults by 70 Percent*, 30 Health Affairs 1762, 1767 (2011) (finding that "the underinsured were more likely to report per person deductibles of $1,000 or more despite lower incomes"). The percentage of covered workers enrolled in high-deductible health plans increased

from 8% to 17% between 2009 and 2011. *Annual Survey* 5 (2011). That percentage is even higher, 23%, among workers in small firms with 3 to 199 employees. *Id.* Employee coverage in a high-deductible plan is most prevalent, 41%, among large firms of 1,000 or more employees. *Id.* As employees select high-deductible health plans in increasing numbers, more of them face the risk of underinsurance. Underinsurance, like uninsurance, can result in uncompensated care, or care that is delayed and delivered when it is more expensive. Sarah R. Collins, Commonwealth Fund, *The Problem of Underinsurance in the United States: What It Means for Working Families and How Health Reform Will Help* (2009) (explaining that while one purpose of health insurance is to provide timely access to medical services to prevent high cost illness later, the underinsured are more likely to delay or skip medical care due to high costs).

Massachusetts has found that despite Chapter 58, significant numbers of individuals offered employer-sponsored health insurance are underinsured and end up relying on state-subsidized health care. Currently, Wal-Mart Stores, Inc. (Walmart) has the highest number of employees utilizing state subsidized insurance in Massachusetts, but Walmart's group benefit plans are self-funded and thus covered by ERISA. Wal-mart Stores Inc., *2011 Annual Report* 35 (2011). In fiscal year 2009, 5,072 Walmart employees, plus 5,699 of their dependents, used state subsidized care in Massachusetts, incurring health care costs of approximately 16.6 million dollars. Div. of Health

Care Fin. & Policy, Mass. Exec. Office of Health & Human Servs. *Employers with 50 or More Employees Using Subsidized Care* app. 5, at 2 (2010) (*Subsidized Care*). This problem is not limited to Walmart; Massachusetts provides benefits to employees of many large, self-funded employers offering ERISA plans. For example, Target Corporation, another large employer in Massachusetts, offers self-funded group health insurance plans. Target Corp., *2010 Annual Report* 26 (2010). In fiscal year 2009, 2,204 Target employees, and 2,190 of their dependents, sought subsidized care from Massachusetts, receiving a total of 7.1 million dollars in subsidized care through MassHealth, Commonwealth Care, or the Health Safety Net. *Subsidized Care*. State subsidized health care under Commonwealth Care is also available to residents who do not have access to employer-sponsored health insurance, such as many part-time employees who are excluded from employer benefits plans. Mass. Gen Laws ch. 118H, § 3. Because of ERISA preemption, Massachusetts cannot require employers such as Walmart and Target to sponsor more generous group health insurance plans.

IV. The interstate nature of the health insurance and health care markets will cause problems for other states that try to achieve affordable, universal access to care.

Other states that seek to reform health care systems will face similar, if not greater, problems than Massachusetts has experienced due to federal law and the interstate nature of the health insurance and health care systems. Health care services are interstate economic activity across the country. The Dartmouth Atlas of Health Care compiled data as to where Medicare patients residing in a specific area are admitted for health care services. See The Dartmouth Atlas of Health Care, Dartmouth Inst. for Health Policy & Clinical Practice, *Data by Region* (2007). The Dartmouth Atlas has used this data to create maps referencing where residents in each area get the majority of their care. Hospital Service Areas (HSAs) show which hospitals patients from a certain area are likely to use for general care, and Hospital Referral Regions (HRRs) show where patients from a certain area are likely to have major procedures done. *Id.*

These HSAs and HRRs give a sense of the magnitude with which several states in the United States interlock with regard to health care services. While some HRRs in the Northeast include one or two states, HRRs in other regions stretch over a very wide area and may include several states. The Denver and Salt Lake City HRRs, for example, include sizeable

portions of three and five surrounding states, respectively. *Id.* The more states included in an HRR or HSA, the more difficult it is for individual state health reform efforts to achieve the goals set by state legislatures.

The success Massachusetts has experienced in enacting its health reform comes, in no small part, from its location in the New England region. The Northeast has the lowest percentage of uninsured in the country; see *U.S. Census Uninsured*, making it easier to implement workable health insurance reforms than in other regions. In fact, all six New England states were included among the fifteen states with the lowest rate of uninsurance during 2004 to 2006. U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2006*, at 24 tbl.6 (Aug. 2007). If Massachusetts were located next to a state with a much higher level of uninsured or underinsured individuals, the problems it has faced due to uninsured or underinsured out-of-state residents would have been greatly magnified. For example, Texas currently has 6.26 million uninsured people, approximately 25% of its population, Kaiser Family Found., *Health Insurance Coverage of the Total Population, States (2009-2010), U.S. (2010)*; placing even a fraction of these people next to Massachusetts would result in an explosion of costs due to uncompensated care in its hospitals.

Stark differences in adjoining states' health insurance regulations and number of uninsured can severely dilute the effectiveness of a state's attempts

to regulate health insurance within its borders. Utah's uninsured population, for example, numbers only about 422,000 (15.3% of 2.76 million total population). See U.S. Census Bureau, *U.S. Census Uninsured: Utah* (last revised Dec. 23, 2011). If Utah ever tried to decrease the number of uninsured within its borders through legislation, it could face a sizeable problem doing so, as it lies adjacent to two of the states with among the highest uninsured rates in the nation, Nevada and Arizona. See Paul Fronstin, Cal. HealthCare Found., *California's Uninsured* 3 (December 2010). These two states alone possess a combined total of 1.7 million uninsured people. See *id.* Since they are not residents of Utah, the State cannot require that they hold health insurance. Even if only a small portion of them enter Utah, they can undermine any health insurance reforms that that state might enact.

Almost every one of the states other than Alaska and Hawaii would face similar problems if they attempted a comprehensive reform of their own health care system. It is not entirely surprising then that Hawaii is the only other state with near universal health insurance coverage. Center for Health Policy Research, Okla. Med. Research Found., *Lessons Learned from Hawaiian Health Care Reform* 2 (Feb. 1992) (some analysts attribute Hawaii's successful reforms, in part, to "the very unique situation of being 3,000 miles from a competing border state"). Health care reform is inherently interstate commerce,

requiring federal coordination under the Commerce Clause.

CONCLUSION

Markets for health care and health insurance are enmeshed in interstate commerce because decisions individuals make in one state regarding whether to have and maintain health insurance inevitably affect other states. As a result of such decisions, states such as Massachusetts cannot solve their health care financing and delivery problems alone, even after they enact broad reforms such as Chapter 58. Only Congress can regulate across state lines; federal legislation such as the Act is therefore a clearly constitutional exercise of the Commerce Clause regulating interstate commerce.

The Court should reverse the Court of Appeals' decision and reverse the judgment of the Court of Appeals regarding the minimum coverage provision.

Respectfully submitted,

WENDY E. PARMET
(*Counsel of Record*)
NORTHEASTERN UNIVERSITY
SCHOOL OF LAW
400 Huntington Ave.
Boston, MA 02115
617-373-2019
w.parmet@neu.edu

LORIANNE M. SAINSBURY-WONG
30 Winter St., Suite 1004
Boston, MA 02108
617-275-2987
sainsbury_wong@hla-inc.org

January 13, 2012

AMICUS CURIAE BRIEF

No. 11-398

IN THE
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF HEALTH CARE POLICY HISTORY SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS (Minimum Coverage Provision)

GEOFFREY F. ARONOW
Counsel of Record
RAECHEL K. ANGLIN
JEFFREY T. HANTSON
BINGHAM MCCUTCHEN LLP
2020 K Street NW
Washington, DC 20006-1806
(202) 373-6277
geoffrey.aronow@bingham.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 7

I. CONGRESS HAS SUPPORTED AND REGULATED THE NATION'S HEALTH CARE DELIVERY AND FINANCE SYSTEM FOR DECADES. 7

A. Federal Financing Has Provided The Underpinnings For Private Health Care Delivery And Insurance 8

1. Federal Support for Health Care Delivery 8

2. Federal Support for Private Health Insurance 11

3. Public Absorption of Costly and Low Income Populations 13

B. Federal Regulation Has Also Shaped The Nation's Health Care System 16

1. Federal Regulation of Drugs and Institutional and Physician Care 16

TABLE OF CONTENTS
(continued)

Page

2. Federal Regulation of Private Health Insurance 18

II. THE MINIMUM COVERAGE PROVISION IS NOT UNPRECEDENTED, BUT IS CONSISTENT WITH ESTABLISHED FEDERAL LAW 21

A. Congress Has For Decades Through Medicare Mandated And Imposed Penalties For Failure To Make Provision For Likely Future Medical Needs. 21

B. Congress Properly Addressed The Problem Of Cost-Shifting Prospectively Rather Than At The Point Of Consumption. 24

III. THE MINIMUM COVERAGE PROVISION ORIGINATED AS A MARKET-FACILITATING SOLUTION TO THE PROBLEM OF PRESERVING PRIVATE INSURANCE. 25

IV. THE AFFORDABLE CARE ACT WILL PRESERVE THE PUBLIC/PRIVATE STRUCTURE OF OUR HEALTH CARE SYSTEM. 33

CONCLUSION 36

APPENDIX A — LIST OF AMICI CURIAE 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Aetna Health Inc. v. Davila,
542 U.S. 200 (2004) 19

Florida v. U.S. Dep't Health & Human Servs.,
648 F.3d 1235 (11th Cir. 2011) ..... passim

FMC Corp. v. Holliday,
498 U.S. 52 (1990) 19

Gonzales v. Carhart,
550 U.S. 124 (2007) 18

Gonzales v. Raich,
545 U.S. 1 (2005) 18

Hall v. Sebelius,
770 F. Supp. 2d 61 (D.D.C. 2011) 22

Liberty Univ., Inc. v. Geithner,
No. 10-2347, 2011 WL 3962915 (4th Cir. 2011) 2

North Carolina ex rel. Morrow v. Califano,
445 F. Supp. 532 (D.N.C. 1977) 17

Seven Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) 2, 23

Thomas More Law Ctr. v. Obama,
651 F.3d 529 (6th Cir. 2011) 2, 23

United States v. South-Eastern Underwriters Ass'n,
322 U.S. 533 (1944) 18

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTION, STATUTES, REGULATIONS, AND RULES

15 U.S.C. § 1012 19

21 U.S.C. §§ 811–831 18

26 U.S.C. § 223 20

29 U.S.C. § 1104(a)(1)(A) 24

29 U.S.C. § 1181(a) 19

29 U.S.C. § 1182 19

29 U.S.C. §§ 1185–1185c 20

42 U.S.C. §§ 300e–300e-17 19

42 U.S.C. § 300gg-1 ..... 19, 20

42 U.S.C. § 300gg-2 19

42 U.S.C. § 300gg-41 20

42 U.S.C. § 300gg-42 20

42 U.S.C. § 300gg-53 20

42 U.S.C. § 402 22

42 U.S.C. § 414 22

42 U.S.C. § 426 22

42 U.S.C. §§ 1320d–1320d-9 18

TABLE OF AUTHORITIES
(continued)

Page(s)

42 U.S.C. § 1395r(b) 22

42 U.S.C. § 1395w-113(b) 22

42 U.S.C. § 1395dd 17

42 U.S.C. § 1395ss 20

42 U.S.C. § 1397bb(b)(3)(C) 15

42 U.S.C. §§ 12101-12117 20

1 Stat. 605 (1798), *available at* http://history.nih.gov/research/downloads/1StatL605 13

42 Stat. 224 (1921) 13

Pub. L. No. 79-725, 60 Stat. 1040 (1946) 9

Pub. L. No. 93-406, 88 Stat. 829 (1974) 19

Pub. L. No. 93-641, 88 Stat. 2225 (1975) 17

Pub. L. No. 111-148, 124 Stat. 173 (2010) 34

LEGISLATIVE MATERIALS

H.R. 2520, 111th Cong. (2009) 31

H.R. 4529, 111th Cong. (2010) 31

S. 1743, 103rd Cong. (1993) 32

S. 1770, 103rd Cong. (1993) 32

TABLE OF AUTHORITIES
(continued)

Page(s)

S. 1807, 103rd Cong. (1994) 32

S. 334, 110th Cong. (2007) 30, 32

S. 391, 111th Cong. (2009) 32

ADMINISTRATIVE MATERIALS

CONG. BUDGET OFFICE, AN ANALYSIS OF THE ADMINISTRATION'S HEALTH CARE PROPOSAL (1994), http://www.cbo.gov/ftpdocs/48xx/doc4882/doc07.pdf. 29

CONG. BUDGET OFFICE, CBO'S MARCH 2011 ESTIMATE OF THE EFFECTS OF THE INSURANCE COVERAGE PROVISIONS CONTAINED IN THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (2011), *available at* http://www.cbo.gov/budget/factsheets/2011b/HealthInsuranceProvisions.pdf. 35

MEDICARE PAYMENT ADVISORY COMM'N, MEDICARE PAYMENT POLICY (2011), *available at* http://www.medpac.gov/documents/Mar03_Entire_ report.pdf 15

U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010 (2011) 3, 33

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER MATERIALS

Anne Martin et al., *Recession Contributes to Slowest Rate of Annual Increase in Health Spending in Five Decades*, 30 HEALTH AFF. 11 (Jan./Feb. 2011). 2

BARRY FURROW ET AL., HEALTH LAW (6th ed., West 2008) 17

DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA (Princeton University Press 2010) 16

Daniel Fox & Daniel Schaffer, *Tax Administration as Health Policy: Hospitals, the Internal Revenue Service, and the Courts*, 16 J. Health Pol., Pol'y & L. 251 (1991) 17

Jack Hadley et al., *Covering the Uninsured in 2008: Current Costs, Sources of Payment, and Incremental Costs*, 27 HEALTH AFF. w399 (2008) 5

JACOB HACKER, THE DIVIDED WELFARE STATE: THE BATTLE OVER THE PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES (Cambridge University Press 2002) 25

John E. McDonough et al., *The Third Wave of Massachusetts Health Care Reform*, 25 HEALTH AFF. w420 (Nov. 2006) 30

TABLE OF AUTHORITIES
(continued)

Page(s)

JUDITH FEDER, MEDICARE: THE POLITICS OF FEDERAL HOSPITAL INSURANCE (Lexington Books 1977) 9, 15

KAISER FAMILY FOUNDATION, STATE HEALTH FACTS: UNITED STATES, HOSPITALS BY OWNERSHIP TYPE (2009), http://www.statehealthfacts.org/ comparebar. jsp?ind=383&cat=8 8

KATHLEEN GIFFORD ET AL., A PROFILE OF MEDICAID MANAGED CARE PROGRAMS IN 2010: FINDINGS FROM A 50-STATE SURVEY (The Henry J. Kaiser Family Foundation 2011), *available at* http://www.kff.org/medicaid/upload/8220.pdf 15

Mark V. Pauly et al., *A Plan for "Responsible National Health Insurance"*, 10 HEALTH AFF. 5 (Feb. 1991) 27, 28

Mitt Romney, *Health Care for Everyone? We've Found a Way,* WALL ST. J., April 11, 2006 30

Newt Gingrich, *Covering the Uninsured—Do We Want Markets or Mandates?*, CENTER FOR HEALTH TRANSFORMATION, June 25, 2007, http://www.healthtransformation.net/cs/ opeds_news?pressrelease.id=33 29

PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE (Basic Books 1982) 4, 8

TABLE OF AUTHORITIES
(continued)

Page(s)

Paul N. Van de Water, *Limiting the Tax Exclusion for Employer-Sponsored Insurance Can Help Pay for Health Reform*, CENTER ON BUDGET AND POLICY PRIORITIES, June 4, 2009, http://www.cbpp.org/cms/index.cfm?fa=view&id=2832 12

Peter Barton Hutt, *The Transformation of American Food and Drug Law*, 60 J. ASS'N FOOD & DRUG OFFICIALS 9 (1996) 16

RICK MAYES & ROBERT BERENSON, MEDICARE PROSPECTIVE PAYMENT AND THE SHAPING OF U.S. HEALTH CARE (The Johns Hopkins University Press 2006) 9, 10

ROBERT F. BENNETT ET AL., SENATE REPUBLICAN TASK FORCE CONSENSUS PRINCIPLES FOR HEALTH CARE REFORM (1993), *available at* http://legacy.library.ucsf.edu/tid/rzf48d00/pdf 28

Robert Field, *Government as the Crucible for Free Market Health Care: Regulation, Reimbursement, and Reform*, 159 PENN. L. REV. 1669 (2011). 10, 11

ROSEMARY STEVENS, THE PUBLIC PRIVATE HEALTH CARE STATE: ESSAYS ON THE HISTORY OF AMERICAN HEALTH CARE POLICY (Transaction Publishers 2007) 13

Simon Lazarus, *Paul Ryan's "Individual Mandate"*, SLATE, May 3, 2011, http://www.slate.com/articles/news_and_politics/jurisprudence/2011/05/paul_ryans_individual _mandate.html 31, 32

TABLE OF AUTHORITIES
(continued)

Page(s)

STUART ALTMAN & DAVID SHACTMAN, POWER, POLITICS, AND UNIVERSAL HEALTH CARE: THE INSIDE STORY OF A CENTURY-LONG BATTLE (Prometheus Books 2011) 9, 16, 17, 19

Stuart Butler, *Assuring Affordable Health Care for All Americans*, 218 THE HERITAGE LECTURES 1 (1989), *available at* http://thf_media.s3.amazonaws.com/1989/pdf/hl218.pdf 26, 27

Summary of a 1993 Republican Health Reform Plan, KAISER HEALTH NEWS, Feb. 23, 2010, http://www.kaiserhealthnews.org/Stories/2010/February/23/GOP-1993-health-reform-bill.aspx 28

THEODORE R. MARMOR, THE POLITICS OF MEDICARE (2nd ed., Aldine Transaction 2000) 14

TIMOTHY STOLTZFUS JOST, DISENTITLEMENT?: THE THREATS FACING OUR PUBLIC HEALTH CARE PROGRAMS AND A RIGHTS-BASED RESPONSE (Oxford University Press 2003) 13

TIMOTHY STOLTZFUS JOST, HEALTH CARE AT RISK: A CRITIQUE OF THE CONSUMER-DRIVEN MOVEMENT (Duke University Press Books 2007) 11, 12

Tom Miller, *Cato Institute Policy Analysis No. 210: Nickles-Sterns is Not the Market Choice For Health Care Reform*, POLICY ANALYSIS, June 13, 1994, http://www.cato.org/pubs/pas/pa210.pdf 28

TABLE OF AUTHORITIES
(continued)

Page(s)

William H. Frist, *Frist: An Individual Mandate for Health Insurance Would Benefit All*, U.S. NEWS & WORLD REPORT, Sept. 28, 2009, *available at* http://www.usnews.com/opinion/articles/2009/09/28/frist-an-individual-mandate-for-health-insurance-would-benefit-all 29

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The Amici Curiae (listed individually by name and title in Appendix A to this brief) are thirty-four scholars who study the history of health care policy in the United States ("Health Care Policy History Scholars"). The Health Care Policy History Scholars come from a variety of academic disciplines, including health policy, health economics, law, and political science, as well as history. All have written books or articles examining the development of health care policy in the United States, and in particular the role of the federal government in shaping health care policy. Several have participated in that policy's development.

The Health Care Policy History Scholars believe that the Eleventh Circuit Court of Appeals' opinion fundamentally mischaracterizes important facts regarding the historical role of the federal government in health care. It is vital for this Court to understand that the role established for the federal government by provisions of the Affordable Care Act ("ACA")—including the minimum coverage requirement—is consistent with, and not different in kind from, the historical role of the federal government in health care.

---

[1] No counsel for a party authored this brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No other person other than the amici curiae or their counsel made such a monetary contribution. All parties have consented to the filing of this brief; letters reflecting their consent have been filed with the Court's Clerk.

SUMMARY OF ARGUMENT

The Eleventh Circuit asserted that the minimum coverage requirement is an "encroachment upon... areas of traditional state concern." *Florida v. U.S. Dep't Health & Human Servs.*, 648 F.3d 1235, 1306 (11th Cir. 2011). It also claimed that the requirement was a "wholly novel...assertion of congressional authority." *Florida*, 648 F.3d at 1328. These statements are inconsistent with the historical facts.

Federal intervention in the nation's health care system is not new, as most federal appellate court judges who have ruled on the constitutionality of the ACA have recognized. *See Seven Sky v. Holder*, 661 F.3d 1, 19 (D.C. Cir. 2011); *Liberty Univ., Inc. v. Geithner*, No. 10-2347, 2011 WL 3962915, at *38 (4th Cir. 2011) (Davis, J., dissenting); *Florida*, 648 F.3d at 1333–36 (Marcus, J., dissenting in part); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 544 (6th Cir. 2011). Congress has long intervened to support and regulate the provision of institutional and professional health care in the United States. Congress also has an extensive history of using its constitutional authority to affect the supply of and demand for health insurance and the amount individuals pay for that insurance.

Our modern American health care system has evolved largely in tandem with federal health policy. Although our health care delivery system remains largely private, it would look very different but for the federal support and regulation during the second half of the twentieth century. Federal funding has extended across the delivery system—supporting hospitals, physician and other professional training, and pharmaceutical research. Direct federal spending for health care currently covers 27 percent of national health care spending. Anne Martin et al., *Re-*

cession Contributes to Slowest Rate of Annual Increase in Health Spending in Five Decades, 30 HEALTH AFF. 11, 15 (Jan./Feb. 2011). Those expenditures have historically been accompanied by federal regulation. Indeed, use of federal authority has played a key role in sustaining private health insurance and private health care markets, and continued federal engagement is necessary to sustain them for the future.

Most Americans have access to the health care system because they have insurance to cover the cost of that care. Both private and public insurance coverage became significant forces in the second half of the twentieth century. While the most common way Americans are insured today is through employer-sponsored insurance, which covers 55.3 percent of the population, 31 percent of Americans are covered by public insurance programs. U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, at 23 (2011).

Federal support and regulation have played a vital role in the development of this system of health care financing. Federal direct funding for health care for the uninsurable and tax expenditures that support private insurance make the nation's private health insurance system possible. Employer-based coverage has flourished because of federal tax subsidies and regulatory protection. The nation's major public health insurance programs, Medicare, Medicaid, the Children's Health Insurance Program ("CHIP"), Veterans and Defense Department programs, the Indian Health Service and federally-qualified community health centers—all funded wholly or in part by the federal government—have covered many Americans who cannot afford private insurance or who are uninsurable.

As described more fully below, federal health care policy has been instrumental in the development of the modern health care system in at least four ways. First, federal support has been vital to the development of the supply side of our health care system, funding hospital construction, medical education, and the research that underlies the development of new drugs and devices. Second, federal support has driven the development of the demand side, both through direct spending via public insurance programs and through tax subsidies that have fostered the provision of private health insurance. Third, federal regulation imposed under the Spending Clause has dramatically changed our health care system, opening the doors of hospitals to individuals regardless of race in the 1960s and to persons undergoing medical emergencies regardless of ability to pay in the 1980s. Finally, federal regulation under the Commerce Clause has long been pervasive, governing employee benefit plans, privacy of medical records, and procedures doctors may use to perform abortions.

State funding and regulation of our health care system, which date back to the nineteenth century, *see* PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 102-07 (Basic Books 1982), antedated federal funding and regulation and continue today. In some contexts federal law has totally preempted state law, in some federal and state law coexist, and in a few areas state law remains predominant. It has been decades, however, since one could accurately characterize health care as an area of "traditional state concern"—as opposed to one in which the federal government played a significant role—in anything other than a historical sense. Indeed, federal law has long had a more pervasive in-

fluence on both health care delivery and finance than state law.

While federal funding and regulation have directly or indirectly helped to bring health insurance to the vast majority of Americans, a substantial and, in recent years, growing number of Americans remain uninsured, and increasing numbers of Americans currently insured face the risk of losing coverage. Uninsured Americans regularly receive substantial amounts of health care, much of the cost of which is "shifted" to the federal and state governments or to those persons who have private health insurance—the existence of which flows largely from the federal government's policies. Jack Hadley et al., *Covering the Uninsured in 2008: Current Costs, Sources of Payment, and Incremental Costs*, 27 HEALTH AFF. w399, w402 (2008).

The ACA seeks to expand access to affordable health insurance through premium tax credits, an expansion of Medicaid and restrictions on health insurers' ability to deny coverage to individuals because of their health status. It also specifically seeks to extend health insurance coverage through the minimum coverage requirement, which encourages uninsured Americans to become insured, often by taking advantage of federal support programs such as Medicaid or premium tax credits.

The minimum coverage requirement seeks to protect Americans who are already insured from bearing the burden of cost-shifting by the uninsured who can afford insurance. It thereby fills a critical gap in the existing scheme of federal statutes and regulations that have already extended health care coverage to most Americans. Seen in the context of the long-standing federal role in getting more Americans

insured, there is nothing "wholly novel" about the minimum coverage requirement.

The way in which the requirement extends coverage—imposing a cost on those who fail to purchase health insurance in a timely manner to provide for their future health needs—is also not "wholly novel." The Medicare program, like the minimum coverage requirement, requires Americans to pay in advance for insurance to cover services they will likely receive in the future and requires eligible beneficiaries to enroll promptly or pay a significant penalty. The Medicare Hospital Insurance program, created in 1965, collects payroll taxes from Americans throughout their working lives to pay for institutional care for individuals when they reach age sixty-five or become disabled, and imposes a serious penalty on individuals who decline enrollment, namely the loss of Social Security. This approach to ensuring that eventual beneficiaries contribute appropriately to the insurance pool in advance is more broadly applicable and imposes a higher cost on non-participation than the penalty under the ACA's minimum coverage provision.[2]

Finally, the history of the minimum coverage requirement itself has been sorely mischaracterized and misunderstood. Although the requirement has been widely criticized as part of a "government takeover" of the health care system or as a radical new idea, in fact it is an idea often promoted in the past by conservative political voices and comes from market-oriented approaches and proposals to achieve

---

[2] Although the Medicare medical (Part B) and prescription drug (Part D) programs are voluntary programs, beneficiaries who decline enrollment forfeit a significant financial benefit, and those who delay enrollment without cause when they first become eligible face substantial penalties. *See infra* at 22.

widely supported goals of ensuring quality, affordable and broadly accessible health care. Congress enacted the minimum coverage requirement explicitly to preserve and improve the functioning of the nation's private health care system and thereby avoid creating a new direct federal program for funding health care. In fact, by utilizing several key mechanisms, including the minimum coverage provision, the ACA leaves the basic structure of the nation's health care system largely unchanged, preserving rather than radically altering that system.

ARGUMENT

I. CONGRESS HAS SUPPORTED AND REGULATED THE NATION'S HEALTH CARE DELIVERY AND FINANCE SYSTEM FOR DECADES.

The U.S. health care system is typically regarded as fundamentally private—distinct among industrialized nations in its reliance on the private rather than the public sector to provide and finance medical care. But an examination of the system's evolution, as well as its current operations, makes clear that public—and, more specifically, federal— support and direction has long been fundamental to the design and operation of the nation's "private" health care system. Alongside federal support for the private health care system has come federal regulation—initially focused primarily on assuring health and safety, but extended repeatedly to prevent discrimination in access to care, secure emergency care, limit the oversupply of health services through health planning, influence professionals' provision of services through payment incentives and protect the privacy of patients and consumers in the use of medical records.

In short, the U.S. private health care system is grounded in public policy that aims to assure access to safe, effective and affordable care. The ACA and its minimum coverage provision falls squarely within that tradition.

A. Federal Financing Has Provided The Underpinnings For Private Health Care Delivery And Insurance.

As described in detail below, throughout the country's history, Congress has enacted legislation that supplemented and encouraged the development of the nation's health care delivery system and the financing of it principally through and in reliance upon private insurance mechanisms.

1. Federal Support for Health Care Delivery

The nation's health care providers—institutional and professional—are overwhelmingly private. *See* KAISER FAMILY FOUNDATION, STATE HEALTH FACTS: UNITED STATES, HOSPITALS BY OWNERSHIP TYPE (2009), http://www.statehealthfacts.org/comparebar.jsp?ind=383&cat=8. But public investment underlies much of the evolution and the current operation of the private organizations that deliver care.

The availability of hospitals in sparsely as well as densely populated regions is a direct product of public, and often federal, investment. Federal support for care in rural areas began in the 1930s, when the federal Farm Security Administration helped finance rural health cooperatives that eventually covered 600,000 Americans. STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE at 304. In 1946, Congress enacted the Hospital Construction and Survey Act ("Hill–Burton Act") to provide federal grants for hospital construction, which, over the next

two decades, assisted the financing of 9,200 new medical facilities and 416,000 new beds nationwide. Pub. L. No. 79-725, 60 Stat. 1040 (1946); *see* STUART ALTMAN & DAVID SHACTMAN, POWER, POLITICS, AND UNIVERSAL HEALTH CARE: THE INSIDE STORY OF A CENTURY-LONG BATTLE 114 (Prometheus Books 2011).

The Medicare and Medicaid programs, enacted in the mid-sixties, further drove hospital growth and development. These programs dramatically expanded the population of paying hospital patients. Their initial terms of payment (cost reimbursement, including a return on capital), were designed to reflect practices of private insurers and supported the expansion of hospital resources. JUDITH FEDER, MEDICARE: THE POLITICS OF FEDERAL HOSPITAL INSURANCE 53-70 (Lexington Books 1977). Similarly, the nursing home industry emerged in the middle of the last century in response to access to federal funding, most significantly Medicaid. Subsequent refinement in Medicare hospital payment methods in 1983 (specifically, adoption of "per case" payments[3]) dramatically altered hospital practice—shortening hospital stays, and driving the development of both outpatient surgery and post-acute care facilities. RICK MAYES & ROBERT BERENSON, MEDICARE PROSPECTIVE PAYMENT AND THE SHAPING OF U.S. HEALTH CARE 98-101 (The Johns Hopkins University Press 2006).

The size and nature of the nation's health workforce similarly reflects a combination of specifically

---

[3]Under "per case" payments, a hospital is paid a set price for each in-patient stay rather than a separate payment for each day a patient is in the hospital or for each service provided a patient.

targeted federal government policies and the impact of government insurance. Alongside enactment of Medicare and Medicaid, which increased the demand for physicians' services, Congress initiated support for training to assure the availability of physicians to meet that demand. Robert Field, *Government as the Crucible for Free Market Health Care: Regulation, Reimbursement, and Reform,* 159 PENN. L. REV. 1669, 1694-98 (2011). Government support allowed existing medical schools to expand and stimulated the creation of new ones, increasing the physician supply. Medicare contributed to this training effort by including in payments to hospitals amounts to support graduate medical education, i.e., the clinical training of new physicians who act as hospital staff. Medicare policy not only influenced the number but also the kind of physicians available by determining the number of training "slots" in each specialty its payments support. *Id.*

Medicare's physician payment policy has greatly influenced the way physicians practice medicine. Medicare's resource-based physician fee schedule, adopted in 1989, established the general standard by which physicians have subsequently been paid.[4] MAYES & BERENSON, MEDICARE PROSPECTIVE PAYMENT AND THE SHAPING OF U.S. HEALTH CARE at 81-92. Professionals, like institutional providers, have adapted to Medicare's payment incentives, which overvalue technologically-oriented services at the expense of primary care. *Id.* at 146.

Government policy has also driven innovation in the treatments health professionals provide. The National Institutes of Health ("NIH"), created in its

---

[4] Under this fee system, doctors are paid a set fee for each service based on the resources needed to produce the service.

current form by legislation enacted shortly after World War II, has funded tens of thousands of researchers—in-house and around the nation—conducting the basic and clinical research that continually advances clinicians' understanding and treatment of disease. Field, 159 PENN L. REV. at 1669-706. The nation's pharmaceutical industry relies heavily on this research to support the development and dissemination of new products. *Id.*

The symbiotic relationship between publicly-funded research and privately-delivered products and treatment is nowhere more visible today than in the development of genomics from NIH's investment in mapping the human genome. *Id.* at 1705-06. The emerging ability to determine susceptibility to and potentially treatment of disease based on an individual's specific genetics offers a dramatic illustration of how publicly-supported basic research transforms privately-delivered medical and pharmaceutical treatment. *Id.*

2. Federal Support for Private Health Insurance

Private health insurance emerged in the mid-twentieth century as the nation's primary means of assuring financial protection against the cost of illness. Public policy supported the initial development, growth, and long-term viability of the private insurance enterprise.

During the Great Depression, providers developed non-profit insurance (Blue Cross by hospitals; Blue Shield by physicians) to secure badly needed revenues. TIMOTHY STOLTZFUS JOST, HEALTH CARE AT RISK: A CRITIQUE OF THE CONSUMER-DRIVEN MOVEMENT 56-69 (Duke University Press Books 2007). State tax preferences enabled them to form

and to compete with for-profit or commercial insurers, who were encouraged by the success of the Blue Cross/Blue Shield plans to offer health coverage as well.

But insurers needed a market. Beginning in the 1940s, employers became the prime target for private insurers' marketing efforts. Employment-based insurance provided the mechanism to overcome the considerable risk of adverse selection (the fact that those people most likely to purchase insurance will be those most likely to need it), enabling the spreading of risk and making insurance both viable and profitable. *Id.* at 59-61.

Federal policies were key to employers' receptivity to purchasing insurance on employees' behalf. In 1949, the National Labor Relations Board ruled that employee benefits were included within the "terms of conditions of employment" subject to collective bargaining under the National Labor Relations Act. In response, unions began to seek health benefits from employers that they had been unable to obtain through legislation. *Id.* at 62-63. Most critical over the long term, the 1954 Internal Revenue Code, clarifying and codifying administrative action by the Treasury Department in 1943, excluded employer-paid health insurance premiums from employees' taxable income, thereby reducing its costs relative to direct purchase. *Id.* at 64. This tax benefit—or as it is now recognized, tax expenditure—not only entrenched private health insurance, but has become, at $246 billion for 2007, the federal government's third most expensive health care program. Paul N. Van de Water, *Limiting the Tax Exclusion for Employer-Sponsored Insurance Can Help Pay for Health Reform*, CENTER ON BUDGET AND POLICY PRIORITIES,

June 4, 2009, http://www.cbpp.org/cms/index.cfm?fa=view&id=2832.

3. *Public Absorption of Costly and Low Income Populations*

Federally-supported health insurance dates almost back to the founding of the Republic. In 1798, Congress adopted an "Act for the Relief of Sick and Disabled Seamen," providing hospital care for merchant seamen funded through mandatory employer contributions. 1 Stat. 605 (1798), *available at* http://history.nih.gov/research/downloads/1StatL605.pdf. The federal government provided medical care for soldiers and sailors since the Revolutionary War and in 1921 created the Veteran's Hospital Program. ROSEMARY STEVENS, THE PUBLIC PRIVATE HEALTH CARE STATE: ESSAYS ON THE HISTORY OF AMERICAN HEALTH CARE POLICY 98 (Transaction Publishers 2007). In 1921, Congress also adopted the Sheppard-Towner Maternity and Infancy Protection Act to provide funding to states to provide health care for pregnant women, mothers and their children. 42 Stat. 224 (1921).

The modern era of public health insurance programs began in 1950, when federal funding for state payments to health care providers for medical care for the poor first became available. TIMOTHY STOLTZFUS JOST, DISENTITLEMENT?: THE THREATS FACING OUR PUBLIC HEALTH CARE PROGRAMS AND A RIGHTS-BASED RESPONSE 80 (Oxford University Press 2003). The Kerr-Mills Act of 1960 expanded this program, providing federal funds to the states to pay health care providers for serving low-income seniors. Congress soon replaced and eclipsed that program by enacting the far-broader Medicare and Medicaid programs in 1965—programs designed to complement and sustain, rather than replace, pri-

vate health insurance. THEODORE R. MARMOR, THE POLITICS OF MEDICARE 11-15 (2nd ed., Aldine Transaction 2000).

Medicare was explicitly aimed at the retired population, which was not being served by burgeoning employer-sponsored private health insurance. Medicare removed expectations and pressures on private insurers to include the elderly, averted the higher premiums their inclusion in the risk pool would have required, and thereby enhanced the viability of private employer-sponsored health insurance.

In addition, the enactment of Medicare created a market for private "Medigap" insurance. The elderly could not provide a viable market for private insurance, given the high cost of insuring this group and the absence of a natural grouping, like employment, to pool risk across healthy and less healthy individuals. But the existence of Medicare as the core provider of health insurance for older Americans made it possible for private insurers to market successfully "Medigap" insurance policies, now widely held by Medicare beneficiaries to fill the significant gaps in Medicare's coverage.

Medicaid, enacted alongside Medicare, similarly removed from private insurers' potential risk pool both people whose incomes would make their payment of premiums unreliable and many people whose health risks would, if included, significantly drive up premium costs and undermine coverage. Medicaid's coverage of low-income and disabled people needing treatment, not only for acute care but for serious mental illness, serious substance abuse, costly HIV/AIDS drugs, and long-term care services, enabled private insurers to focus on a largely

healthy population and offer a more manageable, less costly package of benefits.

CHIP, which Congress enacted in 1997 to insure children in families with modest incomes that were too high to qualify for Medicaid was explicitly designed to preserve private insurance. The program requires states to adopt strategies to keep CHIP coverage from replacing or "crowding-out" private health insurance. 42 U.S.C. § 1397bb(b)(3)(C).

All three programs—Medicare, Medicaid, and CHIP—rely on private health insurers for program operations. From the outset, Medicare has relied on private health insurers for program administration, contracting initially with Blue Cross and Blue Shield plans to manage claims. FEDER, MEDICARE: THE POLITICS OF FEDERAL HOSPITAL INSURANCE at 37. Medicare also supports participation of private health plans ("Medicare Advantage" plans) from which a quarter of the beneficiary population currently gets both core Medicare and supplementary benefits. MEDICARE PAYMENT ADVISORY COMM'N, MEDICARE PAYMENT POLICY 290-91 (2011), *available at* http://www.medpac.gov/documents/Mar03_Entire_report.pdf. For prescription drug coverage (enacted in 2003), Medicare relies exclusively on—and heavily subsidizes—private health insurance plans. *Id.* at 319-20. CHIP, from its inception, has relied on private health plans to provide benefits. Over the course of the last two decades, Medicaid has moved largely to reliance on private managed care plans to cover children and non-disabled adults who constitute the bulk of the program's enrollees. KATHLEEN GIFFORD ET AL., A PROFILE OF MEDICAID MANAGED CARE PROGRAMS IN 2010: FINDINGS FROM A 50-STATE SURVEY 2 (The Henry J. Kaiser Family Foundation

2011), *available at* http://www.kff.org/medicaid/upload/8220.pdf.

B. Federal Regulation Has Also Shaped The Nation's Health Care System.

Federal regulation both predates and extends the influence of federal financing in shaping the American health care system.

1. Federal Regulation of Drugs and Institutional and Physician Care

The earliest federal regulation focused on biologics (1902) and drugs (1906). Peter Barton Hutt, *The Transformation of American Food and Drug Law*, 60 J. ASS'N FOOD & DRUG OFFICIALS 9, 16-19 (1996); *see also* DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA 75 (Princeton University Press 2010). Since 1938, it has been illegal, under the Federal Food, Drug, and Cosmetic Act, to market a drug in the United States without the federal government's permission. CARPENTER, REPUTATION AND POWER at 73-117. The federal government has both funded the basic research that has made modern pharmaceuticals possible and regulated new drugs, biologics and devices to ensure that they are in fact safe and effective.

With federal dollars came more federal requirements to guide their use. When the 1946 Hill–Burton Act provided funding to build hospitals, it also required them to fill specific community service obligations and to provide some services for free or reduced cost for those unable to afford health care. ALTMAN & SHACTMAN, POWER, POLITICS, AND UNIVERSAL HEALTH CARE at 112-21. Similar requirements were initially imposed on hospitals as a condition for designation as "charitable institutions," a

designation that, under a 1956 Revenue Ruling, exempts the institution from federal taxes. *See* Daniel Fox & Daniel Schaffer, *Tax Administration as Health Policy: Hospitals, the Internal Revenue Service, and the Courts*, 16 J. Health Pol., Pol'y & L. 251, 257 (1991).

The 1974 National Health Planning and Resources Development Act ("NHPRDA") imposed extensive federal controls over health care institutions throughout the United States, creating regional and local health planning agencies and requiring new and expanding facilities to obtain a "certificate of need" before beginning construction. Pub. L. No. 93-641, 88 Stat. 2225 (1975); *see* ALTMAN & SHACTMAN, POWER, POLITICS, AND UNIVERSAL HEALTH CARE at 211-12. The NHPRDA, which expired in 1986, established a far-reaching precedent for federal regulation of institutional health care. *See generally North Carolina ex rel. Morrow v. Califano*, 445 F. Supp. 532 (D.N.C. 1977) (upholding the constitutionality of the NHPRDA).

Most relevant to the matter before the Court, the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd, adopted as part of the Consolidated Omnibus Reconciliation Act of 1985, requires that, if a hospital participates in Medicare and has an emergency department, it must screen and stabilize individuals who come to the hospital in an emergency (or in active labor). BARRY FURROW ET AL., HEALTH LAW 609-23 (6th ed., West 2008). Congress passed this statute in response to widespread reports of private hospitals transferring unstablized patients to public hospitals because they were uninsured. *Id.* at 609-11.

EMTALA has been a major factor in securing access to medical treatment for many uninsured per-

sons. However, it has increased the uncompensated care burden of hospitals and shifted involuntarily the cost of uncompensated care to the purchasers of private insurance. This cost-shifting is one of the market failures that the ACA attempts to address by seeking to have everyone obtain their own insurance.

Congress has not only regulated institutional care, but also directly regulated the practice of medicine. The Controlled Substances Act, adopted in 1970, regulates physician practice by requiring doctors to be registered with the Drug Enforcement Administration in order to be able to prescribe certain drugs and by prohibiting doctors from prescribing other drugs at all. 21 U.S.C. §§ 811–831; *see Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding constitutionality under commerce clause). The Health Insurance Portability and Accountability Act of 1996 authorized detailed regulations governing the security and confidentiality of patient records, which apply to health care professionals as well as institutions. 42 U.S.C. §§ 1320d–1320d-9. Finally, this Court recently upheld a federal law prohibiting medical professionals from carrying out a particular abortion procedure, affirming the power of Congress "exercised in this instance under the Commerce Clause, to regulate the medical profession." *Gonzales v. Carhart*, 550 U.S. 124, 166 (2007).

2. Federal Regulation of Private Health Insurance

The federal government has also long and extensively regulated private health insurance. The Supreme Court recognized the authority of Congress to regulate insurance in 1944. *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). Although Congress recognized the continuing authority of the states to regulate insurance in

the McCarran-Ferguson Act, it only preserved state regulation to the extent that it was not preempted by federal law. 15 U.S.C. § 1012. The Health Maintenance Organization ("HMO") Act of 1973 provided federal assistance for HMOs that met certain regulatory requirements and imposed a mandate that every employer with more than twenty-five employees that offered health insurance offer an HMO option if one were available. 42 U.S.C. §§ 300e–300e-17; *see* ALTMAN & SHACTMAN, POWER, POLITICS, AND UNIVERSAL HEALTH CARE at 35-42.

The 1974 Employee Retirement Income Security Act ("ERISA") expanded federal regulatory authority much further, assuming regulatory oversight for employer-sponsored health insurance covering 85 percent of privately-insured Americans. Pub. L. No. 93-406, 88 Stat. 829 (1974). This Court has interpreted ERISA to preempt completely all state regulation of self-insured plans. *See FMC Corp. v. Holliday*, 498 U.S. 52, 60-61 (1990). Although ERISA permits the states to continue to regulate health insurers, it requires ERISA plan members to seek relief in federal court under federal law if they are denied benefits. *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004).

HIPAA, mentioned above, expanded federal authority over health insurance even further, imposing many requirements elaborated under the ACA. HIPAA prohibits health status underwriting within group insurance plans and requires guaranteed issue and renewal for insured small group plans. 29 U.S.C. § 1182; 42 U.S.C. §§ 300gg-1, 300gg-2. It also defines and limits the use of pre-existing condition exclusions for group plans. 29 U.S.C. § 1181(a). It extended federal authority to individual plans as well, imposing guaranteed issue and renewal re-

quirements and banning pre-existing conditions clauses under some circumstances. 42 U.S.C. §§ 300gg-41, 300gg-42. Indeed, the insurance reform requirements of Title I of the ACA are simply amendments to HIPAA that extend its protections.

Congress has adopted a host of other laws addressing specific health insurance issues. The 1990 Americans with Disabilities Act prohibits employers and insurers from discriminating against persons with disabilities. 42 U.S.C. §§ 12101-12117. Another 1990 law standardizes private Medigap insurance, limiting the types of policies that can be sold to Medicare beneficiaries. 42 U.S.C. § 1395ss.

Federal laws adopted in the 1990s and 2000s impose specific requirements on insurers regarding maternity coverage, breast reconstruction following mastectomy and mental health coverage, and prohibiting discrimination based on genetics 29 U.S.C. §§ 1185–1185c, 42 U.S.C. §§ 300gg-1, 300gg-53. Finally, the 2003 Medicare Modernization Act provides federal tax subsidies for Health Savings Accounts, but only if they are accompanied by high-deductible health insurance plans that meet very specific statutory requirements. 26 U.S.C. § 223.

* * *

In sum, as Judge Marcus correctly observed in dissent below:

> It would surely come as a great shock...to the 47.5 million people covered by Medicare, the 44.8 million people covered by Medicaid, and the overwhelming number of employers, health insurers, and health care providers regulated by ERISA, COBRA, and HIPPA, to learn that, because the

> health care industry also 'falls within the sphere of traditional state regulation,' [quoting the Eleventh Circuit majority opinion], Congress was somehow skating on thin constitutional ice when it enacted these laws.

Florida, 648 F.3d at 1345 (Marcus, J., dissenting in part). Title I of the ACA is not an "encroachment on...areas of traditional state concern." It is rather part of a long-standing practice of pervasive federal regulation of health care delivery and finance in the United States.

II. THE MINIMUM COVERAGE PROVISION IS NOT UNPRECEDENTED, BUT IS CONSISTENT WITH ESTABLISHED FEDERAL LAW.

As is explained below, the minimum coverage requirement is not unprecedented, but is consistent with the past and proper scheme of federal regulation of health care, and is, indeed, a "necessary and proper" part of that larger scheme of federal regulation.

A. Congress Has For Decades Through Medicare Mandated And Imposed Penalties For Failure To Make Provision For Likely Future Medical Needs.

The Eleventh Circuit was fundamentally mistaken when it faulted the minimum coverage provision as "overinclusive" because "it conflates those who presently consume health care with those who will not consume health care for many years into the future." *Florida*, 648 F.3d at 1295. The essence of insurance is the pooling of people who are currently using health care with those who will not use it for many years, if ever. Without such pooling, the price

of insurance would be the price of care for those who are using it now. Current and future users must be pooled to make insurance affordable.

Congress has since 1965 required Americans to pay a payroll tax, currently equal to 2.90 percent of income, into the Medicare Hospital Insurance Trust Fund, so that they will be eligible for Medicare when they "consume health care...many years in the future." *Id.* To be fully eligible for Medicare Part A, an individual (or spouse) must generally pay payroll taxes for ten years. 42 U.S.C. §§ 402, 414, 426. Further, substantial penalties are imposed on individuals who decline or delay Medicare coverage once they are eligible for it, even though they have no current health care needs. An individual who declines Medicare Part A coverage forfeits Social Security coverage as well. *See Hall v. Sebelius*, 770 F. Supp. 2d 61, 66-68 (D.D.C. 2011).

Enrollment in other parts of Medicare is "voluntary," but they also carry substantial costs for nonparticipation. If an individual fails to enroll in Medicare when first eligible without good cause (for example, because of continuing employer-sponsored coverage), a 10 percent surcharge is added to the normal Part B premium for the rest of the individual's life for each twelve months that enrollment is delayed. 42 U.S.C. § 1395r(b). Similarly, delay in applying for coverage for Part D drug coverage results in a 1 percent penalty increase in the premium per month unless an exception applies. 42 U.S.C. § 1395w-113(b).

The fact that these powerful incentives and absolute requirements are pervasive and established tools of federal health sector policy belies the Eleventh Circuit's claim that the ACA minimum coverage provision is "unprecedented" as an interference

with individual choice, and, hence, should be held to breach a hereto unknown limitation on Congress' power under the Commerce Clause.

Moreover, as Judge Kavanaugh observed in his D.C. Circuit opinion:

> Privatized social services combined with mandatory-purchase requirements of the kind employed in the individual mandate provision...might become a blueprint used by the Federal Government over the next generation to partially privatize the social safety net and government assistance programs....

Seven Sky, 661 F.3d. at 53 (Kavanaugh, J., dissenting).

Congress should not be barred from utilizing an approach to remedying deficiencies in access to health insurance and services that is actually less coercive than approaches Congress has lawfully utilized under its Tax and Spend authority in the past to achieve the same goal.[5]

B. Congress Properly Addressed The Problem Of Cost-Shifting Prospectively Rather Than At The Point Of Consumption.

The Eleventh Circuit acknowledged that Congress could, under the Commerce Clause, directly regulate the behavior of the uninsured at the point

---

[5] In his Sixth Circuit opinion, Judge Sutton also observed that Congress adopted the minimum coverage requirement as an alternative to using its Tax and Spend authority to reach the same goal. *Thomas More Law Ctr.*, 651 F.3d at 550, 552-53 (Sutton, J., concurring in part and delivering the opinion of the Court in part).

they actually consume care. *Florida*, 648 F.3d at 1294-95. But Congress has, for decades, explicitly rejected that approach. Indeed, the 1986 Emergency Medical Treatment and Active Labor Act is based on the reasonable judgment of Congress that the point in time when a patient shows up at a hospital in an emergency is the wrong time to impose a payment mandate. By imposing instead a mandate on the hospital to provide urgently-needed medical services, EMTALA has, however, contributed to the growing uncompensated care burden on health care providers and effectively forced them to shift much of the burden of uncompensated care to public and private insurance programs.

The federal government indisputably has the responsibility to protect taxpayers and beneficiaries from costs shifted to Medicare and Medicaid attributable to the uninsured. *Id.* But it also has the responsibility to protect employees insured through employer-sponsored insurance—the vast majority of privately insured Americans—from provider cost-shifting. First, a significant share of the cost of these plans is passed on to the federal government through tax expenditures, as noted above. Furthermore, ERISA imposes fiduciary duties on the administrators of employee plans. To the extent that cost-shifting increases the cost of these plans, ERISA fiduciaries are spending money that is not going to the sole benefit of plan participants and beneficiaries. 29 U.S.C. § 1104(a)(1)(A).

While EMTALA reflects the consensus that it is morally wrong to deny care to people in extremis, the minimum coverage requirement recognizes that it is also wrong to allow people to shift the cost of their care to others by refusing to provide responsibly for their future health care needs. In that regard, the

minimum coverage requirement is not a radical departure from the past, as the Eleventh Circuit concluded. Rather, it is a reasonable component of a larger, long-standing federal effort to encourage Americans to pay for their health care needs by protecting those who do act responsibly from the costs imposed by those who fail to do so.

III. THE MINIMUM COVERAGE PROVISION ORIGINATED AS A MARKET-FACILITATING SOLUTION TO THE PROBLEM OF PRESERVING PRIVATE INSURANCE.

All health insurance programs face the problem of adverse selection, which raises premiums and drives healthy individuals away, thus destabilizing insurance pools. The problem is especially acute if, as here, insurance regulation enhances sicker individuals' access to coverage by requiring insurers to take all comers and barring insurers from charging higher premiums to persons with pre-existing conditions.

One solution to this problem is to require all individuals to participate in an insurance pool and contribute to its financing. Social insurance programs like Medicare require that all working-age Americans contribute payroll taxes that establish their eligibility for future benefits, as described above. Proposals to create a national health insurance system in the United States, like the 1943 Wagner-Murray-Dingell and 1974 Kennedy-Mills bills, followed the social insurance model, proposing that all U.S. residents be required to make payroll tax contributions to fund a federal health insurance program. JACOB HACKER, THE DIVIDED WELFARE STATE: THE BATTLE OVER THE PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES 224, 254 (Cam-

bridge University Press 2002). But if payroll tax financing is not used, government health insurance programs require functionally equivalent mechanisms to assure broad participation and avoid adverse selection.

Health reform proposals since the 1970s in fact have increasingly moved away from the model of a single government health plan and instead have sought to build on the existing public-private health insurance structure. These proposals to move towards universal health insurance while relying on private insurance have long embraced the idea of requiring individuals to obtain insurance. The minimum coverage requirement is intended to make private insurance work by mitigating the adverse selection problem and facilitating the enrollment of healthy persons into broad risk pools. Like Medicare's payroll tax, the coverage requirement ensures that individuals will contribute to the costs of their medical care before they require assistance, addressing the cost-shifting problem through collective financing and prepayment.

The roots of the minimum coverage requirement lie in proposals for universal health insurance offered by politically conservative scholars and organizations which included a requirement called an "individual mandate." In 1989, Stuart Butler authored a health reform proposal for the Heritage Foundation that called for a mandate to purchase private coverage (along with tax credits to make purchasing coverage affordable). The Heritage plan explicitly described the individual mandate as an alternative both to national health systems abroad and to U.S. health reform proposals that would mandate employers to finance coverage for their workers. *See* Stuart Butler, *Assuring Affordable Health Care for*

All Americans, 218 THE HERITAGE LECTURES 1, 2, 3, 6 (1989), *available at* http://thf_media.s3.amazonaws.com/1989/pdf/hl218.pdf.

According to Butler, the health insurance requirement is built on the principle of individual responsibility and an implicit contract under which society feels an obligation to assist sick persons requiring medical care regardless of whether they have health insurance, even if that means the rest of us "end up paying the tab" for their care. *Id.* at 6. Butler concluded that

> [a] mandate on individuals recognizes this implicit contract. Society does feel a moral obligation to insure that its citizens do not suffer from the unavailability of health care. But on the other hand, each household has the obligation, to the extent it is able, to avoid placing demands on society by protecting itself.

Id.

In 1991 health economist Mark Pauly and colleagues developed a similar health reform plan for the administration of President George H.W. Bush. Their plan for "responsible national health insurance" required "all citizens to obtain a basic level of health insurance," Mark V. Pauly et al., *A Plan for "Responsible National Health Insurance"*, 10 HEALTH AFF. 5, 8 (Feb. 1991), while providing tax credits to help make insurance purchase affordable for Americans with lower incomes. The plan was envisioned as an alternative to national health plans funded by general revenues, such as the British National Health Service. Noting that lack of insurance "may impose costs on others, because we as a society pro-

vide care to the uninsured," Pauly argued that "the risk of shifting costs to others has led many states to mandate that all drivers have liability insurance. The same logic applies to health insurance." *Id.*

During the 1993-94 health reform debate, the individual mandate model attracted significant Republican support. In 1993, the Senate Republican Health Care Task Force issued "consensus principles on health care reform." Twenty-four Republican Senators signed the statement of principles, which included "individual responsibility." The Senators wrote that "we believe individuals must assume responsibility for securing their own insurance. As long as there are adequate subsidies to make health insurance affordable for the poor and the unemployed, everyone must take responsibility for preparing for an unexpected health crisis." ROBERT F. BENNETT ET AL., SENATE REPUBLICAN TASK FORCE CONSENSUS PRINCIPLES FOR HEALTH CARE REFORM 6 (1993), *available at* http://legacy.library.ucsf.edu/tid/rzf48d00/pdf.

The same year, Senator John Chafee of Rhode Island, leader of the Republican health care task force, proposed legislation that required individuals to obtain health insurance. The Chafee bill had 19 Republican and two Democratic cosponsors. *See Summary of a 1993 Republican Health Reform Plan*, KAISER HEALTH NEWS, Feb. 23, 2010, http://www.kaiserhealthnews.org/Stories/2010/February/23/GOP-1993-health-reform-bill.aspx. Another 1993 Republican health bill, sponsored by Senator Don Nickles of Oklahoma and Representative Cliff Stearns of Florida, required individuals to purchase private health insurance; if they failed to do so, they would be enrolled automatically in a state-sponsored government health program. Tom Miller, *Cato Insti-*

tute Policy Analysis No. 210: Nickles-Sterns is Not the Market Choice For Health Care Reform, POLICY ANALYSIS, June 13, 1994, http://www.cato.org/pubs/pas/pa210.pdf, at 2.

Many Republicans embraced the coverage requirement as an alternative to President Clinton's proposed 1993 Health Security Act ("HSA") employer mandate. Yet the HSA also proposed requiring Americans to make payments towards the purchase of private health insurance. CONG. BUDGET OFFICE, AN ANALYSIS OF THE ADMINISTRATION'S HEALTH CARE PROPOSAL 9-11 (1994), http://www.cbo.gov/ftpdocs/48xx/doc4882/doc07.pdf.

In the past decade, an individual mandate or coverage requirement has been a regular feature of health care reform plans that seek to build on private insurance to move towards universal coverage. The requirement has attracted support from a wide range of analysts and politicians, including former Speaker of the House Newt Gingrich, who in 2007 argued that Congress should "require anyone who earns more than $50,000 a year to purchase health insurance or post a bond." Newt Gingrich, *Covering the Uninsured—Do We Want Markets or Mandates?*, CENTER FOR HEALTH TRANSFORMATION, June 25, 2007, http://www.healthtransformation.net/cs/opeds_news?pressrelease.id=33. In 2009, former Senate Majority leader Bill Frist endorsed an individual mandate for "a minimum level of health coverage," noting that a mandate "is the only way to achieve affordable health insurance coverage for every American in a pluralistic, public-private sector." William H. Frist, *Frist: An Individual Mandate for Health Insurance Would Benefit All*, U.S. NEWS & WORLD REPORT, Sept. 28, 2009, *available at* http://www.usnews.com/opinion/articles/2009/09/28/

frist-an-individual-mandate-for-health-insurance-would-benefit-all.

Most prominently, in 2006, Massachusetts enacted a health reform law that, along with expanding Medicaid and providing subsidies to help lower-income persons afford coverage, required state residents to obtain insurance or pay a tax penalty. The Massachusetts law was backed by Republican Governor Mitt Romney and enjoyed broad bipartisan support in the state legislature, passing the state House 155-2 and the Senate 37-0. John E. McDonough et al., *The Third Wave of Massachusetts Health Care Reform*, 25 HEALTH AFF. w420, w430 (Nov. 2006). Governor Romney defended Massachusetts' decision to impose penalties on people who did not purchase insurance as a "personal responsibility principle," stating that "someone has to pay for the health care that must, by law, be provided: either the individual pays or the taxpayers pay." Mitt Romney, *Health Care for Everyone? We've Found a Way*, WALL ST. J., April 11, 2006, at A16.

The ACA emulated Massachusetts by requiring that Americans either obtain insurance or pay a penalty. Notably, alternatives to the ACA that also rely on private insurance, including those supported by Republicans, have proposed similar requirements to ensure broad participation in insurance pools. For example, the Healthy Americans Act, first introduced in 2007 and sponsored by Senators Ron Wyden, Democrat of Oregon and Robert Bennett, Republican of Utah, would have required all Americans to obtain insurance coverage. It drew seventeen cosponsors, including nine Republicans. S. 334, 110th Cong. (2007).

A 2009 health care reform bill (the "Patients' Choice Act") cosponsored by Republican Senators

Richard Burr of North Carolina and Tom Coburn of Oklahoma and Republican Congressmen Paul Ryan of Wisconsin and Devin Nunes of California proposed "facilitating universal coverage" by automatically enrolling Americans into state health insurance exchanges at government offices, including "State departments of motor vehicles" and through "the submission of State tax forms." H.R. 2520, 111th Cong. § 202(c)(1) (2009). In addition, under the Patients' Choice Act, a "state exchange shall include an incentive for eligible individuals to remain insured from plan year to plan year, and may include incentives such as State tax incentives or premium-based incentives." *Id.* at § 202(c)(2)(C).

Further, the Roadmap for America's Future Act of 2010 introduced by Republican Congressman Ryan called for eliminating the current tax exclusion for employer contributions to workers' health insurance premiums and replacing it with refundable tax credits to purchase private insurance, so that people who choose not to have health insurance would have higher tax bills than those who purchase coverage. H.R. 4529, 111th Cong. §§ 112, 133 (2010). This provision, like the ACA's minimum coverage requirement, sought to create economic incentives for individuals to purchase private insurance. Simon Lazarus, *Paul Ryan's "Individual Mandate"*, SLATE, May 3, 2011, http://www.slate.com/articles/news_and_politics/jurisprudence/2011/05/paul_ryans_individual_mandate.html.

Finally, recent Republican plans to reform Medicare also have adopted financial incentives and policies to compel beneficiaries to purchase private insurance. Under the 2012 budget resolution passed by the Republican majority in the House of Representatives, the traditional government-operated

Medicare program would have been eliminated and beneficiaries would instead have received subsidies to purchase private insurance. All Medicare beneficiaries would have been forced to carry private insurance. Yet the Medicare hospitalization insurance payroll tax would have remained mandatory, and Medicare's premium penalties for late enrollment in Part B and Part D would have remained in place, so that the federal government would have consequently "compel[ed] people to pay for private health insurance policies." *Id.*

In sum, the minimum coverage requirement has a long history of wide bipartisan support. The requirement has attracted support from conservative policy analysts and Republican politicians because of its emphasis on individual responsibility and its potential to remedy the "free rider" or cost-shifting problem. Indeed, ten current Republican Senators who now oppose the minimum coverage requirement as unconstitutional previously sponsored or cosponsored legislation that included an individual mandate.[6] In addition, the coverage requirement is widely recognized as an integral element to health reform plans that seek to build on private insurance and stabilize private insurance pools.

The importance of financial incentives to ensure broad participation and risk pooling in private insurance is confirmed by the fact that alternatives to

---

[6] These Senators are: Sen. Lamar Alexander (R–Tenn.), Sen. Daniel Coates (R–Ind.), Sen. Bob Corker (R–Tenn.), Sen. Mike Crapo (R–Idaho), Sen. Lindsey Graham (R-S.C), Sen. Chuck Grassley (R–Iowa), Sen. Orin Hatch (R–Utah), Sen. Kay Bailey Hutchison (R–Tex.), Sen. Richard G. Lugar (R–Ind.) and Sen. John McCain (R–Ariz.). *See* S. 1743, 103rd Cong. (1993); S. 1770, 103rd Cong. (1993); S. 1807, 103rd Cong. (1994); S. 334, 110th Cong. (2007); S. 391, 111th Cong. (2009).

the ACA proposed by conservative politicians and policy analysts also contain financial incentives to induce purchase of private insurance. Although some of the individuals and organizations that have historically supported the minimum requirement have more recently disavowed their support as the requirement has become politically unpopular in certain quarters, the history of broad support for coverage requirements ultimately reflects a desire to build a universal health insurance system that retains private insurance, rather than turning to the alternative of tax-financed and government-operated national health insurance. The requirement is a critical piece to making private insurance work in a reformed health care system.

IV. THE AFFORDABLE CARE ACT WILL PRESERVE THE PUBLIC/PRIVATE STRUCTURE OF OUR HEALTH CARE SYSTEM.

Although Congress enacted the ACA to address major problems that plague the nation's health care system, it will not, in the end, produce radical changes in the current private-public health care financing and delivery system.

As described above, during the past century, America has developed a mixed health care system with prominent roles for both the public and private sectors. Three major sources of health care financing—employer-sponsored coverage, Medicare and Medicaid—presently cover the vast majority of Americans. Medicare and Medicaid are, of course, programs that Congress created. Employer-sponsored coverage has emerged in response to and been shaped by congressional initiatives. Fifty million U.S. residents, however, continue to lack any health insurance. U.S. CENSUS BUREAU, INCOME,

POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, at 23.

The ACA incorporates several strategies to preserve the nation's mixed private-public health insurance system, while extending coverage to the uninsured. Specifically the ACA:

- creates state-level health insurance exchanges to improve access to health insurance for individuals and small businesses and encourage competition among insurance plans, Pub. L. No. 111-148, §§ 1311, 1321, 124 Stat. 173, 186 (2010);
- offers premium tax credits and cost-sharing subsidies to lower- and middle-income uninsured Americans, *id.* at §§ 1401, 1402, 124 Stat. at 213, 220;
- prohibits risk selection and medical underwriting by insurers against persons with pre-existing conditions, *id.* at § 1201, 124 Stat. at 154;
- expands Medicaid eligibility to cover all Americans with incomes lower than 133 percent of the Federal Poverty Level, *id.* at § 2001, 124 Stat. at 271;
- encourages employer-sponsored coverage by penalizing large employers whose employees are not covered by employer-sponsored insurance and who receive premium tax credits, *id.* at § 1513, 124 Stat. at 213; and
- requires households that can afford health insurance to purchase minimum coverage or pay a penalty, *id.* at § 1501, 124 Stat. at 242.

Combined, these strategies will substantially reduce the number of uninsured Americans. Insurance coverage among the nonelderly population will rise to an estimated 92 percent from 81 percent today, with 34 million Americans gaining coverage. CONG. BUDGET OFFICE, CBO'S MARCH 2011 ESTIMATE OF THE EFFECTS OF THE INSURANCE COVERAGE PROVISIONS CONTAINED IN THE PATIENT PROTECTION AND AFFORDABLE CARE ACT 1 (2011), *available at* http://www.cbo.gov/budget/factsheets/2011b/HealthInsuranceProvisions.pdf.

But the ACA's impact on sources of health insurance and the structure of U.S. medical care will, in fact, be modest. Most Americans will continue to receive health insurance from the same sources that provide them with coverage today. According to the Congressional Budget Office ("CBO"), once the ACA is fully implemented in 2019, 163 million Americans will have employer-sponsored insurance, virtually unchanged from under prior law. Employer-sponsored private coverage will remain the predominant form of insurance for working-age Americans. *Id.* The CBO additionally estimates that 28 million Americans will obtain non-group coverage and that 24 million Americans will enroll in the new insurance exchanges. *Id.*

Medicare enrollment will be unchanged from prior law. Medicaid and CHIP enrollment will increase by 16 million, but these programs will continue to cover only the poorest Americans. Moreover, as most Medicaid programs contract with private managed-care plans to arrange enrollees' medical care, the Medicaid expansions will in fact expand services provided through private plans.

The ACA retains the existing foundations of American health insurance. The one new mecha-

nism it creates—the state health insurance exchanges—is designed to strengthen the market for private non-group coverage. Medical care delivery will remain largely in private hands under the ACA, as it is today.

CONCLUSION

The ACA does not create a new health care system, and it clearly does not constitute a federal government "takeover" of American health care. Rather it continues a policy towards health care that began in the middle of the last century through which Congress has continuously fostered the development of the nation's private health care delivery and financing system, filling gaps with public programs only as necessary. Previous market-based proposals to expand access to health insurance while maintaining private coverage have contained policy tools similar to those utilized by the ACA, including the minimum coverage requirement. The minimum coverage requirement also mirrors and builds on prior federal initiatives to structure health care financing by having Americans prepare responsibly for future health care needs by paying for coverage—public and private—in advance. The ACA will expand access to insurance coverage and to health care, but it will do so by reinforcing existing institutions and by preserving private insurance.

Thus, the minimum coverage requirement is not a "wholly novel" federal intervention in an area of "traditional state concern," but rather another chapter in the long history of attempts by Congress to preserve private insurance markets and ensure all Americans access to health care.

This Court should reverse the decision of the court below, and uphold the constitutionality of the minimum coverage provisions of the ACA.

Respectfully submitted,

GEOFFREY F. ARONOW
Counsel of Record
RAECHEL K. ANGLIN
JEFFREY T. HANTSON
BINGHAM MCCUTCHEN LLP
2020 K Street NW
Washington, DC 20006-1806
(202) 373-6277
geoffrey.aronow@bingham.com

Counsel for Amici Curiae

January 13, 2012

APPENDIX A

LIST OF AMICI CURIAE

Stuart Altman, *Sol C. Chaikin Professor of National Health Policy, Heller School for Social Policy, Brandeis University*

Andrea Louise Campbell, *Associate Professor of Political Science, Massachusetts Institute of Technology*

Daniel Carpenter, *Allie S. Freed Professor of Government, Faculty of Arts and Sciences, Harvard University*

Stephen M. Davidson, *Professor, Boston University School of Management*

Judith Feder, *Professor, Geogetown University Public Policy Institute*

Robert I. Field, *Professor of Law, Drexel University Earle Mack School of Law,* and *Professor of Health Management and Policy, Drexel University School of Public Health*

Colin Gordon, *Professor, University of Iowa Department of History*

Bradford H. Gray, *Senior Fellow, The Urban Institute*

Colleen Grogan, *Professor, School of Social Service Administration,* and *Co-Chair, Center for Health Administration Studies, University of Chicago*

Jacob Hacker, *Stanley Resor Professor of Political Science* and *Director, Institution for Social and Policy Studies, Yale University*

Beatrix Hoffman, *Associate Professor of History, Northern Illinois University*

Timothy Stoltzfus Jost, *Robert L. Willett Family Professor, Washington and Lee University College of Law*

Michael B. Katz, *Walter H. Annenberg Professor of History, University of Pennsylvania*

Jennifer Klein, *Professor of History, Yale University*

Donald W. Light, *Professor of Comparative Health Care, University of Medicine & Dentistry of New Jersey*

Theodore R. Marmor, *Professor, Yale University School of Management*

Rick Mayes, *Associate Professor of Public Policy, University of Richmond*

David Mechanic, *Director* and *Renè Dubos University Professor, Institute for Health, Health Care Policy, and Aging Research, Rutgers, The State University of New Jersey*

Jonathan Oberlander, *Professor of Social Medicine and Health Policy & Management University of North Carolina-Chapel Hill*

Thomas R. Oliver, *Professor of Population Health Sciences, University of Wisconsin—Madison School of Medicine and Public Health,* and *Director, Wisconsin Center for Public Health Education and Training*

Mark A. Peterson, *Professor of Public Policy and Political Science, UCLA Luskin School of Public Affairs*

Harold Pollack, *Helen Ross Professor, School of Social Service Administration, and Faculty Chair, Center for Health Administration Studies, University of Chicago*

Jill Quadagno, *Mildred and Claude Pepper Eminent Scholar in Social Gerontology, Pepper Institute on Aging and Public Policy, Florida State University*

Sara Rosenbaum, *Harold and Jane Hirsh Professor of Health Law and Policy, Department of Health Policy, George Washington University School of Public Health and Health Services*

Mark Schlesinger, *Professor of Health Policy, Yale University School of Public Health*

David Shactman, *Senior Fellow, Schneider Institute for Public Health Policy, Heller School for Social Policy and Management, Brandeis University*

Theda Skocpol, *Victor S. Thomas Professor of Government and Sociology, Harvard University*

David Barton Smith, *Emeritus Professor, Temple University,* and *Research Professor, Department of Health Management and Policy, School of Public Health, Drexel University*

Michael Sparer, *Professor, Mailman School of Public Health, Columbia University*

Paul Starr, *Stuart Professor of Communications and Public Affairs, Princeton University*

Rosemary A. Stevens, *DeWitt Wallace Distinguished Scholar, Social Medicine and Public Policy, Weill Cornell Medical College, Cornell University*

Bruce Vladeck, *Administrator, Health Care Financing Administration (1993-1997)*

Keith Wailoo, *Townsend Martin Professor of History and Public Affairs, Woodrow Wilson School of Public and International Affairs, Princeton University*

Joseph White, *Luxenberg Family Professor of Public Policy, Case Western Reserve University*

AMICUS CURIAE BRIEF

No. 11-398

In The Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE HEALTH FOUNDATION OF GREATER CINCINNATI AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

(Minimum Coverage Issue)

NATHALIE RAYMER
THE HEALTH FOUNDATION OF GREATER CINCINNATI
3805 EDWARDS ROAD
CINCINNATI, OH 45209
(513) 458-6712

JAMES A. FELDMAN
Counsel of Record
5335 WISCONSIN AVE. N.W.
SUITE 440
WASHINGTON, D.C. 20015
(202) 730-1267
WEXFELD@GMAIL.COM

TABLE OF CONTENTS

Page

Interest of the Amicus Curiae 1

Introduction and Summary of Argument 4

Argument..... 7

I. Uninsured status frequently results from financial need, not mere consumer preference 7

II. Uninsured status leads to limited access to health care and affects health 12

Conclusion 21

TABLE OF AUTHORITIES

Statutes:

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 3

42 U.S.C. 18091(a)(2)(F) 6, 12

Miscellaneous:

Anne C. Beal, et al., *Closing the Divide: How Medical Homes Promote Equity in Health Care*, Commonwealth Fund pub.. No. 1035, at 9-10, 14-15, 20 (June 2007)..... 14

TABLE OF AUTHORITIES
(continued)

Page

Families USA, *Hidden Health Tax: Americans Pay a Premium* (2009), http://familiesusa2.org/assets/pdfs/hidden-health-tax.pdf..... 12

74 Fed. Reg. 4199 (Jan. 23, 2009)..... 8

Robert A. Fowler, et al., *An Official American Thoracic Society Systematic Review: The Association between Health Insurance Status and Access, Care Delivery, and Outcomes for Patients Who Are Critically Ill*, 181 Am. J. Respir. Crit. Care Med. 1003 (2010)..... 17-18

Anthony Goudie and Adam C. Carle, *Ohio Study Shows that Insurance Coverage Is Critical for Children With Special Health Care Needs as They Transition to Adulthood*, 30 Health Affairs 2382 (2011) 18-21

Greater Cincinnati Community Health Status Survey, https://www.healthfoundation.org/data_publications/gcchss.html 2-3, 8-10, 12-15

Institute of Medicine, *Care without Coverage: Too Little, Too Late* (2002)..... 16

Institute of Medicine, *America's Uninsured Crisis: Consequences for Health and Health Care* 5 (2009)..... 16-17

Kentucky Health Issues Poll, https://www.healthfoundation.org/data_publications/khip.html.....3, 11

TABLE OF AUTHORITIES
(continued)

Page

J. Michael McWilliams, *Health Consequences of Uninsurance Among Adults in the United States: Recent Evidence and Implications*, 87 Milbank Quarterly 443 (2009)..... 17

Ohio Health Issues Poll, https://www.healthfoundation.org/data_publications/ohip.html 3, 10-11, 15

Thomas Rosenthal, *The Medical Home: Growing Evidence to Support a New Approach to Primary Care*, 21 J. Am. Bd. Of Fam. Med. 427, 428 (2008)..... 14

In The Supreme Court of the United States

NO. 11-398

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE HEALTH FOUNDATION OF GREATER CINCINNATI AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

(Minimum Coverage Issue)

INTEREST OF THE AMICUS CURIAE

The Health Foundation of Greater Cincinnati in its present form received its initial funding in 1998, when the Choicecare Corporaton, an HMO serving the Cincinnati area, was sold to Humana, Inc.[1] The

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus

proceeds of the sale, approximately $221 million, were invested, and the Foundation now spends 5% of its corpus annually, awarding about $7.4 million each year through grants and direct charitable activities towards achieving its vision of helping the Greater Cincinnati region become one of the healthiest in the country. The Foundation operates in a 20-county region in Ohio, Indiana, and Kentucky.[2] The Foundation concentrates its grants in four areas (community primary care, school-age children's health care, substance use disorders, and severe mental illness), but it has also awarded grants in other areas as well in support of its mission.

In addition to funding the direct provision of health-care services, the Foundation has since its inception partnered with local universities and social scientists to conduct surveys and publish data on health and health care in the Cincinnati area and beyond. The Foundation initiated those efforts shortly after 1997, so that it could focus its resources in the areas of greatest need. Since then the Foundation has conducted many surveys, the largest of which is the Greater Cincinnati Community Health Status Survey, which is conducted every 5 years as a comprehensive assessment of regional health status,

---

or its counsel made a monetary contribution to its preparation or submission.

[2] The counties are Adams, Brown, Butler, Clermont, Clinton, Hamilton, Highland, and Warren Counties in Ohio; Dearborn, Franklin, Ohio, Ripley, and Switzerland Counties in Indiana; and Boone, Bracken, Campbell, Gallatin, Grant, Kenton, and Pendleton Counties in Kentucky.

including physical, oral, vision, and mental health in the Foundation's 20-county service region. The Survey also includes assessments of insurance status and health-care access. In addition, the Foundation conducts a statewide Ohio Health Issues Poll and, together with the Foundation for a Healthy Kentucky, a statewide Kentucky Health Issues Poll once or twice a year to gather information and gauge views on health issues and policies at the State and federal levels. The resulting information is used to guide the Foundation's grant-making and assess its impact, and the information is widely shared with other regional health funders, health planners, health researchers, and policymakers.

Achieving the Foundation's goal of improved health care for individuals and families in its region depends on improving the availability of health insurance and health-care services to those who are currently underserved. In 2009 the Foundation launched a program focusing on educating the public on proposed reforms to the health-care and health-insurance systems. Since the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, was enacted on March 23, 2010, the Foundation has learned from its surveys that 65-72% of those surveyed do not have enough information to understand how the Act will affect them personally.[3] In response, the Foundation has published 12 educa-

---

[3] See https://www.healthfoundation.org/hp_docs/OHIPACAData.pdf (65% in Ohio); https://www.healthfoundation.org/hp_docs/KHIP%202010--Data%20for%20What%20Kentuckians%20Think%20about%20the%20ACA.pdf (72% in Kentucky).

tional pieces on the effects of the Act on health care and health insurance for individuals and families. Those publications are available online. See http://reform.healthfoundation.org.

The Foundation submits this brief in the hope that the data it is supplying – much of it data that the Foundation itself has gathered to help achieve its core mission of improving the health care of individuals and families in its region – will be of assistance to the Court in considering the issues in this case.

INTRODUCTION AND SUMMARY

Since its inception in 1998, the Foundation has learned a great deal, both directly from its data-gathering projects and indirectly through its experience as a funder of health-care services for the underserved. The Foundation does not take a position on the important constitutional questions presented by this case concerning the scope of Congress's power under the Commerce Clause. There are, however, some issues with which the Foundation does have experience that touch upon some questions before the Court in this case.

In discussing the minimum coverage issue, the court of appeals in this case sharply distinguished between the health-care market and the health-insurance market, and it understood the mandate at issue in this case as requiring individuals who do not desire to do so to enter the latter, health-insurance market. In the court's view, "[i]ndividuals subjected to th[e] economic mandate [to purchase health insurance] have not made a voluntary choice to enter

the stream of commerce, but instead are having that choice imposed upon them by the federal government." Pet. App. 112a; see, *e.g.*, *id.* at 113a ("The question before us is whether Congress may regulate individuals outside the stream of commerce."). The court stated that the government had "redefine[d] the regulated activity" from the purchase of health insurance to "the uninsured's health-care *consumption* and attendant *cost-shifting*, or the *timing and method of payment* for such consumption," and it rejected what it believed to be the government's "redefin[ition]." *Id.* at 124a.

Embedded in the court of appeals' discussion of these matters are two propositions: that uninsured individuals have made a voluntary decision to remain outside the health-insurance market, and that the health-insurance market is sharply distinct from the health-care market. The Foundation believes that both of those propositions, as a factual matter, are doubtful or mistaken.

First, as a factual matter, many or most uninsured individuals do not make a wholly voluntary choice not to purchase health insurance. Although a lack of health insurance may result from many factors, including exclusions commonly adopted by insurance companies, one important factor – especially for those with low income – is financial need. People with lower incomes are frequently unable to obtain health insurance, because it is too costly. When they do obtain insurance, it is less stable and assured than for others. For many people, the failure to obtain insurance is not a consumer preference, but the result of the inability to afford it.

Second, there are extraordinarily close ties between the health-insurance market and the health-care market – a market in which virtually everyone participates at one time or another. Congress itself recognized one of those ties: that the uninsured receive huge amounts of uncompensated care, whose cost is in turn passed on to those who do have insurance. See 42 U.S.C. 18091(2)(F). But another key tie is that, as a matter of fact, lack of insurance, especially for those with low income, leads to reduced access to needed health care, with potentially serious consequences for health. To be sure, the cost of health care can affect anyone. But studies show that those who are uninsured are more likely than others to do without drugs or physician care in order to pay for basic needs for food, clothing, and shelter. Those without insurance are also less likely than others to have a usual source of medical care – i.e., a clinic or doctor's office where they usually go for medical help; having such a usual source of care is an important factor in actually obtaining needed medical care. More generally, both the Foundation's studies and extensive national research have shown that lack of insurance tends to lead to lack of availability of needed health-care services, which in turn leads to poorer medical outcomes, including increased disease and worse.

ARGUMENT

The court of appeals in this case sharply distinguished between the health-insurance market (which it concluded Congress had no power to require individuals to enter) and the health-care market (which virtually everyone does enter). Individuals, however, generally *want* to enter the health-insurance market, but are frequently prevented from doing so by a variety of barriers, including the unaffordability of insurance. The reason they want insurance is the very close connection between the health-insurance market and the health-care market; the lack of insurance has a major effect on the access to and use of health-care services. This brief addresses those two points.

I. UNINSURED STATUS FREQUENTLY RESULTS FROM FINANCIAL NEED, NOT MERE CONSUMER PREFERENCE

There are many factors that make health insurance unavailable for individuals and families. Amicus AARP in its brief in this case has discussed some of the most significant ones, including employers' increased reluctance to provide (adequate) insurance, and denial or limitation of coverage and exceptional premium hikes for those with pre-existing conditions. See AARP Amicus Br. 8-14. These factors together exclude many people age 50-64 from the insurance market, and it is our experience that the same phenomena are often in play among the 18-64-year-old adults in our surveys. The Foundation's own studies, however, have supported the conclusion that poverty and near-poverty conditions themselves

also play a major role in making health insurance unaffordable or impossible to obtain.

1. The Greater Cincinnati Community Health Status Survey is conducted every five years for the Foundation by the Institute for Policy Research at the University of Cincinnati. The survey samples people from Ohio, Kentucky, and Indiana who live in the Foundation's service area. The most recent survey, in Fall 2010, asked respondents about their health insurance status.[4] The responses suggest that for many people the failure to obtain health insurance is associated with financial need or exclusion from the market, not individual choice to remain uninsured and pay for health services as needed.

The survey asked respondents about both their health insurance status and their income with respect to the Federal Poverty Guidelines (FPG), which is a standard measure that is updated each year. At the time of the survey the FPG was $10,830 for an individual and $22,050 for a family of four. See 74 Fed. Reg. 4199 (Jan. 23, 2009). The survey results showed that those with lower incomes were more likely to be uninsured at any given time.

The results are reported for people between age 18 and 64 (*i.e.*, excluding children who are widely covered under the Children's Health Insurance Program and seniors almost universally covered under Medicare). For those whose incomes are below 100%

---

[4] The methodology of the 2010 survey is fully described at https://www.healthfoundation.org/hp_docs/Overview%20of%20the%202010%20GCCHSS.pdf

of the federal poverty level, 42% are currently uninsured. Of those whose incomes are between 100% and 200% of the FPG, 30% are uninsured. But of those whose incomes are more than 200% of the FPG, only 6% are uninsured.

The uninsured status of people with lower incomes would be even more stark were it not for Medicaid, the federal-state insurance for certain low-income people. For those whose incomes are below 100% of the FPG, 36% (more than half of these who have insurance) are covered by Medicaid (or Medicaid and Medicare), which does not require paying a premium. Among those whose incomes are between 100 and 200% of the FPG, 15% have Medicaid. See https://healthfoundation.org/hp_docs/GCCHSS%202010%20insurance%20status%20ages%2018-64%20data%20tables.pdf (tables showing original data from the Community Health Status Survey).

Not only are those with lower incomes more likely to be uninsured than others, but when they obtain health insurance, it is more unstable as well. Indeed, the survey showed that many individuals who are insured at a given time have been uninsured at some time in the past year. If those who have been uninsured within the last year are added to those who are currently uninsured, 50% of those with incomes below 100% of the FPG are uninsured, 41% of those between 100% and 200% of the FPG are uninsured, while only 11% of those with incomes over 200% of the FPG are uninsured. See *ibid.*

The following table summarizes these results:

Uninsured Rates and Medicaid Coverage by Poverty Level

People age 18-64	Federal Poverty Level		
	Below 100%	100-200%	Over 200%
Uninsured now	43%	30%	6%
Uninsured now or in the past year	50%	41%	11%
Covered by Medicaid, or by Medicaid and Medicare	36%	15%	3%

2. The 2011 statewide Ohio and Kentucky surveys report similar results.[5] For example, in the Ohio Health Issues Poll, of those whose incomes are below the FPG, 37% are uninsured; for those between 100% and 200% of the FPG, 29% are unin-

[5] The methodology of the Ohio and Kentucky Health Issues Polls are described at https://www.healthfoundation.org/hp_docs/OHIPoverview_FINL.pdf (Ohio); https://www.healthfoundation.org/hp_docs/KHIPoverview_FINL.pdf (Kentucky).

sured; but only 5% of those whose incomes are more than 200% of the FPG are uninsured. See https://www.healthfoundation.org/hp_docs/OHIP2011insurance.pdf. The following table summarizes these results:

Uninsured Rates by Poverty Level in Ohio

People age 18-64	Federal Poverty Level		
	Below 100%	100-200%	Over 200%
Uninsured	37%	29%	5%

Similarly, in the Kentucky Health Issues Poll, of those whose incomes are below 100% of the FPG, 55% are uninsured; for those between 100% and 200% of the FPG, 26% are uninsured; while only 14% of those whose incomes are more than 200% of the FPG are uninsured. See https://www.healthfoundation.org/hp_docs/KHIPUninsured_FINL_121211.pdf. The following table summarizes these results:

Uninsured Rates by Poverty Level in Kentucky

People age 18-64	Federal Poverty Level		
	Below 100%	100-200%	Over 200%
Uninsured	55%	26%	14%

Both the Ohio and Kentucky surveys showed that the insured status of those with lower incomes is also less stable; even if they do have insurance, they

are more likely than others to have been uninsured in the previous 12 months. These results strongly suggest that people with low incomes and those in poverty are much more likely to be uninsured — even taking Medicaid and similar programs into account — than those with higher incomes. For many of the uninsured, especially those with low income, the cost of insurance, not personal preference, is likely to be the reason for their uninsured status.

II. UNINSURED STATUS LEADS TO LIMITED ACCESS TO HEALTH CARE AND AFFECTS HEALTH

There is a key link between health insurance, access to the health-care marketplace for needed services, and, ultimately, the quality of one's health itself. Congress itself made well-supported findings that the cost of uncompensated care for the uninsured is shifted to those who do have insurance, raising premiums by $1,000 per year. 42 U.S.C. 18091(a)(2)(F); see Families USA, *Hidden Health Tax: Americans Pay a Premium* 2, 6 (2009). There is, however, another and more direct way in which the health-insurance and health-care markets are tied together. Substantial data gathered in the Foundation's surveys, as well as data from many other studies, demonstrate that, notwithstanding that the uninsured do receive some uncompensated care, the uninsured have less access to health care – with likely serious effects on their health itself.

1. In the Fall 2010 Greater Cincinnati Community Health Status Survey, respondents were asked: "During the last year, did any household member not receive a doctor's care [prescription medications] be-

cause the household needed the money to buy food, clothing, or pay for housing?" Those who were uninsured went without needed health care at a much higher rate than those with insurance. Thus, 11% of the insured but 40% of the uninsured had to go without a doctor's care because they needed the money for basic living expenses. Similarly, 10% of the insured, but 31% of the uninsured had to go without prescription medications for the same reason. See https://www.healthfoundation.org/hp_docs/GCCHSS%202010%20Going%20without%20care%20data%20tables.pdf. Those who do not have insurance must go without needed medical services at a far higher rate than those with insurance.

The following chart summarizes these results:

Going Without Because the Household Needed the Money for Food, Clothing, or Housing

All Adults	Insured	Uninsured
Went without a doctor's care in the past 12 months	11%	40%
Went without prescription medications in the past 12 months	10%	31%

2. Other data gathered by the Foundation support the conclusion that those without insurance have less access to health care and poorer health

outcomes. The Fall 2010 Greater Cincinnati Community Health Status Survey inquired whether respondents had a usual source of care. They were asked: "Is there one particular clinic, health center, doctor's office, or other place that you usually go to if you are sick or need advice about your health?" It is the Foundation's belief, supported by extensive outside studies, that having a usual source of care is an important factor in obtaining needed medical care and achieving sound medical outcomes. See, *e.g.*, Anne C. Beal, et al., *Closing the Divide: How Medical Homes Promote Equity in Health Care*, Commonwealth Fund pub.. No. 1035, at 9-10, 14-15, 20 (June 2007); Thomas Rosenthal, *The Medical Home: Growing Evidence to Support a New Approach to Primary Care*, 21 J. Am. Bd. Of Fam. Med. 427, 428 (2008) (Table 1) ("Patients who have a continuity relationship with a personal care physician have better health process measures and outcomes.").

The Survey results showed that those who did not have health insurance were much less likely to have a usual source of care. Among those who were insured and whose type of insurance was known, between 87% and 96% had a usual source of care.[6] But among those who were uninsured, only 62% had a usual source of care. See https://www.healthfoundation.org/hp_docs/GCCHSS%202010%20%20medical%20home%20data%20tables.pdf. Even that

---

[6] A small number (ten) of respondents were listed as "Insured - Unknown," suggesting incomplete data. Of those, 66.9% had a medical home and .7% were unsure.

percentage includes people who identified a hospital emergency room or an urgent care center as their usual source of care; if the survey had excluded those less-stable sources of care, the proportion of uninsured people with a usual source of care would have been substantially lower.

3. The results of the 2011 Ohio Health Issues Poll also showed a consistent relationship between individuals' ratings of their general health and insurance; as self-ratings of health quality declined, the likelihood of being uninsured increased. Thus, of the insured in the survey, 55% reported that they were in excellent or very good health and 15% reported they were in fair or poor health. Of the uninsured, only 36% reported they were in excellent or very good health, while 26% reported they were in poor health. See https://www.healthfoundation.org /hp_docs/insurance.pdf. These results too are consistent with the proposition that those without health insurance generally have poorer health outcomes than those who are insured. These data are summarized in the following table:

Self-Reported Health Status and Insurance

Health Status	Insured	Uninsured
Excellent or Very Good	55%	36%
Good	30%	38%
Fair or Poor	15%	26%

4. The link between lack of health insurance, less access to health care, and poorer health in general is

supported by numerous other studies. In 2002, the blue-ribbon Institute of Medicine published a comprehensive study, *Care without Coverage: Too Little, Too Late*. A committee of the Institute "select[ed] and evaluate[d] the best-designed research studies investigating the health of working-age adults with and without health insurance." *Id.* at 5. The committee reviewed these studies and summarized its findings as follows:

> Health insurance coverage is associated with better health outcomes for adults. It is also associated with having a regular source of care and with greater and more appropriate use of health services. These factors, in turn, improve the likelihood of disease screening and early detection, the management of chronic illness, and the effective treatment of acute conditions such as traumatic injury and heart attacks. The ultimate result is improved health outcomes.

Id. at 6.

An updated 2009 review of new research for the Institute reached the similar conclusions that "new research evidence on the consequences of health insurance for children and adults is of higher quality and stronger than ever before," and that "[t]his robust body of evidence demonstrates substantial health benefits of health insurance coverage." *America's Uninsured Crisis: Consequences for Health and Health Care* 5 (2009). In particular, children who have health insurance "have fewer avoidable hospitalizations, improved asthma outcomes, and fewer missed days of school," while "[f]or adults, there are

serious harms and sometimes grave consequences to being without health insurance." *Ibid.* "In sum, despite the availability of some safety net services, there is a chasm between health care needs and access to effective health care services for uninsured children and adults. Health insurance coverage in the United States is integral to individuals' personal well-being and health." *Id.* at 7.

An independent 2009 study done by Prof. J. Michael McWilliams of the Harvard Medical School carefully and exhaustively reviewed the evidence collected since the 2002 Institute of Medicine study had been published. See J. Michael McWilliams, *Health Consequences of Uninsurance Among Adults in the United States: Recent Evidence and Implications*, 87 Milbank Quarterly 443 (2009). The "new contributions" to the field had "consistently and robustly demonstrated the positive effects of health insurance coverage on the receipt of beneficial protective services and use of health care more generally, thereby establishing important mediating links in the causal pathway from health insurance to health outcomes." *Id.* at 469. The study found that, although there had been "important strides in research quality" since the 2002 report, the new research had in the end "strengthened the evidence that uninsurance adversely affects health, thereby allowing conclusions to be more definitive." Id. at 485.

Finally, a recent "official . . . systematic review" of the literature conducted by the American Thoracic Society examined the relation between uninsured status and outcomes for patients who were critically ill. Robert A. Fowler, et al., *An Official American*

Thoracic Society Systematic Review: The Association between Health Insurance Status and Access, Care Delivery, and Outcomes for Patients Who Are Critically Ill, 181 Am. J. Respir. Crit. Care Med. 1003 (2010). The study concluded that "the uninsured were much less likely than those who had insurance to receive critical care services." *Id.* at 1006. Critically ill uninsured patients also "were more likely to have life support withdrawn . . ., less likely to have an invasive procedure . . ., or pulmonary artery catheterization . . . and more likely to experience discharge delays when medically ready to leave the hospital." *Id.* at 1006-1007. Of perhaps greatest concern, uninsured critically ill patients "had a higher hospital mortality"; they "had a higher independent risk of death when compared with those with private/commercial insurance." *Id.* at 1007.

5. The Foundation also partially funded a large study, the Ohio Family Health Survey. The analysis that was performed on the survey data reached similar conclusions about the availability of health care to the important subgroup of special-needs young adults. See Anthony Goudie and Adam C. Carle, *Ohio Study Shows that Insurance Coverage Is Critical for Children With Special Health Care Needs as They Transition to Adulthood*, 30 Health Affairs 2382 (2011). Special health-care needs arise from various chronic illnesses and disabling conditions that require medications, specialized health services, or a combination of both.

The study compared Ohio children (age 13-18) who had special health-care needs with young adults (age 19-26) who similarly had special health-care

needs. The children frequently were insured, because special health-insurance options are sometimes available for children. For example, school-age children are often eligible for their parents' employer-sponsored health insurance, though at the time of the study that eligibility ceased at age 19. In addition, children are frequently eligible for Medicaid, but that eligibility terminates at age 20 (aside from those who may remain on Medicaid due to disability). Thus, as children reach young adulthood and need their own insurance, it becomes much harder to get. That is especially true for those with special needs, because they have high rates of pre-existing health conditions that make them unattractive to insurers and sometimes unsuitable as employees (who may receive employer-sponsored group coverage). As a result, the survey showed that only 5% of children with special health-care needs were uninsured, as compared with 29% of special-needs young adults who were without insurance. See *id.* at 2385.

Among the report's conclusions was that "[b]eing uninsured and having special health care needs was directly associated with having a high rate of unmet health care needs" and "was also at least indirectly associated with an increased demand for emergency department visits and inpatient hospital stays." Id. at 2388. This can be seen in the following two tables. The first table, derived from Exhibit 2 in the study, *id.* at 2385, summarizes the unmet needs of the special-needs children and young-adults in the entire sample:

Unmet Needs of Insured and Uninsured Children and Young Adults Who Have Special Health-Care Needs

Unmet needs:	Children ages 13-18	Young Adults, ages 19-26
Prescription medications	8%	33%
Delayed or forgone care	11%	36%
Problems getting care	9%	20%

This can be compared with a further table, derived from Exhibit 3 in the study, *id.* at 2386, which summarizes the unmet needs of just the children and young adults who were uninsured:

Unmet Needs of Uninsured Children and Young Adults Who Have Special Health-Care Needs

Unmet needs:	Uninsured Children ages 13-18	Uninsured Young Adults, ages 19-26
Prescription medications	31%	64%
Delayed or forgone care	55%	69%
Problems getting care	15%	40%

In each category, the uninsured child or young adult has more unmet needs – often twice the level – as

the child or young adult with insurance. Moreover, considering both the children and the young adults in the study, those reporting unmet needs were more likely to have costly emergency department visits (31% and 45%) and hospital stays (12% and 23%). *Id.* at 2387 (percentages derived from Exhibit 5).

CONCLUSION

The lack of health insurance frequently results from financial need or lack of availability, not mere consumer preference. The health insurance and health care markets are closely tied, because uninsured status frequently leads to reduced access to health care and significantly affects health outcomes themselves.

Respectfully submitted.

NATHALIE RAYMER
THE HEALTH
FOUNDATION OF GREATER
CINCINNATI
3805 EDWARDS ROAD
CINCINNATI, OH 45209
(513) 458-6712

JAMES A. FELDMAN
Counsel of Record
5335 WISCONSIN AVE. NW
SUITE 440
WASHINGTON, D.C. 20015
(202) 730-1267
WEXFELD@GMAIL.COM

JANUARY 13, 2012

AMICUS CURIAE BRIEF

No. 11-398

In The
Supreme Court of the United States

DEPARTMENT OF HEALTH
AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

BRIEF *AMICI CURIAE* OF HSA COALITION, INC. AND THE CONSTITUTION DEFENSE FUND, A PROJECT OF FREEDOMWORKS FOUNDATION IN SUPPORT OF RESPONDENTS (MINIMUM COVERAGE PROVISION)

ED R. HADEN
Counsel of Record
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, AL 35203-4642
(205) 226-8795
ehaden@balch.com

Counsel for Amici Curiae

February 13, 2012

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. **To Effect The Individual Mandate, Health Plans Must Be Standardized And Alternatives Must Be Removed, Resulting In The Loss Of Individual Freedom Of Choice** 6

A. **The PPACA Defines The Benefits That Must Be Offered, Sets The Losses That Must Be Paid, And Mandates That Individuals Participate** 6

B. **Consumer-Driven Health Plans Provide Individuals With More Freedom Of Choice** 10

C. **Supporters Of The PPACA Promised HSAs Would Continue As A Viable Option For Individuals** 14

D. **A Milliman Study Finds That The Impact Of The Medical Loss Ratio Requirements Is Likely To Be Greater On High-Deductible Health Plans** 15

TABLE OF CONTENTS – Continued

Page

II. The PPACA's Provisions And Implementing Regulations Standardize Benefits, Force Consumer-Driven Plans Out Of The Exchanges, And Thereby Take Away The Individual's Freedom Of Choice 22

A. With Fewer Viable Low-Cost Choices In The Exchanges, Especially At The Bronze Level, Plans Become Standardized, Resulting In No Real Choice For Individuals Complying With The Mandate 24

B. The Asserted Goals Of The Individual Mandate Are Insufficient To Justify This Loss Of Liberty 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 3

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).....4

United States v. Lopez, 514 U.S. 549 (1995).....4

United States v. Morrison, 529 U.S. 598 (2000) 4

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I

§ 1 3

§ 8, cl. 3.....3

STATUTES

26 U.S.C. § 501(c)(3).....1

26 U.S.C. § 501(c)(6).....1

Medicare Prescription Drug Improvement and Modernization Act of 2003, P.L. 108-173.....11

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 .....*passim*

26 U.S.C.A. § 36B 6

42 U.S.C. § 300gg-18(b).....7

42 U.S.C. § 300gg-18(b)(1)(A).....8

42 U.S.C. § 300gg-18(b)(1)(B).....8

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 300gg-18(b)(3) 8

42 U.S.C. § 18021(a)(1) 7

42 U.S.C. § 18022(b)(1) 7

42 U.S.C. § 18022(d)(1)(A) 7

42 U.S.C. § 18022(d)(1)(B) 7

42 U.S.C. § 18022(d)(1)(C) 7

42 U.S.C. § 18022(d)(1)(D) 7

42 U.S.C. § 18031(b) 6

42 U.S.C. § 18031(e)(2) 9

42 U.S.C. § 18071 6

48 U.S.C. § 5000A(b)(1) 10

48 U.S.C. § 5000A(c)(1) 10

48 U.S.C. § 5000A(e) 9

48 U.S.C. § 5000A(e)(1)(A) 9

REGULATIONS

Medical Loss Ratio Rebate Requirements Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 76594 (Dec. 7, 2011) (to be codified at 45 C.F.R. pt. 158) (final rule with comment period) 8, 16, 22

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

AHIP, *Health Savings Accounts and Account-Based Health Plans: Research Highlights* (November 2011), http://www.ahip.org/Workarea/linkit.aspx?ItemID=4294967298 ..... 12, 13, 14

AHIP Center for Policy and Research, *January 2011 Census Shows 11.4 Million People Covered by Health Savings Account/High-Deductible Health Plans (HSA/HDHPs)* (June 2011), http://o.b5z.net/i/u/10021383/i/HSACensus2011_-_final.pdf 11, 12, 13

AHIP, Press Release, *Over 3 Million Enrolled in High-Deductible/HSA Plans* (Jan. 26, 2006), http://www.kff.org/uninsured/upload/7568.pdf 11

Assurant Health Press Release, *Assurant Health Announces New Organizational Structure* (Aug. 19, 2010), http://www.assuranthealth.com/corp/ah/Newsroom/articles/Assurant+Health+Announces+New+Organizational+Structure.htm 27

Bureau of Labor Statistics, United States Department of Labor, *Consumer-Driven Health Care: What Is It, And What Does It Mean for Employees and Employers?* (Oct. 25, 2010), http://www.bls.gov/opub/cwc/cm20101019ar01p1.htm 10, 12

TABLE OF AUTHORITIES – Continued

Page

Congressional Budget Office, *Budgetary Treatment of Proposals to Regulate Medical Loss Ratios* (Dec. 13, 2009), http://www.cbo.gov/ftpdocs/107xx/doc10731/MLR_and_budgetary_treatment.pdf 24, 25

Ezekiel J. Emanuel & Jeffrey B. Liebman, *The End of Health Insurance Companies*, The New York Times (Jan. 30, 2012), http://opinionator.blogs.nytimes.com/2012/01/30/the-end-of-health-insurance-companies/ 23, 28

Greg Scandlen, National Center for Policy Analysis, *New Regulation Threatens Agents, HSA Plans* (Dec. 12, 2011), http://healthblog.ncpa.org/new-regulation-threatens-agents-hsa-plans/ 8

HSA Consulting Services, LLC, *MLR Regulation Creates Challenges for Future of Affordable Coverage* (Dec. 27, 2011), http://healthcarechoicecoalition.org/pdf/mlr-regulation-creates challentges.pdf 21, 25

HSA Council, Inc., *Comments to the Department of Health and Human Services on the Medical Loss Ratio* (Jan. 31, 2011), http://aba.com/NR/rdonlyres/7DEC4FCA-57AO-4CC5-834A-22C9AB859D37/70665/MLR_Comments_13111_FINAL.pdf 21

TABLE OF AUTHORITIES – Continued

Page

HSA Council, Inc., Health Savings Accounts: *Account-based solutions for affordable health-care*, http://www.hsacoalition.org/wp-content/uploads/2011/11/Nov-2011-HSA-Council-Leave-behind.pdf 13

HSA Council, Inc., Press Release, *Milliman Study Confirms MLR Threat To HSAs*, http://www.aba.com/aba/documents/abia/MillimanReportPressRelease.pdf. 19

Janet Bauer, Oregon Center for Public Policy, *The Active Purchaser Imperative* (Sept. 8, 2011), http://www.ocpp.org/2011/09/08/iss20110908active-purchaser-imperative/ 26, 27

Kaiser Family Foundation, *Health Savings Accounts and High Deductible Health Plans: Are They An Option for Low-Income Families* (Oct. 2006) 11

Kaiser Family Foundation, *Kaiser Health Tracking Poll* (March 2011), http://www.kff.org/kaiserpolls/upload/8166-F.pdf 24

Kaiser Family Foundation, *Snapshots: Health Care Costs: Illustrating the Potential Impacts of Adverse Selection on Health Insurance Costs in Consumer Choice Models*, (November 2006), http://www.kff.org/insurance/snapshot/chcm111006oth2.cfm 23, 27

TABLE OF AUTHORITIES – Continued

Page

Kathleen Sebelius, *How the Affordable Care Act empowers states*, Washington Post (Feb. 10, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/02/09/AR2011020905682.html 15

Letter on Health Insurance Reform from Barack Obama, President, to Congressional Leaders (March 2, 2010), http://www.whitehouse.gov/the-press-office/letter-congressional-leaders-health-insurance-reform 14

Merrill Matthews, *ObamaCare Hidden Price Controls Will Hammer Insurers* (Feb. 7, 2012), http://news.investors.com/ArticlePrint/600420/201202071842/obamacare-price-controls-hurt-health-insurers.htm 20, 27, 28

Milliman, Inc., *Impact of Medical Loss Ratio Requirements Under PPACA on High Deductible Plans/HSAs in Individual and Small Group Markets* (January 6, 2012), http://www.regulations.gov/#!documentDetail;D=CMS-2011-0179-0044 ..... 17, 19, 20, 21, 22

Nancy Pelosi, Speech before the 2010 Legislative Conference of the National Association of Counties (March 9, 2010), http://www.youtube.com/watch?v=NvSkeJbQy74 5

TABLE OF AUTHORITIES – Continued

Page

Opinion, *ObamaCare's Great Awakening*, Wall Street Journal (Feb. 8, 2012), http://online.wsj.com/article/SB10001424052970204369404577209112780407698.html?mod=googlenews_wsj 15

The White House Blog, *Facts Are Stubborn Things*, http://www.whitehouse.gov/blog/Facts-Are-Stubborn-Things/ 14

U.S. Department of Health and Human Services, News Release, *A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius* (Jan. 20, 2012), http://www.hhs.gov/news/press/2012pres/01/20120120a.html 16

U.S. Office of Personnel Management, *High Deductible and Consumer-Driven Health Plans*, http://www.opm.gov/insure/archive/05/guides/70-01/hdcd.asp 14

BRIEF *AMICI CURIAE* OF HSA COALITION AND THE CONSTITUTION DEFENSE FUND, A PROJECT OF FREEDOMWORKS FOUNDATION IN SUPPORT OF RESPONDENTS

Amici HSA Coalition, Inc. and the Constitution Defense Fund, a project of FreedomWorks Foundation, submit this brief and respectfully request that the Eleventh Circuit's decision be affirmed.

INTEREST OF *AMICI CURIAE*[1]

HSA Coalition, Inc. is a § 501(c)(6) organization whose mission is to defend health savings accounts against legislative and other attacks, as well as to improve current law so as to permit more Americans to have the option to choose a health savings account.

The Constitution Defense Fund promotes limited government and the protection of civil liberties by advocating for America's founding constitutional principles in the public arena. The Fund is a project of FreedomWorks Foundation, a § 501(c)(3) nonprofit, nonpartisan organization with more than one million

---

[1] No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. No person or entity, other than the *Amici*, its donors or members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. All parties filed blanket *Amicus* consent letters.

members dedicated to the principles of individual liberty and economic freedom. The Foundation educates citizens about and promotes constitutionally limited government and the adoption of free-market policies that inure to the benefit of consumers and citizens generally, including the establishment of a patient-centered health care system.

SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 199 (PPACA or Act), substantially reduces individual choices in health care decisions. The PPACA penalizes high-deductible plans by making them pay a rebate. This will eliminate such plans and force health insurance into a standardized government-plan model.

The PPACA takes the option of using a health savings account to fund a high-deductible health insurance plan off the table. The Act significantly diminishes individuals' freedom of choice by eliminating this widely used and effective option.

Milliman, Inc., one of the premier actuarial firms, has completed an actuarial study on the medical loss ratio provision of the PPACA that requires health plans to pay out approximately 80% of premiums in claims. That study shows that the detrimental impact of the medical loss ratio requirements is likely to be greater on high-deductible health plans, including

those with HSAs, than other types of comprehensive medical plans.

By eliminating high-deductible (i.e., low-premium) consumer-driven health care plans, the PPACA eliminates a key option available to individuals when they make personal health care decisions. The aggressive constitutional posture of the PPACA will produce an unjustifiable loss of individual liberty.

ARGUMENT

Through Article I of the Constitution, the People vested in Congress the limited legislative power to regulate interstate commerce:

> All legislative Power, herein granted shall be vested in a Congress of the United States. . . .
>
> . . . .
>
> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States. . . .

U.S. Const. art. I, §§ 1, 8, cl. 3.

The Commerce Clause granted the limited power to regulate commercial transactions and the channels and instrumentalities of commerce. It has never included the power to direct private parties to engage in commerce in the first place. *See generally Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (holding Congress

could regulate voluntary private steamboat business); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (holding Congress could regulate voluntary commerce between workers and their employers' businesses); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down statute making voluntary possession of firearm in school zone a federal crime); *United States v. Morrison*, 529 U.S. 598 (2000) (striking down portion of statute making volitional sexual assault a federal crime).

The step from regulating commerce to directing it is not an academic one. The step taken by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 199 (PPACA or Act), has real, practical consequences for individuals making intimate, personal health care decisions for themselves and their children. The PPACA impacts the individual's decision of what doctor, what hospital, and what medicine she can choose.

The Government's brief has failed to recognize, let alone address, the substantial infringement of individual liberty effected by the Legislative direction of health care choices under the individual mandate. If the individual mandate is upheld, an individual no longer has the ability to make many critical health care decisions. Instead, the Government makes these decisions for her by approving which plans may participate in the Exchanges and thus which options are available to individuals. To obtain the Government's necessary approval, health insurance plans must meet a lengthy list of requirements and restrictive standards. If these plans do not qualify, an

individual cannot purchase them through the Exchange. While an individual remains free to choose among plans within the Exchanges, the lack of a full range of insurance products makes these choices illusory at best.

The Act's restriction of health care choices to government plans is a far cry from what Americans were promised.[2] One type of health care choice particularly impacted by the Act and the Government's regulations are Health Savings Accounts (HSA) and high-deductible health insurance plans. A new study by Milliman, Inc – the only actuarial study of the Medical Loss Ratio regulations – confirms that the Act and its regulations have taken away an individual's choice in health insurance decisions, and is replacing it with a limited, standardized array of government-approved options. This is only a first step in removing health care decision-making from individuals. In fact, former advisors in the Obama Administration warned last month that a radically new system is on the horizon.

---

[2] Americans were forced to rely on these promises because Congress "had to pass the [health care] bill so that you can find out what is in it." Nancy Pelosi, Speech before the 2010 Legislative Conference of the National Association of Counties (March 9, 2010).

I. To Effect The Individual Mandate, Health Plans Must Be Standardized And Alternatives Must Be Removed, Resulting In The Loss Of Individual Freedom Of Choice.

A. The PPACA Defines The Benefits That Must Be Offered, Sets The Losses That Must Be Paid, And Mandates That Individuals Participate.

Under the PPACA, only qualified health benefit plans which meet specific government-established criteria can be sold within the state Exchanges.[3] Plans which do not meet these specific criteria may be sold outside the Exchanges, but individuals purchasing these plans will not be eligible for the subsidies provided for under the PPACA. *See* 26 U.S.C. § 36B; 42 U.S.C. § 18071.

A "qualified health plan" is a health plan that is certified by each Exchange through which it is offered. It must provide the essential benefits package, as defined by the Secretary of Health and Human Services. It must be offered by a licensed issuer that agrees to offer at least one silver plan and one gold plan, agrees to charge the same premium whether the plan is sold through the Exchange or outside of it, and complies with all other requirements of the Secretary of Health

---

[3] The term "Exchanges" refers to the health benefit exchanges that each State must create and operate. 42 U.S.C. § 18031(b).

and Human Services and the Exchange. 42 U.S.C. § 18021(a)(1).

Each qualified health plan must meet the "essential health benefits" requirements by covering the following general categories of services: ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance abuse disorder services; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; pediatric services, including oral and vision care. 42 U.S.C. § 18022(b)(1). The scope of benefits has yet to be determined by the Secretary of Health and Human Services.

Health plan coverage levels are also strictly defined. All qualified health plans must provide coverage that provides benefits that are actuarially equivalent to 60% of the full actuarial value of benefits under the plan. *Id.* § 18022(d)(1)(A). Plans that provide benefits at the 60% level are bronze plans. *Id.* § 18022(d)(1)(A). Silver, gold and platinum level plans provide benefits that are actuarially equivalent to 70%, 80% and 90% of the full actuarial value of benefits under the plan, respectively. *Id.* § 18022(d)(1)(B), (C), (D).

The PPACA also establishes minimum "Medical Loss Ratio" standards for all insurers. *See id.* § 300gg-18(b). The Act specifies that in the large group market, insurers must spend at least 85% of the amount of premiums collected on direct patient care through the payment of medical claims. *Id.*

§ 300gg-18(b)(1)(A). In the small group and individual markets, insurers must spend at least 80% of premiums collected on direct patient care. Any insurer that does not meet the 80% or 85% minimum must pay rebates to insureds. *Id.* § 300gg-18(b)(1)(B). The Act requires the Secretary to implement the minimum medical loss ratio requirements. *Id.* § 300gg-18(b)(3). The Secretary recently promulgated regulations to do so. *See* Medical Loss Ratio Rebate Requirements Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 76594 (Dec. 7, 2011) (to be codified at 45 C.F.R. pt. 158) (final rule with comment period).

For example, if an individual buys a health plan with no deductible that costs $5,000, and has $4,000 in medical expenses, the plan is in compliance with the medical loss ratio because 80% of the premium is used for medical claims. By contrast, an individual buys a policy with a $1,000 deductible with $4,000 in premiums, and has the same $4,000 in medical expenses. The individual pays the first $1,000 of medical expenses directly to cover the deductible, while the health plan pays the remaining $3,000. This $3,000 is only 75% of the $4,000 premium, so the plan does not meet the minimum medical loss ratio of 80% and must pay a rebate. *See* Greg Scandlen, National Center for Policy Analysis, *New Regulation Threatens Agents, HSA Plans* (Dec. 12, 2011). The medical expenses and the total cost of coverage are the same under both plans. What is not the same is the burden placed on the consumer-driven health plan. The low deductible plan meets the medical loss ratio, while the high-deductible plan does not. By forcing the

high-deductible plan to pay a rebate, the Act will remove such plans from the Exchanges.

In addition, Exchanges must submit justifications of any premium increase prior to implementation. 42 U.S.C. § 18031(e)(2). Exchanges must take into account a justification of premium increases when certifying plans. *Id.* § 18031(e)(2). These pertinent provisions of the PPACA effectively place decisions about how health insurance must look into the hands of government bureaucrats and out of the hands of participants in the market.

The individual mandate requires most individuals to have minimum acceptable coverage (as defined by the Government). The PPACA exempts several categories of individuals from the individual mandate penalty, including individuals whose required annual premium contribution exceeds 8% of their household income for the taxable year are exempt from the individual mandate penalty. PPACA § 1501; 48 U.S.C. § 5000A(e). The required contribution for coverage is the amount required to maintain coverage either in an employer-sponsored health plan or in a bronze-level plan offered on an Exchange. *See* 48 U.S.C. § 5000A(e)(1)(A). Only eligible individuals who purchase insurance through a stated-based exchange may receive a subsidy.[4]

---

[4] The Act allows the federal government to set up a federally-run Exchange if the State fails to implement an Exchange. PPACA § 18041(c)(1). It is not clear whether individuals who

(Continued on following page)

If a non-exempt individual fails to purchase a government-approved health plan, the individual must pay a penalty. *Id.* § 5000A(b)(1). The annual penalty is either a flat dollar amount, or a percentage of the individual's income, if higher than the flat rate. *Id.* § 5000A(c)(1). The percentage-of-income figure is capped at the national average premium amount for bronze-level plans in the Exchanges. *Id.*

B. Consumer-Driven Health Plans Provide Individuals With More Freedom Of Choice.

A consumer-driven health plan is the combination of a pretax payment account with a high-deductible health plan. *See* Bureau of Labor Statistics, United States Department of Labor, *Consumer-Driven Health Care: What Is It, And What Does It mean for Employees and Employers?* (Oct. 25, 2010). Consumer-driven health plans are a three-tier payment system, consisting of a savings account, out-of-pocket payments, and an insurance plan. *Id.* The savings account is an account that allows enrollees to pay for services, as well as the insurance plan deductible, using pretax dollars, funded either by the individual or an employer. *Id.* The second tier is the "coverage gap," that is, the difference between the amount of money in

---

purchase insurance from a federally-run Exchange are eligible for subsidies because the text of the PPACA states that only state-based Exchanges may distribute subsidies.

the pretax account and the deductible, and which must be covered by the insured. *Id.* If health care expenses exceed the deductible amount, the high-deductible health insurance plan kicks in, and operates as a traditional health plan does. *Id.*

High-deductible plans, while generally having high annual deductibles and higher annual out-of-pocket maximums than traditional plans, have lower premiums as well as the ability to open a health savings account (HSA) to use tax-free savings for medical expenses. *Id.* Most high-deductible health plans cover preventive care services without requiring enrollees to first meet the deductible. *See* AHIP Center for Policy and Research, *January 2011 Census Shows 11.4 Million People Covered by Health Savings Account/High-Deductible Health Plans (HSA/HDHPs)* 2 (June 2011).

HSAs were authorized by the Medicare Prescription Drug Improvement and Modernization Act of 2003, P.L. 108-173, and are designed to help consumers save to defray current and future medical out-of-pocket costs. HSAs are the fastest growing health or finance product. *See* AHIP Center for Policy and Research, *January 2011 Census Shows 11.4 Million People Covered by Health Savings Account/High-Deductible Health Plans (HSA/HDHPs)* 4 (June 2011). Over 3 million previously uninsured people are covered by HSAs. *See* Kaiser Family Foundation, *Health Savings Accounts and High Deductible Health Plans: Are They An Option for Low-Income Families*, 7 (Oct. 2006) (citing AHIP, Press Release, *Over 3 Million*

Enrolled in High-Deductible/HSA Plans (Jan. 26, 2006)).

HSA plans, a subset of consumer-driven plans, provide individuals with incentives to manage their own health care costs by coupling a tax-favored savings account used to pay medical expenses with a high-deductible health plan that meets certain requirements for deductibles and out-of-pocket expense limits.[5] *See* AHIP Center for Policy and Research, *January 2011 Census Shows 11.4 Million People Covered by Health Savings Account/High-Deductible Health Plans (HSA/HDHPs)* 4 (June 2011). Unused amounts roll over to the next year without penalty. *See* Bureau of Labor Statistics, United States Department of Labor, *Consumer-Driven Health Care: What Is It, And What Does It Mean for Employees and Employers?* (Oct. 25, 2010). Individuals may invest funds in HSAs in stocks or other types of investments permitted for Individual Retirement Accounts. *See id.* In 2010, 73% of accountholders contributed more than they spent during each month in 2010, and account balances grew for all groups, with 35% of accounts having balances over $1,000. *See* AHIP, *Health Savings Accounts and Account-Based Health Plans: Research Highlights* 4 (November 2011). Ninety-four percent of individuals with an HSA will spend less than $5,000 in medical expenses annually, making them an attractive affordable option for healthy

---

[5] Under current law, an individual must have a high-deductible health plan to open an HSA, or to contribute to one. Therefore, the lack of high-deductible plan products will eliminate the ability of individuals to choose an HSA.

individuals. HSA Council, Inc., *Health Savings Accounts: Account-based solutions for affordable health care*, http://hsacoalition.org/wp-content/uploads/2011/11/Nov-2011-HSA-Council-Leave-behind.pdf.

With the rise in health care costs, coupled with a desire to take more control of their health care decisions, an increasing number of individuals are using consumer-driven health plans, and in particular, HSA/high-deductible health plans. As of January 2011, 11.4 million people were covered by HSA/high-deductible health plans, a 3.4 million increase since January 2009. *See* AHIP Center for Policy and Research, *January 2011 Census Shows 11.4 Million People Covered by Health Savings Account/High-Deductible Health Plans (HSA/HDHPs)* 6 (June 2011). HSA/high-deductible health plan coverage accounted for 13.5% of all new health insurance enrollment in the small group market. *See id.* at 8. In January 2011, HSA-eligible products accounted for 6.1% of newly issued health insurance policies purchased in the individual market. *See* AHIP, *Health Savings Accounts and Account-Based Health Plans: Research Highlights* 1 (November 2011).

Consumer-driven health plans have an important place in the market. They provide comprehensive coverage for high-cost medical events, and can be coupled with a tax-advantaged method to build savings for future medical expenses. With consumer-driven health plans, individuals have greater flexibility and discretion over how these health care benefits are used. The U.S. Office of Personnel Management has recognized that a consumer-driven plan "provides

you with greater freedom in spending health care dollars the way you want." U.S. Office of Personnel Management, *High Deductible and Consumer-Driven Health Plans*, http://www.opm.gov/insure/archive/05/guides/70-01/hdcd.asp. Studies have found that individuals with HSA accounts are more engaged in their health care decisions. *See* AHIP, *Health Savings Accounts and Account-Based Health Plans: Research Highlights* 6-7 (November 2011).

C. Supporters Of The PPACA Promised HSAs Would Continue As A Viable Option For Individuals.

During the legislative battle, supporters of the PPACA touted the availability in the Exchanges of low-cost, consumer-driven plans at the bronze level. President Obama has repeatedly assured Americans that "the Government is not going to make you change plans under health reform." *See, e.g.*, The White House Blog, *Facts Are Stubborn Things* (Aug. 4, 2009). The President was even more specific in his assurance that HSAs would remain a viable choice when, in a March 2, 2010 letter to Congressional leaders, he wrote:

> I believe that high-deductible health plans could be offered in the exchange under my proposal, and I'm open to including language to ensure that is clear. This could help to encourage more people to take advantage of HSAs.

Letter on Health Insurance Reform from Barack Obama, President, to Congressional Leaders (March 2, 2010). Secretary Sebelius also boasted about the

availability of HSAs and the discretion of States to offer products desired by their residents:

> The Affordable Care Act puts states in the driver's seat because they often understand their health needs better than anyone else. . . . States have discretion, for example, to offer a wide variety of plans through their exchanges, including those that feature health savings accounts.

Kathleen Sebelius, *How the Affordable Care Act empowers states*, Washington Post (Feb. 10, 2011). These assurances are contradicted by the findings of an independent study which show the almost-certain elimination of HSAs from the Exchanges as a result of the Medical Loss Ratio regulations.

D. A Milliman Study Finds That The Impact Of The Medical Loss Ratio Requirements Is Likely To Be Greater On High-Deductible Health Plans.

Clearly, the individual mandate burdens the ability of individuals to freely make a choice not to purchase health insurance.[6] Those uninsured individuals

---

[6] The Medical Loss Ratio regulations are but one example of how the PPACA, and its implementing regulations, are causing a loss of liberty. *See* Opinion, *ObamaCare's Great Awakening*, Wall Street Journal (Feb. 8, 2012) ("When politics determines who can or should receive what benefits, and who pays what for it, government will use its force to dictate the outcomes that it wants – either for reasons of cost, or to promote its values. . . ."). The Government's decision to interpret "essential health benefit"

(Continued on following page)

mandated to purchase health insurance will most likely purchase bronze or silver plans, which are the least expensive options within the Exchanges. Supporters of the Act made promises that consumer-driven health plans, such as HSAs, which provide individuals a large degree of choice and autonomy, as well as lower cost, would be eligible for inclusion in the Exchanges. In fact, it was widely believed at the time of the Act's passage that HSAs would be used with the bulk of the bronze plans offered, thus limiting the burden of purchasing health insurance through the availability of low-cost, consumer-driven options in the exchanges. However, in a classic inside-the-Beltway bait-and-switch, the promised HSAs and high-deductible health plans in the individual and small group markets are effectively excluded from the Exchanges.

In December 2011, the Medical Loss Ratio regulations were promulgated. *See* Medical Loss Ratio Rebate Requirements Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 76594 (Dec. 7, 2011). The purpose of the medical loss ratio requirement is

---

to include birth control is another. *See* PPACA §§ 1001, 1302(b); U.S. Department of Health and Human Services, News Release, *A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius* (Jan. 20, 2012). In implementing the birth control mandate, the Administration, despite promises of compromise, narrowly defined the "conscience exception" for religious organizations. The Administration's continuing regulation of all choices related to health care, justified under the Commerce Clause, is truly alarming.

to reduce non-medically related costs, such as administrative expenses, as well as alleged windfall profits. This medical loss ratio regulation dictates to insurance companies selling "fully insured" policies (e.g., those purchased by individuals, small businesses and some larger businesses) that they must spend at least 80% (or 85% for policies sold to larger companies) of the premiums they collect as medical claims. Thus, insurance companies must pay at least $80 of every $100 in premiums collected on medical claims. The remaining $20 is left to cover administrative expenses, such as brokerage fees, fraud detection, marketing, as well as surplus and profits.

Milliman, Inc., one of the premier actuarial firms, has completed an actuarial study of the medical loss ratio interim final regulations, and has found that the impact of the medical loss ratio requirements is likely to be greater on high-deductible health plans, including those with HSAs, than other types of comprehensive medical plans. *See* Milliman, Inc., *Impact of Medical Loss Ratio Requirements Under PPACA on High Deductible Plans/HSAs in Individual and Small Group Markets* 3 (January 6, 2012), http://www.regulations.gov/#!documentDetail;D=CMS-2011-0179-0044.

The Milliman study's Executive Summary notes four primary issues of concern for high-deductible health plans:

1. **The MLR formula doesn't take into account contributions to HSAs.** Many

HDHPs are accompanied by an HSA, which covers much of the first-dollar costs before the plan's deductible is reached. HSA contributions are currently not reflected in the MLR calculations.

2. **HDHPs may not be able to raise rates fast enough to keep up with rising costs.** HDHPs will require larger annual rate increases than typical/average medical plans because medical inflation will have a greater impact on HDHPs claim levels than plans with lower deductibles.

3. **HDHPs have less premium dollars to cover their fixed expenses.** Every plan has fixed expenses that it covers with premiums. Since HDHPs have lower premiums than other plans, a greater percentage of the premium must be used to pay these fixed expenses. For example, $400 of fixed expenses represents 40 percent of a $1,000 premium, but only 20 percent of a $2,000 premium and only 8 percent of a $5,000 premium. Therefore, it is harder for lower premium plans such as HDHPs to keep its non-claim expenses below 20 percent of its adjusted premiums as the MLR rule requires.

4. **HDHPs have less predictable claims experience that could increase the risk of paying rebates.** High-deductible insurance plans pay fewer claims than plans with low deductibles. But when HDHPs pay claims, the claim dollar amounts tend to be larger. This lower-frequency/high-payment creates

> less actuarial predictability, which can result in high claims in one year and low claims in another. If the plan has low claims, it may not meet the 80 percent MLR and be required to pay rebates. If the plan has high claims, it may lose money that it cannot "make up" in other years.

HSA Council, Inc., Press Release, *Milliman Study Confirms MLR Threat To HSAs*, http://www.aba.com/aba/documents/abia/MillimanReportPressRelease.pdf (emphases in original).

The Milliman study provides several bases for concluding that "without some type of reform, the feasibility of [HSAs and high deductible health plans] under the PPACA seems poor." Milliman, Inc., *Impact of Medical Loss Ratio Requirements Under PPACA on High Deductible Plans/HSAs in Individual and Small Group Markets* 8 (January 6, 2012), http://www.regulations.gov/#!documentDetail;D=CMS-2011-0179-0044. First, the claim portion of the premium dollar is necessarily lower for high-deductible health plans than that for average deductible plans because the high-deductible plan requires the insured to pay more of the cost of care. *See id.* To achieve the minimum loss ratio, the high-deductible health plan's expenses and administrative costs must be lower on a dollar basis than they are for typical health plans. *See id.* Yet, high-deductible health plans are not designed to achieve this. Therefore, "a uniform [Medical Loss Ratio] requirement of 80% for individual and small group adversely affects companies that write a significant amount of higher-deductible business." *Id.* at 6. The medical loss ratio requirement necessitates the

cutting of administrative expenses even more, which may "create disincentives to offer such lower-cost plans, particularly if the insurer cannot generate reasonable risk margins." *Id.* at 6.

Second, due to the high deductible, fewer policyholders have claims in a year, and when they do, the typical claim amounts are higher for high-deductible plans. *See id.* at 3. This variability can lead to high claims in one year and low claims in another. *See id.* It also increases the likelihood that high-deductible plans will fail to meet the 80% medical loss ratio in those years of low claims, and therefore, be required to pay rebates. *See id.* As the Milliman study shows, if the plan is priced to meet the minimum medical loss ratio threshold of 80%, in any given year, there is close to a 50% chance that the claim experience will result in medical loss ratios above 80%. *See id.* at 7. There is also close to a 50% chance that the insurance carrier will need to pay a rebate even though its plan was priced properly to meet the 80% medical loss ratio threshold. *See id.* The carrier will then need to pay a rebate, further limiting its ability to amass the surplus needed to offset high claim payment years.[7] *See id.*

---

[7] The administrative cost of processing and sending thousands of rebate checks will only make it more difficult for a high-deductible health plan to meet the Medical Loss Ratio. *See* Merrill Matthews, *ObamaCare Hidden Price Controls Will Hammer Insurers* (Feb. 7, 2012) ("Wisconsin Insurance Commissioner Ted Nickel says that just processing those rebate checks could cost a small fortune for companies with thousands of policyholders – and makes no economic sense if the rebate checks are small.").

Third, the medical loss ratio calculations do not account for the inclusion of HSAs within high-deductible plans. High-deductible health plans are often accompanied by an HSA, which is used to cover much of the first-dollar costs before the high-deductible plan's deductible is reached. *See id.* However, the amounts paid out of an HSA are not permitted to be included in the plan's calculation of its medical loss ratio. Given that 94% of those with an HSA will spend less than $5,000 in medical expenses annually, only expenses from roughly 6% of those with an HSA are counted in the medical loss ratio formula. Thus, it is almost mathematically impossible for HSA/high-deductible plans to meet the medical loss ratio in most years.

There is concern that discrimination against HSA plans seems intentional.[8] High-deductible plans are not designed to pay claims below the deductible, nor are they designed to meet a high medical loss ratio. If a high-deductible plan, i.e., a bronze plan, is designed (and priced accordingly) to pay 60% of the cost of benefits, it is arbitrary and discriminatory to require it to pay 80% of its premiums as medical claims. *See* HSA Consulting Services, LLC, *MLR Regulation Creates Challenges for Future of Affordable Coverage* 5 (Dec. 27, 2011). Yet, the interim final regulations do

---

[8] Through public comments and meeting, HHS officials were repeatedly warned that the regulations would effectively put HSAs out of business. *See, e.g.*, HSA Council, Inc., *Comments to the Department of Health and Human Services on the Medical Loss Ratio* (Jan. 31, 2011).

not permit a plan to include, for purposes of its medical loss ratio calculation, any claims incurred for benefits covered below the deductible.[9] *See*, Medical Loss Ratio Requirements Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 76574, 76593 (Dec. 7, 2011) (final rule with comment period) (setting out formula for calculating an issuer's medical loss ratio).

Finally, the Milliman study finds that the PPACA's "unreasonable rate increase" provisions may make it difficult for high-deductible health plans to increase plan premiums. *Id.* at 3. Such rate increases will be necessary if high-deductible health plan deductibles do not increase with medical inflation because the expected annual costs under the high-deductible health plan will increase faster than under a lower deductible plan. *See id.*

II. The PPACA's Provisions And Implementing Regulations Standardize Benefits, Force Consumer-Driven Plans Out Of The Exchanges, And Thereby Take Away The Individual's Freedom Of Choice.

In January 2012, former advisors to the Obama Administration warned of the impending continued

---

[9] Although claims incurred for benefits covered below the deductible cannot be included for purposes of the medical loss ratio calculation, the plan will still incur administrative costs to process these claims, thereby making it even more difficult to reduce its administrative expenses to meet the 80% Medical Loss Ratio.

loss of autonomy and liberty in this area. They predicted that the American health insurance industry will be extinct by 2020 and will be replaced by "accountable care organizations."[10] Ezekiel J. Emanuel & Jeffrey B. Liebman, *The End of Health Insurance Companies*, The New York Times (Jan. 30, 2012) [Emanuel & Liebman]. According to these former advisors, with the advent of accountable care organizations "a new system is on its way, one that will make insurance companies unnecessary" and "health insurers superfluous." *Id.* The "final bonus" they argue is that accountable care organizations will relieve consumers of the need to choose among insurance plans, because these are choices "that few of us are any good at making." *Id.*

The reason that supporters of the PPACA must take away the autonomy and choices of individuals is because "[w]henever consumers have a choice among different insurance arrangements, there is a tendency for people to choose a level of insurance based on their expected need for what is being covered (in this case health care)." Kaiser Family Foundation, *Snapshots: Health Care Costs: Illustrating the Potential Impacts of Adverse Selection on Health Insurance Costs in Consumer Choice Models* (November 2006).

---

[10] An accountable care organization is an organization of health care service providers (e.g., doctors, hospitals, and other providers) that agrees to be accountable as a single agent for the quality, cost, and overall care of enrolled health insurance beneficiaries. The accountable care organization is accountable to third-party payers for the quality, appropriateness and efficiency of the health care provided. PPACA § 3022.

Therefore, to achieve the goals of the individual mandate, regulators must necessarily burden, indeed, take away, most individual autonomy and choice. To accomplish this, consumer-driven health plans must effectively be put out of business. It is no wonder then, that 67% of the American public support the repeal of the individual mandate. *See* Kaiser Family Foundation, *Kaiser Health Tracking Poll* 4 (March 2011). If the still-to-come "essential benefits" and "actuarial value" regulations contain the same bias against consumer-driven plans as does the medical loss ratio regulations, it is clear that no viable low-cost bronze plans will qualify for the Exchanges. However, when these regulations put the nail in the coffin of consumer-driven health plans, the public should not be surprised. In short, the individual mandate will replace individual choice with the government's choices.

A. With Fewer Viable Low-Cost Choices In The Exchanges, Especially At The Bronze Level, Plans Become Standardized, Resulting In No Real Choice For Individuals Complying With The Mandate.

As the Milliman study concluded, the PPACA and implementing regulations unduly burden HSAs and high-deductible health plans. Therefore, insurance companies will be incentivized to offer more expensive plans with more first-dollar coverage in order to easily meet the medical loss ratio requirement or leave the market entirely. *See* Congressional Budget Office, *Budgetary Treatment of Proposals to Regulate Medical Loss Ratios* (Dec. 13, 2009) (discussing the effect of

this "powerful regulatory tool"). As a result, the exchanges will be dominated by more expensive plans. *See id.* ("Such responses would reduce the types, range of prices, and number of private-sector sellers of health insurance. . . .").

If HSAs and high-deductible health plans are effectively eliminated from the Exchanges, the burden on both the individual and the State, in terms of loss of liberty and autonomy and of cost, will grow. The elimination of low-cost, consumer-driven plans will dramatically reduce the affordability of coverage and significantly add to the cost of income-based subsidies provided under the Act.[11] *See* HSA Consulting Services, LLC, *MLR Regulation Creates Challenges for Future of Affordable Coverage* 7 (Dec. 27, 2011).

With few, if any, viable low-cost options, an individual will be forced by the mandate to go outside the Exchange to purchase low-cost insurance, stay within the Exchange and purchase a less discretionary and more expensive plan, or forgo insurance altogether and pay the penalty. All three options result in an unjustifiable loss of individual liberty.

If healthy individuals either forgo insurance or purchase coverage outside of the Exchange, the less healthy will be left in the Exchange, with only the option of more expensive plans.

---

[11] Subsidies are based on the weighted average premiums for silver plans. *See* HSA Consulting Services, LLC, *MLR Regulation Creates Challenges for Future of Affordable Coverage* 7 (Dec. 7, 2011).

Even individuals participating in employer plans are impacted by the elimination of low-cost, consumer-driven health plans. Should employers decide to pay the penalty for not providing health insurance to its workers, even larger numbers of individuals will be dumped into the individual and small group markets. And they will find only the standardized, expensive plans left in the Exchanges from which to choose.

B. The Asserted Goals Of The Individual Mandate Are Insufficient To Justify This Loss Of Liberty.

Healthy individuals, when faced with few viable low-cost choices may simply pay the penalty and remain uninsured (at least until they become sick), thus thwarting the mandate's goal of reduction of the number of uninsured. Or, these healthy individuals will find coverage outside of the Exchange. If the Exchange has a disproportionate share of less healthy individuals remaining, adverse selection will result.[12] As a result, the exchange risk pool will become a less healthy group with greater overall health care expenses. *See* Janet Bauer, Oregon Center for Public Policy, *The Active Purchaser Imperative* (Sept. 8,

---

[12] Adverse selection results when healthy and less healthy individuals separate into different insurance risk pools. *See* Janet Bauer, Oregon Center for Public Policy, *The Active Purchaser Imperative* (Sept. 8, 2011). Healthy individuals are more often able to choose low-cost, consumer-driven plans, while less healthy individuals tend to choose plans with more generous coverage, even though they have higher premiums. *Id.*

2011). To meet the increased amount of health care expenses, the plans in the Exchanges will be forced to increase premiums for the remaining less healthy individuals, thus thwarting the PPACA's asserted goal of more affordable health care for all Americans.[13] When the cost of the remaining plans in the Exchanges increases to account for the risk of the less healthy individuals remaining in the Exchanges, those less healthy individuals will then need increased subsidies to continue to afford coverage.

The discrimination against high-deductible health plans, HSAs, and other consumer-driven plans will result in some insurance companies going out of business. Even prior to the interim final Medical Loss Ratio regulations, the first company to begin providing HSAs laid off 130 workers to begin streamlining for the post-Act marketplace. *See* Assurant Health Press Release, *Assurant Health Announces New Organizational Structure* (Aug. 19, 2010). Post-implementation, some health insurers are dropping out of the individual market completely, while others are cutting back. Merrill Matthews, *ObamaCare Hidden Price Controls Will Hammer Insurers* (Feb. 7, 2012). One report states that "'20,000 small groups, representing as many as 200,000 members' will lose

---

[13] If only 4 out of 1,000 people leave the Exchange, it could result in a 5% difference in the average per-person cost. *See* Bauer, *supra* note 12 (citing Kaiser Family Foundation, *Snapshots: Health Care Costs: Illustrating the Potential Impacts of Adverse Selection on Health Insurance Costs in Consumer Choice Models* (November 2006)).

their coverage" as a result of failure to meet the Medical Loss Ratio. *Id.* This result, while plainly in line with the Obama Administration's goal of making insurance companies unnecessary and health insurers superfluous, *see* Emanuel & Liebman, is at odds with the Government's argument that the mandate "'is necessary' to the end of regulating insurers' underwriting practices without running insurers out of business." Pet. Br. (minimum coverage provision) at 30 (quoting Pet. App. 231a (Marcus, J.)).

Finally, the effective elimination of low-cost, consumer-driven plans from the Exchanges will lead to a less efficient market. Individuals will have fewer choices, and those large companies that are able to remain in the individual and small group markets will face less competition.

CONCLUSION

The Act takes one small step from regulation to direction of commerce, but one giant leap for governmental power over the life and health of every American. Its real consequence for individuals making health care decisions is sharply restricted personal choice and a substantial infringement of individual liberty.

The judgment of the court of appeals invalidating the minimum coverage provision should be affirmed.

Respectfully submitted,

ED R. HADEN
Counsel of Record
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, AL 35203-4642
(205) 226-8795
ehaden@balch.com
Counsel for Amici Curiae

February 13, 2012

AMICUS CURIAE BRIEF

No. 11-398

IN THE

Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

FLORIDA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE INDEPENDENT WOMEN'S FORUM IN SUPPORT OF RESPONDENTS (Individual Mandate)

MEIR KATZ
P.O. Box 20828
Baltimore, MD 21209
MKatzLitigation@gmail.com

KEVIN J. HASSON
Counsel of Record
1875 I Street, NW
Suite 500
Washington, DC 20006
(202) 841-2981
KevinJHasson@gmail.com

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether the minimum coverage provision of the Affordable Care Act exceeds Congress' powers under Article I of the Constitution?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS* 1

CONSTITUTIONAL AUTHORITY 2

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Commerce Power Exists in Order to Secure the People's Freedom from State Protectionism 5

II. The Commerce Power is Limited in Order to Secure the People's Freedom from Federal Centralization of the Marketplace 7

III. Congress' Assertion of Total Power Over Health Care Delivery Improperly Centralizes the Marketplace of Goods, Services—and Ideas 12

A. The Affordable Care Act Improperly Centralizes the Marketplace Concerning Health Care Delivery Systems 13

B. The Affordable Care Act Improperly Centralizes the Marketplace Concerning Important Moral and Social Issues 16

1. Abortion 17

2. Sterilization, Contraception, and Abortion-Inducing Drugs 21

3. End-of-Life Decisions 25

CONCLUSION 30

Table of Authorities

Cases **Page**

Alden v. Maine,
527 U.S. 706 (1999) 7

Belmont Abbey College v. Sebelius,
No. 11-cv-1989 (D.D.C. filed Nov. 10, 2011) 25

Bond v. United States,
131 S. Ct. 2355 (2011) 2, 7, 11, 29

City of Boerne v. Flores,
521 U.S. 507 (1997) 3, 8

Colorado Christian University v. Sebelius,
No. 11-cv-3350
(D. Colo. filed Dec. 22, 2011) 25

Cruzan v. Director, Missouri Dept. of Health,
497 U.S. 261 (1990) 27

Eternal World Television Network v. Sebelius,
No. 12-cv-00501
(N.D. Ala. filed Feb. 9, 2012) 24

Gonzales v. Raich,
545 U.S. 1 (2005) 6

Harris v. McRae,
448 U.S. 297 (1980) 21

Hillsborough County v. Automated Medical Laboratories, Inc.,
471 U.S. 707 (1985) 13

H.P. Hood & Sons, Inc. v. Du Mond,
336 U.S. 525 (1949) 5

J. McIntyre Machinery v. Nicastro,
131 S. Ct. 2780 (2011) 29

Jacobson v. Massachusetts,
197 U.S. 11 (1905) 13

Near v. Minnesota,
283 U.S. 697 (1931) 10

New York v. United States,
505 U.S. 144 (1992) 7, 11

New York Times Co. v. United States,
403 U.S. 713 (1971) 3, 10-11

Planned Parenthood v. Casey,
505 U.S. 833 (1992) 21

Printz v. United States,
521 U.S. 898 (1997) 11-12

Stenberg v. Carhart,
530 U.S. 914 (2000) 21

United States v. Lopez,
514 U.S. 549 (1995) 12-13

United States v. Penn,
647 F.2d 876 (9th Cir. 1980) 25

Washington v. Glucksberg,
521 U.S. 702 (1997) 27, 29

Constitution

U.S. Const. art. I, § 8, cl. 3
(Commerce Clause) ..... *passim*

U.S. Const. amend. XIV, § 5 ..... 2, 7-8

Statutes and Regulations

26 U.S.C. § 1402(g) 20

26 U.S.C. § 5000A 19

26 U.S.C. § 5000A(d) 20

42 U.S.C. § 300gg-13(a)(4) 21

42 U.S.C. § 1395x(u) 26

42 U.S.C. § 1395kkk(b) 26

42 U.S.C. § 1395kkk(c)(2) 26

42 U.S.C. § 1395kkk(c)(2)(ii) 26

42 U.S.C. § 1395kkk(d)(4) 26

42 U.S.C. § 1395kkk(e) 26

42 U.S.C. § 18021 17

42 U.S.C. § 18023 17

42 U.S.C. § 18023(a) 17, 19-20

42 U.S.C. § 18023(b)(1)(A)(ii) 17

42 U.S.C. § 18023(b)(2)(A) 18

42 U.S.C. § 18023(b)(2)(B)-(C) 18

42 U.S.C. § 18023(b)(2)(C)(ii)(II) 18

42 U.S.C. § 18023(b)(2)(D)(ii) 19

42 U.S.C. § 18023(b)(3) 20

42 U.S.C. § 18054(a)(6) 19

45 C.F.R. § 147.130(a)(1)(iv) 22-23

45 C.F.R. § 147.130(a)(1)(iv)(B)(2)-(3) 22-23

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (Affordable Care Act) ..... *passim*

Other Authorities

Armando Silvestrini-Biavati, et. al.,
Manual Orthodontic vs. Oscillating-Rotating Electric Toothbrush in Orthodontic Patients: A Randomised Clinical Trial, 11 Eur. J. Pediatric Dentistry 200 (2010) 11

Betsy McCaughey,
Obama's Health Rational-in-Chief, N.Y. Times, Aug. 27, 2009 28

Brief of the United States, Secret Portion
New York Times Co. v. United States, 403 U.S. 713, Nos. 1873, 1885 (June 1971) ... 8-10

Centers for Medicare and Medicaid Services,
Medicare: Overview, Jan. 20, 2012 25-26

The Commonwealth Fund,
Utah Health Exchange, States in Action, Feb.-Mar. 2011 14-15

Donald R. Hoover, et al.,
Medical Expenditures During the Last Year of Life: Findings from the 1992–1996 Medicare Current Beneficiary Survey, 37 Health Services Res. 1625 (2002) 27

Edmund Haislmaier,
State Health Reform: The Significance of Utah Health Insurance Reforms, The Heritage Foundation, July 29, 2009 15

Editorial,
Respecting Religious Exemptions,
Wash. Post, Jan. 23, 2012 23

Exec. Order No. 13,535,
75 Fed. Reg. 15,599 (Mar. 24, 2010) 18

Ezekiel Emanuel,
The Cost-Coverage Trade Off,
299 JAMA 947 (2008) 28

Ezra Parmalee Prentice & John Garret Egan,
The Commerce Clause of the Federal Constitution (1898) 5

The Federalist No. 11 5

The Federalist No. 42 5

The Federalist No. 45 5-6

Health Resources and Services Administration,
Women's Preventive Services: Required Health Plan Coverage Guidelines 22

H.R. 3590, 111th Cong. § 1303(a)(1)(D) (2010) 19

Institute of Medicine,
Clinical Preventive Services for Women (2011) 22

Institute of Medicine,
Women's Preventive Services Recommended by IOM to be Covered Under Affordable Care Act 22

Joseph Story,
Commentaries on the Constitution of the United States 5

Leonard M. Fleck,
Just Health Care Rationing: A Democratic Decisionmaking Approach, 140 U. Pa. L. Rev. 1597 (1992) 27

Meir Katz,
Towards a New Moral Paradigm in Healthcare Delivery: Accounting for Individuals, 36 Am. J.L. & Med. 78 (2010) 19

National Committee for a Human Life Amendment, *The Hyde Amendment* 21

Oregon Health Authority,
Current Prioritized List of Health Services . 15-16

Oregon Health Authority,
The Prioritized List 16

Ricardo Alonso-Zaldivar,
End-of-Life Planning Dropped from Medicare Checkup Rules, Wash. Post, Jan. 6, 2011 25

United States Conference of Catholic Bishops, *Bishops Renew Call to Legislative Action on Religious Liberty*, Feb. 10, 2012 24

Utah Governor's Office of Economic Development, *An Overview of the Utah Health Exchange* 14

Utah Health Exchange, *Overview* 14

White House Office of the Press Secretary, *Fact Sheet: Women's Preventive Services and Religious Institutions*, Feb. 10, 2012 23

INTEREST OF THE *AMICUS*[1]

Amicus, The Independent Women's Forum, is a non-partisan, 501(c)(3) research and educational institution that believes women and their families are best served by greater economic and personal freedom and limited government. *Amicus* is gravely concerned that the Affordable Care Act represents a significant, unconstitutional increase in federal power, which if allowed to stand will limit competition, stifle debate and thus deprive us of the liberties and opportunities we would otherwise enjoy.

---

[1] The parties have consented to the filing of this brief, and such consents are on file with the Court. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus*, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

CONSTITUTIONAL AUTHORITY

The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . . U.S. Const. art. I, § 8, cl. 3.

SUMMARY OF ARGUMENT

The principal reason for giving the commerce power to Congress was to equip it to overcome the various protectionist schemes adopted by the States under the Articles of Confederation. The Commerce Clause was born with a pro-competition bias.

The commerce power is limited in order to secure the people's freedom from undue federal centralization. The Constitution reserves to the States the power over all matters not delegated to the federal government. Thus, the federalist structure of the Constitution functions by "protecting the integrity of the governments themselves," and also by "protecting the people, from whom all governmental powers are derived." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

This Court has consistently insisted that this structure be respected and that the federal government's enumerated powers remain within their due limits. In particular, this Court has refused to allow federal power to expand merely because of the magnitude or the urgency of the particular issue at hand. For example, it has insisted on adherence to the limits to section five of the Fourteenth Amendment, regardless of how worthy the

underlying civil rights project might be. *City of Boerne v. Flores*, 521 U.S. 507 (1997). Similarly, it has refused to allow the federal government to trespass into the people's liberties protected by the Press Clause, notwithstanding dire predictions of immediate and irreparable harm to national security. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam). So too here. The scope and urgency of the problems allegedly solved by the Affordable Care Act are simply beside the point when the question is whether Congress has exceeded the limits of its power under the Commerce Clause.

A federalism properly conceived respects the free marketplace—a marketplace not just of goods and services, but also of the political ideas necessarily bound up with them. When the Affordable Care Act monopolizes the marketplace concerning health care delivery, it also quashes debate on several profound issues. The most obvious of these issues are the conceptions of justice, charity, liberty, and life itself at stake in health care delivery. To illustrate, the States of Utah and Oregon have adopted very different models to further their citizens' access to health care. These models diverge significantly—both in terms of their structure and in terms of their underlying theory. Utah has adopted a strict, market-based approach, emphasizing access to information and consumer choice. Oregon directly insures qualifying low-income adults and seeks to control costs by rigorously prioritizing and selectively funding particular medical services. The Affordable Care Act largely preempts both—and so closes the laboratory of state innovation—while preempting debate on the larger, crucial questions of how and

why we should choose one system over another to begin with.

Indeed, the Affordable Care Act goes out of its way to nationalize and impose a single federal answer to a number of highly charged questions: Are abortion, sterilization, morning-after pills, and contraception part of the good life that should be available to all, free of charge? Should such availability be subsidized by those who have deep-seated religious convictions to the contrary? To what extent should people be able to dictate their treatment options at the end of their lives? These are big questions that should be open for debate. They should not be summarily silenced by centralized federal authority.

For the federal government to so centralize such a vast area of our nation's economy at the same time it centralizes the answers to such profound moral, philosophical, and religious questions is symptomatic of a pathological breakdown in federalism. It points clearly to a Congress that has breached the limits of its power under the Commerce Clause.

ARGUMENT

The parties and other *amici* will debate the specific boundaries of the commerce power. Our objective is to explain why the commerce power exists at all, why it is limited, and why those limitations are still required to secure the people's freedom.

I. The Commerce Power Exists in Order to Secure the People's Freedom from State Protectionism

The principal motivation for granting Congress its commerce power was the need to dismantle the economic barricades of competing duties, tariffs, and taxes erected by the States under the Articles of Confederation. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-34 (1949) (opinion by Jackson, J.) (recounting history). Indeed, investigating what was to be done about such barriers to trade was the "sole purpose for which Virginia initiated the movement which ultimately produced the Constitution." *Id.* And New Jersey, which had largely foreseen the problems created by the absence of a federal commerce power, objected to the adoption of the Articles of Confederation in part because they denied to Congress the power to regulate foreign commerce. Joseph Story, *Commentaries on the Constitution of the United States*, § 259 n.1.

In the "more perfect Union" envisioned by the Framers, Congress would be empowered—via the Commerce Clause—to put an end to the States' economic abuses. Ezra Parmalee Prentice & John Garret Egan, *The Commerce Clause of the Federal Constitution* 1-3 (1898); *see also* The Federalist No. 11 (Alexander Hamilton); Nos. 42, 45 (James Madison).

In short, the Commerce Clause was born with a pro-competition bias. That is not to say, of course, that all valid exercises of the commerce power must favor unfettered competition in wide open markets.

See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding as a valid exercise of the commerce power a statute that closed down the interstate market in marijuana). It is to say that rabidly anti-competitive legislation allegedly authorized by the Commerce Clause should be viewed with suspicion. It may not, by itself, be sufficient to make a diagnosis, but it is certainly a worrisome symptom.

Giving Congress the power to regulate interstate and foreign commerce was not at all controversial, either during the Constitutional Convention or in the ratification debates. Madison said that while the commerce power was admittedly "an addition" to the federal powers, it was one "which few oppose, and from which no apprehensions are entertained." The Federalist No. 45 (James Madison). In other words, everyone was fed up with the States' protectionism. And, anyway, who could imagine any mischief resulting from the power to regulate interstate commerce, of all things?

Notwithstanding the general optimism, Madison was adamant: The Constitution—Commerce Clause and all—reserved to the States power over "all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45 (James Madison).

II. The Commerce Power is Limited in Order to Secure the People's Freedom from Federal Centralization of the Marketplace

As this Court has recently emphasized, the federalist structure of the Constitution operates not only by "protecting the integrity of the governments themselves," but also by "protecting the people, from whom all governmental powers are derived." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). "State sovereignty," the Court explained, "is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Id.* (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)) (internal quotation marks omitted).

Similarly, the Constitution and its ratifiers "insisted upon a federal structure for the very purpose of rejecting the idea that the will of the people in all instances is expressed by the central power, the one most remote from their control." *Alden v. Maine*, 527 U.S. 706, 759 (1999).

Thus, this Court has repeatedly insisted that the federal powers remain contained within their assigned boundaries, even in the face of great and urgent national problems. The Fourteenth Amendment, proposed and ratified in the wake of the Civil War, greatly altered the balance of power between the federal and state governments. And, if over-generously construed, it could have all but obliterated it. Section five of the Fourteenth Amendment granted Congress the authority to enact

laws to "*enforce* . . . the provisions of this article." U.S. Const. amend. XIV, § 5 (emphasis added). The great temptation courts have faced in construing section five is similar to that occasioned by Commerce Clause cases—to turn the provision into a blank check of federal power in order to engage some exigency or other. This is all the more true in Fourteenth Amendment cases since the circumstances surrounding its adoption were nothing less than Reconstruction, and issues concerning the interpretation to be given to section five inevitably arise in civil rights cases. This Court has nonetheless insisted that section five's grant of power to Congress is limited—limited to the "enforcement" of the Amendment's provisions. And "enforcement" (like "regulation") is no blank check. Enforcement must be "remedial" and must be both "congruen[t] and proportional[]" to the injury being remedied. *City of Boerne v. Flores*, 521 U.S. 507, 519-22 (1997).

Where there is no cognizable injury to be remedied, Congress lacks the power to act under the Fourteenth Amendment, even where acting would seem to serve the broadly defined purposes of the Amendment. *Id.* So too with the Commerce Clause. Its limits do not vary according to the greatness of the cause for which it is invoked.

Nor do the limits of federal power depend on how urgently the federal government presses its case. In 1971, as the New York Times and Washington Post were set to publish excerpts of the "Pentagon Papers," documents concerning the Vietnam War produced by the Department of Defense and classified as "Top Secret—Sensitive," the federal

government sought a prior restraint against their publication. In the secret portion of its briefing to this Court, the federal government declared that publication of certain portions of the Pentagon Papers would cause "immediate and irreparable harm to the security of the United States." Brief of the United States, Secret Portion, at 3, *New York Times Co. v. United States*, 403 U.S. 713, Nos. 1873, 1885 (June 1971), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB48/griswoldbrief.pdf (last visited Feb. 12, 2012).

Per the government's brief, publication of the sensitive portions of the Pentagon Papers could have (1) compromised on-going negotiations with citizens and government officials in certain foreign nations (some of whom had been negotiating without consent of their governments); (2) offended certain governments through the publication of derogatory statements about particular people; (3) jeopardized or retarded the United States' ability to continue to withdraw troops from Vietnam; (4) compromised the anonymity and security of CIA operatives then active in Southeast Asia; (5) compromised military plans by the Southeast Asia Treaty Organization ("SEATO") to address "communist armed aggression" in Southeast Asia and, potentially, future military cooperation between the United States and SEATO's member nations; (6) revealed to Soviet intelligence information about the capabilities of the United States' intelligence; (7) otherwise harmed the United States' diplomatic relations with the Soviet Union and other nations; (8) breached the trust of military officials in South Vietnam and Laos; and (9)

frustrated negotiations to free prisoners of war. *Id.* at 4-10.

The federal government's national security arguments there were certainly at least as pressing as the economic arguments it makes here. Nevertheless, the Court held in *New York Times* that, notwithstanding the weight of those arguments, the federal government had not met the "heavy burden of showing justification for the imposition of [a prior] restraint." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (internal citation omitted).

Justice Black explained his vote elegantly: "[F]or the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says . . . ." *Id.* at 715 (Black, J., concurring). Justice Brennan put it only slightly more prosaically. The First Amendment, he wrote, "tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." *Id.* at 725-26 (Brennan, J., concurring) (citing *Near v. Minnesota*, 283 U.S. 697, 713 (1931), for the proposition that the "chief purpose of [the First Amendment's] guaranty [is] to prevent previous restraints upon publication" (alternations in original)).

In short, it doesn't matter how great the cause or how urgent the issue. The Commerce Clause gives Congress only limited power to regulate interstate commerce, not plenary power to solve national problems by whatever means are closest to hand. It,

too, "mean[s] what it says." *Id.* at 715 (Black, J., concurring); *see also New York v. United States*, 505 U.S. 144, 187 (1992) ("[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.") [2]

The limits on the federal commerce power protect freedom in less obvious ways as well. "Federalism secures the freedom of the individual. It allows States to respond . . . to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond* 131 S. Ct. at 2364. The federalism that is maintained by restricting Congress to its limited role under the Commerce Clause is thus one that preserves individuals' economic freedom as well as the freedom of the marketplace itself. That freedom includes respecting individuals' ability to "shap[e] the destiny of their own times" by urging state governments to experiment with potential solutions to the problems of the day. *Id.*; *see also Printz v. United States*, 521 U.S. 898, 919-20 (1997) ("[T]he Framers rejected the concept of a central government that would act upon

---

[2] Suppose that Congress determined that the rapidly rising costs of dental hygiene were a major drain on our economy and that electronic toothbrushes are more efficient than manual toothbrushes. (Such things are not impossible. *Cf.* Armando Silvestrini-Biavati, et. al., *Manual Orthodontic vs. Oscillating-Rotating Electric Toothbrush in Orthodontic Patients: A Randomised Clinical Trial*, 11 Eur. J. Pediatric Dentistry 200 (2010).) Could Congress, under any of its enumerated powers, lawfully compel each citizen to buy a specific toothbrush?

and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people."). The States are, after all, "laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

In other words, a properly understood federalism maintains a free marketplace not just of goods and services, but also a free marketplace of the political ideas inextricably tied to them. By contrast, legislation that closes markets in both goods and services and in their underlying ideas is symptomatic of a breakdown of true federalism.

III. Congress' Assertion of Total Power Over Health Care Delivery Improperly Centralizes the Marketplace of Goods, Services—and Ideas

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 ("Affordable Care Act"), monopolizes the marketplace concerning health care delivery. In a purely fiscal sense, the new federal monopoly is obvious. It prevents the States from fielding alternative models of health care delivery that differ significantly from those of the other States and from the federal government. Such diversity of thought was highly prized by the Framers and remains essential. But the Affordable Care Act "forecloses the States from experimenting and exercising their own

judgment in an area to which States lay claim by right of history and expertise." *See Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); *see also Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (observing that the regulation of public health is a police power traditionally within the power of the States and was not surrendered by them upon "becoming a member of the Union under the Constitution."); *cf. Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985) ("[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern.").

It bears emphasis, however, that it is not just fiscal issues that are at stake in the present assertion of congressional power. Health care is not merely the "widget" of classroom fame, a hypothetical, all-purpose, and all-fungible unit of commerce. Rather, health care issues are inescapably fraught with issues of philosophy, morality, and religious exercise. The decision of how to deliver health care calls into question the underpinnings of what constitutes justice, charity, liberty, and the good life, to name but a few.

A. The Affordable Care Act Improperly Centralizes the Marketplace Concerning Health Care Delivery Systems

The Affordable Care Act asserts that in the United States, health care will hereafter be provided as Congress and the Secretary of Health and Human Services instruct. The congressional method might not be the best one. It is certainly not the only one.

But Congress' power grab forecloses testing of alternative methods. We offer two examples from opposite ends of the spectrum:

The State of Utah opted to reform its health care delivery system by granting greater autonomy to consumers and granting them access to information. The Utah Health Exchange is designed to be a market-based system, driven by consumers rather than government. Utah Governor's Office of Economic Development, *An Overview of the Utah Health Exchange*, http://www.goed.utah.gov/site-media/page-media/files/An_Overview_of_the_Utah_Health_Exchange_final.pdf (last visited Feb. 12, 2012).

Indeed, Utah's health exchange is barely more than a web portal, Utah Health Exchange, *Overview*, http://exchange.utah.gov/about-the-exchange/overview (last visited Feb. 12, 2012), through which (1) participating businesses make a defined contribution to subsidize the health insurance of their employees and (2) employees select among competing health insurance plans and benefits. If the employee wants a plan with a price tag higher than the employer's contribution, the employee has the option of paying the difference. The Commonwealth Fund, *Utah Health Exchange*, States in Action, Feb.-Mar. 2011, http://www.commonwealthfund.org/Newsletters/States-in-Action/2011/Mar/February-March-2011/Snapshots/Utah.aspx.

Utah's exchanges are significantly different from the complex network created by the Affordable Care Act.

> Compared with the requirements of the Affordable Care Act . . . in standardizing benefit design and setting and monitoring cost and quality standards, the Utah Health Exchange's approach has been more passive, letting the private market compete under limited oversight and guidelines. Working with a very modest budget ($650,000 annual allotment from the state), administrators view their exchange as first and foremost a technical platform, whereby the state contracts with private companies that own and run the software.

Id.[3]

Have Utah's measures met their goals of both increasing access and decreasing costs? We may never know. The program piloted in 2010 and will soon be preempted by the Affordable Care Act.

At the other end of the spectrum, Oregon has adopted a quite different model. It seeks to control costs by directly insuring qualifying low-income adults. In order to control costs, the State created an agency that prioritizes various medical services, literally ranking them in order of their priority as determined by that agency. Oregon Health

---

[3] For more on Utah's reform program, see Edmund Haislmaier, *State Health Reform: The Significance of Utah Health Insurance Reforms*, The Heritage Foundation, July 29, 2009, http://www.heritage.org/research/reports/2009/07/state-health-reform-the-significance-of-utah-health-insurance-reforms.

Authority, The Prioritized List, http://www.oregon.gov/OHA/healthplan/priorlist/main.shtml (last visited Feb. 12, 2012). The state legislature appropriates a certain amount of money to operate the Oregon Health Plan and, presumably based on historical data, the plan determines which items on the prioritized list it can afford to cover. It draws a line—currently after priority number 498 of 692—and all medical services that appear below that line receive no coverage under the plan. Oregon Health Authority, Current Prioritized List of Health Services, http://www.oregon.gov/OHA/OHPR/HERC/Current-Prioritized-List.shtml (last visited Feb. 12, 2012).

The federal plan will largely supplant Oregon's. While we would not have chosen it, Oregon's legislators did. They should be free to experiment. And, provided that Oregon rigorously studies its program and releases reliable data on it, we all benefit from their efforts. The Affordable Care Act will end that experimentation.

B. The Affordable Care Act Improperly Centralizes the Marketplace Concerning Important Moral and Social Issues

What is more, the Affordable Care Act actually goes out of its way to nationalize and impose a single answer to the highly-charged questions of whether abortion, sterilization, morning-after pills, and contraception generally should be subsidized by virtually all Americans, regardless of their consciences and religious beliefs. It will no doubt do

the same for end-of-life issues. This is nothing short of a legal and societal earthquake.[4]

1. Abortion

Section 1303 of the Affordable Care Act, as amended, 42 U.S.C. § 18023, coerces private subsidization of abortion. It does so by compelling private individuals to pay into a fund that will be used solely for abortion coverage, while not even adequately informing them of that development. It provides no exemption for those conscientiously opposed to abortion.

The Affordable Care Act permits the issuer of a "qualified health plan"—a term defined by 42 U.S.C. § 18021 to include essentially *every* health plan not otherwise exempted by the Affordable Care Act—to provide abortion coverage. § 18023(b)(1)(A)(ii). And while the issuer's decision to include abortion within its coverage is subject to veto by the State in which the plan is offered, § 18023(a), individual conscientious objectors—those who are actually required to *pay* for the abortion coverage—are offered no such option. For them, whether their plan includes abortion coverage or not is merely a confluence of events that, for most people, are only partially under their control.

---

[4] *Amicus* takes no position on the ultimate answers to these moral and social questions. We simply urge that individuals continue to have the opportunity to discuss and debate them and draw their own conclusions. And we take strong exception to the federal government's efforts to preempt the discussions, shut down the debates, and impose on the people its own preferred answers to these questions.

The Affordable Care Act provides that funding for abortion coverage will be segregated from the general funds of plans providing that coverage. § 18023(b)(2)(B)-(C). Funds for "abortions for which public funding is prohibited" (that is, all abortions other than those sought following an act of rape or incest or when the life of the mother is endangered, *see* Exec. Order No. 13,535, 75 Fed. Reg. 15,599 (Mar. 24, 2010)) (hereafter "non-exempted abortions"), must be collected separately and retained in separate accounts. § 18023(b)(2)(C). Because federal funds may not be used to cover non-exempted abortions, § 18023(b)(2)(A), the funding for non-exempted abortions must come from plan participants.

In order to ensure adequate funding for abortion coverage, the Affordable Care Act *mandates* that issuers of plans providing coverage for non-exempted abortion collect money for that coverage from each enrollee. § 18023(b)(2)(B). That money will go into a segregated account to be used for the sole purpose of paying for non-exempted abortions. § 18023(b)(2)(C)(ii)(II).

Importantly, *all* members of the plan are required to pay into the segregated account that will be used, perhaps against their will and perhaps even without their prior knowledge, to fund non-exempted abortions. The Affordable Care Act requires plan issuers to "collect from each enrollee in the plan *(without regard to the enrollee's age, sex, or family status)* a separate payment for . . . an amount equal to the actuarial value of the coverage of [non-exempted abortions]." § 18023(b)(2)(B) (emphasis

added). That actuarial value is defined statutorily to be not less than "$1 per enrollee, per month," § 18023(b)(2)(D)(ii), thus guaranteeing that each enrollee in such a plan will pay something from their own funds every month to subsidize the non-exempted abortions of enrollees.

The abortion provisions, read together with the individual mandate, 26 U.S.C. § 5000A, compel the subsidization of abortion by nearly every U.S. citizen, national, and legal alien.

Objecting individuals do not necessarily have the option of enrolling in qualified care that does not provide abortion. First, individuals who will receive insurance coverage through their employers might not be permitted to choose their health plan. (Under the current regime, health insurance contracts between employers and employees are quite often unilateral "take-it-or-leave-it" contracts. Meir Katz, *Towards a New Moral Paradigm in Healthcare Delivery: Accounting for Individuals*, 36 Am. J.L. & Med. 78, 82 & n.13-15 (2010)).

Second, the Affordable Care Act does not ensure the existence of an option to join a plan that does not subsidize abortion. A prior version of the Act, one passed by the House of Representatives, would have mandated that each health insurance market contain at least one plan that does not offer abortion coverage. H.R. 3590, 111th Cong. § 1303(a)(1)(D) (2010). But, as adopted, the Act contains only a watered-down version of that provision, ensuring choice only with respect to multi-state plans. 42 U.S.C. § 18054(a)(6). Thus, in States that opt not to

ban abortion coverage, *see* § 18023(a), or where no multi-state plan option exists, nearly all citizens, nationals, and legal aliens will be required to individually and directly subsidize abortion.

Not only does the Affordable Care Act compel private subsidy of abortion, it does so without providing adequate notice to the compelled supporters. The Act requires plans that cover non-exempted abortions to notice enrollees "*only* as part of the summary of benefits and coverage explanation, at the time of enrollment." § 18023(b)(3) (emphasis added). By implication, further disclosure is prohibited.

Moreover, the Act goes out of its way to camouflage the abortion subsidies that it compels. The Act mandates that advertising used by the plan's issuer and information provided by the insurance exchange(s) in which it participates "shall provide information only with respect to the total amount of the combined payments for services." *Id.* In other words, the abortion subsidy will not receive a separate line item or be otherwise identified. As a result, the public will be uninformed and participants will have a limited ability to figure out that they are personally and directly subsidizing abortion.[5]

---

[5] This might not have been unintentional. The individual mandate exempts people who conscientiously object to accepting the benefits of public or private insurance generally. 26 U.S.C. § 5000A(d); 26 U.S.C. § 1402(g). It does not exempt people who conscientiously object to abortion. The drafters of the Act clearly knew how to create an exemption and opted instead to compel private subsidy of abortion as broadly as possible.

There is a good reason that non-exempt abortion is described by the Affordable Care Act as "abortion for which public funding is prohibited." Congress has prohibited the federal government from financing abortions at least since the Hyde Amendment was first enacted in 1976. *See* National Committee for A Human Life Amendment, *The Hyde Amendment*, http://www.nchla.org/datasource/ifactsheets/4FSHydeAm22a.08.pdf (Apr. 2008). This Court upheld the constitutionality of that congressional practice in 1980. *Harris v. McRae*, 448 U.S. 297 (1980). Congress presumably decided to so restrict funding for abortion because of the "profound moral and spiritual implications" tied up in abortion decisions. *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992).

"Millions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child." *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000). Their moral objections should not be summarily silenced by centralized national health care.

2. Sterilization, Contraception, and Abortion-Inducing Drugs

A seemingly innocuous provision of the Affordable Care Act, 42 U.S.C. § 300gg-13(a)(4), provides that group health plans and health insurance issuers offering group or individual coverage must provide women free coverage for "preventive care and screenings . . . as provided for in comprehensive guidelines" to be issued subsequently through administrative regulation. In interpreting

"preventive care" for the purpose of issuing its regulations, HHS sought the recommendations of the Institute of Medicine (IOM), an outside research organization. When the IOM recommended that HHS mandate that all covered insurance providers offer, free to the insured, "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity," Institute of Medicine, *Clinical Preventive Services for Women* 102-110 (2011), *available at* http://books.nap.edu/openbook.php?record_id=13181, HHS formally adopted those recommendations in less than two weeks. Institute of Medicine, *Women's Preventive Services Recommended by IOM to be Covered Under Affordable Care Act*, http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps/Action-Taken.aspx (last visited Feb. 12, 2012).

HHS's final regulations thus interpret "preventive care and screenings," to extend well past screening for breast and cervical cancer, to include "contraceptive methods[and] sterilization procedures." *See* 45 C.F.R. § 147.130(a)(1)(iv) (referring to "binding comprehensive health plan coverage guidelines" to be published independently); Health Resources and Services Administration, *Women's Preventive Services: Required Health Plan Coverage Guidelines*, http://www.hrsa.gov/womensguidelines (last visited Feb. 12, 2012).

The regulations permit the *discretionary* grant of exemptions to only those providers that meet each of

four criteria which, taken together, appear to apply only to churches and monasteries. 45 C.F.R. § 147.130(a)(1)(iv). Religious organizations that have a *bona fide* conscientious objection to the free provision of contraception but, for example, employ members of other faiths or serve the general public cannot receive an exemption. *See* 45 C.F.R. § 147.130(a)(1)(iv)(B)(2)-(3). Their options are to forego their beliefs, pay massive fines, or cease to exist.

After many religious organizations protested that the regulations compelled the violation of their religious convictions, HHS revised the regulations. But only a little—by one year to be exact. The administration "feint[ed] at a compromise" with such organizations by awarding them "another year to figure out how to . . . spend their own money in a way that contradicts the tenets of their faith." Editorial, *Respecting Religious Exemptions*, Wash. Post, Jan. 23, 2012, at A16.

This change did little to satisfy the religious community, so the President has just announced yet another one. The President decreed the regulations would be changed. Those regulations would now require insurance carriers for religious "charities" and schools to affirmatively offer, free of charge, the coverage in question to the religious organizations' employees. White House Office of the Press Secretary, *Fact Sheet: Women's Preventive Services and Religious Institutions*, Feb. 10, 2012, http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions.

But even assuming this is a valid use of the Executive's authority, the underlying economic reality will not have changed. The same insurance companies will be providing the same benefits to the same individuals. What is more, unless those insurance companies—and their shareholders—are prepared to forego some of their profit, they will necessarily be charging the same religious employers the same premiums as before. The only difference is there will not be any awkward line items for contraceptive services etc. on the invoices.

Moreover, even taken on its own terms, the President's new policy does nothing for the large number of religious organizations that self-insure their employees and are thus both the employer and the insurer. It likewise does nothing for for-profit organizations, such as religious bookstores, or for the large numbers of conscientious objectors in the general economy. *See* United States Conference of Catholic Bishops, *Bishops Renew Call to Legislative Action on Religious Liberty*, Feb. 10, 2012, http://www.usccb.org/news/2012/12-026.cfm.

In short, the problems with the President's ever-changing program are not subsiding, they are multiplying. They are further symptoms of the constitutional infirmity of the Affordable Care Act itself.

At least three federal lawsuits challenging the contraceptive mandate are currently pending under the Religious Freedom Restoration Act and the Free Exercise Clause. *Eternal World Television Network v. Sebelius*, No. 12-cv-00501 (N.D. Ala. filed Feb. 9,

2012); *Colorado Christian University v. Sebelius*, No. 11-cv-3350 (D. Colo. filed Dec. 22, 2011); *Belmont Abbey College v. Sebelius*, No. 11-cv-1989 (D.D.C. filed Nov. 10, 2011).

Whether contraception ought to be available free of charge to all who want it is an important and complex social question that ought to be left open to debate. We fear that the failures by Congress and the Executive Branch to exempt conscientious objectors is but a "precursor of the state's hostility" to ideas that it disagrees with. *See United States v. Penn*, 647 F.2d 876, 889 (9th Cir. 1980) (en banc) (Kennedy, J., dissenting).

3. End-of-Life Decisions

Similarly, the Affordable Care Act will inevitably give to the federal government influence over countless decisions relating to end-of-life care. While neither the Act itself nor HHS's current regulations yet compel end-of-life "counseling," (despite a considerable effort by Congress and the Executive Branch to include the same), Ricardo Alonso-Zaldivar, *End-of-Life Planning Dropped from Medicare Checkup Rules*, Wash. Post, Jan. 6, 2011, the federal government's increased involvement in medicine and determination to cut costs is destined to lead to a greater involvement in medical choices, including those relating to end-of-life care.

Obviously, the federal government already has control over Medicare coverage limitations, *see* Centers for Medicare and Medicaid Services, *Medicare: Overview*, Jan. 20, 2012,

http://www.cms.gov/CoverageGenInfo, and thus has great latitude to deny coverage for treatment that it deems wasteful. And the Affordable Care Act plainly indicates an intent to exercise that latitude by creating the "Independent Medicare Advisory Board," the purpose of which is to "reduce the per capita rate of growth in Medicare spending." 42 U.S.C. § 1395kkk(b). While the Advisory Board may not recommend any "restrict[ion of] benefits or modif[ication of] eligibility criteria, § 1395kkk(c)(2)(ii), it may recommend the reduction of reimbursement rates to physicians and, starting in 2019, hospitals. *See* § 1395kkk(c)(2); 42 USC § 1395x(u). Reducing physician reimbursement rates on particular procedures will have precisely the same effect as overt rationing as many physicians will be unwilling to offer services for which they will inadequately compensated.[6]

But the federal government's influence over the health industry extends far beyond actually denying coverage or instituting other rationing measures. The Affordable Care Act places the regulation of health care (for the entire population, not just the elderly and poor) within the ambit of the federal government. The government will no doubt seek to create disincentives to the provision of private care that it deems wasteful.

---

[6] Per the terms of the Affordable Care Act, the Advisory Board's "recommendations" are subject to limited debate by the Senate, 42 U.S.C. § 1395kkk(d)(4), and automatically become law unless Congress takes affirmative action to the contrary. 42 U.S.C. § 1395kkk(e).

End-of-life care occupies a considerable percentage of total health care expenditures—by some estimates, 22%. Donald R. Hoover, et al., *Medical Expenditures During the Last Year of Life: Findings from the 1992–1996 Medicare Current Beneficiary Survey*, 37 Health Services Res. 1625, 1635 (2002). And 26% of the annual Medicare budget is used on the same population. *Id.* at 1635-36. Roughly 30% of those terminal-year expenses are made in the final month of life. *Id.* at 1636. Reducing the expenses of end-of-life care thus becomes an attractive goal for those dedicated to reduce total medical expenses.

The federal government's influence has tremendous moral and social implications. It might decide, as the United Kingdom did, to deny (or create disincentives for) coverage for dialysis to patients over sixty-five years old or to patients with other health complications who are just fifty-five years old. *See* Leonard M. Fleck, *Just Health Care Rationing: A Democratic Decisionmaking Approach*, 140 U. Pa. L. Rev. 1597, 1612 (1992). Or it might decide to limit access to medical resources for comatose patients who desire (more accurately, whose surrogates desire for them) to be kept alive. This Court has strongly suggested that even incapacitated patients have a right to be kept alive if they wish to be. *See Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 279-82 (1990); *Washington v. Glucksberg*, 521 U.S. 702, 728-34 (1997). How will those patients enforce that right if the federal government has stacked the deck against them?

These concerns are not fanciful. Dr. Ezekiel Emanuel, a health advisor to the President and the brother of his former chief of staff, wrote in 2008 that he desires a health reform that alters doctors' ethical obligations. Dr. Emanuel wants to compel doctors to provide what he calls "socially sustainable, cost-effective care." Ezekiel Emanuel, *The Cost-Coverage Trade Off*, 299 JAMA 947 (2008). For Dr. Emanuel, that means teaching physicians to think less of the needs of *their* patients and more of the societal need to ration care. Betsy McCaughey, *Obama's Health Rational-in-Chief*, N.Y. Times, Aug. 27, 2009.

Dr. Emanuel added that drastic measures, such as the ones he proposes, are necessary and that "[v]ague promises of savings from cutting waste, enhancing prevention and wellness, installing electronic medical records and improving quality of care are merely 'lipstick' cost control, *more for show and public relations* than for true change." Emanuel, *supra* (emphasis added).

* * * * *

Important decisions concerning morally and socially significant matters—such as end-of-life care and the subsidization of procedures and devices that large segments of society reject on moral grounds—ought to be the subject of ongoing debate in the public square. That debate should not be summarily silenced by the policy preferences of remote central authorities. At a minimum, there ought to be room for dissent and conscientious objection.

As this Court closed its decision in *Washington v. Glucksberg*, 521 U.S at 735, it noted that: "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."

The commerce power, like all enumerated powers, is limited. It bears repeating: "Federalism secures the freedom of the individual. It allows States to respond . . . to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond* 131 S. Ct. at 2364. No doubt, the problem of health care in America is a serious one that would benefit from expeditious action. Nevertheless, "the Constitution commands restraint before discarding liberty in the name of expediency." *J. McIntyre Machinery v. Nicastro,* 131 S. Ct. 2780, 2791 (2011) (plurality opinion).

This is all the more true when confronting a gambit as massive as the Affordable Care Act. For the federal government to so centralize such a vast area of our nation's economy is troubling enough. For it to simultaneously stifle debate on profound moral, philosophical, and religious questions is even more worrisome. Taken together, these two trespasses point clearly to a Congress that has breached the limits of its power under the Commerce Clause.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

KEVIN J. HASSON
Counsel of Record
1875 I Street, NW
Suite 500
Washington, DC 20006
(202) 841-2981
KevinJHasson@gmail.com

MEIR KATZ
P.O. Box 20828
Baltimore, MD 21209
MKatzLitigation@gmail.com

Counsel for Amicus Curiae

February 13, 2012

AMICUS CURIAE BRIEF

No. 11-398

In The
Supreme Court of the United States

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF RESPONDENTS (MINIMUM COVERAGE PROVISION)

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
DANA BERLINER
STEVEN M. SIMPSON
Counsel of Record
ELIZABETH PRICE FOLEY
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
ssimpson@ij.org

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Congress has the power under Article I of the Constitution to impose the individual mandate of the Patient Protection and Affordable Care Act.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE INDIVIDUAL MANDATE VIOLATES THE LONGSTANDING AND FUNDAMENTAL PRINCIPLE OF MUTUAL ASSENT THAT IS AT THE HEART OF ALL CONTRACTS 3

A. Mutual Assent Has Always Been (and Still Is) Required for All Legally Binding Contracts 4

B. At the Time the Constitution Was Drafted and Ratified, It Was Widely Known and Accepted That *Coercion* Necessarily Renders Any Assent Invalid 8

C. This Court's Early Decisions Recognized the Centrality of Mutual Assent to Commercial Relations 13

II. THE INDIVIDUAL MANDATE ERASES THE DISTINCTION, LONG ACKNOWLEDGED BY THIS COURT, BETWEEN THE POWER TO REGULATE COMMERCE AND THE POWER TO COMPEL IT 15

TABLE OF CONTENTS – Continued

Page

A. **This Court Has Recognized the Distinction Between the Power to Regulate and the Power to Compel in Decisions Interpreting the Commerce Clause** 17

B. **This Court Has Recognized the Qualitative Difference Between Regulation and Compulsion in Statutory Decisions** 24

III. **THE INDIVIDUAL MANDATE IS NOT A "PROPER" EXERCISE OF CONGRESS'S POWER UNDER THE NECESSARY AND PROPER CLAUSE BECAUSE IT VIOLATES THE PRINCIPLE OF MUTUAL ASSENT** 27

IV. **THIS COURT SHOULD ENFORCE APPROPRIATE LIMITS ON CONGRESS'S POWER** 30

CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES

Arnold v. Hickman, 20 Va. (6 Munf.) 15 (1817).....7

Bank of Newbern v. Pugh, 9 N.C. 198 (1820).....6

Bond v. United States, 131 S. Ct. 2355 (2011).....3, 21

Collins v. Westbury, 2 S.C.L. (2 Bay) 211 (S.C. Const. Ct. App. 1799).....13

Field v. Harrison, Wythe 273 (Va. High Ch. 1794).....12

Florida v. U.S. Dep't of Health and Human Servs., 648 F.3d 1235 (11th Cir. 2011).....30

Gardner v. Lane, 94 Mass. (12 Allen) 39 (1866).....7

Gonzales v. Raich, 545 U.S. 1 (2005).....30

Hallet v. Jenks, 7 U.S. (3 Cranch) 210 (1805).....24, 26

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).....22, 23

Inhabitants of Middleborough v. Inhabitants of Rochester, 12 Mass. (11 Tyng) 363 (1815).....7

Inhabitants of Stockbridge v. Inhabitants of West Stockbridge, 14 Mass. (13 Tyng) 257 (1817).....6

Jackson v. Kniffen, 2 Johns. 31 (N.Y. Sup. Ct. 1806).....12

Katzenbach v. McClung, 379 U.S. 294 (1964).....22, 23

Manby v. Scott, (1674) 86 Eng. Rep. 781.....5

TABLE OF AUTHORITIES – Continued

Page

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 2, 27, 28, 29

Nat'l Labor Relations Bd. v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937) 17, 19, 20

New York v. United States, 505 U.S. 144 (1992) 18, 19, 21

Penn-Central Merger and N & W Inclusion Cases, 389 U.S. 486 (1968) 25, 26

Price v. Campbell, 6 Va. (2 Call) 110 (1799) 6

R v. Gade, (1796) 168 Eng. Rep. 467 5

Robinson v. Barfield, 6 N.C. (2 Mur.) 391 (1818) 6

Smith v. Kemper, 4 Mart. (o.s.) 409 (La. 1816) 6

Speake v. United States, 13 U.S. (9 Cranch) 28 (1815) 14

St. Joe Paper Co. v. Atlantic Coast Line R. Co., 347 U.S. 298 (1954) 25, 26

Stones v. Keeling, 9 Va. 143 (1804) 7

Taylor v. Patrick, 4 Ky. (1 Bibb) 168 (1808) 6

The Frances, 12 U.S. (8 Cranch) 354 (1814) 5

United States v. Tingey, 30 U.S. (5 Pet.) 115 (1831) 13, 14, 15

Utley v. Donaldson, 94 U.S. 29 (1876) 5

Williams v. Smith, 2 Cai. 13 (N.Y. Sup. Ct. 1804) 8

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. X 20, 21, 23, 30

U.S. Const. art. I, § 8 ..... 13, 29

U.S. Const. art. VI, § 3 32

CODES

Patient Protection and Affordable Care Act (PPACA), 26 U.S.C.A. § 5000(A) (West 2010) 1, 28, 29, 33

OTHER PUBLICATIONS

1 H.T. Colebrooke, *Treatise on Obligations and Contracts* (1818) ..... *passim*

1 John Joseph Powell, *Essay upon the Law of Contracts and Agreements* (1796) 5, 9

1 John Trenchard & Thomas Gordon, *Cato's Letters: Or, Essays on Liberty, Civil and Religious, and Other Important Subjects* (Ronald Hamowy ed., Liberty Fund 1995) (1721) 11

Randy E. Barnett, *Commandeering the People: Why the Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & Liberty 581 (2010) 21

Elizabeth Price Foley, *Liberty for All: Reclaiming Individual Privacy in a New Era of Public Morality* (Yale Univ. Press 2006) 21

TABLE OF AUTHORITIES – Continued

Page

Hugo Grotius, *The Rights of War and Peace* (A.C. Campbell trans., M. Walter Dunne 1901) (1625) 4

Robert G. Natelson, *The Enumerated Powers of the States*, 3 NEV. L.J. 469 (2003) 23

Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law* (Michael Silverthorne, trans., Cambridge Univ. Press 1991) (1682) 4

William W. Story, *A Treatise on the Law of Contracts Not Under Seal* (1844) 9, 12

The Federalist No. 45 (James Madison) 3

The Federalist No. 78 (Alexander Hamilton) 31, 32

Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law* (Charles G. Fenwick, trans., William S. Hein & Co. 1995) (1758) 10, 31

James Wilson, *Lectures on Law in* 1 *The Works of James Wilson* (Robert Green McCloskey ed., Belknap Press 1967) (1790-91) 12, 21

INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest law firm committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. The Institute is filing this brief in support of the respondents. The parties in the case have consented to the filing of this amicus brief.[1]

SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act (PPACA) compels covered individuals to purchase health insurance policies for themselves and their dependents. 26 U.S.C.A. § 5000A(a) (West 2010). This provision, known as the minimum coverage provision or individual mandate, requires individuals to enter into contracts whether they wish to do so or not. The mandate thus marks the first time Congress has passed a law, using its commerce power, from which there is no escape.

The Founding generation that drafted and ratified the Constitution never meant for the federal

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity other than amicus curiae Institute for Justice, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

government to possess the power to coerce individuals to engage in commercial transactions against their will. Coercing commercial transactions is antithetical to the foundational principle of mutual assent that permeated the common law of contracts at the time of the founding and continues to do so today. The Founding generation recognized that this principle was critical to protecting individual liberty. It would never have given, and in fact did not give, Congress, through the guise of the Commerce Clause, the power to gut the foundation upon which the entirety of contract law rests.

Equally important, granting Congress the power to eviscerate the doctrine of mutual assent cannot be a "proper" exercise of congressional power within the meaning of the Necessary and Proper Clause. As Chief Justice Marshall declared in *McCulloch v. Maryland*, for a law to be necessary and proper, the "end [must] be legitimate" and it must "consist with the letter and spirit of the constitution . . . ." 17 U.S. (4 Wheat.) 316, 421 (1819). But it is not consistent with the letter and spirit of the Constitution for Congress to compel individuals to engage in commerce and thereby to eviscerate the concept of mutuality of assent.

Construing the enumerated powers of Congress as including a power to coerce individuals to engage in commerce would destroy the longstanding principle of mutual assent. It truly would be the last step in creating a general federal police power to legislate concerning "the lives, liberties, and properties of the

people, and the internal order, improvement, and prosperity of the State" that the Framers assured the American people were reserved to the States. *The Federalist* No. 45 (James Madison). As this Court recently noted in *Bond v. United States*, 131 S. Ct. 2355 (2011), the purpose of the Constitution's scheme of enumerated powers and federalism is to protect individual liberty. *Id.* at 2364 (citing *N.Y. v. United States*, 505 U.S. 144, 181 (1992) (noting that federalism secures liberties to citizens)). Allowing Congress to compel individuals to enter into contracts against their will would destroy a fundamental precept of contract law and would have a devastating impact on individual liberty.

ARGUMENT

I. THE INDIVIDUAL MANDATE VIOLATES THE LONGSTANDING AND FUNDAMENTAL PRINCIPLE OF MUTUAL ASSENT THAT IS AT THE HEART OF ALL CONTRACTS.

The individual mandate requires individuals to enter into contracts of insurance that would never be enforceable at common law because they would violate an essential element of all enforceable contracts – mutuality of assent. This principle is now and has always been a basic presupposition of all legally binding contracts. The Founding generation recognized this principle, and so has this Court.

A. Mutual Assent Has Always Been (and Still Is) Required for All Legally Binding Contracts.

At the time the Constitution was ratified in 1788, the most influential philosophers and the common law of contracts had long recognized that, for a contract to be valid, the parties must mutually assent to its terms. Indeed, all of the major contract law doctrines in place at the time of the Founding, such as capacity, mistake, fraud, and duress are grounded in the commonsense notion that a contracting party who fails to fully and freely assent to the material terms of the contract cannot, by definition, be fairly bound to it.

The importance of mutual assent was understood long before the American Founding as a prerequisite to the legal enforcement of an agreement. *See, e.g.*, Hugo Grotius, *The Rights of War and Peace* 147-48 (A.C. Campbell trans., M. Walter Dunne 1901) (1625) ("In all contracts, natural justice requires that there should be an equality of terms. . . . [That equality] includes also an entire freedom of consent in both [parties to the contract]."); Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law* 70 (Michael Silverthorne trans., Cambridge Univ. Press 1991) (1682) ("Our unconstrained consent is most particularly required, if our promises and agreements are to oblige us to give or do anything where we previously had no obligation, or to refrain from doing something which we could previously do of right.").

The requirement of mutual assent was embraced by British common-law courts, and firmly entrenched by the time of the American Founding. *See, e.g.*, 1 H.T. Colebrooke, *Treatise on Obligations and Contracts* 2 (1818) ("An *agreement*, convention, compact, or accord, is the consent of two or more persons concurring to form, to modify, or to rescind an engagement between them. It is an aggregation of minds. . . .") (footnote omitted); 1 John Joseph Powell, *Essay upon the Law of Contracts and Agreements* vii-viii (1796) ("That these things must coincide, is evident from the very nature and essence of a contract . . . [and] it is necessary that the party to be bound, shall have given his free assent to what is imposed upon him."); *R v. Gade*, (1796) 168 Eng. Rep. 467, 471 ("[T]his transfer is deficient, inasmuch as it was not accepted by the transferree [sic]; and all contracts require the mutual consent of the contracting parties."); *Manby v. Scott*, (1674) 86 Eng. Rep. 781, 783 ("For the first, every gift, contract, or bargain, is, or contains an agreement; for the contractor or bargainor wills, that the donee or bargainee shall have the things contracted for, and the other is content to take them; and so in every contract there is a mutual *assent* of their minds, which mutual assent is an agreement . . . .").

After ratification of the Constitution, American courts continued to follow this common-law doctrine. *See, e.g.*, *Utley v. Donaldson*, 94 U.S. 29, 47 (1876) ("There can be no contract without the mutual assent of the parties. This is vital to its existence. There can be none where it is wanting."); *The Frances*, 12 U.S.

(8 Cranch) 354, 357 (1814) ("It has been very truly urged for the captors, that to vest this property . . . a contract is necessary; and that to form a contract, the consent of two parties is indispensable. In this case, no such contract appears."); *Taylor v. Patrick*, 4 Ky. (1 Bibb) 168 (1808) ("Certain it is, that where the mind is . . . illegally and unjustly constrained, so as to prevent free volition, a contracting party cannot be said to have been willing to contract, or to have given his assent to the contract[.]"); *Smith v. Kemper*, 4 Mart. (o.s.) 409 (La. 1816) (declaring to be a principle of "incontrovertible truth and soundness . . . that no offer or proposition, tending to a contract, can be binding on the person proposing until the proposition be accepted; because there can exist no contract without the concurrence and simultaneous will of the contracting parties."); *Inhabitants of Stockbridge v. Inhabitants of West Stockbridge*, 14 Mass. (13 Tyng) 257, 260 (1817) ("To a contract of this species, as to every other contract, the consent of two minds is necessary."); *Bank of Newbern v. Pugh*, 8 N.C. 198, 206 (1820) ("an essential part of all contracts [is] the assent of both parties."); *Robinson v. Barfield*, 6 N.C. (2 Mur.) 391 (1818) ("[I]t is essential to the validity of every deed, that it be made *freely* and by persons laboring under no disability to contract: in other words, the party contracting must assent to the contract."); *Price v. Campbell*, 6 Va. (2 Call) 110 (1799) (noting that a "contract or agreement presupposes the consent of both [parties].").

The centrality of mutual assent is reinforced by various ancient doctrines that vitiate a contract's enforceability. For example, contracts can be avoided due to fraud, mistake, duress, and incapacity – all of which are grounded in a lack of meaningful consent by one of the parties. In the instance of incapacity – such as mental disability or minority – the individual's inherent inability to give meaningful consent renders his contracts invalid. *See, e.g.*, *Inhabitants of Middleborough v. Inhabitants of Rochester*, 12 Mass. (11 Tyng) 363, 365 (1815) (invalidating marriage contract with person "void of understanding, so as to be incapable of making a valid contract"); *Stones v. Keeling*, 9 Va. 143, 145 (1804) (noting that infancy or idiocy would make a marriage void due to "a want of power or capacity to consent to the contract."); 1 H.T. Colebrooke, *Treatise on Obligations and Contracts* 25-26 (1818) ("Any person is *able to contract*, who has the free use of reason, to render him capable of giving consent, which is the essence of agreement. . . . Those who are by nature *incapable* of contracting, are infants, idiots, and insane persons, or any whose reason is, by disease or other cause, suspended . . . ."). *Cf. Arnold v. Hickman*, 20 Va. (6 Munf.) 15 (1817) (upholding contract because "assent to the contract, thus understood, was given when he was not disabled, from contracting, by intoxication or otherwise.").

Similarly, a contract grounded in mistake is unenforceable against the mistaken party because the mistake renders their mutual assent illusory. *See, e.g.*, *Gardner v. Lane*, 94 Mass. (12 Allen) 39, 44 (1866)

("[I]t cannot be doubted that if under a contract of sale a delivery was made, through mistake, of an article different from that agreed upon by the parties, there would be no sale of the article delivered, and no property in it would pass, for the simple reason that the vendor had not agreed to sell nor the vendee to buy it. There would in fact be 'no contract between the parties in respect to the article actually furnished;' or, to express it in different words, when a material mistake occurs in respect to the nature of the subject matter of a sale, there is no mutual assent, and therefore the contract is void.") (citing *Story on Sales*, §§ 148, 458); *Williams v. Smith*, 2 Cai. 13 (N.Y. Sup. Ct. 1804) (Livingston, J., concurring) ("If neither of the parties know of a circumstance which subsequent events have discovered to be important, the contract is founded in *mutual error*, in which case the parties cannot be said to have assented to it."); Colebrooke, *supra*, at 47 ("If the mistake be respecting that, at which the person making the contract aimed, the agreement will be void; because his assent is founded on the ground of the matter being as supposed.").

B. At the Time the Constitution Was Drafted and Ratified, It Was Widely Known and Accepted That *Coercion* Necessarily Renders Any Assent Invalid.

As doctrines such as mistake and incapacity show, any individual who cannot give free, full, and knowing consent cannot be fairly characterized as having

assented to a contract. Mutual assent, in other words, presupposes that assent has been *freely given*.

This was well known to the Founding generation and those who drafted and ratified the Constitution. In his influential 1809 multivolume treatise, *Essay Upon the Law of Contracts and Agreements*, John Joseph Powell observed that assent signifies the "free use" of the mind and moral power, making it "clear from the nature of its constitution; [that] one essential ingredient [of a contract is] 'that it is *entered into freely, of the parties' own accord*.'" 1 John Joseph Powell, *Essay Upon the Law of Contracts and Agreements* *10, *371 (1796) (emphasis added). Similarly, H.T. Colebrooke's 1818 *Treatise on Obligations and Contracts* declared,

> A true assent implies the serious and *perfectly free use of power, both physical and moral, to give assentment*. This essential requisite is wanting in promises made in jest or compliment: or made in earnest, but under mistake and illusion; or under deception and delusion; *or in consequence of constraint and compulsion*.

Colebrooke, *supra*, at 45 (emphasis added). *See also* William W. Story, *A Treatise on the Law of Contracts Not Under Seal* 52 (1844) ("[Assent] should be mutual; it should be *without restraint*; it should be understandingly made and without error or mistake.") (emphasis added). Contracts made under "restraint" – i.e., not the product of a party's own free will – are inherently objectionable and unenforceable.

The necessity of free will in contractual relations has deep philosophical roots, extending well before the ratification of the Constitution. The most influential natural rights philosophers – with whom the Founders were intimately familiar – understood that coerced contracts were inherently antithetical to respect for individuals and their inalienable rights. One of the most influential of those philosophers, Emmerich de Vattel, articulated the necessity of contractual freedom in 1758:

> Men . . . *are perfectly free to buy or not buy a thing which is for sale*. . . . No man has any right . . . to sell what belongs to him to one who does not wish to buy. . . .
>
> . . . .
>
> By reason of the natural liberty which belongs to all men, it is for me to judge whether I have need of [things to buy] or if I am in a position to sell them to you. . . .
>
> . . . .
>
> [C]ommerce consists in the reciprocal purchase and sale of all sorts of commodities.

Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law* 40-41 (Charles G. Fenwick trans., William S. Hein & Co. 1995) (1758) (emphasis added).

Similarly, the widely read John Trenchard and Thomas Gordon, writing under the pseudonym "Cato," stated in 1721 that "Nothing is more certain, than that

trade cannot be forced; she is a coy and humourous dame, who must be won by flattery and allurements, and always flies force and power; . . . she cannot breathe in a tyrannical air. . . ." 1 John Trenchard & Thomas Gordon, *Cato's Letters: Or, Essays on Liberty, Civil and Religious, and Other Important Subjects* 442-43 (Ronald Hamowy ed., Liberty Fund 1995) (1721) (emphasis added).

Founder James Wilson, who signed both the Declaration of Independence and the Constitution, likewise explained in his 1790-91 lectures on law that an intent to be bound cannot occur in the context of compulsion:

> The common law is a law of liberty. The defendant *may plead, that he was compelled to execute the instrument*. He cannot, indeed, deny the execution of it; but he can state, in his plea, the circumstances of compulsion attending his execution; and these circumstances, if sufficient in law, and established in fact, will procure a decision in his favour, that, in such circumstances, *he did not bind himself*. . . . [But] if he executed it voluntarily; if he executed it knowingly; the law will pronounce, that he bound himself. *This has been the regular course of the law during time immemorial – a course, uninterrupted and unrepealed*. In the municipal law of England, therefore, the doctrine is established – that a man can bind himself. This doctrine is established by strict legal inference from the principles and the practice of the common law.

James Wilson, *Lectures on Law*, *in* 1 *The Works of James Wilson* 190 (Robert Green McCloskey ed., Belknap Press 1967) (1790-91). Wilson thus made it clear that, though a man could legally bind himself via contract, the "immemorial . . . uninterrupted and unrepealed" understanding of Anglo-American law was that compelled contracts were not binding.

Equally important to this early philosophical understanding are the deeply entrenched common-law doctrines of fraud and duress, which are grounded in the same fundamental logic: Contracts cannot be coerced. Fraud is a valid defense to the enforcement of a contract because the fraud prevents the innocent party from acquiring information required for mutual assent, thereby effectively coercing her into a contract she did not intend to make. *See, e.g.*, *Field v. Harrison*, Wythe 273 (Va. High Ch. 1794) (fraud vitiates consent); Colebrooke, *supra*, at 51 ("There can be no true consent, when the words or writings, by which the assent is said to be expressed, are drawn from either of the parties *by fraud*.").

Similarly, a contract procured by duress is unenforceable because a person who is forced to enter into a contract cannot, by definition, be said to freely consent to that contract. William W. Story, *A Treatise on the Law of Contracts Not Under Seal* 57 (1844) ("The assent however must not only be mutual, but it must be freely and voluntarily given in order to create a valid contract. Compulsion or duress will therefore avoid any agreement."); *Jackson v. Kniffen*, 2 Johns. 31, 34 (N.Y. Sup. Ct. 1806) ("[I]t is essential

to the validity of every deed that the party making it be free from restraints, and not under duress.") (citations omitted). As the Constitutional Court of Appeals of South Carolina acknowledged in 1799,

> So cautiously does the law watch over all contracts, that *it will not permit any to be binding but such as are made by persons perfectly free, and at full liberty to make or refuse such contracts*, and that not only with respect to their persons, but in regard to their goods and chattels also. *Contracts to be binding must not be made under any restraint or fear of their persons, otherwise they are void* . . . .

Collins v. Westbury, 2 S.C.L. (2 Bay) 211 (S.C. Const. Ct. App. 1799) (emphasis altered).

C. This Court's Early Decisions Recognized the Centrality of Mutual Assent to Commercial Relations.

The centrality of mutual assent – and its concomitant prohibition on coerced contracts – was recognized in this Court's early case law involving the mandatory posting of bonds with the federal government. In *United States v. Tingey*, 30 U.S. (5 Pet.) 115 (1831), for example, the Court was asked to consider the validity of a bond entered into by a Navy purser, an officer charged with disbursing money. Pursuant to its powers to regulate the Navy, *see* U.S. Const. art. I, § 8 (giving Congress the power to "provide and maintain a Navy" and to "make Rules for the Government

and Regulation of the land and naval Forces"), Congress had passed a statute requiring Navy pursers to execute a bond for security of U.S. funds.

The Court's earlier decision in *Speake v. United States*, 13 U.S. (9 Cranch) 28 (1815), had endorsed the federal government's power to impose bonds in its own contractual relationships, so long as there was antecedent statutory authorization for the bond. The court reasoned that individuals contracting with the government *after* the enactment of such a statute had *voluntarily assented* to such contractual (bond) obligations as a condition of their doing business with the government. As such, the bond could not be characterized as compelled. *Id.* at 35. In *Tingey*, by contrast, the bond statute did not authorize the type of bond entered into, leading the Court to conclude that the bond was "extorted . . . contrary to the statute . . . as the condition of . . . remaining in the office of purser, and receiving its emoluments." *Tingey*, 30 U.S. (5 Pet.) at 129. Accordingly, the Court declared that "[t]here is no pretence then to say that it was a bond voluntarily given" because it "was demanded of the party, upon the peril of losing his office; it was extorted under colour of office, against the requisitions of the statute." *Id.*

The facts in the case at bar are analogous to those in *Tingey*. Here, as there, the government is compelling individuals to enter into contractual relations under threat of penalty. In both cases, the targeted individuals have not freely and voluntarily assented to such a contractual relationship. As such, the contract

cannot be legally enforceable; it is being "extorted" by the federal government upon threat of punishment. If such extortion is unacceptable when the federal government acts as an employer – as it did in *Tingey* – it is even more unacceptable when the government acts upon the broader citizenry. In either instance, an extorted contractual relationship is contrary to hundreds of years of understandings about the very nature of legally valid contracts.

The necessary implication from the longstanding conception of contract law recognized by the Founding generation and this Court in *Tingey* is that legally binding contracts cannot, by definition, be coerced. Yet that is exactly what the individual mandate does – it forces individuals to enter into lifelong contractual relations with a health insurance company. The individual mandate thus stands against over two centuries' worth of understandings about the core premise of contract law. As the next section shows, the mandate also stands against this Court's understanding of the commerce power.

II. THE INDIVIDUAL MANDATE ERASES THE DISTINCTION, LONG ACKNOWLEDGED BY THIS COURT, BETWEEN THE POWER TO REGULATE COMMERCE AND THE POWER TO COMPEL IT.

This Court's prior decisions, both constitutional and statutory, have embraced the longstanding Anglo-American tradition of mutual assent and the idea

that coercing parties to engage in commerce is antithetical to valid contractual and commercial relations.

Thus, in its Commerce Clause cases, the Court has been careful to distinguish between permissible regulations of commerce and impermissible compulsion. In its Tenth Amendment cases the Court has recognized the flip side of this proposition: Congress lacks the power to force States, and, by implication, the people, to take title to goods against their will. Following the same principle, the Court has refused to interpret the term "commerce" in statutes enacted under the commerce power to include involuntary commercial relationships, or to permit compelled contractual relationships such as mergers or bonds.

In short, as broad as this Court has construed Congress's enumerated powers, it has never interpreted Congress's power to regulate interstate commerce as a power to compel individuals who had not already freely chosen to do business in interstate commerce or otherwise enter into commercial or contractual relationships.

The individual mandate crosses this line. As this section demonstrates, it is contrary not only to hundreds of years of understandings about the nature of contractual relations, but also to this Court's decisions interpreting Congress's enumerated powers and the term "commerce" in federal statutes. The Court's repeated recognition of the difference between regulation and coercion should be viewed as an alarm bell,

warning of the broader ramifications inherent in a constitutional case such as this.

A. This Court Has Recognized the Distinction Between the Power to Regulate and the Power to Compel in Decisions Interpreting the Commerce Clause.

This Court explicitly observed the critical distinction between the power to regulate commerce and the power to compel it in *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937). As the Court noted, the National Labor Relations Act (NLRA) "does *not compel agreements* between employers and employees. It does *not compel an agreement whatever*. It does not prevent the employer from refusing to make a collective contract and hiring individuals on whatever terms the employer may by unilateral action determine." *Id.* at 45 (internal quotation marks omitted) (emphasis added).

The *Jones and Laughlin* Court was careful to note that the NLRA did not compel parties to enter into contracts, observing that the "theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements *which the Act in itself does not compel*." *Id.* (emphasis added). Because the Act did not compel employers and employees to reach any agreements – but instead to negotiate in good faith – the *Jones and Laughlin* Court was comfortable upholding

the law as a valid exercise of the power to "regulate" commerce.

This Court similarly recognized the crucial distinction between regulation and compulsion in *New York v. United States*, 505 U.S. 144 (1992). In *New York*, the Court invalidated a portion of the Low-Level Radioactive Waste Policy Amendments Act of 1985, a law grounded in the commerce power. Specifically, the Court ruled unconstitutional a portion of the Act that compelled states to "take title" to low-level radioactive waste in certain situations. As the Court noted, "[W]hile Congress has substantial power under the Constitution to encourage the States to provide for the disposal of the radioactive waste generated within their borders, the Constitution does not confer upon Congress the ability simply to *compel* the States to do so." *Id.* at 149 (emphasis added). Elaborating, the Court stated:

> [T]he Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer, standing alone, would in principle be no different than a *congressionally compelled subsidy from state governments to radioactive waste producers*. The same is true of the provision requiring the States to become liable for the generators' damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the States to assume the liabilities of certain state residents. Either type of federal action would "commandeer" state

> governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments.

Id. at 175-76 (emphasis added).

New York thus became known as establishing an "anti-commandeering principle" by which Congress could not force state legislative or executive officials to carry out a federal regulatory program. Although the case is principally understood as a Tenth Amendment case, the majority was careful to emphasize that enforcing limits on the commerce power versus preserving the reserved powers of the states via the Tenth Amendment were but "mirror images of each other." *Id.* at 155-56 ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."). *Accord Jones and Laughlin*, 301 U.S. at 37 ("Undoubtedly the scope of [the commerce] power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government.").

Logically, then, the anti-commandeering principle must define the limits of the commerce power as well. That is, if the Tenth Amendment does not permit Congress to compel a state to take title to radioactive waste, then the Commerce Clause must not delegate that power to Congress. Yet the commerce power undoubtedly allows Congress to regulate interstate commerce in radioactive waste. It follows that the power to *regulate* commerce does not include the power to *compel* a party to take title to goods or services against its will. Much like the individual mandate, the take-title provision in *New York* sought to compel states to acquire a product they did not want, leading the Court to conclude that the Tenth Amendment – and, by implication, the Commerce Clause – did not permit such compulsory commercial transactions.

Although the take-title provision at issue in *New York* operated on the states, rather than individuals, the distinction between regulation and compulsion must apply as much when Congress is attempting to compel individuals to purchase a product as it does when Congress attempts to compel states to do so. The Tenth Amendment states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*." U.S. Const. amend. X (emphasis added). If it is beyond Congress's authority to "commandeer" the States by compelling them to take title to radioactive waste, then it must likewise be beyond Congress's power to "commandeer" the people, by requiring them to purchase

insurance. *See, e.g.*, Randy E. Barnett, *Commandeering the People: Why the Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & Liberty 581, 626-27 (2010).

Indeed, in *Bond v. United States*, 131 S. Ct. 2355 (2011), this Court unanimously acknowledged that the purpose of the Tenth Amendment and the federal system of government that it preserves is to protect individual liberty, not simply state sovereignty. As the Court stated, "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake." *Id.* at 2364 (internal citation omitted). *Accord New York*, 505 U.S. at 181 ("[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.") (internal quotation marks and citation omitted).

The Founders understood this point. As James Wilson stated in his *Lectures on Law* in 1790, "The dread and redoubtable sovereign, when traced to his ultimate and genuine source, has been found, as he ought to have been found, in the free and independent man." James Wilson, *Lectures on Law*, *in* 1 *The Works of James Wilson* 81 (Robert Green McCloskey ed., Belknap Press 1967) (1790-91). *See also* Elizabeth Price Foley, *Liberty for All: Reclaiming Individual Privacy in a New Era of Public Morality* 9-15 (Yale

Univ. Press 2006) (discussing the nature of popular sovereignty under the American constitutional structure). One aspect of the liberty that such free and independent men of the time enjoyed was the liberty to enter into commercial arrangements and transactions by one's own consent. As an influential contract law treatise by H. T. Colebrooke, published in 1818, noted:

> [F]orce, whether used, or barely threatened, lays a necessity on a man contrary to his will. So that *it is in appearance, only, that a man forced or menaced gives assent.* The engagement is vitiated by the force put upon his will. . . . Because all undue force or menace, which obliges men, contrary to their inclination, to give their assent, which else they would not do, *takes away that liberty which is essential to a valid engagement* . . . .

1 H.T. Colebrooke, *Treatise on Obligations and Contracts* 49 (1818) (emphasis added).

In sum, this Court has recognized the cardinal distinction between the power to regulate and the power to compel[2] and that compelling commercial

---

[2] This Court's recognition of the distinction between the power to regulate and the power to compel is not altered by its decisions in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964). Both cases involved the validity, under the Commerce Clause, of Title II of the Civil Rights Act (CRA) of 1964, which prohibited "discrimination or segregation on the ground of race, color, religion, or national origin" in places of public accommodation such

(Continued on following page)

relationships can trench on the powers reserved to the states and the people under the Tenth Amendment. Contract law is properly the domain of the states, not the federal government. *See* Robert G. Natelson, *The Enumerated Powers of the States*, 3 NEV. L.J. 469, 485 (2003). And a fundamental precept of contract law is that individuals must be free to decide for themselves whether to enter into contractual arrangements. Thus, by compelling individuals to enter into lifelong contracts of health insurance, the individual mandate simply cannot be squared with Congress's commerce power or with the powers reserved to the states and the liberties reserved to the people under the Tenth Amendment.

---

as hotels, restaurants, and movie theaters. *Heart of Atlanta*, 379 U.S. at 247; *Katzenbach*, 379 U.S. at 298.

The CRA of 1964 does not compel commerce. It regulates the terms and conditions on which commerce conducted by businesses such as these can lawfully take place. The CRA did not force the owners of the Heart of Atlanta Motel, for example, to operate a motel or the proprietors of Ollie's Barbeque to operate a restaurant. In both cases, the proprietors had already chosen to enter into businesses that were public accommodations, and the CRA then regulated the terms upon which they could operate in interstate commerce. The individual mandate, by contrast, compels individuals to enter into a type of commercial transaction that they would otherwise not enter into at all.

B. This Court Has Recognized the Qualitative Difference Between Regulation and Compulsion in Statutory Decisions.

The Court has exhibited similar reticence to endorse a power to compel contractual relations, even in decisions raising only statutory, not constitutional, questions.

For example, in the 1805 decision in *Hallet v. Jenks*, 7 U.S. (3 Cranch) 210 (1805), the Court construed a federal act in such a way as to avoid punishment for involuntary or coerced commerce. In *Hallet*, the Court was asked to construe a law, enacted pursuant to the commerce power, that prohibited vessels from engaging in "any traffic or commerce with or for any person resident within the jurisdiction or under the authority of the French republic." *Id.* at 213. The owner of the vessel charged with violating this "non-intercourse" statute argued that the vessel was forced into a French port by severe weather, necessitating the offloading and sale of perishable merchandise. He asserted that the purpose of the federal law was to prevent only *voluntary* commercial intercourse deemed to be against the interests of the U.S., reasoning: "What is traffic? A contract by consent of both parties. *If one is under compulsion, it is no contract, no traffic.*" *Id.* at 217 (emphasis added). Chief Justice John Marshall delivered the opinion of the Court, agreeing with the vessel owner that the "terms of the act of congress seem to imply an intentional offence," *id.* at 219, thus avoiding the imposition of punishment for coerced or involuntary commerce. Marshall's terse

opinion suggests that the basic argument made – that *contracts made under compulsion were inherently not commerce* – was logical and accepted by Congress.

Similarly, in a pair of Interstate Commerce Commission (ICC) cases, *St. Joe Paper Co. v. Atlantic Coast Line Railroad Co.*, 347 U.S. 298 (1954), and *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486 (1968), the Court refused to interpret statutes defining the ICC's power as including a power to compel contractual relations.

In *St. Joe Paper*, the question before the Court was whether the ICC had the power to compel a bankrupt railroad to merge with another, solvent railroad. 347 U.S. at 299. The Court noted that "[a]dvocacy of giving the Commission power to propose and enforce mergers has been steady and, at times, strong, but *it has consistently failed in Congress*." *Id.* at 306 (emphasis added). The Court could not accept that the Bankruptcy Act had been "stealthily designed [by Congress] to jettison its longstanding and oft-reiterated policy against compulsory mergers." *Id.* at 307-08. The *St. Joe Paper* Court concluded that, under existing law, "one carrier cannot be railroaded by the Commission into an *undesired merger* with another carrier." *Id.* at 309-10 (emphasis added).

A similar question was raised in *Penn-Central*, in which numerous railroads challenged an ICC merger-and-inclusion order requiring that the merging railroads offer smaller railroads inclusion in the merger. 389 U.S. 486 (1968). In addressing an objection that

the Court could not adjudicate the propriety of the proposed merger until the smaller railroads were included, the Court noted "there is no provision of law by which the Commission or the courts may *compel* the three protected roads to accept inclusion in the N & W [merger], as ordered by the Commission, or in any other system . . . . *Id.* at 517. The Court further noted that the Act "does not make provision for compelling an unwilling railroad which is not itself a party to a merger agreement to accept inclusion under the terms the Commission prescribes." *Id.* at 518.

While *Hallet*, *St. Joe Paper*, and *Penn-Central* are only statutory cases, they illustrate the Court's understanding of the intrinsic difference between regulation and compulsion. The Court's reticence to construe statutes based on the Commerce Clause as including the power to coerce contractual relations acknowledges the highly controversial nature of such a power and its potential for abuse in future situations.

By enacting the individual mandate, Congress has crossed that line, using its commerce power to coerce contractual relations. So, unlike in *Hallet*, *St. Joe Paper*, and *Penn-Central*, this Court must now squarely address Congress's constitutional power to do so. Because the individual mandate exceeds Congress's enumerated powers, this Court should strike it down.

III. THE INDIVIDUAL MANDATE IS NOT A "PROPER" EXERCISE OF CONGRESS'S POWER UNDER THE NECESSARY AND PROPER CLAUSE BECAUSE IT VIOLATES THE PRINCIPLE OF MUTUAL ASSENT.

In light of the foregoing, it cannot be "proper," within the meaning of the Necessary and Proper Clause, to exercise the commerce power in a way that eviscerates hundreds of years of understanding of the very essence of legally binding contracts. The Necessary and Proper Clause is designed to ensure that Congress has an array of *means* to accomplish permissible *ends*, which are defined by the enumerated powers. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 419 (1819) ("[W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution . . . ."). But the Clause was not designed to allow Congress to accomplish *ends* beyond the scope of its enumerated powers. As Chief Justice Marshall declared in *McCulloch*, for a law to be necessary and proper, the "end [must] be legitimate" and it must "consist with the letter and spirit of the constitution . . . ." *Id.* at 421. But, as shown above, it is not consistent with the letter and spirit of the Constitution for Congress to compel individuals to engage in commerce and thereby to eviscerate the concept of mutuality of assent.

Indeed, here the government is attempting to use the Necessary and Proper Clause in the way the

McCulloch Court said it could not be used. As the Court stated in *McCullough*, "should congress, *under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government*; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land." *Id.* at 423 (emphasis added).

Yet that is precisely what the government is attempting to do here. The purpose of PPACA is to increase insurance coverage. PPACA's health insurance market reforms – guaranteed issue, community rating, elimination of preexisting-condition exclusions, covering minors until age 26 – make health insurance more expensive and thus reduce coverage. According to the government, the individual mandate is "necessary" to offset the negative effects of these market reforms. *See* Gov'ts Br. 24 ("The minimum coverage provision is necessary to make effective the Act's core reforms of the insurance market . . . ."); *id.* at 32 ("The minimum coverage provision is key to the insurance reforms that were designed to fill that gap [in health insurance coverage].").

This is a classic bootstrapping argument. Using PPACA's market reforms as its base, Congress is attempting to accomplish an object not entrusted to it as part of its enumerated powers – namely, the power to compel contractual relations. The government asserts that the individual mandate is a "necessary and proper" means to effectuate the insurance market reforms contained elsewhere in PPACA, reasoning

that without the mandate, the entire insurance market could collapse due to adverse selection. As the government's brief explained it, the "guaranteed-issue and community-rating [market reforms] enacted in isolation create a spiral of higher costs and reduced coverage because individuals can wait until they are sick." *Id.* at 18. Because PPACA's market reforms, standing alone, would actually *harm* the health insurance market, the government claims that the individual mandate is "necessary" to keep the health insurance market viable.

But it is Congress that created that problem in the first place. Surely it cannot be "proper" for Congress to enact regulations of commerce (here, regulations of health insurance) that are so harmful to the survival of that commercial market that it would then be "proper" to give Congress the additional, awesome power to compel contractual arrangements. The invocation of the Necessary and Proper Clause in this case elevates means over ends, contrary to the Clause's original meaning and purpose. Under the pretext of regulating the health insurance market, the government seeks to use the Necessary and Proper Clause to validate a qualitatively different power than those enumerated in Article I, Section 8 – the power to compel commercial transactions. Using the Necessary and Proper Clause as a bootstrapping mechanism to expand the commerce power in this manner presents the classic pretext situation roundly condemned by the Court in *McCulloch*.

As Justice Scalia observed in his concurrence in *Gonzales v. Raich*, "These phrases [from *McCulloch*] are not merely hortatory. For example, cases such as *Printz v. United States* and *New York v. United States* affirm that a law is not *proper* for carrying into Execution the Commerce Clause [w]hen [it] violates [a constitutional] principle of state sovereignty." 545 U.S. 1, 39 (2005) (Scalia, J., concurring) (internal citations and quotation marks omitted). Because the individual mandate violates the principle of limited federal power and both state and individual sovereignty memorialized in the Tenth Amendment, it cannot be "proper" under the Necessary and Proper Clause.

IV. THIS COURT SHOULD ENFORCE APPROPRIATE LIMITS ON CONGRESS'S POWER.

Several lower courts and judges that have heard challenges to the individual mandate have opined that a properly "restrained" federal judiciary should leave to Congress the task of deciding how to regulate the health care system. But, as the Eleventh Circuit noted in striking down the mandate, "the Constitution requires judicial engagement, not judicial abdication." *Florida v. U.S. Dep't of Health and Human Servs.*, 648 F.3d 1235, 1284 (11th Cir. 2011).

The purpose of a written constitution is to provide an enforceable blueprint for ascertaining the limits of government power and, consequently, the liberty of its citizens. A written constitution is but a dead letter

if its limits on government power are not enforced. As influential political philosopher Emmerich de Vattel observed in 1758:

> The constitution and laws of a State are rarely attacked from the front; it is against secret and gradual attacks that a Nation must chiefly guard. . . . [C]hanges are overlooked when they come about insensibly by a series of steps which are scarcely noted. One would do a great service to Nations by showing from history how many States have thus changed their whole nature and lost their original constitution.

Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law* 18 (Charles G. Fenwick trans., William S. Hein & Co. 1995) (1758).

The Founders understood Vattel's point and believed the federal judiciary would be vigilant in enforcing the Constitution's structure, including the concept of limited and enumerated powers. Indeed, at the time of the ratification, there was a widely held fear that Congress would ignore its constitutional limits and the federal courts would acquiesce in the expansion, allowing Congress to become the "constitutional judges of their own powers." *The Federalist* No. 78 (Alexander Hamilton).

In response to this fear, *Federalist* No. 78 assured the American public that "this cannot be the natural presumption" because "the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the

latter within the limits assigned to their authority." *Id.* Hamilton explained that meaningful judicial engagement in enforcing the constitutional architecture did not imply a superiority of the judiciary over Congress, but merely that

> the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

Id.

Reflexively deferring to Congress's enactment of the individual mandate is an abdication of the judicial duty owed to the American people to enforce and support the Constitution. *See* U.S. Const. art. VI, § 3 ("The . . . judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ."). If courts cannot find and articulate meaningful limits on the federal government's enumerated powers, the entire constitutional architecture collapses. At a minimum, courts should be willing to draw a line between the power to regulate commerce and the power to *compel* it. Hundreds of years of historical understandings of the centrality of mutual assent, this Court's own constitutional and statutory decisions relating to the commerce power, and the very nature of our

federal structure all support the conclusion that, by enacting the individual mandate, Congress has pushed its commerce power one critical step too far.

CONCLUSION

If the individual mandate of PPACA is upheld, the power to regulate commerce will include the power to *compel* it. This massive new federal power would soon overtake the entirety of the states' residual police power, including the entirety of contract law, enabling the federal government to eviscerate hundreds of years of basic understandings of the voluntary essence of legally binding contracts.

Equally important, from the perspective of individual liberty, a power to compel contractual relations would have no logical stopping point. It would presumably include, for example, the power to compel individuals to buy *any* good or service – not just health insurance – so long as Congress could rationally conclude the market for that product would benefit from forced purchasing. It would also presumably include a power to compel individuals to work for specific employers or in specific occupations, so long as Congress could rationally conclude that those industries or occupations would benefit from such forced contractual relationships. When combined with the Court's highly deferential standard of review for exercises of the commerce power, extending that power to include the awesome power to compel would create

the very Leviathan government the Founders spilled their blood to resist.

Respectfully submitted,

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
DANA BERLINER
STEVEN M. SIMPSON
Counsel of Record
ELIZABETH PRICE FOLEY
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
ssimpson@ij.org

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

No. 11-398

In The
Supreme Court of the United States

DEPARTMENT OF HEALTH
AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

STATE OF FLORIDA, *et al.*,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

BRIEF OF *AMICI CURIAE* JEWISH ALLIANCE FOR LAW & SOCIAL ACTION (JALSA), JEWISH COUNCIL ON URBAN AFFAIRS (JCUA), JEWISH SOCIAL POLICY ACTION NETWORK (JSPAN), NEW ENGLAND JEWISH LABOR COMMITTEE (JLC), AND PROFESSOR ABIGAIL R. MONCRIEFF IN SUPPORT OF PETITIONERS ON THE INDIVIDUAL LIBERTY IMPLICATIONS OF THE MINIMUM COVERAGE PROVISION

ANDREW M. FISCHER
(*Counsel of Record*)
JASON & FISCHER
47 Winter Street
Boston, MA 02108
telephone (617) 423-7904
fax (617) 451-3413
afischer@jasonandfischer.com

QUESTION PRESENTED

The minimum coverage provision does not require individuals to purchase any unique product or service but rather requires a standardized financial contribution to the national healthcare infrastructure from all legal residents who are able to pay – a kind of requirement that has never been found unduly or even unusually restrictive of individual liberty.

The question presented is whether the Eleventh Circuit erred in finding that the minimum coverage provision's implications for individual liberty support a holding of constitutional invalidity under the Commerce Clause and Necessary and Proper Clause.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

I. THE ELEVENTH CIRCUIT MISCHARACTERIZED THE MINIMUM COVERAGE PROVISION'S IMPLICATIONS FOR INDIVIDUAL LIBERTY 5

A. Although Liberty is a Legitimate Concern in Federalism Analysis, the Liberty Interests that Have Been Relevant in this Context Are Those that Relate to the Core Police Power of the States..... 7

B. The Minimum Coverage Provision is a Well-Calibrated and Non-Coercive Requirement for Financial Participation in the National Healthcare Infrastructure, Which Does Not Implicate State Police Power..... 9

C. The Minimum Coverage Provision Fully Respects and Preserves Individuals' Healthcare Autonomy 22

II. FOR THOSE WHO CHOOSE TO COMPLY BY PURCHASING INSURANCE, THE ACA LEAVES THE CONTENTS OF THEIR PURCHASE PRIMARILY TO STATE CONTROL, PRESERVING STATE POWER OVER THE ASPECTS OF THE MANDATE THAT MATTER MOST TO LIBERTY..... 26

TABLE OF CONTENTS – Continued

Page

A. The Minimum Coverage Provision Preserves the States' Historic Police Power in the Regimes that are Most Important to Individual Liberty 28

1. States retain their nearly exclusive authority over regulation of medicine 29

2. States retain significant authority over insurance regulation 32

B. The ACA Provides States with Political and Administrative Avenues to Influence the ACA's Development and to Innovate Beyond the ACA 36

CONCLUSION 40

TABLE OF AUTHORITIES

Page

CASES

Adkins v. *Children's Hosp. of D.C.*, 261 U.S. 525 (1923), overruled in part by *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937) 15

Alaska Packers Ass'n v. *Indus. Accident Comm'n*, 294 U.S. 532 (1935) 17

Barnes v. *Glenn Theatre, Inc.*, 501 U.S. 560 (1991) 30

Barsky v. *Bd. of Regents*, 347 U.S. 442 (1954) 30

Bond v. *United States*, 131 S. Ct. 2355 (2011) ..... *passim*

Florida ex rel. Att'y Gen. v. *U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) ..... *passim*

Florida ex rel. Bondi v. *U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011), aff'd in part, rev'd in part *sub nom. Florida ex rel. Att'y Gen.* v. *U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) 10, 18, 23

German Alliance Ins. Co. v. *Kansas*, 233 U.S. 389 (1914) 16

Gonzales v. *Oregon*, 546 U.S. 243 (2006) 30

Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 8

Head v. *N.M. Bd. of Exam'rs in Optometry*, 374 U.S. 424 (1963) 30

Hill v. *Colorado*, 530 U.S. 703 (2000) 30

TABLE OF AUTHORITIES – Continued

Page

Hillsborough Cnty. v. *Automated Med. Labs., Inc.*, 471 U.S. 707 (1985) 30

In re Opinion of the Justices, 81 N.H. 566 (1925) 17

Jacobson v. *Massachusetts*, 197 U.S. 11 (1905) 30

Lochner v. *New York*, 198 U.S. 45 (1905) 15, 17, 18, 19, 21

Munn v. *Illinois*, 94 U.S. 113 (1876) 15

New York v. *United States*, 505 U.S. 144 (1992) 8

O'Gorman & Young, Inc. v. *Hartford Fire Ins. Co.*, 282 U.S. 251 (1931) 16

Oregon-Washington R.R. & Navigation v. *Washington*, 270 U.S. 87 (1926) 30

Paul v. *Virginia*, 75 U.S. (8 Wall.) 168 (1869) 21

Printz v. *United States*, 521 U.S. 898 (1997) 8

South Dakota v. *Dole*, 483 U.S. 203 (1987) 8, 9

Steward Mach. Co. v. *Davis*, 301 U.S. 548 (1937) 9

Thomas More Law Ctr. v. *Obama*, 651 F.3d 529 (6th Cir. 2011), petition for *cert.* pending, No.11-117 (filed July 26, 2011) 12, 22

United States v. *Comstock*, 130 S. Ct. 1949 (2010) 28

United States v. *Lopez*, 514 U.S. 549 (1995) 8, 38

United States v. *Morrison*, 529 U.S. 598 (2000) 8

TABLE OF AUTHORITIES – Continued

Page

United States v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) 21, 27

Washington v. *Harper*, 494 U.S. 210 (1990).....23

CONSTITUTION AND STATUTES

U.S. Const. art I., § 8 5

Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd.....18

Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.) 29

Federal Food, Drug, and Cosmetic Act of 1938 (FDCA), Pub. L. No. 717, 52 Stat. 1040 (1938) (codified as amended in 21 U.S.C.) 29

Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 5

Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 101 Stat. 1936 (1996) (codified as amended in 42 U.S.C.) 28

McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2006).....32

Old-Age, Survivors, and Disability Insurance Act of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965) (codified as amended in 42 U.S.C.) 29

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).....5

TABLE OF AUTHORITIES – Continued

Page

Women's Health and Cancer Rights Act of 1998, Pub. L. No. 105-277, § 902, 112 Stat. 2681 (1998) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.) 28

26 U.S.C.A. § 1402(g)(1) 12

26 U.S.C.A. § 5000A 5

26 U.S.C.A. § 5000A(a) 26

26 U.S.C.A. § 5000A(b) 10

26 U.S.C.A. § 5000A(c)(1) 10

26 U.S.C.A. § 5000A(c)(1)(B) 10

26 U.S.C.A. § 5000A(d)(2) 12

26 U.S.C.A. § 5000A(e) 11

26 U.S.C.A. § 5000A(f) 26

26 U.S.C.A. § 5000A(f)(1)(A)(i) 11

26 U.S.C.A. § 5000A(f)(1)(A)(ii) 11

26 U.S.C.A. § 5000A(f)(1)(A)(iv)-(v) 11

42 U.S.C.A. § 280g-15 31

42 U.S.C.A. § 300gg(a)(1) 35

42 U.S.C.A. § 300gg-1 35

42 U.S.C.A. § 300gg-2 35

42 U.S.C.A. § 300gg-3 35

42 U.S.C.A. § 300gg-4(a) 35

42 U.S.C.A. § 300gg-4(b) 35

42 U.S.C.A. § 300gg-6(a) 34

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C.A. § 300gg-11 35

42 U.S.C.A. § 300gg-12 35

42 U.S.C.A. § 300gg-18(b) 34

42 U.S.C.A. § 300gg-22 36

42 U.S.C.A. § 18011(a) 34

42 U.S.C.A. § 18022 26

42 U.S.C.A. § 18022(a) 34

42 U.S.C.A. § 18031 33

42 U.S.C.A. § 18031(f) 33

42 U.S.C.A. § 18032(f)(2) 33

42 U.S.C.A. § 18041(c) 33

42 U.S.C.A. § 18052 37

42 U.S.C.A. § 18091(a)(2)(F) 18

42 U.S.C.A. § 18091(a)(2)(F)-(G) 20

MISCELLANEOUS

Associated Press, *U.S. Embassy Resumes Use of Blackwater Security*, U.S.A. Today, Sept. 21, 2007, http://www.usatoday.com/news/world/iraq/2007-09-21-iraq-blackwater_N.htm 13

Ctrs. for Medicare & Medicaid Servs., *Part A/Part B Medicare Administrative Contractor* (Sept. 21, 2011), https://www.cms.gov/MedicareContractingReform/07_PartAandPartBMedicareAdministrativeContractor.asp 14

TABLE OF AUTHORITIES – Continued

Page

Jonathan Dinan, *Shaping Health Reform: State Government Influence in the Patient Protection and Affordable Care Act*, 41 Publius 395 (2011) 32

Einer Elhauge, Op-Ed., *The Broccoli Test*, N.Y. Times, Nov. 15, 2011, at A35, *available at* http://www.nytimes.com/2011/11/16/opinion/health-insurance-and-the-broccoli-test.html 22

Einer Elhauge, *The Irrelevance of the Broccoli Argument Against the Individual Mandate*, 366 New Eng. J. Med. e1 (2012), http://www.nejm.org/doi/full/10.1056/NEJMp1113618 23

Christopher C. Jennings & Katherine J. Hayes, *Health Insurance Reform and the Tensions of Federalism*, 362 New Eng. J. Med. 2244 (2010) 32

Jon Kingsdale & John Bertko, *Insurance Exchanges Under Health Reform: Six Design Issues for the States*, 29 Health Aff. 1158 (2010) 33

Conrad F. Meier, *Destroying Insurance Markets: How Guaranteed Issue and Community Rating Destroyed the Individual Health Insurance Market in Eight States*, Council for Affordable Health Insurance (2005), http://www.cahi.org/cahi_contents/resources/pdf/destroyinsmrkts05.pdf 35

Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 Duke L.J. 2023 (2008) 38

TABLE OF AUTHORITIES – Continued

Page

Gillian E. Metzger, *Privatization as Delegation*, 103 Colum. L. Rev. 1367 (2003) 13

Abigail R. Moncrieff, *The Freedom of Health*, 159 U. Pa. L. Rev. 2209 (2011) 22, 31

National Conference of State Legislatures, *State Actions to Implement Health Exchanges* (Nov. 2011), http://www.ncsl.org/?tabid=21388 ..... 33, 34

Office of the Press Sec'y, *Fact Sheet: The Affordable Care Act: Supporting Innovation, Empowering States* (Feb. 28, 2011), http://www.whitehouse.gov/the-press-office/2011/02/28/fact-sheet-affordable-care-act-supporting-innovation-empowering-states 37

Robert Pear, *Health Care Law Will Let States Tailor Benefits*, N.Y. Times, Dec. 17, 2011, at A1, available at http://www.nytimes.com/2011/12/17/health/policy/health-care-law-to-allow-states-to-pick-benefits.html 38

Phillip Rucker, *Sen. DeMint of S.C. Is Voice of Opposition to Health-Care Reform*, Wash. Post, July 28, 2009, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/07/27/AR2009072703066.html 14

Frank J. Thompson & Courtney Burke, *Executive Federalism and Medicaid Demonstration Waivers: Implications for Policy and Democratic Process*, 32 J. Health Pol. Pol'y & L. 971 (2007) 37

TABLE OF AUTHORITIES – Continued

Page

Tim Worstall, *Big Corn's HFCS v. Big Sugar's Sucrose: Maybe Both Could Lose?*, Forbes.com (Dec. 26, 2011), http://www.forbes.com/sites/timworstall/2011/12/26/big-corns-hfcs-v-big-sugars-sucrose-maybe-both-could-lose/ 19

INTEREST OF *AMICI CURIAE*[1]

The *amici* Jewish organizations represent a tradition of believing that the community has an essential role in providing for the sick. Preserving life and health is one of the highest of communal duties in the Jewish tradition, taking precedence even over the construction of a synagogue. These petitioners represent a minority community deeply committed to individual rights, including the right of privacy and the right of the individual to express choices of conscience in healthcare matters. Petitioners would oppose any sacrifice of genuinely fundamental individual rights in an effort to address the health care crisis.

The **Jewish Alliance for Law and Social Action (JALSA)** is a membership-based non-profit organization based in Boston working for social and economic justice, civil rights, and civil liberties for all peoples. Inspired by Jewish teachings and values, they have sought to achieve universal access and improvement of health outcomes through grassroots action, strategic coalition-building, and legislative initiatives. The organization was involved in the passage of the Massachusetts statute that served as a model for the Patient Protection and Affordable Care Act (ACA).

---

[1] This brief is submitted with the consent of the parties, as lodged with the Clerk per the Docket Sheets. Pursuant to Rule 37.6, counsel represent that this brief was not authored in whole or in part by counsel for any party. *Amici* have borne their own expenses, without support from any party.

The **Jewish Council on Urban Affairs (JCUA)** combats poverty, racism and anti-Semitism in partnership with diverse communities in the Chicago area and beyond. Guided by prophetic Jewish principles, JCUA pursues social and economic justice for those who are most vulnerable by promoting a vision of empowering communities from within. Since its founding in 1964, JCUA has assisted groups in low-income communities and communities of color, built coalitions with diverse groups, advocated on issues of human rights, poverty and racism, and mobilized a Jewish constituency to create a more just world for all.

The **Jewish Social Policy Action Network (JSPAN)** is a non-profit organization working out of Philadelphia dedicated to protecting the constitutional and civil rights of minorities and the vulnerable. JSPAN utilizes education, testimony, *amicus curiae* briefs and permissible grassroots organizing to support the separation of church and state, to advance individual rights under law, and generally to pursue *tikkun olam*, the "repair of the world." JSPAN supports the availability of adequate healthcare, and health insurance in particular, to all Americans and has consistently supported the principles expressed in the ACA.

The **New England Jewish Labor Committee (JLC)** is the voice of the Jewish community in the labor movement and the voice of the labor movement in the Jewish community. By engaging the Jewish community in support of issues affecting working

people and the labor movement, the JLC enables the Jewish community and the trade union movement to work together on important issues of shared interest and concern, in pursuit of our shared commitment to economic and social justice. Access to universal, quality, affordable healthcare is seen as a critical social justice goal.

Professor Abigail R. Moncrieff is Peter Paul Career Development Professor and Associate Professor of Law at Boston University School of Law, and she proudly joins these civil rights and civil liberties organizations as an *amicus*. Professor Moncrieff teaches and writes in the fields of healthcare law, federalism, and constitutional law, and she has written extensively on the liberty implications of the minimum coverage provision as well as on the federalism implications of the ACA. Professor Moncrieff therefore has a strong professional interest in the outcome of this case, as well as a personal pecuniary interest in the continuing security of the healthcare infrastructure. She joins this brief together with her students, **Zoë Sajor**, **Rachel Smit**, and **Emily Westfall**, whom she thanks for their excellent research assistance. Professor Moncrieff's relevant scholarly works are available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=784767.

SUMMARY OF THE ARGUMENT

In its analysis of the minimum coverage provision, the Eleventh Circuit mischaracterized the statute's implications for individual liberty, both in terms of the provision's substantive intrusion on individual freedom and in terms of its structural incursion on state power to protect that freedom. As a result, the Court reached the wrong decision on the merits of the Article I challenge.

Although respondents do not argue that the so-called "individual mandate" violates any protectable rights, they do argue – and the Eleventh Circuit held – that the provision's implications for liberty support invalidation under the Commerce Clause and Necessary and Proper Clause. The Eleventh Circuit correctly noted that, under this Court's precedent, concerns about liberty often shape federalism doctrine. But the Court has emphasized such concerns only in a limited set of federalism cases: those in which the national government has exerted a kind of control that falls within the states' traditional police power.

The individual mandate is not such a law. Contrary to the Eleventh Circuit's assertions, the minimum coverage provision does not require individuals to purchase any particular product. It is, instead, merely a requirement for individual financial participation in the national healthcare infrastructure, much like a tax. The provision is thus a kind of regulatory control that does not, under this Court's precedent, raise rights-based concerns.

Furthermore, although the Patient Protection and Affordable Care Act (ACA) certainly increases the federal government's involvement in insurance regulation, the statute preserves significant state authority over both health insurance and healthcare. Beyond the federally-mandated financial contribution, individuals remain free to choose among many insurance products for structuring their healthcare payments and free to choose whatever courses of medical treatment they prefer, subject almost entirely to state rather than federal definition.

ARGUMENT

I. THE ELEVENTH CIRCUIT MISCHARACTERIZED THE MINIMUM COVERAGE PROVISION'S IMPLICATIONS FOR INDIVIDUAL LIBERTY.

In holding that the minimum coverage provision ("provision" or "individual mandate"), 26 U.S.C.A. § 5000A, of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (ACA),[2] is unconstitutional under Article I, see U.S. Const. art I., § 8, the Eleventh Circuit hinged its analysis on the provision's implications for individual liberty. See *Florida ex rel. Att'y Gen.* v. *U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1284, 1291-92

[2] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

(11th Cir. 2011) (noting at the outset that the "ultimate goal" of "structural constitutional limitations" is "the protection of individual liberty" and that the mandate's perceived intrusion on freedom "strikes at the very heart of whether Congress has acted within its enumerated power").

Although the Eleventh Circuit correctly noted that one purpose of our government's federal structure is to protect freedom, the majority opinion made a critical error that led it to the wrong result on the merits: It misunderstood the basic nature and function of the minimum coverage provision. When properly characterized as a requirement for individual financial contribution to the national healthcare infrastructure rather than as a requirement for individual purchase of a unique product or individual consumption of a given commodity, the provision poses neither a threat to liberty nor a threat to federalism.

As civil rights and civil liberties organizations dedicated to improving access to high quality healthcare, *amici* are interested in both the protection of liberty *from* government and the facilitation of liberty *through* government. The federal structure serves both purposes, and it is vital that all units of government – Congress, the Executive, and this Court alike – strike an appropriate balance between limiting intervention and respecting regulation. With the ACA, Congress wrote a well-balanced law that supports a high quality healthcare infrastructure without

unduly restricting states' or individuals' power to satisfy their needs and preferences.

A. Although Liberty is a Legitimate Concern in Federalism Analysis, the Liberty Interests that Have Been Relevant in this Context Are Those that Relate to the Core Police Power of the States.

A general principle of individual freedom undoubtedly underlies our government's federal structure. In part, federalism serves simply to slow down regulatory decisionmaking, to make restrictive interventions harder to pass. More importantly, though, federalism serves to place the most intrusive forms of regulatory power into the hands of smaller governments so that individuals are better represented in the regulatory processes that lead to their forfeitures of freedom, particularly their imprisonment. See *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011) (noting that state governments allow individuals to make their voices heard "without having to rely solely upon the political processes that control a remote central power").

In keeping with the latter point, this Court has stressed the importance of federalism to liberty only when the national government has exerted a kind of control that belongs with the states' police power: regulations related to education, public health, and public safety. Indeed, all Supreme Court cases that have noted the interrelationship of liberty and

federalism have involved federal attempts to regulate public safety. See *Bond*, 131 S. Ct. 2355 (criminal chemical weapons ban); *United States* v. *Morrison*, 529 U.S. 598 (2000) (private right of action for victims of domestic violence); *Printz* v. *United States*, 521 U.S. 898 (1997) (background checks for gun sales); *United States* v. *Lopez*, 514 U.S. 549 (1995) (criminal prohibition on firearm possession near schools); *New York* v. *United States*, 505 U.S. 144 (1992) (regulation of nuclear waste disposal); see also *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991) (interpreting a federal statute to preserve a state public health regulation: a mandatory retirement age for state judges).

By contrast, this Court does not emphasize libertarian[3] implications in federalism cases that center on purely financial regulations, such as taxes or other kinds of mandatory contributions, even when those financial regulations intend to affect individual behavior. In *South Dakota* v. *Dole*, 483 U.S. 203, 211-12 (1987), for example, the Court confronted the view that the federal government's effective taxation of states for refusing to change the drinking age raised concerns about state freedom, and it squarely rejected the argument. The Court noted that constitutional limits have always relied on "'a robust common sense which assumes the freedom of the will [to reject mere

[3] Throughout this brief, we use "libertarian" in its small-l sense, to mean "related to liberty." We do not mean to refer to the Libertarian Party or to the broader political movement that has now come to be associated with the Tea Party.

financial incentives] as a working hypothesis.'" *Id.* (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)).

In short, the virtues of the states as subunits of government, providing citizens with greater opportunities of voice, diversity, and exit than they have at the national level, are important to individual freedom when the regulation at issue is truly coercive – when it is one that has historically fallen within the states' police power. Financial regulations are capable of raising the same kinds of libertarian concerns only if they reach a magnitude of intervention at which "'pressure turns into compulsion.'" *Dole*, 483 U.S. at 211 (quoting *Steward Mach.*, 301 U.S. at 590). But universal obligations for financial participation that are well-calibrated and minimally intrusive, like ordinary taxes, have never been thought to raise libertarian concerns or to require state control. The Eleventh Circuit's apparent holding to the contrary constitutes a dramatic departure from this Court's longstanding and consistent precedent.

B. The Minimum Coverage Provision is a Well-Calibrated and Non-Coercive Requirement for Financial Participation in the National Healthcare Infrastructure, Which Does Not Implicate State Police Power.

Given the role that liberty has played in federalism cases, the respondents would need to establish that the minimum coverage provision either is

non-financial or is truly coercive in order to establish that libertarian concerns can justify their narrow reading of Article I. But the mandate is, in fact, purely financial and not at all coercive.

Notwithstanding the Eleventh Circuit's and the respondents' insistence to the contrary, the individual mandate does not require individuals to buy any particular product or service. Instead, it merely requires legal residents of the United States to contribute some money to the national healthcare infrastructure, *either* by paying into a private insurance pool of the individual's choice *or* by making an equivalent or lesser "shared responsibility payment" to the national treasury. 26 U.S.C.A. § 5000A(b); § 5000A(c)(1) (capping possible penalties at the cost of an average private plan). Importantly, the maximum amount that the mandate requires any individual to pay is the average cost of the least-comprehensive level of private insurance coverage, § 5000A(c)(1)(B), meaning that individuals are not financially penalized for choosing to give their money to the federal fisc instead of giving it to private insurance. The only thing that self-insured individuals forfeit by choosing a shared responsibility payment over an insurance contract is the private insurance coverage, but that forfeiture is not a penalty at all for individuals like the respondents, who prefer to remain self-insured, see *Florida ex rel. Bondi* v. *U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1270-71 (N.D. Fla. 2011) (describing the allegations of two plaintiffs who claim to prefer self-insurance), aff'd in part,

rev'd in part *sub nom. Florida*, 648 F.3d 1235. Given the magnitude of the penalty and its statutory calibration to private insurance premiums, the minimum coverage provision requires nothing more or less than a universal, standardized contribution to the healthcare infrastructure from all legal residents who are able to pay.[4]

In this sense, the individual mandate is, as far as its effect on liberty is concerned, indistinguishable from an ordinary tax.[5] Although the mandate functions slightly differently from ordinary taxes – as we will discuss shortly – its effects on individual liberty are fundamentally the same. Indeed, Congress was aware that the mandate resembles a tax for liberty purposes; the provision contains a religious exemption that simply cross-references the Internal

---

[4] The mandate excuses from this financial contribution legal residents who have public healthcare through the Military Health System (TRICARE) and Veterans Affairs. See 26 U.S.C.A. § 5000A(f)(1)(A)(iv)-(v). Those individuals, though, have earned their public benefit through their service and have supported the national infrastructure in other ways. Others are excused from the contribution only if they are unable to pay, like Medicaid enrollees, § 5000A(f)(1)(A)(ii), if they have paid into the system through prior taxation, like Medicare enrollees, § 5000A(f)(1)(A)(i), or if they fall into limited statutory exemptions, § 5000A(e).

[5] This brief does not argue that the individual mandate is a tax for purposes of the Anti-Injunction Act or the Article I taxing power. The point here is only that the mandate's imposition on liberty is no greater or lesser than that of a standard tax, which would be true even if the mandate constituted a commercial regulation rather than a tax.

Revenue Code's general religious exemption for self-employed individuals. 26 U.S.C.A. § 5000A(d)(2) (cross-referencing 26 U.S.C.A. § 1402(g)(1)). The religious exemption, thus, relates only to financial contribution, not to enrollment in health insurance, because financial contribution is all that the mandate ultimately requires.

The federal government compels residents to contribute to countless national infrastructures on which they might or might not individually rely, including the military, highway, telecommunications, ecological, agricultural, and energy infrastructures, among many others, and the individual mandate simply adds the healthcare infrastructure to that list. Cf. *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 564 (6th Cir. 2011) (Sutton, J., concurring) (noting that the mandate is no more intrusive than the many tax laws requiring individuals to "spend money on things they may not need"), petition for *cert.* pending, No.11-117 (filed July 26, 2011).

Of course, there is an obvious arguable distinction between the individual mandate and ordinary taxation (at least as taxation is commonly perceived): The minimum coverage provision relies on private entities to maintain the healthcare infrastructure rather than relying on public entities like the United States military. It is this difference more than any other that seemingly motivated the Eleventh Circuit to decry the individual mandate as a "novel" attempt to "compel" individuals "to enter the stream of commerce." See *Florida*, 648 F.3d at 1291-92

("Individuals subjected to this economic mandate have not made a voluntary choice to enter the stream of commerce, but instead are having that choice imposed upon them by the federal government."); *id.* at 1328 ("This economic mandate represents a wholly novel and potentially unbounded assertion of congressional authority: the ability to compel Americans to buy an expensive health insurance product they have elected not to buy. . . .").

But this arguable distinction is a false one. Many of our most important national infrastructures rely on private contractors for their primary support. Private utility companies are responsible for many states' energy infrastructures; private construction contractors maintain the highway and transportation infrastructures; private telephone and internet providers own the telecommunications infrastructure; private environmental consultants safeguard the ecological infrastructure; private farmers own the agricultural infrastructure. And even the military sometimes relies on private contractors to support its efforts, as the public learned in the Blackwater Security scandal, see Associated Press, *U.S. Embassy Resumes Use of Blackwater Security*, U.S.A. Today, Sept. 21, 2007. See generally Gillian E. Metzger, *Privatization as Delegation*, 103 Colum. L. Rev. 1367 (2003) (discussing governmental reliance on private contractors and its implications for structural constitutional limits). General tax dollars, collected compulsorily from all Americans, support these private companies without raising liberty-based constitutional

concerns – without provoking accusations that these programs force unwilling Americans "to enter the stream of commerce." *Florida*, 648 F.3d at 1292.

Importantly, the federal Medicare program also relies on private insurance companies, called "Medicare Administrative Contractors," to manage the part of the healthcare infrastructure that serves the elderly and disabled populations. See Ctrs. for Medicare & Medicaid Servs., *Part A/Part B Medicare Administrative Contractor* (Sept. 21, 2011). Under Medicare, the government forcibly collects tax dollars from all individuals working in the United States and uses those dollars to pay private health insurance companies to administer enrollees' benefits. This point might help to explain why a protester infamously commanded Representative Robert Inglis to "keep your government hands off my Medicare," Phillip Rucker, *Sen. DeMint of S.C. Is Voice of Opposition to Health-Care Reform*, Wash. Post, July 28, 2009, at A1 ("At a recent town-hall meeting in suburban Simpsonville[, S.C.], a man stood up and told Rep. Robert Inglis (R-S.C.) to 'keep your government hands off my Medicare.'"), but it raises the question of why such protesters do not, either when paying Medicare payroll taxes or when enrolling in the mandatory Medicare Part A program for hospitalization benefits, complain that they are being forced to "enter the stream of commerce." *Florida*, 648 F.3d at 1292.

The difference might be that, when paying Medicare taxes, the money goes first to the federal

government and only later to the Medicare Administrative Contractor, making the Medicare payments more obviously taxation. The minimum coverage provision, by contrast, cuts out the middle man of the federal government for those individuals who choose private insurance contracts over shared responsibility payments, effectively enlisting a network of private contracts *as* a public program. But that strategy for a public infrastructure is far from novel.

Even during the height of the *Lochner* era, see *Lochner* v. *New York*, 198 U.S. 45 (1905), this Court recognized that some private industries were so "impressed with a public interest" that they were essentially public in nature – sufficiently so that they could be rate-regulated despite the then-robust freedom of contract doctrine. *Adkins* v. *Children's Hosp. of D.C.*, 261 U.S. 525, 546 (1923) (citing *Munn* v. *Illinois*, 94 U.S. 113 (1876)), overruled in part by *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937). The paradigmatic example of such quasi-public entities is the common carrier – railroads, airlines, and the like – but the public interest exception to the freedom of contract also extended to bakers, warehouses, innkeepers, and many others. See *Munn*, 94 U.S. at 125 ("[I]t has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold.").

Crucially for present purposes, the same exception applied to insurers. See *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U.S. 251, 257 (1931) (holding that "[t]he business of insurance is so far affected with a public interest that the State may regulate the rates" (citing *German Alliance Ins. Co.* v. *Kansas*, 233 U.S. 389 (1914))). In fact, the *Lochner*-era Supreme Court explicitly analogized private insurance to taxation, reasoning:

> The effect of insurance – indeed, it has been said to be its fundamental object – is to distribute the loss over as wide an area as possible. In other words, the loss is spread over the country, the disaster to an individual is shared by many, the disaster to a community shared by other communities. . . . In assimilation of insurance to a tax, the companies have been said to be the mere machinery by which the inevitable losses by fire are distributed so as to fall as lightly as possible on the public at large, the body of the insured, not the companies, paying the tax.

German Alliance, 233 U.S. at 412-13. This Court thus has a long history of treating private insurance as a quasi-public infrastructure, closely analogous to a system of collective taxation, and the Court has therefore allowed insurance to be subject to intensive regulation even in the face of once-robust substantive restrictions.

Indeed, several states passed the first compulsory insurance provisions for workers' compensation

and automobile insurance during the same era. Perhaps because this Court had established that insurance was quasi-public, freedom of contract challenges to these provisions gained no traction. See *Alaska Packers Ass'n* v. *Indus. Accident Comm'n*, 294 U.S. 532, 541-43 (1935) (noting that a California court had characterized the state's workers' compensation regime as "compulsory insurance" but upholding the regime against a freedom of contract challenge on the ground that it merely assigned liabilities); see also *In re Opinion of the Justices*, 81 N.H. 566 (1925) (considering possible constitutional infirmities with a proposed compulsory auto insurance law in an advisory opinion to the New Hampshire legislature and raising only equal protection and dormant commerce clause issues, not freedom of contract issues). Even at the height of the *Lochner* era, then, compulsory insurance provisions did not raise libertarian concerns.

Of course, the *Lochner*-era Court's special treatment of insurance – and its analogizing of insurance to taxation – makes tremendous sense. Not only do insurance pools and tax funds play similar roles of risk-spreading and cost-sharing, but also, when free-riders and other market failures cause insurance pools to fail, taxpayers inevitably fill the gap. A property destroyed by fire that cannot be rebuilt must be condemned; a non-functioning automobile on the highway that cannot be towed must be cleared; and a family left behind after death that cannot self-sustain must be supported. Similarly, because we have decided as a matter of policy that all Americans with

emergent medical conditions must be treated, see Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd, taxpayers frequently fill expensive gaps when the self-insured are unable to pay, see 42 U.S.C.A. § 18091(a)(2)(F) (finding that uncompensated care cost $43 billion in 2008). In the end, as the *Lochner* Court seemed to understand, requiring individuals to choose between paying into an insurance pool or contributing an equal or lesser sum to the national treasury does not actually change their baseline state of freedom. Taxpayers are already paying for systemic healthcare costs through the less-efficient public safety net.

The longstanding analogy between insurance and taxation also helps to refute the slippery slope arguments that have arisen in this litigation, including the District Court's fear that a finding of constitutionality might allow Congress to require purchases of anything from broccoli to automobiles. See *Florida*, 780 F. Supp. 2d at 1289. An important distinguishing feature of insurance is that it is *merely* a fiscal pool, available to protect against economic loss. Unlike a compelled purchase of broccoli or cars, a mandatory contribution to an insurance pool does not require the regulated individual to devote any of her time or space to keeping, selling, or destroying any physical object. The imposition on her liberty is thus extremely small and, again, purely financial. The appropriate analogy to food markets, then, is not to a broccoli mandate but rather to farm subsidies, which force all taxpayers to buy into the agricultural infrastructure

whether or not they consume the supported products. And those subsidies can be just as influential on consumption choices as the minimum coverage provision ever could be; the subsidies for domestic corn (combined with tariffs on imported sugar) have long "compel[led]," *Florida*, 648 F.3d at 1328, Americans to buy corn syrup instead of sugar. See Tim Worstall, *Big Corn's HFCS v. Big Sugar's Sucrose: Maybe Both Could Lose?*, Forbes.com (Dec. 26, 2011).

The Eleventh Circuit and the respondents posit a second distinction between the minimum coverage provision and other quasi-public infrastructures: Private individuals during the *Lochner* era were not required to give their money to the quasi-public entities, like insurance companies, *unless* they were likely to use or were in fact using the entities' services. Car insurance was obligatory only for drivers; workers' compensation funds were obligatory only for employers; and payments to common carriers, bakers, warehousemen, and grain elevators were obligatory only for users. The individual mandate, by contrast, applies to all legal residents of the United States, regardless of whether they are using or ever will use the healthcare system. See *Florida*, 648 F.3d at 1290-91.

The most that can be said of this distinction, though, is that it makes the ACA's statutory scheme slightly more analogous to mandatory taxation than the *Lochner*-era schemes were. There is simply nothing in this Court's constitutional jurisprudence or in the text of the Constitution itself that obligates

regulators to choose user fees over collective contributions to support public or quasi-public infrastructures. So long as the infrastructure in question is a proper subject of federal regulation and the magnitude of the compelled fee is reasonable, Congress may choose any regulatory approach it likes. Furthermore, it makes sense for Congress to choose collective contributions over user fees when all Americans are extremely likely to benefit from the supported infrastructure at some point and when payments are difficult to collect from users at the point of service. National defense is the classic example of an infrastructure with these characteristics, and healthcare is similar, particularly given individuals' failures to save sufficiently for needed care. See 42 U.S.C.A. §§ 18091(a)(2)(F)-(G) (finding that individuals consumed $43 billion of uncompensated care in 2008 and that such unsaved-for consumption contributes to 62 percent of personal bankruptcies).

In short, there is nothing in the least bit novel about relying on private insurance as a quasi-public infrastructure, nor is there anything novel about setting rates for and requiring contributions to private insurers in order to fund that infrastructure. This approach to collective maintenance of public goods has an established history in the United States, and it is a regulatory approach that has long been thought to respect even the most stringent

substantive libertarian constraints.[6] Furthermore, it is an approach that is, as this Court has long acknowledged, closely analogous to the standard *federal* function of distributing the costs of national public goods through taxation.[7]

Of course, the individual mandate has aroused considerable public backlash (further bolstering the analogy to taxation!) because many Americans are uncomfortable with the *perceived* requirement that they enter a private contract. Also, the mandate is obviously somewhat intrusive of individual freedom insofar as it directs Americans' use of their money.

---

[6] This approach fell out of favor during the New Deal era, as the federal government began to replace quasi-public industry with purely public programs like Social Security. It is therefore understandable that the regulatory strategy appears novel to today's respondents. With the modern push towards privatization and deregulation, however, this approach to supporting public infrastructures might well become more common. The important point, though, is that quasi-public strategies for public infrastructures do not now raise nor have they ever raised implications for individual liberty beyond the generalized restraints that come with all taxation and regulation.

[7] Although the *Lochner*-era Supreme Court treated insurance as a local business that could not be subject to national regulation, see *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168 (1869), the Court has since reversed that holding, see *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). It is now well established that the business of insurance crosses state lines and therefore falls within Congress's authority to regulate interstate commerce. Indeed, the respondents do not allege that Congress lacks authority to regulate health insurers directly; they have not challenged the many insurance regulations in the ACA.

But "[n]ot every intrusive law is an unconstitutionally intrusive law." *Thomas More*, 651 F.3d at 565 (Sutton, J., concurring). The individual mandate presents no greater threat to liberty than any ordinary requirement to pay for the support of our nation's infrastructures.

C. The Minimum Coverage Provision Fully Respects and Preserves Individuals' Healthcare Autonomy.

One true distinction between the individual mandate and other quasi-public infrastructures is that the minimum coverage provision regulates health, which is a regime that has been dedicated to states' police power, see *Florida*, 648 F.3d at 1306, as well as a regime that has received special solicitude in modern substantive due process jurisprudence, see Abigail R. Moncrieff, *The Freedom of Health*, 159 U. Pa. L. Rev. 2209 (2011). Ultimately, however, this distinction makes no difference. The mandate does not attempt to influence public health regulation (the subject that has been state or local) or medical decisionmaking (the subject that receives heightened substantive protection). The mandate regulates only healthcare *financing*.

In the mythology that has arisen around this case, many commentators have analogized the minimum coverage provision to a requirement that individuals buy broccoli, see generally Einer Elhauge, Op-Ed., *The Broccoli Test*, N.Y. Times, Nov. 15, 2011,

at A35 (noting the prevalence of the broccoli analogy); Einer Elhauge, *The Irrelevance of the Broccoli Argument Against the Individual Mandate*, 366 New Eng. J. Med. e1 (2012) (arguing that the analogy ultimately fails), while others, including the District Court below, have also analogized the mandate to a requirement that individuals *eat* broccoli, *Florida*, 780 F. Supp. 2d at 1289. As discussed above, it is not at all clear that the provision compels any purchase at all because individuals can comply by making an equal or lesser financial contribution to government; and even if the provision did require a purchase, the analogy to broccoli would fail because the mandate includes no obligation to take ownership or possession of a physical object. Regardless, though, it is beyond cavil that the mandate does *not* require *consumption* of any particular medical care. In other words, the mandate does not, in fact, require anyone to eat his broccoli. The minimum coverage provision, at most, requires individuals to be insured against certain kinds of sickness and accidents. It does not require individuals to seek healthcare when they become sick or have an accident.

The individual mandate, therefore, does nothing to regulate individuals' autonomous medical decisions nor anything to regulate public health inputs or outcomes, nor does it in any way infringe on an individual's freedom to reject unwanted medical interventions. Cf. *Washington* v. *Harper*, 494 U.S. 210, 221-22 (1990) (noting that individuals have "a significant liberty interest . . . under the Due Process

Clause of the Fourteenth Amendment" in rejecting unwanted medical intervention). The provision is simply a requirement that all capable individuals contribute financially to the nation's healthcare infrastructure.

Again, the appropriate analogy to food markets is not to a purchase mandate for broccoli but rather to the mandatory contributions that all taxpayers make to the agricultural infrastructure through farm subsidies. Those subsidies flow from taxpayers to private farmers, not public programs; they are compulsory for all taxpaying residents; and although they alter the overall balance of the food supply (in favor of corn syrup over sugar, for example), the subsidies leave Americans free to choose what they eat. The only functional difference between the minimum coverage provision and farm subsidies is that the mandate channels financial support directly from taxpayers to private insurers instead of involving the national government as a middle man subsidizer. In the end, just as farm subsidies leave Americans free to eat whatever they choose, the insurance mandate leaves Americans free to pursue any course of medical treatment they choose.

It ought also to be relevant to healthcare autonomy that the individual mandate will *increase* many Americans' access to healthcare, improving rather than harming their freedom to obtain medical interventions. By mandating universal financial support for the healthcare infrastructure, the mandate ensures that high quality medical care will always be

available in the United States. In this sense, too, the mandate functions like farm subsidies, which have long been thought necessary to ensure that the food supply is sufficient to sustain Americans' freedom to access adequate nutrition. Because both food and healthcare are basic human needs, regulations that improve access to and quality of those goods (without restricting consumption choices) ought to be understood as fundamentally freedom-enhancing. Furthermore, because purchasing insurance coverage will constitute compliance with the mandate, many individuals will choose to gain easy financial access to healthcare by entering an insurance contract, rather than choosing to continue their reliance on often-faulty self-insurance by making a shared responsibility payment. Those individuals will gain significantly greater capacity to obtain healthcare, even though they will remain free to reject any healthcare they don't want. From the perspective of medical liberty and healthcare autonomy, thus, the individual mandate improves the baseline state of freedom for the currently insured and the currently uninsured alike.

II. FOR THOSE WHO CHOOSE TO COMPLY BY PURCHASING INSURANCE, THE ACA LEAVES THE CONTENTS OF THEIR PURCHASE PRIMARILY TO STATE CONTROL, PRESERVING STATE POWER OVER THE ASPECTS OF THE MANDATE THAT MATTER MOST TO LIBERTY.

Although the Eleventh Circuit correctly noted that both the insurance and healthcare industries fall "within the sphere of traditional state regulation," *Florida*, 648 F.3d at 1305, the majority opinion grossly exaggerated the minimum coverage provision's departure from that traditional baseline. Indeed, the opinion merely asserted, without citation or elaboration, "that the individual mandate supersedes a multitude of the states' policy choices in these key areas of traditional state concern." *Id.* at 1306.

Of course, the mandate itself does no such thing. Whether viewed as a standardized contribution to the healthcare infrastructure or as a purchase mandate for an insurance product, the individual mandate itself, 26 U.S.C.A. § 5000A(a), says nothing at all about the nature of the insurance at issue, much less about the nature of the medical care that such insurance will cover, cf. § 5000A(f) (defining "minimum essential coverage" broadly to include any legal, comprehensive health insurance product). It is instead the ACA's other insurance regulations, including the definition of "essential health benefits" found elsewhere in the statute, 42 U.S.C.A. § 18022, that regulate the insurance products one can buy in complying

with the mandate. But the respondents do not allege here or anywhere else that those insurance regulations exceed Congress's Article I powers. Indeed, under this Court's holding in *South-Eastern Underwriters*, 322 U.S. 533, Congress has clear authority to regulate the contents and practices of any insurance contract bought or sold in the United States. It is only the supposed additional requirement that legal residents *enter* such contracts that is in dispute here.

That said, the ACA's overall regulatory approach to health insurance and healthcare is, in one sense, relevant to the mandate's implications for individual liberty: The greater the range of options available to individuals and states for complying with the mandate, the less concerned this Court needs to be that the mandate represents a coercive exercise of a federal police power. Cf. *Florida*, 648 F.3d at 1309 (worrying that a finding of constitutional validity would "vest Congress with a general police power"). It is thus highly relevant that the ACA, notwithstanding the Eleventh Circuit's conclusory assertion to the contrary, preserves significant state authority over both insurance and care. Because states have authority to diversify in regulating the contents of insurance contracts, individuals could have essentially limitless options for compliance with the mandate.

State diversification is possible through two avenues. First, the ACA preserves state authority over the aspects of public health and healthcare regulation that historically have been delegated to states' police power – a point that cuts in favor of constitutionality

under the Necessary and Proper Clause, see *United States* v. *Comstock*, 130 S. Ct. 1949, 1958-61 (2010) (stressing the importance to Necessary and Proper Clause analysis of the statute's degree of departure from traditional areas of federal concern), and that eviscerates the Eleventh Circuit's fear of a national police power. Second, the ACA provides the states with many opportunities for asserting their citizens' interests through national political and administrative processes, providing additional prospects for interstate diversification through the ACA regulatory structure as well as providing further support for constitutionality under the Necessary and Proper Clause, see *id.* at 1962-63 (noting that a statute is more likely to be constitutional if it "accounts for state interests").

A. The Minimum Coverage Provision Preserves the States' Historic Police Power in the Regimes that are Most Important to Individual Liberty.

The Eleventh Circuit correctly noted that healthcare and insurance regulation traditionally fall within the police power of the states. But not all statutes that relate to healthcare or insurance implicate that power, as should be apparent from the multitude of federal healthcare and health insurance regulations already on the books. See, *e.g.*, Women's Health and Cancer Rights Act of 1998, Pub. L. No. 105-277, § 902, 112 Stat. 2681 (1998) (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.); Health

Insurance Portability and Accountability Act, Pub. L. No. 104-191, 101 Stat. 1936, 1936 (1996) (codified as amended in 42 U.S.C.); Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.); Old-Age, Survivors, and Disability Insurance Act of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965) (codified as amended in 42 U.S.C.) (establishing Medicare); Federal Food, Drug, and Cosmetic Act of 1938 (FDCA), Pub. L. No. 717, 52 Stat. 1040 (1938) (codified as amended in 21 U.S.C.). The states' police power, then, has been and ought to be limited to those exercises of regulatory power that truly coerce individuals. Although the ACA sets a federal floor for some insurance regulations, the statute preserves the nearly exclusive state authority over medical regulation (such as licensure, vaccination, and quarantine), and it preserves significant state authority over insurance regulation, including the core state power to license insurers.

1. States retain their nearly exclusive authority over regulation of medicine.

Although it is well established that the power to regulate healthcare and public health traditionally rests with the states, that tradition does not encompass all regulations related to healthcare. The tradition historically covers only true medical regulation, such as licensure of doctors and hospitals, and true public health regulation, such as mandatory vaccination and quarantine. Indeed, the cases that the

Eleventh Circuit cited in asserting the police power over healthcare – and the cases in which this Court has emphasized that state power – relate to one of those two regulatory regimes. The relevant cases concern regulations that seek to ensure the safety and efficacy of medical interventions and regulations that seek to prevent the spread of disease. See *Florida*, 648 F.3d at 1305 (citing *Gonzales* v. *Oregon*, 546 U.S. 243 (2006) (safety and efficacy of physician-assisted suicide); *Hill* v. *Colorado*, 530 U.S. 703 (2000) (safety of abortion clinics); *Barnes* v. *Glenn Theatre, Inc.*, 501 U.S. 560 (1991) (clothing mandates for exotic dancers); *Head* v. *N.M. Bd. of Exam'rs in Optometry*, 374 U.S. 424 (1963) (safety of optometrists through licensure regulations); *Barsky* v. *Bd. of Regents*, 347 U.S. 442 (1954) (safety of physicians through licensure regulations); *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905) (mandatory vaccination)); *Florida*, 648 F.3d at 1306 (citing *Hillsborough Cnty.* v. *Automated Med. Labs., Inc.*, 471 U.S. 707 (1985) (safety of blood donation), as well as insurance cases not relevant in this subsection); see also *Oregon-Washington R.R. & Navigation* v. *Washington*, 270 U.S. 87, 93-96 (1926) (noting that state police power includes quarantine, notwithstanding impact on interstate commerce, unless Congress has exercised conflicting control by statute).

Both of those categories of power – both medical regulation and public health regulation – remain untouched under the ACA. The statute says nothing about disease control; it leaves the licensure of

hospitals, doctors, and other medical practitioners entirely to the states; and it does nothing to shift safety and quality regulations to the federal government beyond the shift accomplished long ago in the FDCA. Although the ACA does create a grant program to encourage state experimentation with alternative medical malpractice regimes, the states are free to refuse those grants. 42 U.S.C.A. § 280g-15. Overall, the ACA requires no change in state regulations of medical care.

The core police power over healthcare, thus, remains entirely intact. All of medical regulation remains as much in state hands as it was before the ACA. States therefore remain primarily in charge of an individual's freedom to obtain or to reject medical treatments – the aspects of healthcare regulation that potentially implicate modern substantive due process. See generally Moncrieff, *supra*. Once individuals buy insurance policies to comply with the federal mandate, their access to and interactions with medical care will be subject to state rather than federal oversight, just as they always have been. As a result, if an individual dislikes her state's medical regulatory regime, she will be free to move to a different state with a different approach, and she will also be free to appeal to her smaller state government for policy change. The benefits of federalism to *medical* freedom, thus, are entirely untouched by the ACA and its individual mandate.

2. States retain significant authority over insurance regulation.

The ACA obviously does more to regulate insurance than medical care, but the statute nevertheless preserves significant state authority over insurance practice. Indeed, the states retain primary authority to define the range of products available to their citizens for complying with the individual mandate.

Most importantly, the ACA does nothing to disrupt the longstanding state power over insurance licensure. See Christopher C. Jennings & Katherine J. Hayes, *Health Insurance Reform and the Tensions of Federalism*, 362 New Eng. J. Med. 2244, 2245 (2010) (noting that states will continue licensing insurers). Under the ACA, a state may refuse to allow any given insurance company to write and sell policies within its borders. The states thus possess – and retain after the ACA – an absolute power of exclusion that they can use to control the health insurance products available to their citizens. The ACA obviously imposes some new limits on the contents and practices of insurance policies, as we discuss below, but the states retain an important power to exclude from their markets any insurance company or product that the state or its citizens dislike. Moreover, after extensive state lobbying during the passage of the ACA, Congress opted not to repeal the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2006), which continues to exempt insurance from federal antitrust regulations. See Jonathan Dinan, *Shaping Health Reform: State Government Influence in the Patient*

Protection and Affordable Care Act, 41 Publius 395, 399, 412-13 (2011). Any state that chooses to do so, therefore, may create an insurance monopoly or oligopoly within its borders without fear of federal intervention.

Of course, the ACA includes a new requirement that licensed insurance products be available for purchase through "American Health Benefit Exchanges," 42 U.S.C.A. § 18031, but it leaves the states with tremendous flexibility in designing and governing those exchanges. See generally Jon Kingsdale & John Bertko, *Insurance Exchanges Under Health Reform: Six Design Issues for the States*, 29 Health Aff. 1158 (2010). Indeed, the most fundamental choices about exchange design are up to state discretion. States can choose among a state-specific exchange, a federal exchange, and a multi-state regional exchange, 42 U.S.C.A. §§ 18031(f), 18041(c); they may establish multiple exchanges within their borders, § 18031(f); and they may decide whether or not to allow large group insurers to sell policies through the exchange, § 18032(f)(2). In short, just as the range of products is left to states to determine through licensure, so too is the interface for consumer purchases left to the states to design through exchange governance. The ordinary American's experience of purchasing insurance to comply with the mandate can therefore be governed almost entirely by the states.

Furthermore, it is already clear that the states will diverge in their exchange designs. See generally National Conference of State Legislatures, *State*

Actions to Implement Health Exchanges (Nov. 2011). Some states' exchanges will be non-profit private entities; some will be public-private partnerships; some will be new states agencies; some will run through existing state agencies. *Id.* Some states' exchanges will work as "active purchasers" of insurance, buying large-group plans on behalf of exchange enrollees, while others will work as "open marketplaces," allowing any licensed insurer in the state to make its product available through the exchange. *Id.* The ACA thus allows for interstate diversity and experimentation in the insurance marketplace, providing each citizen with an exit opportunity if she dislikes her state's insurance options or exchange interface. In short, the ACA leaves significant power over health insurance regulation in the hands of the smaller subunits of government, allowing citizens to retain a strong voice in insurance regulation "without having to rely solely upon the political processes that control a remote central power." *Bond*, 131 S. Ct. at 2364.

Admittedly, the ACA sets a federal floor on the categories of benefits that must be included in many insurance contracts, see 42 U.S.C.A. § 300gg-6(a) (requiring individual and small-group plans to include the "essential health benefits package"); § 18011(a) (exempting grandfathered plans); § 18022(a) (defining the "essential health benefits package"), and it sets a federal ceiling on the administrative costs (including profits) that insurers are allowed to incur, see § 300gg-18(b) (setting a minimum medical-loss ratio

of 85% for large-group plans and 80% for individual and small-group plans, effectively allowing insurers to spend 15-20% of their intake on administration and profit). The ACA also establishes new federal bans on many once-common insurance practices, including caps on annual and lifetime benefits, § 300gg-11, exclusions for preexisting conditions, § 300gg-3, rescissions of plans for reasons other than fraud, § 300gg-12, refusals to issue or renew policies for individuals, §§ 300gg-1, 300gg-2, 300gg-4(a), and practices of medical underwriting based on factors other than age, tobacco use, and geography, §§ 300gg(a)(1), 300gg-4(b).

These insurance regulations, however, do not represent a presumptuous federal takeover of state police power. Instead, they represent the culmination of many years of state experimentation with insurance reform, which has been necessary to address market failures that allow too many sleights of hand by insurers at patients' expense. But many of the states' regulatory attempts have experienced limited success because insurance companies can leave the states that regulate them in favor of states with laxer regimes. See generally Conrad F. Meier, *Destroying Insurance Markets: How Guaranteed Issue and Community Rating Destroyed the Individual Health Insurance Market in Eight States*, Council for Affordable Health Insurance *passim* (2005). In other words, the story has been a classic race to the bottom requiring some federal standardization. The ACA accomplishes that standardization while preserving state

flexibility to innovate and diversify above the federal floor. Furthermore, the ACA leaves the states with primary enforcement power for all of these regulations, see 42 U.S.C.A. § 300gg-22, allowing coercive regulatory power to remain primarily in state rather than federal hands.

In short, much of the states' core police power over insurance remains intact after the ACA, including the central power of licensure. The ACA puts very little coercive regulatory power in federal hands, and it preserves opportunities for interstate differentiation in insurance regulation. The ordinary American's experience in complying with the individual mandate, thus, will be colored largely by state rather than federal regulation, leaving citizens with many opportunities to influence their health insurance options without resort to the "remote central power" of the federal government. *Bond*, 131 S. Ct. at 2364.

B. The ACA Provides States with Political and Administrative Avenues to Influence the ACA's Development and to Innovate Beyond the ACA.

Of course, while the "political processes that control a remote central power," *id.*, may be entirely inaccessible or frustratingly unresponsive from an individual voter's perspective, state governments are quite capable of penetrating and influencing those processes on their citizens' behalf. A federal statute that provides clear avenues for state participation in

the federal regulatory regime is therefore less implicative of a federal police power than a federal statute that occupies the regulatory space to the exclusion of the states. The ACA provides several such avenues, in two broad categories.

First and most obviously, the ACA provides for "state innovation waivers," 42 U.S.C.A. § 18052, empowering the Secretary of Health & Human Services ("Secretary") to excuse individual states from most of the ACA's regulatory requirements, as long as the state comes up with a different way to achieve comparable results. If the majority of a state's citizens strongly dislike the individual mandate, then, they are not reduced to lobbying Congress for repeal of the minimum coverage provision; they can also ask their state government to apply for a waiver, replacing the mandate with a more liberty-protective option for universal coverage. See generally Office of the Press Sec'y, *Fact Sheet: The Affordable Care Act: Supporting Innovation, Empowering States* (Feb. 28, 2011). A similar waiver scheme has allowed for interstate diversity in Medicaid programs, see Frank J. Thompson & Courtney Burke, *Executive Federalism and Medicaid Demonstration Waivers: Implications for Policy and Democratic Process*, 32 J. Health Pol. Pol'y & L. 971 (2007), indicating that the Secretary's oversight does not stifle states' ability to represent their citizens' needs and preferences.

A second broad feature of the ACA is equally important but subtler: By placing primary enforcement power in states' hands, the ACA gives the states

tremendous leverage to influence the everyday administration of the ACA's regulatory scheme. See generally Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 Duke L.J. 2023, 2076 (2008) (noting that "responsibility for program implementation and enforcement appears to enhance state influence over federal agency decisionmaking"). The point here is different from the point above that leaving enforcement with the states helps to preserve the core of their police power. Here, the idea is that preserving state enforcement power forces federal administrators to be responsive to state demands. This aspect of state leverage in the federal-state relationship has already manifested in a dramatic and surprising way; the Department of Health & Human Services recently announced that it will not promulgate federal regulations to define the benefits required under the broad categories of "essential health benefits" but will instead leave that task to the states. Robert Pear, *Health Care Law Will Let States Tailor Benefits*, N.Y. Times, Dec. 17, 2011, at A1.

Within the ACA's regulatory regime, then, the states will have many opportunities to shape healthcare and insurance regulation to their citizens' needs and preferences. The Eleventh Circuit's fear that the ACA "forecloses the States from experimenting and exercising their own judgment" is therefore entirely misplaced. *Florida*, 648 F.3d at 1305 (quoting *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring)). Although the ACA channels some of that experimentation and judgment through federal administrative processes,

the states retain many opportunities to experiment and diversify on their citizens' behalf. Individuals with particular healthcare and health insurance needs, thus, will not need to appeal to the "remote central power," *Bond*, 131 S. Ct. at 2364, for accommodation; they will be able to accomplish anything they need through state action. In short, even if most individuals will comply with the mandate by purchasing a product, the nature and content of that product is left largely to state control.

* * *

Given the structure of the individual mandate as well as the structure of the ACA as a whole, the minimum coverage provision presents no threat to individual liberty nor to the states' authority to protect that liberty. The mandate is merely a standardized obligation for all able taxpayers to make a financial contribution to the national healthcare infrastructure. The provision is thus indistinguishable from an ordinary tax in terms of its imposition on liberty. Furthermore, for those Americans who choose to make their mandatory contribution to a private health insurer instead of making a shared responsibility payment to government, their experience of purchasing insurance will be shaped primarily by state rather than federal regulation. If citizens are unhappy with the perceived purchase mandate, they will have many opportunities to accomplish change through their state representatives, "without having to rely

solely upon the political processes that control a remote central power." *Bond*, 131 S. Ct. at 2364.

CONCLUSION

For the foregoing reasons, we urge the Court to reverse the Eleventh Circuit and direct entry of judgment for the petitioners on the constitutional validity of the minimum coverage provision.

Respectfully submitted,

ANDREW M. FISCHER

Counsel of Record for the Amici Curiae
JASON & FISCHER
47 Winter Street
Boston, MA 02108

AMICUS CURIAE BRIEF

No. 11-398

IN THE
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *ET AL.*,
Petitioners,

v.

STATE OF FLORIDA, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF JUDICIAL WATCH, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS ON THE MINIMUM COVERAGE PROVISION

Paul J. Orfanedes
Counsel of Record
JUDICIAL WATCH, INC.
425 Third Street, S.W., Ste. 800
Washington, DC 20024
porfanedes@judicialwatch.org
(202) 646-5172
Counsel for Amicus Curiae

QUESTION PRESENTED

The question presented is whether the Minimum Coverage Provision of the Affordable Care Act exceeds Congress' powers under Article I of the Constitution.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. Petitioners Must Look to the Commerce Clause for Authority to Pass the Minimum Coverage Provision Because It Cannot Retroactively Declare a Penalty to be a Tax 3

II. The Commerce Clause Cannot Provide Authority to Pass the Minimum Coverage Provision Because To Allow Such Authority Would Transform the Federal Government Into One of Unlimited Powers 10

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Heart of Atlanta Motel, Inc. v. U.S.,
379 U.S. 241 (1964) 13

Marbury v. Madison,
5 U.S. 137 (1803) 18

NLRB v. Jones and Laughlin Steel Corp.,
301 U.S. 1 (1937) 12, 13

Printz v. Mack,
521 U.S. 898 (1997) 12

Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) 17

Wickard v. Filburn,
317 U.S. 111 (1942) 13, 14, 18

U.S. v. La Franca,
282 U.S. 568 (1931) 7

U.S. v. Lopez,
514 U.S. 549 (1995) 11, 12, 14, 18, 19

U.S. v. Morrison,
529 U.S. 598 (2000) 10

STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. CONST. art. I, § 8, cl. 3. .....10, 11

U.S. CONST. amend. X. 11, 12

26 U.S.C. § 5000A(b)(3) 6

26 U.S.C. § 7421(a).....3

42 U.S.C. § 18091(1).....6

42 U.S.C. § 18091(2)(A).....6

LEGISLATIVE MATERIALS

America's Affordable Health Choices Act of 2009, H.R. 3200, 111th Cong. (2009) 6, 7

Affordable Health Care for America Act, H.R. 3962, 111th Cong. (2009) 7

America's Healthy Future Act, S. 1796, 111th Cong. (2009) 6, 7

MISCELLANEOUS

Barack Obama, Remarks in Dover, New Hampshire, September 12, 2008) 4, 5

Matt Cover, *When Asked Where the Constitution Authorizes Congress to Order Americans to Buy Health Insurance, Pelosi says 'Are You Serious?,'* CNSNews (Oct. 22, 2009) 10

News Transcript: *ABC News, This Week with President Barack Obama* (September 20, 2009) 5, 6

Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001) 12

INTEREST OF THE *AMICUS CURIAE*[1]

Judicial Watch, Inc. is a non-partisan, educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as *amicus curiae* in this Court on a number of occasions.

Amicus is concerned about the important questions of constitutional interpretation and the proper balance of power between the several states and the federal government. This case also raises important questions about the consistency and transparency of the federal government's position on whether an act passed by Congress constitutes a tax. Specifically, Judicial Watch has undertaken research on whether Congress may mandate that an individual who does not purchase health insurance do so. Judicial Watch has also examined whether the federal government has been transparent and accountable in its positions on taxes in the Patient Protection and Affordable Care Act.

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus* and his counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

SUMMARY OF ARGUMENT

Petitioners argue that the Minimum Coverage Provision in the Patient Protection and Affordable Care Act of 2010, which requires nearly all Americans to purchase health insurance, is a tax that the Court may uphold under Congress' broad taxing powers. However, Congress drafted and passed the Minimum Coverage Provision as a mandate with a penalty for failure to comply, not as a tax. Petitioner's argument that the Minimum Coverage Provision is a tax therefore fails.

To uphold the law, Petitioners must show that Congress had authority to pass the Minimum Coverage Provision under its Commerce Clause power, but if the Court allows Congress to do so, it must be willing to hold that Congress' powers under the Commerce clause are plenary and unlimited, for there remains no principled way to limit Congress' power if it is stretched as far as Petitioners ask.

ARGUMENT

Petitioners are trying to defend a provision in an act passed by Congress that exceeds its enumerated powers. Though Congress enacted this provision under the Commerce Clause, Congress' power under the clause is not broad enough to compel Americans to engage in commerce by purchasing a particular product. Though Petitioners try to rescue the provision by arguing that it is valid under Congress' taxing power even if it is invalid under Congress' commerce power, a provision of an act that is not a

tax may not be construed as a tax merely to save it from being declared unconstitutional.

I. Petitioners Must Look to the Commerce Clause for Authority to Pass the Minimum Coverage Provision Because They Cannot Retroactively Declare a Penalty to be a Tax.

According to Petitioners, the same provision that can be classified as a penalty when there is a political price to pay for raising taxes can take on the classification of a tax when needed to survive a court challenge. The federal government now argues that the Minimum Coverage Provision of the Patient Protection and Affordable Care Act (the "PPACA") is a tax because it operates in the same way as a tax and produces revenue like a tax. Petitioners encourage the Court to ignore the text of the law, which calls the Minimum Coverage Provision a "penalty," not a tax, when it is convenient for Petitioners.

At the same time, Petitioners take the position that the Court has jurisdiction to decide the constitutionality of the Minimum Coverage Provision now, although that position implies that the Minimum Coverage Provision is not a tax. If the Minimum Coverage Provision were a tax, the Anti-Injunction Act ("AIA") would bar the Court from either striking down or upholding the provision before it takes effect, which in this case would be in the year 2015. *See* 26 U.S.C. § 7421(a). Petitioners claim in their brief:

> [t]he AIA applies to suits to restrain the assessment or collection of "any tax." The payment under the Affordable Care Act's minimum coverage provision is, however, termed a "penalty" rather than a "tax," and it is not within the category of tax penalties that trigger the AIA's jurisdictional bar.

(Petitioner's Anti-Injunction Act Brief at 6). Petitioners, along with Respondents, want to see the Court rule on the constitutionality of the Minimum Coverage Provision now rather than in three years. Petitioners therefore argue, in this context, that the Minimum Coverage Provision does not meet the definition of "any tax." But in arguing the issue of the constitutionality of the Minimum Coverage Provision itself, Petitioners claim that it is a tax after all because it is a "revenue-raising provision bearing so many indicia of taxation." (Petitioner's Minimum Coverage Provision Brief at 53). Petitioners may not have it both ways.

During the charged political atmosphere prior to the law's passage, both chambers of Congress and the President wanted to avoid raising taxes on most Americans in order to pay for changes to the health care system. Only the year before, during the presidential campaign, then candidate Obama had made a firm promise not to do so. For instance, on September 12, 2008, at a rally in New Hampshire, Mr. Obama stated: "and I can make a firm pledge. Under my plan, no family making less than $250,000 a year will see any form of tax increase. Not your

income tax, not your payroll tax, not your capital gains taxes, not any of your taxes." *Barack Obama, Remarks in Dover, New Hampshire, (September 12, 2008)*, at http://www.presidency.ucsb.edu. Raising taxes on such families as part of the health care reform bill also was something congressional supporters of the health care bill wanted to avoid.

President Obama himself proclaimed emphatically that an insurance mandate is not a tax. In an interview with ABC News, This Week with George Stephanopoulos, on September 20, 2009, President Obama responded to George Stephanopoulos' assertion that the Minimum Coverage Provision was a tax increase by stating:

> No. That's not true, George. The -- for us to say that you've got to take a responsibility to get health insurance is absolutely not a tax increase. What it's saying is, is that we're not going to have other people carrying your burdens for you anymore than the fact that right now everybody in America, just about, has to get auto insurance. Nobody considers that a tax increase. People say to themselves, that is a fair way to make sure that if you hit my car, that I'm not covering all the costs.

News Transcript: *ABC News, This Week with President Barack Obama* (September 20, 2009), at http://abcnews.go.com. When Stephanopoulos then said, "you reject that it's a tax increase?" President

Obama answered: "I absolutely reject that notion." *Id.*

As the President described the Minimum Coverage Provision, it is not a tax, but a punishment on those who do not carry health insurance. Such people are, by this calculation, doing something wrong in attempting to shift their own costs to other people. The punishment is not a severe one, being only a monetary penalty rather than a deprivation of any other rights or privileges, but a punishment is still a punishment even if it is a relatively light one.

With these positions taken so publicly, it is no surprise that the language of the Minimum Coverage Provision explicitly described the provision as a penalty, a "regulation," not a tax, grounded in Congress' commerce powers, not its tax powers. The congressional findings accompanying the Minimum Coverage Provision declare that the requirement "substantially affects interstate commerce." 42 U.S.C. § 18091(1). The PPACA also states that "the requirement regulates activity that is commercial and economic in nature." *Id.* at § 18091(2)(A). Failure to obtain the mandated health insurance coverage required by the Minimum Coverage Provision results in the "payment of a penalty." 26 U.S.C. § 5000A(b)(3). The choice of the word "penalty" rather than the word "tax" was a deliberate choice; earlier versions of the bill in the House of Representatives and in the Senate used the word "tax." *See* America's Affordable Health Choices Act of 2009, H.R. 3200, 111th Cong. (2009); Affordable Health Care for America Act, H.R. 3962,

111th Cong. (2009); and America's Healthy Future Act, S. 1796, 111th Cong. (2009). The change was clearly deliberate.

The concept of regulatory penalties as distinct from taxes is not in itself a departure from recognized precedent. As the Court stated in *U.S. v. La Franca*:

> A tax is an enforced contribution to provide for the support of government; a penalty ... is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such.

282 U.S. 568, 572 (1931). Thus, the publicly stated purpose of the Minimum Coverage Provision very appropriately comports with the traditional definition of a penalty. Contrary to Petitioners' arguments, the Minimum Coverage Provision operates as a penalty; it does not "operate as a tax law." (Petitioner's Minimum Coverage Provision Brief at 52). What is unprecedented about the penalty is that, generally when Congress penalizes American citizens, the punishment is for an action that Congress disapproves, not simply for a lack of action.

The Court should not ignore the actual text of the law, which defines the Minimum Coverage Provision as a penalty, to classify the provision as a tax. Congress clearly demonstrated the intent not to pass a tax when it drafted and passed the bill that became the PPACA. Congress voted on and enacted a penalty, not a tax. The bill ultimately passed the Senate without a single vote to spare, suggesting that Congress needed to structure the Minimum Coverage Provision as a penalty. That Congress' taxing power may be broader than its Commerce Clause power cannot change Congress' intent as reflected in the plain language of the statute. Principles of statutory construction do not allow Petitioners to recharacterize that intent after the fact. As can be seen from their brief on the Anti-Injunction Act Issue, even Petitioners agree with this analysis, when their legal position allows them to do so without adverse consequence.

Once the PPACA was enacted, the proponents of the new law changed tactics. Before passage, the fate of the PPACA depended on politics, not law. At that time, the Minimum Coverage Position was emphatically not a tax. In court, the status of the Minimum Coverage Provision has become more complicated: it is a penalty for the purposes of the Anti-Injunction Act, but a tax for the purposes of Congress' taxing power.

The provision's "sometimes" status as a tax dates to the time when the PPACA was first challenged in the district courts. Petitioners, who were the defendants in cases filed in many

jurisdictions, began to adopt as its litigation stance the argument that the Minimum Coverage Provision was a tax after all. For instance, in its memorandum in support of Defendant's Motion for Summary Judgment in the Eastern District of Virginia, Petitioners took the position that, because the Minimum Coverage Provision raises revenue, it is an exercise of Congress' independent power under the General Welfare Clause: "[i]ndependent of its Commerce Clause authority, Congress is vested with the 'Power to lay and collect Taxes, Duties, Imports, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.'" (Defendant's Motion for Summary Judgment at 39, *Commonwealth ex rel. Cuccinelli v. Sebelius*, Case No. 3:10CV188 (E.D. Va. 2010)). For purposes of their brief before this Court on the Minimum Coverage Provision, Petitioners continue to take this position despite its uneasy coexistence with their position that the Anti-Injunction Act does not apply to the Minimum Coverage Provision.

The Minimum Coverage Provision was drafted to regulate the choices of Americans directly rather than to affect their choices by offering tax incentives. Although Petitioners point out that the Minimum Coverage Provision has the effect of raising revenue, the purpose of the provision was explicitly not to raise revenue, but to force Americans to buy insurance. Thus, wanting to compel Americans to buy health insurance, Congress passed a law that made it illegal not to do so. Congress also appeared to have no doubts about its power to enact such a mandate at the time of passage. On October 22,

2009, the then Speaker of the House of Representatives, Nancy Pelosi, was asked in a press conference by a CNSNews reporter: "Madam Speaker, where specifically does the Constitution grant Congress the authority to enact an individual health insurance mandate?" In response, Speaker Pelosi asked the question: "Are you serious? Are you serious?" Matt Cover, *When Asked Where the Constitution Authorizes Congress to Order Americans to Buy Health Insurance, Pelosi says 'Are You Serious?,'* CNSNews (October 22, 2009), at http://cnsnews.com. Petitioner's alternate argument, however, is also fatally flawed.

II. The Commerce Clause Cannot Provide Authority to Pass the Minimum Coverage Provision Because To Allow Such Authority Would Transform the Federal Government Into One of Unlimited Powers.

Petitioners have taken the position that the Minimum Coverage Provision is a tax because they understand that, if it is not, this Court can only uphold the provision if it is willing to do now what it has never been willing to do before, which is declare "Congress' regulatory authority" to be "without effective bounds." *U.S. v. Morrison*, 529 U.S. 598, 608 (2000). Congress grounded its constitutional authority to pass the Minimum Coverage Provision in the interstate commerce clause of Article III of the Constitution, which states: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. Petitioners argue that the

Minimum Coverage Provision is a valid exercise of Congress' Commerce power because it is an "integral part of a comprehensive scheme of economic regulation" that "regulates economic conduct with a substantial effect on interstate commerce." (Petitioner's Minimum Coverage Provision Brief at 24 and 33.) However, the Commerce power cannot be broad enough to encompass the authority to force Americans who have engaged in no activities that affect interstate commerce to purchase a product from another private party. Americans who have engaged in no activity at all cannot be said to have engaged in an activity that affects interstate commerce. Such a decree exceeds Congress' authority even if the requirement to purchase that product is part of a scheme of economic regulation, and the purchases once made have a substantial effect on interstate commerce. If the Court accepted such an argument it would not only have to extend the power of the Commerce Clause farther than it has ever been extended before but it would have no principled basis to provide any limitation on the authority of the commerce clause at all. Under present precedent, that the Court may not do.

"The federal government is acknowledged by all to be one of enumerated power . . . the enumeration presupposes something not enumerated." *U.S. v. Lopez*, 514 U.S. 549, 566 (1995) (citations omitted). The Tenth Amendment also makes clear that the federal government does not exercise plenary power, neither over the states nor the people, when it states: "the powers not delegated to the United States by the Constitution, nor prohibited by it to

the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. If all power had been delegated to the United States through the Commerce Clause, reserving powers to the states just would not make sense. The Constitution lays out these principles by inference, but they are not less powerful for that reason: "It is not at all unusual for our resolution of a significant constitutional question to rest upon reasonable implications." *Printz v. Mack*, 521 U.S. 898, 924, n.13 (1997).

The reach of the federal government under the scope of the enumerated power to regulate commerce among the states extends much farther today than it did originally. When the Constitution was written, "commerce referred predominately to exchange or trade as distinct from the agricultural or manufacturing production of those things that are subsequently traded." Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 114. (2001). The evidence suggests that the Commerce Clause was meant to allow the federal government to regulate trade between the states rather than to control all aspects of the national economy. *Id.* However, starting in 1937, the Court significantly expanded the latitude allowed to Congress under the Commerce Clause. In *NLRB v. Jones and Laughlin Steel Corp.*, the Court found that Congress could regulate intrastate activities as long as they could be said to have a substantial effect on interstate commerce: "[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial

relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." 301 U.S. 1, 37 (1937).

Then, in 1942, with the case of *Wickard v. Filburn,* the scope of the Commerce Clause expanded even further. 317 U.S. 111 (1942). In *Wickard*, the Court held that Congress may penalize a farmer for growing too much wheat on his farm, even for his own intrastate consumption. *Id.* at 118. The Court stated that the farmer's activity could be reached by Congress as long as that activity, even if trivial on its own, could "exert a substantial economic effect" if "taken together with that of many others." *Id.* at 125, 127-128. This principle allows Congress to regulate even seemingly trivial and insignificant activities as having a "substantial effect" on commerce. The scope extended so far that it seemed to allow Congress to regulate any activity engaged in by Americans, so long as that activity could be tied, however indirectly, to the national economy. No activity could be too small and no activity could be too local. (*See, e.g., Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 258 (1964) ("[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.") (citation omitted)). The reach of the interstate Commerce Clause extended so far it seemed for a long time that nothing could be out of Congress' grasp. Several decades after this expansion of the commerce clause, however, with the *Lopez* and *Morrison* cases, the Court showed that, for all the

deference the Court was willing to show to Congress since the New Deal era, it is still the Court's duty to preserve some limits on federal power. The question is how to apply a limiting principle.

The Minimum Coverage Provision gives the Court its last best chance to provide a limiting principle. By refusing to uphold the mandate, the Court can defend liberty and federalism while distinguishing the cases of *Wickard* and its progeny, which allowed Congress to regulate and restrict activity, but never to mandate it. It is true that "the Court as an institution and the legal system as a whole" have "a stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point." *Lopez,* 514 U.S. at 574 (Kennedy, J., concurring). This case would allow the Court to finally delineate a limit to Congress' powers under the Commerce Clause while preserving the entire doctrine as it has evolved to this point. The Minimum Coverage Provision is the first time that Congress has not only prohibited, restricted or regulated the activity of American citizens under the commerce power, as part of its power to regulate the national economy, but has actually gone so far as to order entirely passive Americans to enter into a national market. Congress has reached beyond its previous power to prevent virtually any activity it chooses, so long as it can be argued that that activity would have a substantial effect on national economic activity, and adopts the position that it has the power to also require virtually any activity it chooses so long as that activity could have a substantial effect on national economic activity. After more than

two hundred years of functioning without the power to order Americans into commerce, Congress has made a policy choice to now do so. But, having found a new power, what Congress could do with this power is limitless.

Petitioners spend many pages pointing out reasons why the health care market is unique, in an attempt to reassure the Court that to uphold the mandate would not be to allow Congress a new power with no limits. Petitioners argue that virtually everyone needs health care at some point. Petitioners point out that health care "involves needs that cannot reasonably be anticipated and budgeted for" and that "costs can mount rapidly." (Petitioner's Minimum Coverage Provision Brief at 35, 36.) Petitioners note that Congress has enacted laws requiring all hospitals to stabilize patients who arrive with an emergency condition whether they can pay or not. (*Id.* at 40). These laws allow Americans who do not insure themselves to shift costs to American society at large, and the Minimum Coverage Provision stops Americans from exploiting such laws in their favor. The Minimum Coverage Provision is not a stand-alone provision, but part of a "comprehensive scheme" of economic regulation. However, for all the many arguments Petitioners make about the differences between health care and everything that is not health care, nothing Petitioners say provides a limiting principle that this Court could apply to future cases. Can Congress exceed the bounds of its powers under the Constitution merely because it is dealing with a pressing national issue? Can Congress expand its

constitutional powers by writing laws which create problems which cannot be solved within previous constitutional limitations, such as laws requiring hospitals to subsidize costs of the indigent?

Yet while the health care market has features that make it unique, so could any market have features that make it unique. Suppose Congress decided to require that every American purchase a Chevy Volt. Such a mandate might seem extreme and politically infeasible, but what if Congress made the argument that without the mandated purchase of the Chevy Volt, given all the regulations applicable to American car manufacturers, without a mandate the American automotive industry would fall apart completely? Sooner or later, every American ends up needing transportation or at least benefits from the transportation of others, so can Americans as a whole really said to be not engaging in commerce when they choose not to buy a car? Although the mandated purchase of a Chevy Volt may sound like an extreme imposition on the liberty of American citizens, on what grounds could the Court protect that liberty if such a purchase were designed as an integral part of a comprehensive scheme of economic regulation, perhaps a desire to create a viable national economy in electric cars within a nation that finds electric cars undesirable. This hypothetical illustrates that, as much as the interpretation of the commerce power since *Wickard* allows Congress great latitude in interfering with the liberty of Americans, this expansion of the commerce power would allow Congress infinitely more. There are an infinite number of activities,

which, if Congress required Americans to engage in them, would also address national economic problems and substantially affect interstate commerce.

Allowing the Minimum Coverage Provision to stand would pave the way to a profound change in the relationship between Americans and the federal government, a change every bit as profound as the change ushered in by *Wickard*. This change would also take place in the absence of constitutional authority. No limiting principle is possible if the Petitioners' arguments are accepted. This logical implication has even been accepted by courts below that were willing to thus extend the Commerce Clause's power. "We acknowledge some discomfort with the Government's failure to advance any clear doctrinal principles limiting congressional mandates that any American purchase any product or service in interstate commerce." *Seven-Sky v. Holder*, 661 F.3d 1, 18 (D.C. Cir. 2011).

It is true that, as regards the Commerce Clause, the federal government has already been operating far outside the constraints of its original meaning. In light of the fact that "interstate commerce" has departed so far from original intent, it may seem to be a daunting task to prune it back. But this case offers a simple way to start, as it provides a bright line rule and does not require any previous precedent to be overruled. Petitioners argue that an "unprecedented limitation on the commerce power" should be rejected and that there is no "textual support in the Commerce clause for [the] 'inactivity'

limitation." But if the power grasped by Congress is unprecedented, any limitations on that power would also be unprecedented. And there is no textual support to allow the expansion of the commerce clause even as far as previous case law allows, much less expanding its scope even further. Even if the structure that developed by commerce clause case law allows Congress more powers than the original meaning intended, preserving some limits to Congress' power is closer to the text of the Constitution than preserving none would be.

Petitioners are wrong to assert that the Minimum Coverage Provision is "a policy choice the Constitution entrusts the democratically accountable Branches to make, and the Court should respect it." (Petitioner's Minimum Coverage Provision Brief at 24). The Court has taken the position since *Marbury v. Madison*, 5 U.S. 137 (1803), that it should not respect the political branches of government when they violate the Constitution and violate the constitutional liberties of Americans. If the Court declines to protect liberty here, in the service of the structure of the Constitution itself, designed to protect the individual liberties of Americans through a balance between federal and state power, why should the Court protect American liberties in any judicial review context? Why should the Court assiduously protect perceived liberties considerably less tethered to any written clause in the constitutional text in the due process context, but give up entirely on one of the core concerns of the Constitution, limited federal government? The "federal balance is too essential a part of our

constitutional structure and plays too vital a role in securing freedom for [the Court] to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring). With the Minimum Coverage Position, the federal government has tipped the scales too far and the Court must act.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court affirm the Eleventh Circuit's decision and hold that the Minimum Coverage Provision of the PPACA is unconstitutional.

Respectfully submitted,

Paul J. Orfanedes
Counsel of Record
JUDICIAL WATCH, INC.
425 Third St, S.W., Suite 800
Washington, DC 20024
porfanedes@judicialwatch.org
(202) 646-5172

Counsel for Amicus Curiae

February 13, 2012

AMICUS CURIAE BRIEF

No. 11-398

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

v.

STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., AIDS UNITED, ASIAN & PACIFIC-ISLANDER COALITION ON HIV/AIDS, BLACK AIDS INSTITUTE, CENTER FOR HIV LAW AND POLICY, GAY & LESBIAN ADVOCATES & DEFENDERS, GAY & LESBIAN MEDICAL ASSOCIATION, HIV MEDICINE ASSOCIATION, HIV PREVENTION JUSTICE ALLIANCE, LATINO COMMISSION ON AIDS, NATIONAL ASSOCIATION OF PEOPLE WITH AIDS, NATIONAL CENTER FOR LESBIAN RIGHTS, NATIONAL CENTER FOR TRANSGENDER EQUALITY, NATIONAL NATIVE AMERICAN AIDS PREVENTION CENTER, U.S. POSITIVE WOMEN'S NETWORK/WORLD, AND TREATMENT ACCESS EXPANSION PROJECT, AS AMICI CURIAE IN SUPPORT OF PETITIONER ON THE MINIMUM COVERAGE REQUIREMENT ISSUE

SUSAN L. SOMMER
SCOTT A. SCHOETTES
HAYLEY J. GORENBERG
JON W. DAVIDSON
IVÁN ESPINOZA-MADRIGAL
LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC.
120 Wall Street,
19th Floor
New York, NY 10005
(212) 809-8585

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
ROPES & GRAY LLP
One Metro Center
700 12th Street. N.W., Suite 900
Washington, D.C. 20005
(202) 508-4600
Douglas.Hallward-Driemeier@ropesgray.com
BRADLEY D. GROSSMAN
BRENDON O. CARRINGTON
JACOB M. HELLER
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199

TABLE OF CONTENTS

Page

Interest of amici 1

Summary of argument 2

Argument:

I. The health care insurance market has failed to serve individuals living with HIV, with dire public health and economic consequences 4

A. With full access to health insurance, the HIV/AIDS epidemic could be stemmed 5

B. Prior to the ACA, the health insurance market drastically limited access to care for those with HIV 8

1. Private insurers have systematically excluded those with HIV 9

2. Public programs provide an incomplete and inadequate patchwork of coverage 10

C. The insurance market's failure to provide coverage to individuals with HIV has dire economic and public health consequences .. 13

1. The failure of the insurance market takes a staggering public health and economic toll 13

2. The combined effect of the HIV epidemic and lack of insurance falls hardest on already marginalized groups 15

II. The MCR is an essential feature of Congress's solution to the health insurance crisis for those with HIV 17

A. Massachusetts' experience demonstrates that health insurance reform paired with an MCR makes access to HIV treatment affordable and achievable 18

B. States that enacted partial reforms without an MCR fail to provide affordable and accessible care to people living with HIV 21

C. Piecemeal state solutions are inadequate to address the health care coverage crisis for those affected by the HIV/AIDS epidemic 23

III. The HIV/AIDS epidemic illustrates why Congress's enactment of the MCR was within its constitutional authority 24

A. The MCR is necessary and proper to Congress's exercise of its power under the Commerce Clause 25

B. The HIV/AIDS epidemic demonstrates that Congress was also within its Commerce Clause authority in enacting the MCR 27

Conclusion 30

Appendix 1a

TABLE OF AUTHORITIES

Page(s)

Cases:

Florida v. *HHS*, 648 F.3d 1235 (11th Cir. 2011) ..... *passim*

Gonzales v. *Raich*, 545 U.S. 1 (2005) 17, 26, 27

Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964) 5, 25

Thomas More Law Ctr. v. *Obama*, 651 F.3d 529 (6th Cir. 2011) 28

United States v. *Comstock*, 130 S. Ct. 1949 (2010) 3, 18, 26

United States v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) 5, 17, 25

Constitution and Statutes:

U.S. Const. art. I, § 8:

Cl. 3 (Commerce Clause) ..... *passim*

Cl. 18 (Necessary and Proper Clause) ..... *passim*

Emergency Medical Treatment and Active Labor Act, 42 U.S.C. 1395dd 28

Medicaid Act, 42 U.S.C. 1396 *et seq.* 10

42 U.S.C.A. 1396a(a)(10)(A)(i)(VIII) 17

Medicare Act, 42 U.S.C. 1395 *et seq.* 11

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) .. *passim*

Ryan White CARE Act, 42 U.S.C. 300ff *et seq.* 12, 23, 28

Statutes—Continued:

42 U.S.C.A. 300gg 17
42 U.S.C.A. 300gg-1(a) 17
42 U.S.C.A. 300gg-3(a) 17
42 U.S.C.A. 300gg-4(a) 17
1998 Ky. Acts 1881 21
2011 Me. Laws 114 21

Miscellaneous:

AIDS.gov:
Health Care Reform and HIV/AIDS: How Does the Affordable Care Act Impact People Living with HIV/AIDS? (Jan. 14, 2011), http://aids.gov/federal-resources/policies/health-care-reform 1, 9, 10
Stages of HIV (Oct. 12, 2010), http://aids.gov/hiv-aids-basics/diagnosed-with-hiv-aids/hiv-in-your-body/stages-of-hiv/ 14
Centers for Disease Control & Prevention:
Deaths: Final Data for 2007, 58 Nat'l Vital Stat. Rep. 1 (2010), http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_19.pdf 20
HIV Infection among Transgender People (2011), http://www.cdc.gov/hiv/transgender/pdf/transgender.pdf 16
HIV Prevention Strategic Plan: Extended Through 2010 (2007), http://www.cdc.gov/hiv/resources/reports/psp/pdf/psp.pdf 23

Miscellaneous—Continued:

HIV Surveillance Report, 2005 (2007), http://www.cdc.gov/hiv/surveillance/resources/reports/2005report/pdf/2005SurveillanceReport.pdf 21, 22

HIV Surveillance Report, 2009 (2011), http://www.cdc.gov/hiv/surveillance/resources/reports/2009report/pdf/2009SurveillanceReport.pdf ..... *passim*

HIV Surveillance—United States, 1981-2008, 60 Morbidity & Mortality Wkly. Rep. 689 (2011) ..... *passim*

Myron S. Cohen et al., *Prevention of HIV-1 Infection with Early Antiretroviral Therapy*, 365 N.E. J. Med. 493 (2011) 6, 15

155 Cong. Rec. (daily ed.):

p. H11,855 (Oct. 27, 2009) 22

p. H12,910 (Nov. 7, 2009) 22

156 Cong. Rec. (daily ed.):

p. H1717 (Mar. 19, 2010) 10

p. H1801 (Mar. 20, 2010) 9

p. S1953 (Mar. 25, 2010) 9

Deborah Donnell et al., *Heterosexual HIV-1 Transmission after Initiation of Antiretroviral Therapy: A Prospective Cohort Analysis*, 375 Lancet 2092 (2010) 6

Anthony S. Fauci, *AIDS: Let Science Inform Policy*, 333 Sci. 13 (2011) 7

Miscellaneous—Continued:

John A. Fleischman et al., *The Economic Burden of Late Entry Into Medical Care for Patients With HIV Infection*, 48 Medical Care 1071 (2010) 8, 14

Edward M. Gardner et al., *The Spectrum of Engagement in HIV Care and its Relevance to Test-and-Treat Strategies for Prevention of HIV Infection*, 52 HIV/AIDS 793 (2011) 6, 8, 12

Dana P. Goldman & Yuhua Bao, *Effective HIV Treatment and the Employment of HIV+ Adults*, 36 Health Servs. Res. 1691 (2004) 11

Kathleen McDavid Harrison et al., *Life Expectancy After HIV Diagnosis Based on National HIV Surveillance Data from 25 States, United States*, 53 J. Acquired Immune Deficiency Syndrome 124 (2010) 5

Harvard Law School Center for Health Law and Policy Innovation, *Massachusetts HIV/AIDS Resource Allocation Project* (Dec. 13, 2011), http://www.taepusa.org/Library/Analyses.aspx 18, 19, 20, 21

Health Res. & Servs. Admin., *Ryan White HIV/AIDS Program—2009 State Profiles*, State Population Data (2010), http://hab.hrsa.gov/stateprofiles/2009/states/us/State-Population-Data.htm#chart3 9

Miscellaneous—Continued:

Angela B. Hutchinson et al., *The Economic Burden of HIV in the United States in the Era of Highly Active Antiretroviral Therapy*, 43 J. Acquired Immune Deficiency Syndrome 451 (2006) 6, 15

Institute of Medicine of the National Academies:

Care without Coverage: Too Little, Too Late (2002), http://www.iom.edu/Reports/2002/Care-Without-Coverage-Too-Little-Too-Late.aspx 7, 13, 14

HIV Screening and Access to Care: Exploring the Impact of Policies on Access to and Provision of HIV Care (2011), http://books.nap.edu/openbook.php?record_id=13057 7

Public Financing and the Delivery of HIV-AIDS Care: Securing the Legacy of Ryan White (2005), http://www.nap.edu/openbook.php?record_id=10995 ..... *passim*

Judith A. Johnson, Cong. Research Serv., RL33279, *The Ryan White HIV/AIDS Program* (2011) 12

Kaiser Family Foundation:

Fact Sheet: Medicaid and HIV/AIDS (2009), http://www.kff.org/hivaids/7172.cfm 11

Fact Sheet: The HIV/AIDS Epidemic in the United States (2011), http://www.kff.org/hivaids/upload/3029-12.pdf 16

Miscellaneous—Continued:

Financing HIV/AIDS Care: A Quilt with Many Holes (2004), http://www.kff.org/hivaids/1607-02.cfm ... 9, 11

HIV/AIDS Policy Fact Sheet: The Ryan White Program (2007), http://www.kff.org/hivaids/upload/7582_03.pdf 12

Mass. Dep't of Pub. Health, *The Massachusetts HIV/AIDS Epidemic at a Glance: Detailed Data Tables and Technical Notes* (2010), http://www.mass.gov/eohhs/docs/dph/aids/2010-profiles/epidemic-glance-data.pdf 22

Mass. Div. of Health Care Fin. & Policy, *Health Care in Massachusetts: Key Indicators* 12 (May 2011), http://www.mass.gov/eohhs/researcher/physical-health/health-care-delivery/dhcfp-publications.html #key_indicators 20

N.Y. State Dep't of Health, *New York State HIV/AIDS Surveillance Annual Report* (2010), http://www.health.ny.gov/diseases/aids/statistics/annual/2008/2008-12_annual_surveillance_report.pdf 22

Office of the President of the U.S., *National HIV/AIDS Strategy for the United States* (2010), http://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf 2, 8, 16, 24

Joseph Prejean et al., *Estimated HIV Incidence in the United States, 2006–2009*, 6 PLoS ONE e17502 (2011) 13

Miscellaneous—Continued:

Bruce R. Schackman et al., *The Lifetime Cost of Current Human Immunodeficiency Virus Care in the United States*, 44 Med. Care 990 (2006) 29

Sandra K. Schwarcz et al., *Do People Who Develop AIDS Within 12 Months of HIV Diagnosis Delay HIV Testing?*, 126 Pub. Health Rep. 552 (2011) 7, 14

Michael Smith, *HIV Life Expectancy Approaching Normal*, MedPage Today, June 27, 2008, http://www.medpagetoday.com/HIVAIDS/HIVAIDS/9930 5

Robert J. Smith et al., *Evolutionary Dynamics of Complex Networks of HIV Drug-Resistant Strains: The Case of San Francisco*, 327 Sci. 697 (2010) 8

U.S. Census Bureau, Current Population Survey, *2011 Annual Social and Economic Supplement* (2011), http://www.census.gov/hhes/www/cpstables/032011/health/h05_000.xls 20

Ronald O. Valdiserri, *Late HIV Diagnosis: Bad Medicine and Worse Public Health*, 4 PLoS Med. 975 (2007) 15

Murray Waas, *Insurer Targeted HIV Patients to Drop Coverage*, Reuters, Mar. 17, 2010, http://www.reuters.com/article/2010/03/17/us-insurers-idUSTRE62G2DO20100317 10

Miscellaneous—Continued:

Wash. State Dep't of Health, *Washington State HIV Surveillance Quarterly Report* (2011), http://www.doh.wa.gov/cfh/hiv/statistics/docs/qtr3-11.pdf 22

INTEREST OF AMICI[1]

Amici are nonprofit organizations that undertake litigation, public policy, and advocacy efforts on behalf of people living with HIV, many of whom are denied or receive inadequate health care due to unlawful discrimination or lack of insurance.[2] When the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010) (as amended), was enacted, only 17% of Americans with HIV/AIDS had private health insurance, and nearly 30% had neither public nor private insurance. See AIDS.gov, *Health Care Reform and HIV/AIDS: How Does the Affordable Care Act Impact People Living with HIV/AIDS?* ¶ 2 (Jan. 14, 2011) ("*Health Care Reform and HIV/AIDS*"). These uninsured individuals were unable to obtain private insurance yet did not meet Medicaid or Medicare eligibility requirements. This coverage gap has produced severe economic consequences for society at large, and undercuts public health efforts to combat the national HIV/AIDS epidemic. Amici therefore share a strong interest in ensuring full implementation of the ACA, including its minimum coverage requirement.

---

[1] The parties have consented to the filing of amicus curiae briefs in support of either party or of neither party, in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

[2] A description of each of the amici organizations is included in an appendix hereto.

SUMMARY OF ARGUMENT

The ACA's minimum coverage requirement ("MCR") is the linchpin of Congress's comprehensive response to a broken national health insurance system. The briefs of the United States and many other amici address in detail the fallacy of the purported distinction between economic "activity" and "inactivity," especially in the context of health insurance. Rather than repeat those arguments, amici here provide a focused analysis of the systemic failure of the health insurance market for people living with HIV, and the significance of that failure for the constitutionality of Congress's response in enacting the ACA.

The HIV/AIDS epidemic provides a powerful case study of how quintessentially economic activity by health insurers and consumers has led to devastating consequences for the over 1.2 million Americans living with HIV and for society at large. We have the tools to stem this epidemic, which continues to produce an alarming 50,000 new HIV infections each year. As the 2010 National HIV/AIDS Strategy declares, "[o]ur Nation is at a crossroads" in the battle against HIV. Office of the President of the U.S., *National HIV/AIDS Strategy for the United States* 1 (2010) ("*National HIV/AIDS Strategy*"). But only with comprehensive national health care reform and expanded access to coverage and treatment can we turn the tide on this epidemic.

Several hundred thousand American individuals with HIV have been excluded from the private insurance market and are ineligible for government insurance programs. Private insurers have employed numerous devices, including pre-existing condition exclusions, excessive premiums, annual and lifetime benefit

limits, and, in some cases, outright deceit to remove individuals with HIV from their rolls. As a result, before passage of the ACA, only 17% of Americans with HIV had private health insurance (in contrast to 67% of the non-elderly population generally); 30% lacked either public or private insurance. Very few of these individuals can afford to pay the costs of treating HIV or AIDS out-of-pocket. Yet, if people with HIV could receive consistent access to health insurance and health care, thousands of lives—and billions of dollars—could be saved each year, and the HIV/AIDS epidemic could be dramatically curbed. It is undisputed that Congress acted within its authority under the Commerce Clause in enacting the guaranteed issue and community rating provisions of the ACA, which prevent the widespread exclusion of those living with HIV from the private health insurance market.

The MCR is the critical component by which Congress ensured the availability of health insurance—and life- and cost-saving health care—to those with HIV who otherwise would be denied access. Massachusetts, which adopted comparable health care reform, including an MCR, has succeeded in making health care coverage almost universal, with, in turn, remarkable improvements in the health status of those with HIV and lowered rates of new HIV transmissions. The contrast between Massachusetts' success and the market failures of states addressing the problem in the absence of an MCR provides empiric proof that the MCR is an essential part of Congress's larger regulation of the interstate insurance market, and thus is constitutional under the Necessary and Proper Clause. See *United States* v. *Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring in the judgment).

The experiences of those living with HIV further demonstrate that, even apart from Congress's authority under the Necessary and Proper Clause, enactment of the MCR itself was within Congress's Commerce Clause authority. A person who contracts HIV cannot reasonably expect to "self-insure" against the enormous health care costs of treating the virus, which far exceed most individuals' savings. Such individuals will inevitably rely on publicly-funded programs and the safety net of health care facilities, which are legally required to provide at least emergency care and which pass the costs of these services onto other market participants. When insurance is available, as it is under the ACA, an individual's decision not to acquire health insurance is, in fact, a decision to accept the economic benefits of this socially available insurance without paying for it.

But the great majority of people living with HIV have had no choice in the matter of private insurance coverage. The insurance market has systematically excluded them, with grave consequences to their health, unnecessary spread of HIV, and significant burdens on the economy. Congress acted well within its constitutional authority in enacting the MCR, an essential component of the ACA, in response to this national health care crisis.

ARGUMENT

I. The Health Care Insurance Market Has Failed To Serve Individuals Living With HIV, With Dire Public Health And Economic Consequences

Currently, an estimated 1.2 million people live with HIV in the United States. Ctrs. for Disease Control & Prevention ("CDC"), *HIV Surveillance—United States,*

1981-2008, 60 Morbidity & Mortality Wkly. Rep. 689, 689 (2011) ("*HIV Surveillance 1981-2008*"). Until enactment of the ACA, the health care insurance market has largely failed these individuals. Most private insurers have refused to provide affordable coverage to those with HIV or have otherwise limited benefits. This market failure has caused serious consequences both for individuals with HIV—who suffer unnecessary illness and premature death—and for society generally in higher overall health care costs and lost productivity. Virtually all this suffering is avoidable: medical care is available that can turn HIV into a chronic, manageable condition. Congress was well within its Commerce Clause authority to address this nationwide market failure by regulating practices in the insurance industry that effectively exclude this segment of our society. U.S. Const. art. I, § 8, cl. 3; see, *e.g.*, *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 552-553 (1944) (Congress may regulate sale of insurance under Commerce Clause); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 257-258 (1964) (Congress may, under Commerce Clause, prohibit practice of refusing to sell goods or services to certain individuals).

A. With Full Access To Health Insurance, The HIV/AIDS Epidemic Could Be Stemmed

Antiretroviral medications ("ARVs"), a medical breakthrough made in 1996, now allow people living with HIV to approach normal life expectancy. Kathleen McDavid Harrison et al., *Life Expectancy After HIV Diagnosis Based on National HIV Surveillance Data from 25 States, United States*, 53 J. Acquired Immune Deficiency Syndrome 124 (2010); Michael Smith, *HIV Life Expectancy Approaching Normal*, MedPage

Today, June 27, 2008. ARVs also greatly improve quality of life, and allow people with HIV to work and lead economically productive lives. Inst. of Med. of the Nat'l Acads., *Public Financing and the Delivery of HIV-AIDS Care: Securing the Legacy of Ryan White* 89 (2005) ("*Public Financing of HIV/AIDS Care*"); Angela B. Hutchinson et al., *The Economic Burden of HIV in the United States in the Era of Highly Active Antiretroviral Therapy*, 43 J. Acquired Immune Deficiency Syndrome 451, 455 (2006) ("*Economic Burden of HIV*").

ARVs act by reducing viral load, *i.e.*, the amount of HIV in blood plasma. For most patients taking ARVs, the viral load drops to clinically undetectable levels within six months of commencing therapy. Deborah Donnell et al., *Heterosexual HIV-1 Transmission after Initiation of Antiretroviral Therapy: A Prospective Cohort Analysis*, 375 Lancet 2092 (2010); see also Edward M. Gardner et al., *The Spectrum of Engagement in HIV Care and its Relevance to Test-and-Treat Strategies for Prevention of HIV Infection*, 52 HIV/AIDS 793, 795 (2011) ("*Spectrum of Engagement in HIV Care*").

Very significantly from a national public health standpoint, suppressed viral load also minimizes infectiousness. *HIV Surveillance 1981-2008*, at 691. When viral load is sufficiently suppressed, the risk of transmission drops measurably. Myron S. Cohen et al., *Prevention of HIV-1 Infection with Early Antiretroviral Therapy*, 365 N.E. J. Med. 493, 503 (2011) ("*Prevention of HIV-1 Infection*") (noting 96% reduction in relative risk of transmission with suppressed viral load). Thus early detection of HIV and immediate access to care and treatment with ARVs, when medically appropri-

ate, not only promotes the health of individuals with HIV but also significantly contributes to stemming the spread of HIV. See Anthony S. Fauci, *AIDS: Let Science Inform Policy*, 333 Sci. 13, 13 (2011) ("The fact that treatment of HIV-infected adults is also prevention gives us the wherewithal, even in the absence of an effective vaccine, to begin to control and ultimately end the AIDS pandemic.").

But people living with HIV—and society at large—will only realize these benefits with consistent and continuous access to ARVs and ongoing medical monitoring and care. See Inst. of Med. of the Nat'l Acads., *HIV Screening and Access to Care: Exploring the Impact of Policies on Access to and Provision of HIV Care* 4 (2011) ("Despite the improvements in health for people with HIV who are in care and on treatment, many people with HIV in the United States enter medical care with advanced disease, have inconsistent adherence, or discontinue therapy prematurely.").

The availability of affordable insurance is therefore critical to effective HIV treatment and to stemming the epidemic. Having insurance—and access to care—increases the likelihood of early detection and consistent use of ARVs. See Sandra K. Schwarcz et al., *Do People Who Develop AIDS Within 12 Months of HIV Diagnosis Delay HIV Testing?*, 126 Pub. Health Rep. 552, 553, 555 (2011) ("*Delayed HIV Testing*"); Instit. of Med. of the Nat'l Acads., *Care Without Coverage: Too Little, Too Late* 64-67 (2002) ("*Care Without Coverage*"). Early treatment also improves health outcomes and reduces overall medical costs. People starting HIV medication late—because they were not tested or could not access ARVs—suffer more symptoms of HIV infection, including compromised immune systems, with re-

sulting direct health care costs 1.5 to 3.7 times higher than those entering medically indicated treatment promptly. John A. Fleischman et al., *The Economic Burden of Late Entry Into Medical Care for Patients With HIV Infection*, 48 Medical Care 1071, 1075-1078 (2010) ("*Economic Burden of Late Entry Into Medical Care*"). Even if one receives early treatment, sustained care is essential. Missing doses of ARVs can lead to increased viral resistance for the particular patient and, more broadly, to spread of dangerous drug-resistant variants of the virus. *Spectrum of Engagement in HIV Care* 795; Robert J. Smith et al., *Evolutionary Dynamics of Complex Networks of HIV Drug-Resistant Strains: The Case of San Francisco*, 327 Sci. 697, 697-701 (2010).

B. Prior To The ACA, The Health Insurance Market Drastically Limited Access To Care For Those With HIV

While successful treatment of HIV and an end to the epidemic are within our nation's reach, without the ACA the insurance market will continue to fail to provide coverage for people living with HIV. Private insurers have largely excluded those with HIV from the market, and the patchwork of publicly funded coverage, despite its cost to the federal government, has not delivered timely or adequate care to many people. See *National HIV/AIDS Strategy* 41 (in 2010, federal government invested more than $19.46 billion in response to HIV epidemic).

1. *Private insurers have systematically excluded those with HIV*

Private insurers have systematically excluded individuals with HIV from the private insurance market. When the ACA was adopted, 67% of the overall United States population had private health insurance, see Health Res. & Servs. Admin., *Ryan White HIV/AIDS Program—2009 State Profiles*, State Population Data, Chart 3 (2010); the same was true for only 17% of people with HIV, see *Health Care Reform and HIV/AIDS* ¶ 2. Moreover, the situation has been worsening. Between 1996 and 2010, the rate of private insurance for people with HIV *was cut nearly in half*: from 31% to 17%. Compare *Public Financing of HIV/AIDS Care*, Fig. 3-1, at 74, with *Health Care Reform and HIV/AIDS* ¶ 2.

In the individual insurance market, people living with HIV are generally considered "uninsurable" and are routinely rejected when they apply for coverage. Kaiser Family Found., *Financing HIV/AIDS Care: A Quilt With Many Holes* 14 (2004) ("*Financing HIV/AIDS*"). Even when these individuals find an insurance company to cover them, most states have no rating limits, allowing insurers to charge prohibitively expensive premiums. *Public Financing of HIV/AIDS Care* 107-108.

Members of Congress were acutely aware of this problem when considering the ACA. One Senator commented that, when people "get sick with HIV, [or] with full-blown AIDS * * * [insurance companies] just simply cancel their policies and throw them out." 156 Cong. Rec. S1953 (daily ed. Mar. 25, 2010) (statement of Sen. Feinstein); see also 156 Cong. Rec. H1801 (daily ed. Mar. 20, 2010) (statement of Rep. T. Ryan). And a

Representative noted reports that at least one major insurer had routinely raised unfounded allegations of fraud against people diagnosed with HIV.

> Fortis designed a computer program that would automatically flag any policyholder with HIV-AIDS and trigger an automatic fraud investigation. Knowing the treatment was expensive, the executives were looking for anything they could use to revoke health insurance policies for people with HIV. Then, when nothing turned up, they would essentially invent a reason.

156 Cong. Rec. H1717 (daily ed. Mar. 19, 2010) (statement of Rep. McDermott); see also Murray Waas, *Insurer Targeted HIV Patients to Drop Coverage*, Reuters (Mar. 17, 2010).

2. *Public programs provide an incomplete and inadequate patchwork of coverage*

Through a patchwork of public programs, substantially funded by the United States, the government has tried to fill some—although far from all—of the gaps left by the private insurance market. But public programs have still left uninsured approximately 30% of people living with HIV. See *Health Care Reform and HIV/AIDS* ¶ 2. Moreover, restrictions on public programs, which vary by state, have meant that needed treatment is often delayed, limited, and even unavailable altogether.

a. Through the Medicaid program, 42 U.S.C. 1396 *et seq.*, the federal government supports state health insurance programs for the poor. Yet this state-federal partnership has created cruel and costly paradoxes for people living with HIV. Childless adults with HIV

have been excluded from benefits under states' implementation of Medicaid unless they become disabled by active symptoms or are pregnant. Kaiser Family Found., *Fact Sheet: Medicaid and HIV/AIDS* 2 (2009). In many states, to qualify for Medicaid, a disability determination requires an AIDS diagnosis. This has created a Catch-22 for the many low-income individuals living with HIV: only once their HIV progresses to AIDS do they become eligible for the ARVs that would have prevented AIDS from developing, at which point treatment is more difficult and expensive. *Ibid.*

Medicaid's pre-ACA income thresholds also force many of the working poor who live with HIV to choose between employment and treatment. Treatment with ARVs often makes a person living with HIV well enough to work. *Financing HIV/AIDS* 7; Dana P. Goldman & Yuhua Bao, *Effective HIV Treatment and the Employment of HIV+ Adults*, 36 Health Servs. Res. 1691, 1693 (2004). But increased employment income frequently leads to ineligibility for Medicaid coverage; in turn, the pre-existing condition of HIV likely means a private insurer will not write a health insurance policy. To receive care, many low-income workers have had to stay out of the job market. See *id.* at 1694.

b. The Medicare program, 42 U.S.C. 1395 *et seq.*, covers ordinary health care services for elderly and disabled people. But HIV and AIDS create extraordinary expenses, many of which are not covered by Medicare. Medicare imposes large cost-sharing requirements on beneficiaries and does not cap out-of-pocket spending for many benefit categories. As a result, many people living with HIV need other coverage in addition to Medicare. *Financing HIV/AIDS* 11. Obtaining private supplemental insurance to cover treat-

ment expenses not covered by Medicare is not a viable solution for most beneficiaries living with HIV. Such policies typically have deductibles, cover only a percentage of drug costs, have annual benefit caps, and are too costly for low- and middle-income Medicare beneficiaries. *Public Financing of HIV/AIDS Care* 117.

c. Through the Ryan White CARE Act, 42 U.S.C. 300ff *et seq.*, the federal government functions as the payer of last resort, making grants to states, cities, and nonprofit organizations to provide treatment and medication to HIV patients with no alternative coverage. Ryan White funding is far from adequate to fill the massive gaps in health care for people with HIV. Demand for Ryan White programs has outpaced federal appropriations, and the grants do not correspond to the number of people in need in each state or the actual costs of services. Judith A. Johnson, Cong. Research Serv., RL33279, *The Ryan White HIV/AIDS Program* 12-13 (2011) ("*Ryan White HIV/AIDS Program*"); Kaiser Family Foundation, *HIV/AIDS Policy Fact Sheet: The Ryan White Program* 2 (2007). Many states have responded with cost-cutting measures, including waiting lists for ARVs, limits on access to primary care, and limits on covered medications. *Ryan White HIV/AIDS Program* 12-13; *Public Financing of HIV/AIDS Care* 13, 118.

Despite the federal government's annual investment of over $19 billion responding to the HIV epidemic, an astounding 60% of individuals infected with HIV in the United States do not receive regular HIV care, *Spectrum of Engagement in HIV Care* 795, and transmission of the infection continues at alarming rates.

C. The Insurance Market's Failure To Provide Coverage To Individuals With HIV Has Dire Economic And Public Health Consequences

The insurance market's failure to provide coverage for those with HIV has grave consequences. While proper treatment could substantially stem the spread of HIV, in the current failed system, approximately 50,000 Americans contract HIV each year. *HIV Surveillance 1981-2008*, at 691; see also Joseph Prejean et al., *Estimated HIV Incidence in the United States, 2006–2009*, 6 PLoS ONE e17502 (2011). And while HIV can be well-managed and progression to AIDS arrested with treatment, each year approximately 35,000 Americans are diagnosed with AIDS, and 16,000 die. CDC, *HIV Surveillance Report, 2009*, Tbl. 1b, at 24 and Tbl. 12b, at 45 (2011) ("*2009 HIV Surveillance Report*"). Worst of all, these consequences fall disproportionately on already marginalized and underserved populations.

1. The failure of the insurance market takes a staggering public health and economic toll

As the Institute of Medicine of the National Academies has concluded, the combination of "limited access to private insurance and constrained eligibility for public programs" has directly led to "continued preventable death and disability and little decline in the rate of new infections each year." *Public Financing of HIV/AIDS Care* 135.

Inadequate insurance leads to dramatically worse health outcomes for those with HIV. People without health insurance are much less likely to receive regular HIV care and effective medications. *Care Without Coverage* 66-67. When the uninsured do manage to re-

ceive ARVs after an HIV diagnosis, it happens on average 4.5 months later than privately insured people diagnosed with HIV. *Ibid.* The uninsured are also substantially more likely to discontinue drug therapy after they begin. *Id.* at 67. Consistency is critical when people with HIV are treated with ARVs. Inconsistent access leads to drug resistance, which in turn can lead to a quicker progression to AIDS and increased risk of medical complications requiring emergency room visits, hospitalizations, and other significant costs for both the individual and the public. See *Public Financing of HIV/AIDS Care* 135. Without adequate treatment, a person is more likely to suffer a damaged immune system and become vulnerable to opportunistic infections. See AIDS.gov, *Stages of HIV* ¶ 5 (Oct. 12, 2010). When HIV is allowed to advance to AIDS, treatment is far more expensive; thus the lack of early access to treatment resulting from inadequate insurance leads to much greater overall health care costs. See *Economic Burden of Late Entry Into Medical Care* 1075-1078.

The ultimate consequence of having no insurance for those with HIV is often premature death. When a person with HIV has health insurance of any kind, the chance that the person will die within six months decreases by 71% to 85%. *Care Without Coverage* 67. This is in part because uninsured adults are more likely to receive a "late" HIV diagnosis—that is, they do not get tested until 12 months or fewer before getting AIDS. *Delayed HIV Testing* 555-556 and Tbl. 3. A late diagnosis puts a person at higher risk for short-term mortality, since the individual will have a reduced window of opportunity to take ARVs that prevent the onset of potentially life-threatening opportunistic infections. *HIV Surveillance 1981-2008*, at 692. The broader

social consequences are also dramatic. The economy is projected to suffer $29.7 billion in lost earnings due to the premature deaths of those who contracted HIV in 2002 alone. *Economic Burden of HIV* 453.

Lack of insurance also leads to increased rates of transmission and exacerbates an epidemic that could be substantially curtailed. Since the uninsured are less likely to obtain testing and know their HIV status, the chance that they will unwittingly transmit the infection increases. "[A]nnual transmission rates in the United States are some 3.5 times higher among people with undiagnosed HIV infection compared to those who are diagnosed." Ronald O. Valdiserri, *Late HIV Diagnosis: Bad Medicine and Worse Public Health*, 4 PLoS Med. 975, 975 (2007). People who are uninsured and thus under-treated are more likely to transmit HIV: "[R]eceiving sustained comprehensive treatment can help to prevent transmission of HIV to others because drug therapies reduce viral loads thus potentially rendering the individual less infectious." *Public Financing of HIV/AIDS Care* 135. ARV therapy thus reduces the relative risk of spreading HIV to others by as much as 96%. *Prevention of HIV-1 Infection* 503. By one estimate, society saves $910,800 (discounted to 2002 dollars) each time a transmission of HIV is prevented. *Economic Burden of HIV*, Tbl. 3, at 455.

2. *The combined effect of the HIV epidemic and lack of insurance falls hardest on already marginalized groups*

Marginalized and underserved populations are particularly hard-hit by the HIV epidemic, exacerbating the harms from the insurance industry's exclusion of persons with HIV. The groups with the highest inci-

dence of HIV have the lowest incidence of private insurance: Black and Latino people with HIV are much more likely to be uninsured. *Public Financing of HIV/AIDS Care* 272. As a result, they bear a disproportionate share of the harmful public health and economic consequences of being an uninsured person with HIV.

Black men and women comprise 12% of the U.S. population, but 44% of people with new HIV infections. See Kaiser Family Found., *Fact Sheet: The HIV/AIDS Epidemic in the United States* 2 (2011). "Survival after an AIDS diagnosis is lower for Blacks than for most other racial/ethnic groups, and Blacks have had the highest age-adjusted death rate due to HIV disease throughout most of the epidemic." *Ibid.* The HIV/AIDS epidemic has placed younger gay and bisexual men (ages 13-29) at particularly acute risk: in 2009, they accounted for 27% of all new HIV infections and 44% of infections among all gay and bisexual men. *Ibid.* Likewise, transgender communities in the United States suffer a high prevalence of HIV. See CDC, *HIV Infection among Transgender People* 1-2 (2011).

Without engaging in greater risk behaviors than others, people in underserved demographic groups still are more likely to contract HIV due to the sheer number of HIV-positive people in their social networks. *National HIV/AIDS Strategy* 12. And the disparity in rates of infection has only grown worse since the onset of the epidemic: "[T]hose newly infected with HIV are more likely than in the past to be poor, members of a racial/ethnic minority group, and uninsured or publicly insured." *Public Financing of HIV/AIDS Care* 38.

* * * * *

In sum, the ACA tackles a complex series of economic and public health problems arising from the exclusion of persons with HIV from the private insurance market. After 30 years spent propping up private and state markets with federal funds, Congress determined it was time for a comprehensive and more effective federal solution. As explained below, the MCR was an essential ingredient of that solution.

II. THE MCR IS AN ESSENTIAL FEATURE OF CONGRESS'S SOLUTION TO THE HEALTH INSURANCE CRISIS FOR THOSE WITH HIV

The ACA directly responds to the failures of the health insurance market. It prevents insurers from denying coverage to consumers with pre-existing conditions and from charging discriminatory rates based on these conditions. 42 U.S.C.A. 300gg, 300gg-1(a), 300gg-3(a), 300gg-4(a).[3] These "guaranteed issue" and "community rating" provisions are unquestionably valid exercises of Congress's Commerce Clause power. See *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 552-553 (1944). As the lessons of the HIV/AIDS health care crisis demonstrate, the MCR is critical to making these provisions effective, and therefore is within Congress's power under the Necessary and Proper Clause. U.S. Const. art. I, § 8, cl. 18; see, *e.g.*, *Gonzales* v. *Raich*, 545 U.S. 1, 36 (2005) (Scalia, J., concurring) (observing that Congress may enact a sta-

---

[3] The ACA also broadens the availability of Medicaid by setting uniform eligibility standards, including that, as of 2014, Medicaid will be available to persons with incomes up to 133% of the federal poverty level, regardless of whether they are disabled. 42 U.S.C.A. 1396a(a)(10)(A)(i)(VIII).

tute that is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut" without the statute) (internal quotation omitted).

The success of Massachusetts' health insurance reforms, which include an MCR, in significantly improving health care for those with HIV, and the failure of those states that attempted reforms without an MCR, provide "empirical demonstration" of the necessity of the MCR to the regulatory regime. *United States* v. *Comstock*, 130 S. Ct. 1949, 1966-1967 (2010) (Kennedy, J., concurring).

A. Massachusetts' Experience Demonstrates That Health Insurance Reform Paired With An MCR Makes Access To HIV Treatment Affordable And Achievable

In 2006, Massachusetts enacted health care reform legislation similar to the ACA, featuring an MCR and nearly universal insurance coverage for persons with HIV. See Harvard Law School Center for Health Law and Policy Innovation, *Massachusetts HIV/AIDS Resource Allocation Project* 3-5 (Dec. 13, 2011) (Working Paper) ("*Massachusetts HIV/AIDS*").[4] Massachusetts' reforms have made critical HIV treatments widely affordable and accessible. See *id.* at 1-2. The resulting benefits to those living with HIV in Massachusetts have been remarkable. They foretell what the nation

---

[4] In addition, in 2001, Massachusetts obtained a waiver from the federal government allowing it to provide Medicaid coverage to all persons living with HIV who are within 200% of the federal poverty level. See *Massachusetts HIV/AIDS* 1.

can expect once the ACA is fully implemented and people with HIV receive nearly universal coverage.

First, because treatment reduces the chances of transmission significantly, nearly universal insurance coverage has reduced the HIV transmission rate. Between 2005 and 2008, Massachusetts had a 37% *decrease* in HIV infections, while the nation had an 8% *increase*. *Massachusetts HIV/AIDS* 1, 7. Second, with nearly universal coverage, Massachusetts is "vastly outpacing the rest of the country in the declining rates of hospitalization and the percentage of patients with suppressed viral loads," with 64.6% achieving total viral load suppression in Massachusetts compared to 48.6% nationwide. *Id.* at 1, 10. As a result of the suppressed viral loads, Massachusetts had 6.5 AIDS diagnoses per 100,000 persons in 2009, compared with 11.2 per 100,000 nationally. *Id.* at 7. Third, the death rate for individuals living with HIV "is far lower and falling faster in Massachusetts than the rest of the nation." *Id.* at 1. Massachusetts' age-adjusted HIV/AIDS death rate is almost half the national average (2% versus 3.7%), and has fallen by 42% since 2002, compared with a 24% drop nationwide. *Id.* at 7-8.

Nearly universal health coverage—and the resulting improvements in clinical outcomes—have allowed Massachusetts to focus its federally-subsidized HIV programs on preventive care "rather than paying for urgent, late-stage medical care." *Massachusetts HIV/AIDS* 14. Unlike programs in the many states with long waiting lists and formulary limits on drugs important to treatment of HIV and AIDS, Massachusetts' drug assistance program "has no waiting list, an unrestricted formulary, and covers citizens up to 481% of the federal poverty limit." *Id.* at 15. Despite having

one of the most comprehensive drug assistance programs in the nation, Massachusetts has seen a "$7 million *decrease* in state spending on HIV/AIDS medications since 2004." *Id.* at 15 (emphasis added).

By contrast, people living with HIV fare far worse in states that have not adopted health insurance reform. Respondent Florida, for example, did not undertake reforms like Massachusetts, with correspondingly far worse health outcomes for people living with HIV. According to Census data, in Florida, 20.8% of residents are uninsured, compared with Massachusetts' rate of 5.6%, the lowest in the nation. U.S. Census Bureau, *Current Population Survey, 2011 Annual Social and Economic Supplement*, Tbl. HI06 (2011).[5] Florida's HIV infection rate, 33 of every 100,000 people, is the highest for any state in the nation, see *2009 HIV Surveillance Report*, Tbl. 19, at 64, and five times that of Massachusetts, see *Massachusetts HIV/AIDS* 7. The rate of AIDS diagnoses in Florida (23.7 per 100,000 people) is roughly four times that of Massachusetts (6.5). *2009 HIV Surveillance Report*, Tbl. 20, at 65. The age-adjusted death rate from HIV in Florida is 8.3 for every 100,000 people—four times higher than that of Massachusetts (2.0). CDC, *Deaths: Final Data for 2007*, 58 Nat'l Vital Stat. Rep. 1, Tbl. 29, at 101 (2010).

---

[5] These Census estimates on uninsured rates are used to allow direct comparison between Massachusetts and Florida; other sources put the Massachusetts uninsured rate even lower, at 1.9%. See *Massachusetts HIV/AIDS* 12; Mass. Div. of Health Care Fin. & Policy, *Health Care in Massachusetts: Key Indicators* 12 (May 2011).

B. States That Enacted Partial Reforms Without An MCR Fail To Provide Affordable And Accessible Care To People Living With HIV

Seven states (Kentucky, Maine, New Jersey, New Hampshire, New York, Washington, and Vermont) have tried to expand access to affordable insurance through much-needed guaranteed issue and community rating reforms, but have done so without an MCR. In each case, the effort "simply [did] not work." *Florida* v. *HHS*, 648 F.3d 1235, 1349 (11th Cir. 2011) (Marcus, J., dissenting). Indeed, enacting these essential reforms without an MCR produced the opposite of their intended effect. Premiums skyrocketed, many insurers stopped issuing new policies or left the state altogether, and the number of uninsured individuals rose. *Ibid.* Kentucky later repealed its reforms, 1998 Ky. Acts 1881, and Maine just recently undid much of its reforms, 2011 Me. Laws 114. In contrast, in Massachusetts the size of the private insurance market remains nearly identical to national medians, insurers operating in the State are financially healthy, and the number of uninsured has declined dramatically. See *Massachusetts HIV/AIDS* 22.

The differences in insurance market policy between Massachusetts and these seven states translate into critical health consequences for people living with or at higher risk for HIV and AIDS. In Massachusetts, 10.8 new AIDS cases per 100,000 people were diagnosed in 2005, the year before it enacted its reforms with an MCR. By 2009, that number had dropped to 6.5—a 39.8% decrease. Compare *2009 HIV Surveillance Report* Tbl. 20, at 65, with CDC, *HIV Surveillance Report, 2005*, Tbl. 14, at 28 (2007) ("*2005 HIV Surveillance Report*"). None of the states that implemented health

reform without an MCR fared as well; indeed, in two nearby New England states, Maine and New Hampshire, new AIDS cases *increased*. Compare *2009 HIV Surveillance Report*, Tbl. 20, at 65, with *2005 HIV Surveillance Report*, Tbl. 14, at 28.

Furthermore, the states that attempted reform without an MCR also fared worse than Massachusetts in rates of diagnosed new infections. In Massachusetts, the number of new HIV infections decreased by 37.4% between 2005 and 2009. Mass. Dep't of Pub. Health, *The Massachusetts HIV/AIDS Epidemic at a Glance: Detailed Data Tables and Technical Notes*, Tbl. 1, at 2 (2010). By contrast, Washington saw a decrease of just 3.4%, and New York of 10.8%. Wash. State Dep't of Health, *Washington State HIV Surveillance Quarterly Report*, Tbl. 1, at 5 (2011); N.Y. State Dep't of Health, *New York State HIV/AIDS Surveillance Annual Report*, Tbl. 1, at 20 (2010).

As the Massachusetts experience shows, opening the health insurance market to persons living with HIV significantly reduces spread of the epidemic and costs of care, and allows these individuals to lead healthy, economically productive lives. Congress anticipated that the same positive results would follow nationwide from the ACA.[6]

---

[6] See, *e.g.*, 155 Cong. Rec. H12,910 (daily ed. Nov. 7, 2009) (statement Rep. Kanjorski) ("While I believe that caring for our fellow citizens is a moral imperative, it also makes economic sense to have as many people covered by insurance as possible. * * * [I]t is in the best interest of all of our health to make sure that sick people are treated quickly and affordably so that infectious diseases are not spread."); 155 Cong. Rec. H11,855-56 (daily ed. Oct. 27, 2009) (statement Rep. Jackson-Lee) (same).

C. Piecemeal State Solutions Are Inadequate To Address The Health Care Coverage Crisis For Those Affected By The HIV/AIDS Epidemic

Nor can it be argued that each state should decide individually whether to implement an MCR and remove HIV-related barriers to insurance. States have already tried to regulate the financing of health care for people living with HIV, and the result has been systemic market failure, with needless HIV transmission and human suffering.

Piecemeal local attempts to extend insurance coverage for those living with HIV will not curb the national epidemic.[7] If the MCR is not implemented nationally, states such as Florida will continue to have large, and likely growing, populations of uninsured individuals with HIV. These individuals—often unaware of and untreated for their infection—are more likely to transmit the virus to others. As the Institute of Medicine of the National Academies has explained, "the current federal-state partnership for financing HIV care is unresponsive to the fact that HIV/AIDS is a national

---

[7] Recognizing the national interstate crisis posed by the HIV/AIDS epidemic, for the last several decades, the federal government has taken the lead in setting and coordinating national HIV/AIDS policy. See, *e.g.*, Ryan White CARE Act of 1990, 42 U.S.C. 300ff *et seq.*, as amended (supplementing and helping to standardize HIV testing and treatment nationwide); CDC, *HIV Prevention Strategic Plan: Extended Through 2010* 10 (2007) (explaining that government must "strengthen the capacity nationwide to monitor the epidemic, develop and implement effective HIV prevention interventions and evaluate prevention programs").

epidemic with consequences that spill across state borders." *Public Financing of HIV/AIDS Care* 6. For these reasons, the White House's National HIV/AIDS Strategy has established a uniform set of standards and priorities for combating the epidemic, explaining that "overlapping and competing programs also hinder efforts at the State and local levels." *National HIV/AIDS Strategy* 42. The ACA, including the MCR, is a critical element of the national response to this epidemic.

III. The HIV/AIDS Epidemic Illustrates Why Congress's Enactment Of The MCR Was Within Its Constitutional Authority

The ACA represents a permissible exercise of Congress's authority under the Commerce Clause to enact comprehensive reform of the interstate health insurance market, which has excluded persons living with HIV and other serious health conditions, causing national public health and economic problems of severe magnitude. As the dynamics of the insurance market for those with HIV demonstrate, the MCR is the linchpin that allows these reforms to function as intended. Thus, regardless of whether it is within Congress's Commerce Clause authority to adopt the MCR as a stand-alone provision, it is well within Congress's authority under the Necessary and Proper Clause as an essential element of the larger regulation of interstate commerce.

Furthermore, independent of the Necessary and Proper Clause, the MCR, even viewed in isolation, also passes muster under the Commerce Clause. The MCR addresses a consumer's economic decision whether to pay for health care insurance or depend on the social

insurance of a health care system paid for by others. Again, HIV provides an example of the point. Once the virus is contracted and symptoms emerge, an individual cannot realistically avoid accessing the health care system, and will almost certainly rely on available forms of health care coverage in doing so. Congress acted within its Commerce Clause authority to regulate this economic behavior.

A. The MCR Is Necessary And Proper To Congress's Exercise Of Its Power Under The Commerce Clause

Respondents do not dispute that Congress had the authority under the Commerce Clause to enact those provisions of the ACA directly regulating and prohibiting the policies and practices of insurance companies that deny health insurance to individuals with HIV. These practices—which have led to the nationwide failure of the health insurance market to provide coverage to individuals living with HIV—are quintessential economic activity that Congress may regulate under the Commerce Clause. See *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 552-553 (1944) (Congress may regulate sale of insurance under Commerce Clause); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 257-258 (1964) (Congress may, under Commerce Clause, prohibit practice of refusing to sell goods or services to certain individuals).

The experience of the HIV epidemic further demonstrates that the MCR is an indispensable prerequisite to making those ameliorating reforms effective, and therefore is within Congress's power under the Necessary and Proper Clause. Under that Clause, Congress may enact statutes that are "an essential part of a larg-

er regulation of economic activity, in which the regulatory scheme could be undercut" without the statute. *Gonzales* v. *Raich*, 545 U.S. 1, 36 (2005) (Scalia, J., concurring in the judgment) (internal quotation omitted).

The remarkable success of Massachusetts' health insurance reforms, which include an MCR, in improving health outcomes for those with HIV, and the contrasting failures of those states that attempted health insurance reform without an MCR (see Section II.B., *supra*), provide "empirical demonstration" that the MCR is necessary to the success of the overall regulatory regime. *United States* v. *Comstock*, 130 S. Ct. 1949, 1966-1967 (2010) (Kennedy, J., concurring). In short, "effectuat[ing] guaranteed issue and community rating reforms without some form of individual mandate . . . simply does not work." *Florida* v. *HHS*, 648 F.3d 1235, 1349-1350 (11th Cir. 2011) (Marcus, J., dissenting).

Without the MCR, the ACA would be far less effective in curtailing the HIV epidemic and its economic costs. In fact, it likely would do the opposite. Insurance premiums would be prohibitive for many people with HIV, providers would be scarce or nonexistent, and ultimately few people with HIV would have private coverage. Thus, the absence of the MCR would leave a "gaping hole" in the ACA, see *Raich*, 545 U.S. at 22, transforming Congress's efforts to ensure health care for all into an exercise in futility.

Even if the Eleventh Circuit were correct that the small number of people who have "not made a voluntary choice to enter the stream of commerce" do not engage in economic activity that is independently within the scope of Congress's Commerce Clause authority, *Florida* v. *HHS*, 648 F.3d at 1291-1292, Congress could nonetheless adopt the MCR as a necessary and proper

measure to regulate the private insurance market's systematic exclusion of millions of Americans, including those with HIV. "The relevant question" under the Necessary and Proper Clause "is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power." *Raich*, 545 U.S. at 36-37 (Scalia, J., concurring in the judgment). The MCR was not just "reasonably adapted" to the "legitimate end" of reforming the private insurance market to allow participation for those with medical conditions like HIV; it was absolutely imperative to achieving these goals.

B. The HIV/AIDS Epidemic Demonstrates That Congress Was Also Within Its Commerce Clause Authority In Enacting The MCR

The Eleventh Circuit ruled the MCR unconstitutional under the Commerce Clause because it would "compel[] non-market participants to *enter into* commerce," which, according to the majority, is unconstitutional. *Florida* v. *HHS*, 648 F.3d at 1311. The court's analysis ignores the reality that failure to pay for health insurance in reliance on a health care system and insurance market that will be available to the individual at the moment of need *is* economic activity. The dynamics of health care and coverage for those who live with HIV proves the point.

Although a person may hope not to contract HIV, it is inconceivable that a person who does contract the virus would forego accessing health care services. When diagnosed with HIV, a person will need costly medical treatments for the rest of that person's life. If untreated, a person infected with HIV will inevitably re-

quire medical services for opportunistic infections and AIDS symptoms, at even greater expense than if the infection had been promptly treated.

A person who does not pay for health care insurance knows that at least the safety net of health care facilities, supported by the insurance market and government subsidies, will still be available to that person. See, *e.g.*, Emergency Medical Treatment and Active Labor Act, 42 U.S.C. 1395dd (requiring hospitals to provide emergency services, regardless of ability to pay); Ryan White CARE Act, 42 U.S.C. 300ff *et seq.* (providing funding to cities and states for certain services for people living with HIV or AIDS who lack alternative coverage).

Thus, even individuals who do not pay for insurance obtain some of its benefits—the assurance that the health care system will be there, at least to some extent, when most needed. When a person makes a "voluntary choice" not to purchase *private* health insurance, the person has invariably chosen to rely on *social* insurance against future catastrophic illnesses like HIV or AIDS. "Individuals must finance the cost of health care by purchasing an insurance policy or by self-insuring cognizant of the backstop of free services required by law." *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 544 (6th Cir. 2011) (Sutton, J., concurring in part).

Indeed, the characterization of those who do not pay for insurance as engaging in "self-insurance" is particularly a misnomer in the context of HIV. The costs of treating HIV are simply too prohibitive to pay on one's own. They cannot be anticipated or budgeted for in advance, and exceed most people's savings by several orders of magnitude. "Even among those individuals

who have resources, the costs of HIV care can quickly exhaust their assets and may leave them impoverished." *Public Financing of HIV/AIDS Care* 270. The anticipated undiscounted lifetime cost of HIV medications per person is $618,900, or around $2,100 per month. Bruce R. Schackman et al., *The Lifetime Cost of Current Human Immunodeficiency Virus Care in the United States*, 44 Med. Care 990, 994 (2006). In addition, people living with HIV or AIDS usually require several thousand dollars per year in doctor's visits, laboratory tests, and drugs to prevent or treat HIV-related opportunistic infections. *Public Financing of HIV/AIDS Care* 270. Health care for medical conditions this serious "can be so expensive that most everyone must have some access to funds beyond their own resources in order to afford them." See *Florida* v. *HHS*, 648 F.3d at 1357 (Marcus, J., dissenting in part).

Moreover, other provisions of the ACA preventing an insurer from denying coverage because of a preexisting condition make rational the economic decision to postpone paying for insurance until an individual needs to make heavy use of the health care system, such as after an HIV diagnosis. This economic activity also takes advantage of the financial contributions of others to the health care and health insurance markets, and, as the experience of a number of states has already shown, without an MCR renders measures to reform the market unsustainable.

Consequently, the court of appeals was wrong to suggest that the MCR unconstitutionally "compel[s] non-market participants to *enter* into commerce." *Florida* v. *HHS*, 648 F.3d at 1311. Every time an individual chooses whether to pay for health care insurance now or to depend later on the guaranteed availability of a

system paid for by others, that person makes an economic decision, which, in the aggregate, has a monumental impact on interstate commerce.

Of course, the great majority of people with HIV have had no choice but to rely on social insurance or forego critical care, due to economic barriers and exclusionary practices of the private health insurance market. These are not the individuals whom the Eleventh Circuit identifies as being unconstitutionally "compelled" to "enter into commerce." See *Florida* v. *HHS*, 648 F.3d at 1311 (emphasis omitted). Instead, they have been involuntarily excluded from a segment of commerce, with dire consequences for their health and economic productivity, and for the national HIV/AIDS crisis. The ACA, including the linchpin MCR, puts within reach an end to the HIV/AIDS epidemic, and it was well within Congress's power to enact.

CONCLUSION

The Court should reverse the judgment of the Eleventh Circuit Court of Appeals on the minimum coverage provision issue.

Respectfully submitted.

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
BRADLEY D. GROSSMAN
BRENDON O. CARRINGTON
JACOB M. HELLER
ROPES & GRAY LLP

SUSAN L. SOMMER
SCOTT A. SCHOETTES
HAYLEY J. GORENBERG
JON W. DAVIDSON
IVÁN ESPINOZA-MADRIGAL
LAMBDA LEGAL DEFENSE
& EDUCATION FUND, INC.

JANUARY 2012

APPENDIX

Formed in 1973, **Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal")** is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, and transgender ("LGBT") people and those living with HIV through impact litigation, education, and public policy work. Lambda Legal has represented the interests of people living with HIV since the beginning of the HIV/AIDS epidemic, and its work has ensured access to treatment, promoted effective prevention policies, and helped combat discrimination, bias, and stigma. Lambda Legal has appeared in this Court as counsel to parties or amici in cases addressing discrimination against people who are LGBT or living with HIV, including *Romer* v. *Evans*, 517 U.S. 620 (1996), *Lawrence* v. *Texas*, 539 U.S. 558 (2003), and *Cooper* v. *Federal Aviation Administration*, No. 10-1024 (U.S. Sup. Ct., argued Nov. 30, 2011).

The mission of **AIDS United** is to end the AIDS epidemic in the United States through national, regional and local policy/advocacy, strategic grant-making, and organizational capacity building. With partners throughout the country, AIDS United works to ensure that people living with and affected by HIV/AIDS have access to the prevention and care services they need and deserve. AIDS United programs and initiatives include the development and implementation of sound public health policy in response to the HIV/AIDS epidemic. The organization works to advance federal policies that improve the quality of life and ensure access to treatment and care for all those living with HIV/AIDS.

Founded in 1989 with a mission to provide HIV/AIDS services and advocate for Asian and Pacific Islanders Living with HIV/AIDS, **Asian & Pacific Islander Coalition on HIV/AIDS ("APICHA")** now provides comprehensive primary care, preventive health services, and mental health and supportive services to medically underserved and marginalized residents of New York City, particularly Asians and Pacific Islanders, LGBT individuals, and recent immigrants from communities of color. APICHA is noted for its culturally competent and linguistically appropriate services, with capacity to serve over fifteen Asian languages plus Spanish in addition to English.

Founded in May of 1999, the **Black AIDS Institute** is the only national HIV/AIDS think tank focused exclusively on Black people. The Institute's mission is to stop the AIDS pandemic in Black communities by engaging and mobilizing Black institutions and individuals in efforts to confront HIV. The Institute interprets public and private sector HIV policies, conducts trainings, offers technical assistance, disseminates information, and provides advocacy mobilization from a uniquely and unapologetically Black point of view. The Institute's motto describes a commitment to self-preservation: "Our People, Our Problem, Our Solution."

The **Center for HIV Law and Policy ("CHLP")** is a national legal and policy resource and strategy center for people with HIV and their advocates. CHLP's interest in this case is consistent with its mission to reduce the impact of HIV on vulnerable and marginalized communities and to secure the rights of people affected by HIV. Equitable access to essential health care is the foundation of the ability of communities affected by

HIV to participate productively in society, and is central to meeting the national public health goal of reducing new HIV infections and HIV-related deaths in the United States.

Gay & Lesbian Advocates & Defenders ("GLAD") is a public interest legal organization dedicated to ending discrimination based upon sexual orientation, HIV status, and gender identity and expression. GLAD's AIDS Law Project, founded in 1984, has litigated numerous cases in state and federal court addressing access to health care for people with HIV. GLAD was counsel in *Bragdon* v. *Abbott*, 524 U.S. 624 (1998), which involved a dentist who refused to provide dental care to people with HIV.

The **Gay & Lesbian Medical Association ("GLMA")** is the world's largest and oldest association of LGBT health care professionals. GLMA's mission is to work to ensure equality in health care for LGBT individuals and health care professionals, using the medical and health expertise of GLMA members in public policy and advocacy, professional education, patient education and referrals, and the promotion of research. GLMA was founded in 1981 in part as a response to the call to advocate for policy and services to address the growing health crisis that would become the HIV/AIDS epidemic.

The **HIV Medicine Association ("HIVMA")** is a national organization representing more than 4,800 HIV medical providers, researchers, and scientists working in all 50 states and more than 50 countries. HIVMA is nested within the Infectious Diseases Society of America and was created in 2001 to promote access to quality HIV care and to advocate for federal

policies that ensure a comprehensive and humane response to the AIDS pandemic informed by science and social justice. As an organization representing frontline medical providers caring for many uninsured and underinsured patients with HIV/AIDS, HIVMA has a strong interest in supporting sound health care financing policies that improve access to lifesaving care and treatment for people living with HIV/AIDS.

Founded in 2009, the **HIV Prevention Justice Alliance ("HIV PJA")** is a coalition of more than 80 organizations and a network of 13,000 individuals working at the intersection of HIV/AIDS, health care, and human rights through education, training, public policy work, public health, and community mobilization. We are dedicated to representing the interests of people living with HIV as key agents of HIV prevention and the best voices to speak out for effective prevention policies, health care, and against discrimination, bias, and stigma. HIV PJA is headquartered in Chicago, has staff in New York City, and steering committee members in those cities as well as Philadelphia, Atlanta, Seattle, Portland (OR), San Francisco, Los Angeles, Boston, Jackson (MS), Washington (DC), and Detroit.

The **Latino Commission on AIDS ("Commission")** is a nonprofit membership organization founded in 1990 dedicated to addressing the impact of HIV/AIDS and health challenges in the Latino/Hispanic community. The Commission realizes its mission by promoting health advocacy, HIV testing, and health promotion; developing prevention programs for high-risk communities; implementing community participatory research/evaluation initiatives; and providing capacity building services. The Commission is

the leading national Latino AIDS organization, coordinating National Latino AIDS Awareness Day and other prevention and advocacy programs across the United States and its territories.

As it has been for more than 25 years, the **National Association of People with AIDS ("NAPWA")** is the oldest, most trusted voice for saving and improving the lives of people impacted by HIV/AIDS. NAPWA founded National HIV Testing Day, the nation's first official HIV awareness day, to encourage all Americans to take responsibility and know their status. Founded in 1983, NAPWA advocates for the lives and dignity of all people living with HIV/AIDS, especially the 1.2 million Americans who live with it today. NAPWA believes that full implementation of the ACA is critical to the lives of countless individuals living with HIV/AIDS and other chronic, disabling conditions. NAPWA wants the epidemic to end, and for life to be better for people with HIV until it does.

Founded in 1977, the **National Center for Lesbian Rights ("NCLR")** is a national legal organization committed to advancing the civil and human rights of LGBT people and their families through litigation, public policy advocacy, and public education. NCLR advocates for laws and policies that promote the health and well-being of those living with HIV.

The **National Center for Transgender Equality ("NCTE")** is a national social justice organization devoted to advancing equality for transgender people through education and advocacy. Founded in 2003, NCTE advocates for policy reform at the federal level on a wide range of issues affecting transgender people (including HIV/AIDS, ACA implementation, and other

health policies), provides technical assistance to organizations and institutions at the state and local levels, and works to create greater public understanding of issues affecting transgender people. NCTE receives inquiries from thousands of transgender people and their loved ones each year, including numerous people living with HIV or AIDS. Because transgender people are disproportionately affected by HIV and more likely to be uninsured, NCTE has a strong interest in ensuring that nondiscriminatory, affordable health care is accessible to all individuals.

Formed in 1987, the **National Native American AIDS Prevention Center ("NNAAPC")** is a national Native organization committed to addressing the impact of HIV/AIDS on American Indians, Alaska Natives, and Native Hawaiians through culturally appropriate advocacy, research, education, and policy development. Acknowledging that 28.4% of American Indians are currently living in poverty in the U.S., that many Native people harbor a historical distrust of Western medicine, that American Indian and Alaska Native people have the third and fourth highest rates of new HIV infections annually in the U.S., and that recent research demonstrates that people living with HIV who are linked to regular care stand a significantly decreased chance of transmitting HIV, NNAAPC supports efforts that will bring affordable and accessible healthcare to all Native peoples.

Based in Washington, DC and Boston, the **Treatment Access Expansion Project ("TAEP")** is a national organization that has worked since 1996 to improve access to affordable, comprehensive, high quality healthcare for poor and low-income people living with

chronic medical conditions, including HIV/AIDS. TAEP plays a leadership role within the HIV/AIDS community in addressing emerging healthcare opportunities and challenges by coordinating and informing efforts of national, state, and local partners to expand access to care. TAEP specifically focuses on four goals: supporting HIV testing and linkage to care initiatives, reducing the number of people diagnosed late in their disease progression, promoting early access to care and treatment, and eliminating HIV-related stigma and discrimination. TAEP has been integrally involved in shaping and carrying out the national HIV/AIDS community's advocacy efforts related to healthcare reform and the ACA.

Founded in 1991, **Women Organized to Respond to Life-threatening Diseases ("WORLD")** is a women centered HIV organization serving HIV-positive women in the Bay Area and around the nation. As one of the first women-centered AIDS service organizations in the country, WORLD's mission is to improve the lives and health of women, girls, families, and communities affected by HIV through peer-based education, wellness services, advocacy, and leadership development. In 2008, the **U.S. Positive Women's Network ("PWN")** was founded as a project of WORLD to address gaps for HIV-positive women in national and local laws and HIV policies. PWN is a national network with regional chapters in Oakland, San Diego, Philadelphia, the state of Colorado, the Midwest, and the Deep South, where it advocates for the rights and health of women living with HIV.

AMICUS CURIAE BRIEF

No. 11-398

In The
Supreme Court of the United States

DEPARTMENT OF HEALTH
AND HUMAN SERVICES, et al.,

Petitioners,

v.

STATE OF FLORIDA, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

**BRIEF OF AMICUS CURIAE
LANDMARK LEGAL FOUNDATION
IN SUPPORT OF RESPONDENTS
ON THE INDIVIDUAL MANDATE
(Minimum Coverage)**

MARK R. LEVIN
MICHAEL J. O'NEILL
MATTHEW C. FORYS
LANDMARK LEGAL FOUNDATION
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176
(703) 554-6100
(703) 554-6119 (Facsimile)

RICHARD P. HUTCHISON
Counsel of Record
LANDMARK LEGAL FOUNDATION
3100 Broadway
Suite 1210
Kansas City, MO 64111
(816) 931-1175
(816) 931-1115 (Facsimile)
Hutchison@landmarklegal.org
Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. THE PPACA'S INDIVIDUAL INSURANCE MANDATE IS AN UNPRECEDENTED AND UNCONSTITUTIONAL NATIONAL POLICE POWER PERMISSIBLE NEITHER UNDER THE COMMERCE CLAUSE NOR THE NECESSARY AND PROPER CLAUSE 5

A. The Commerce Clause in Historical Context Contemplates Voluntary Commercial Interactions. 5

B. *Gibbons v. Ogden* Requires Reasonable Application of Commerce Clause 6

C. The Supreme Court's Modern Jurisprudence Does Not Sustain The Individual Mandate 8

1. The Individual Mandate Cannot Survive Commerce Clause Scrutiny 9

a. Inactivity is *not* activity 9

b. The decision to forego insurance constitutes inactivity 11

2. The Individual Mandate Is Not Saved By The Necessary And Proper Clause... 11

a. The Necessary And Proper Clause is restrained 11

TABLE OF CONTENTS – Continued

Page

b. *United States v. Comstock* Reaffirms Limits On The Necessary And Proper Clause 13

D. The Individual Mandate Is An Unconstitutional National Police Power 16

II. SECTION 5000A OF THE PPACA ESTABLISHES AN UNCONSTITUTIONAL TAX ... 18

A. The Federal Government Cannot Justify The Penalty Provision As A Permissible Excise Tax 20

B. Rationales Proffered By Petitioner And Lower Courts That The Penalty Provision Constitutes A Justifiable Tax Are Untenable And Should Not Be Adopted By The Court 23

C. The Federal Government Cannot Justify The Penalty Provision As A Permissible Income Tax 27

D. The Penalty Provision Is Readily Distinguishable From The Social Security Act 30

E. Article I, Section 9, Clause 4 Prohibits The Issuance Of Capitation Or Direct Taxes Unless Apportioned Among The States 31

TABLE OF CONTENTS – Continued

Page

F. The Penalty Provision Constitutes An Impermissible Direct Tax Because It Is Not Apportioned Among The States 35

CONCLUSION 36

TABLE OF AUTHORITIES

Page

Cases

Bromely v. McCaughn, 280 U.S. 124 (1929) 21

Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955) 28

Commissioner v. Indianapolis Power & Light Co., 493 U.S. 203 (1990) 28

Eisner v. Macomber, 252 U.S. 189 (1920) 27, 28

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 17

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 6, 7, 8

Gonzales v. Raich, 545 U.S. 1 (2005) 9, 10, 12

Helvering v. Davis, 301 U.S. 619 (1937) 18

Liberty University v. Geithner, No. 10-2347, 2011 U.S. App. LEXIS 18618 (4th Cir. Sept. 8, 2011) 24, 26

McColloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 11, 12, 13, 14, 15

Murphy v. I.R.S., 493 F.3d 170 (D.C. Cir. 2007) 21, 22, 33, 34

New York v. United States, 505 U.S. 144 (1992) 12, 16

Ogden v. Saunders, 25 U.S. 606 (1827) 8

Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895) 31

Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601 (1895) 32, 34

TABLE OF AUTHORITIES – Continued

Page

Printz v. United States, 521 U.S. 898 (1997) 12

Sozinsky v. United States, 300 U.S. 506 (1937) 25, 26

Steward Machine Co. v. Davis, 301 U.S. 548 (1937) 20, 23

Strattons Independence, Ltd. v. Howbert, 231 U.S. 399 (1914) 21

Thomas v. United States, 192 U.S. 363 (1904) 23

United States v. Comstock, 130 S.Ct. 1949 (2010) ..... *passim*

United States v. Darby, 312 U.S. 100 (1941) 12

United States v. Doremus, 249 U.S. 86 (1919) 25, 26

United States v. Lopez, 514 U.S. 549 (1995) 5, 9, 16

United States v. Morrison, 529 U.S. 598 (2000) 9

Wickard v. Filburn, 311 U.S. 111 (1942) 3, 10

CONSTITUTIONAL PROVISIONS

U.S. Const. Article I, Section 8 ..... 2, 4, 19, 24

U.S. Const. Article I, Section 9, Clause 4 ... 19, 31, 33, 34

U.S. Const. Amend. XVI 4, 19, 27, 33

STATUTES

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Section 1501, 124 Stat. 119 (2010) 2

TABLE OF AUTHORITIES – Continued

Page

26 U.S.C. Section 5000A 18, 19, 23, 29

42 U.S.C. Section 18091(a)(2)(C)-(I) 25

OTHER AUTHORITIES

Robert H. Bork and Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce,* 25 Harv. J.L. & Pub. Pol'y 849 (2002) 5

Brian Galle, *The Taxing Power, the Affordable Care Act, and the Limits of Constitutional Compromise*, 120 Yale L.J. Online 407 (April 5, 2011) 32

Giles Jacob, *New Law Dictionary* (10th Ed. 1782), available at http://galenet.galegroup.com/ezproxy.mnl.umkc.edu/servlet/ECCO 6

Erik M. Jensen, *The Apportionment of 'Direct Taxes': Are Consumption Taxes Constitutional?* 97 Colum. L. Rev. 2334 (1997) 29, 33, 34

Gary L. McDowell, *The Language of Law and the Foundations of American Constitutionalism* (New York: Cambridge University Press, 2010) 8

Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt and Company, Inc. 1996) 7

Joseph Story, *A Familiar Exposition of the Constitution of the United States* (Washington, D.C.: Regnery, 1986) 4

TABLE OF AUTHORITIES – Continued

Page

Joint Comm. On Taxation, 111th Cong., Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as amended, in combination with the "Patient Protection and Affordable Care Act" 31, Errata For JCX-18-10 (Mar. 21, 2010, Errata published May 4, 2010) 20

Steven J. Willis and Nakku Chung, *Constitutional Decapitation and Healthcare,* 2010 TNT 133-6, July 13, 2010 ..... 20, 30, 31, 33

Thomas M. Cooley, *A Treatise on the Law of Taxation* (Chicago, Callaghan and Co. 1876) 33

INTEREST OF *AMICUS CURIAE*

Amicus Curiae Landmark Legal Foundation ("Landmark") is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, originalist construction of the Constitution and individual rights.[1] Specializing in Constitutional history and litigation, Landmark presents herein a unique perspective concerning the legal issues and national implications of the lower courts' decisions striking down the individual mandate and its penalty provision.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about individual liberty, state sovereignty and federalism. Indeed, whether there remain any limits on the power and reach of the federal government is the fundamental question before this Court. The federal government's defense of the individual

[1] The parties have filed blanket consents to the filing of *Amicus Curiae* briefs.

No counsel for a party authored this brief in whole or in part, and no counsel, party or any person other than *Amicus Curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

insurance mandate,[2] if accepted, requires the Court to disregard more than 220 years of Commerce Clause application and Supreme Court precedents, fundamentally misapply the Necessary and Proper Clause and disregard the Constitution's requirements for the laying and collection of taxes. The heavy-handed demands of temporary politicians seeking to fundamentally and permanently change the relationship between the citizen and government – in a manner that no past Congress or Executive have undertaken and which the Constitution does not allow – must not be given this Court's imprimatur.

The Commerce Clause, Article I, Section 8 of the Constitution, provides that: "The Congress shall have Power . . . To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes." Congress can tax interstate commerce, regulate interstate commerce, and even prohibit certain types of interstate commerce. The federal government portrays the individual insurance mandate as a run-of-the-mill exercise of an enumerated power. There is nothing in the history of the Constitution and the Commerce Clause empowering the federal government to compel an individual to enter into a legally binding private contract against the individual's will and interests simply because the individual is living and breathing. Such a sweeping

---

[2] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, Section 1501, 124 Stat. 119 (2010) ("PPACA").

departure from precedent, law, and logic has never been contemplated, let alone imposed upon, the American people.

The federal government's flagship case, *Wickard v. Filburn*, 311 U.S. 111 (1942) has nothing in common with the PPACA's individual mandate. In fact, it underscores its unconstitutionality. In that case, the government did not mandate a farmer to grow wheat. It sought to regulate the wheat the farmer, by his own free will, chose to grow. Moreover, the government did not compel the consumer to purchase wheat, whereas in the instant case it compels the consumer to purchase insurance. There would seem to be few limits on federal power where individuals are ordered to produce things and individuals are ordered to purchase things. To assert a constitutional basis to justify such an unprecedented seizure of authority by the federal government is simply nonsense.

Once unleashed, what are the limits to this new, unconstitutional assertion of power? Having so thoroughly contorted the Commerce Clause, what are the discernable limitations on congressional power? The Court should be mindful that the past Congress and current administration seek nothing less than to fundamentally change the relationship between the citizen and the federal government. Perhaps this Court will inquire of the federal government the contours of this new authority it claims.

The federal government also invokes the Necessary and Proper Clause to defend what is indeed an

unprecedented national police power. The Necessary and Proper Clause, however, does not create any additional congressional power, nor does it expand any enumerated power. *See* Joseph Story, *A Familiar Exposition of the Constitution of the United States* (Washington, D.C.: Regnery, 1986), Section 208. The individual mandate is not "a discrete and narrow exercise of authority over a small class of persons already subject to . . . federal power." *United States v. Comstock,* 130 S.Ct. 1949, 1968 (2010) (Kennedy, J., concurring). Accordingly, the Necessary and Proper Clause does not justify the individual mandate as Congress never has had the authority to compel private parties to engage in private economic activity based solely on the fact of living.

Finally, although never considered a "tax" prior to this litigation, the federal government's defense of the individual mandate's penalty provision as a tax fails to satisfy every test for a tax permitted by the Constitution under the Apportionment Clause as well as the taxing power of Article I, Section 8 and the 16th Amendment. As with their determination that the individual mandate was unconstitutional, the lower courts' conclusion that the penalty provision is likewise unconstitutional should also be upheld.

ARGUMENT

I. THE PPACA'S INDIVIDUAL INSURANCE MANDATE IS AN UNPRECEDENTED AND UNCONSTITUTIONAL NATIONAL POLICE POWER PERMISSIBLE NEITHER UNDER THE COMMERCE CLAUSE NOR THE NECESSARY AND PROPER CLAUSE.

A. The Commerce Clause in Historical Context Contemplates Voluntary Commercial Interactions.

"Commerce," at the time the Constitution was drafted and ratified, "consisted of selling, buying, and bartering, as well as transporting for these purposes." *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring). Not only was the customary meaning of "commerce" well understood, the Framers' usage of the term is well documented.

As Robert H. Bork and Daniel E. Troy have observed from the historical record, "'*commerce' does not seem to have been used during the founding era to refer to those acts that precede the act of trade*. Interstate commerce seems to refer to interstate trade – that is, commerce is 'intercourse for the purposes of trade in any and all forms, including the transportation, purchase, sale, and exchange of commodities between the . . . citizens of different States.'" Bork and Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce,* 25 Harv. J.L. & Pub. Pol'y 849, 864 (2002) (internal citations omitted; emphasis added in part).

Giles Jacob, *New Law Dictionary* (10th Ed. 1782) – the Black's Law Dictionary of the Framers' day – defined "commerce" as "traffic, trade or merchandize in buying and selling of goods." (Available at http://galenet.galegroup.com/ezproxy.mnl.umkc.edu/servlet/ECCO.) These concepts contemplate *interactions* consisting of *activity* freely engaged in by individuals in the marketplace.

In short, the Framers understood that there needed to be a unified national authority for regulating the interstate flow of goods in private commerce. The Supreme Court's historic 1824 Commerce Clause decision, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), confirmed that this was the Commerce Clause's purpose.

B. *Gibbons v. Ogden* Requires Reasonable Application of Commerce Clause.

Gibbons v. Ogden is the preeminent Commerce Clause decision of the founding era. The Eleventh Circuit's holding – that the power to *regulate* commerce has never been understood to include the power to *compel* commerce – is fully supported by *Gibbons* and warrants emphasis.

The issue in *Gibbons* was whether the Commerce Clause power included the power to regulate navigation. The case, which became known as "the emancipation proclamation for American commerce," raised the question whether individual states could grant monopolies for access to their navigational waters.

Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt and Company, Inc. 1996), 474. New York, New Jersey and Connecticut were on the brink of civil war over New York's refusal to allow any ships or other navigational transports access to the state's ports or harbors other than those owned by New York's designees. The result was escalating transport fees to neighboring states, confiscation of unlicensed vessels and dangerously heightened tensions between New York and its neighboring states. *Gibbons*, 22 U.S. (9 Wheat.) at 184-185.

A national crisis, if not civil war, was averted by the Supreme Court's application of the Commerce Clause, which was straightforward, logical, and obvious:

> All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The Convention must have used the word in that sense; because all have understood it in that sense, and the attempt to restrict it comes too late.

Id. at 190.

Gibbons teaches that the Constitution, including the Commerce Clause, must be read plainly and in its proper historical context. In *Gibbons,* Chief Justice John Marshall demonstrated that the Commerce Clause viewed in proper context stands for the principle of open commerce between and among the states. *Gibbons,* 22 U.S. at 190. The notion that *Gibbons* supports the proposition that an individual can be compelled by the federal government to initiate undesired private commerce, however, is well beyond any contemplated historical boundary for Commerce Clause power. *See Ogden v. Saunders*, 25 U.S. 606, 652 (1827) (Marshall, C.J., dissenting).[3] *See also* Gary L. McDowell, *The Language of Law and the Foundations of American Constitutionalism* (New York: Cambridge University Press, 2010), 313 n.5.

C. The Supreme Court's Modern Jurisprudence Does Not Sustain The Individual Mandate.

The federal government argues that the individual mandate is permissible under the Supreme

---

[3] "[I]ndividuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and conferred by the act of the parties. This results in the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society, but are brought into it." 25 U.S. at 652.

Court's analysis in *Gonzales v. Raich*, 545 U.S. 1 (2005), recognizing Congress's broad authority to "regulate activities that substantially affect interstate commerce." Petitioner's Brief, 22 (citing *Raich*, 545 U.S. at 16-17). Where there is literally no commerce, however, there can be nothing to regulate. Moreover, by applying in this case the Supreme Court's "substantial effects on commerce" test in boilerplate fashion to individuals who decide not to purchase a policy from an insurance company, the federal government focuses on the wrong actors and "activities." In so doing, it sidesteps limits on the Commerce Clause recognized in *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000) as well as in *Raich*. The federal government asserts these cases support the PPACA because the underlying legislation in *Lopez* and *Morrison* did not regulate economic activity. Petitioner's Brief, 45. The irony of its own position is lost on the federal government, which now asks this Court to re-write the Commerce Clause to define the individual mandate as commerce when, in fact, there is no commerce but for the government unconstitutionally compelling individuals to enter into private, binding contracts against their will.

1. The Individual Mandate Cannot Survive Commerce Clause Scrutiny.

a. Inactivity is *not* activity.

Petitioner's Commerce Clause analysis is dependent on this Court accepting that an individual's

decision not to purchase health insurance, i.e., inactivity, substantially affects interstate commerce. Petitioner's Brief, 50 (citing *Raich*, 545 U.S. at 16 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942))). But in *Raich* and *Wickard*, individuals actually produced or possessed an actual product for which there was a national market, legal or illegal. In the instant matter, the individual who is compelled to purchase private health insurance is neither creating a product nor providing a service. He is not doing anything. Therefore, the individual is withholding nothing from commerce because he is producing nothing.

In *Wickard,* the farmer grew wheat, which he withheld from interstate commerce. The Court rationalized in *Wickard,* and later reinforced in *Raich,* that withholding wheat from interstate commerce disrupted the federal price scheme and thus was subject to regulation. *See Raich*, 545 U.S. at 19 (Introducing a legal supply of marijuana into the national market would inevitably affect market prices.). The current matter has nothing to do with *Wickard* or *Raich*. It is the insurance company that creates the product or service, much like the farmer who grows wheat in his field or the criminal who grows marijuana in her basement. No one disputes that insurance companies are subject to reasonable regulation. But the individual who is the target of the federal government's mandate is not providing any service or producing any good; he is merely existing. In neither *Wickard* nor *Raich* did the federal

government attempt to compel an individual to purchase or grow wheat or marijuana.

b. The decision to forego insurance constitutes inactivity.

The federal government's conception of health care is not one where millions of citizens each exercise their individual judgment to make separate and rational decisions on how to manage their own particular health and welfare. Rather, the federal government sees Americans as "groups" and "classes" to be regulated. However, this is not Plato's *Republic*, Thomas More's *Utopia*, Thomas Hobbes's *Leviathan*, or Karl Marx's *Workers' Paradise*. It is a constitutional republic where individuals are free to decide for themselves whether to participate in commerce or not. By any objective standard, the individual who foregoes purchasing health insurance has made a decision *not* to engage in commerce.

2. The Individual Mandate Is Not Saved By The Necessary And Proper Clause.

a. The Necessary And Proper Clause is restrained.

Early on, the Supreme Court made clear that the Necessary and Proper Clause does not expand Congressional power. As Chief Justice Marshall explained in *McColloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), the first inquiry must be whether a legislative end is constitutional and legitimate,

i.e., whether it flows from an enumerated power. *McColloch*, 17 U.S. at 421. Next, the means must be "appropriate" and "plainly adapted" to that enumerated end. Moreover, these means may not be otherwise "prohibited" and must be "consistent with the letter and spirit of the constitution." These phrases are not merely fluff, as demonstrated in *Printz v. United States,* 521 U.S. 898 (1997) and *New York v. United States,* 505 U.S. 144 (1992). *Printz* affirmed that a law is not "'proper for carrying into Execution the Commerce Clause'" "[w]hen [it] violates [a constitutional] principle of state sovereignty." *Printz, supra,* at 923-924; *see also New York, supra,* at 166; *Raich,* at 39 (Scalia, J., concurring).

The question for this Court is not whether compelling an individual to purchase an insurance policy as required by the PPACA is necessary to the successful implementation of the PPACA. Rather, the question is whether it is appropriate and plainly adapted to an enumerated federal power for the federal government to require an individual to purchase a good or service from another individual or private entity *for any private purpose* regardless of whether or not that purpose is necessary for carrying into execution a broad federal government program.

The relevant standard for evaluating the individual mandate under the Necessary and Proper Clause is whether the mandate is "'reasonably adapted' to the attainment of a legitimate end under the commerce power." *Raich,* at 37 (citing *United States v. Darby*, 312 U.S. 100, 118-119 (1941)). What constitutes a

"reasonably adapted" means – and the potential for congressional mischief in asserting federal power under the Necessary and Proper Clause – has been a recurring concern since the Framing.

It is clear that Congress had and still has myriad constitutional ways to legislate a health care regime that would have achieved its intended purposes. The individual mandate is not one of them. This Court should not permit Congress to permanently damage our constitutional construct by unleashing both intended and unintended consequences that irrationally and fundamentally alter the nature of this Republic. If this Court strikes down the PPACA, Congress must simply consider legislative alternatives that do no violence to the Constitution while advancing its policy and political objectives.

b. *United States v. Comstock* Reaffirms Limits On The Necessary And Proper Clause.

Petitioner points to the Supreme Court's recent Necessary and Proper Clause examination in *United States v. Comstock* as justification for the individual mandate. (Petitioner's Brief, 22.) *Comstock* employed a five-part test for evaluating legislation under the Necessary and Proper Clause. This Court, however, still looks to *McColloch v. Maryland* to "define the scope of the Necessary and Proper Clause." It stated: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which

are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." *Comstock*, 130 S.Ct. at 1956 (quoting *McColloch,* 17 U.S. at 421).

Applying the "means-ends" rational relationship principle developed by the Supreme Court's Necessary and Proper Clause cases, the *Comstock* Court used a five-part test to evaluate a federal civil commitment statute, which the Supreme Court upheld. However, application of the *Comstock* test in this case correctly led the lower courts to the conclusion that the individual mandate is unconstitutional.

First, the Necessary and Proper Clause confirms Congress's broad authority to enact federal legislation. While *Amicus Curiae* strongly rejects the propriety of nationalizing the health care system, that issue is not before this Court. Second, the *Comstock* civil commitment statute constituted a "modest addition to a set of federal prison-related mental-health statutes that have existed for many decades." *Id.* at 1958. In this case, Congress is proposing to exercise a radically new national police power, one the Constitution does not grant. Third, "Congress reasonably extended its longstanding civil commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody. . . ." *Id.* at 1961. Again, here Congress creates an unprecedented, entirely new coercive power. Fourth, the statute properly accounts for state interests. *Id.* at 1962. Not so here. In fact, the unprecedented number of states challenging the constitutionality of the statute in the instant

action speaks volumes. Fifth, the links between the civil commitment statute and "an enumerated Article I power are not too attenuated. Neither is the statutory provision too sweeping in its scope." *Id.* at 1963. Here the link between the mandatory individual insurance provision, which creates a sweeping unprecedented power, and any enumerated power is non-existent.

The PPACA thus fails the Necessary and Proper Clause tests set forth both in *McColloch v. Maryland* and *Comstock*. As Justice Kennedy explained in his *Comstock* concurrence, when the inquiry is whether a federal law has sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links, but the strength of the chain. *Id.* at 1966. And in *Comstock,* Justice Kennedy concluded that the links were sufficiently strong, that it did not involve a case

> in which the National Government demands that a State use its own governmental system to implement federal commands. It is not a case in which the National Government relieves the States of their own primary responsibility to enact laws and policies for the safety and well being of their citizens. Nor is it a case in which the exercise of a national power intrudes upon functions and duties traditionally committed to the State.

130 S.Ct. at 1968.

To the contrary, Justice Kennedy upheld the enactment in *Comstock* because he found it to be "a

discreet and narrow exercise of authority over a small class of persons already subject to federal power." *Id.* The PPACA and its insurance mandate are the antithesis of the limited federal power exercised in *Comstock*. The PPACA requires states to implement a wide range of federal commands; it deprives states of their primary responsibility to enact laws and policies for the safety and well-being of their citizens; and it is aimed in unprecedented fashion at a broad sweep of Americans.

D. The Individual Mandate Is An Unconstitutional National Police Power.

The insurance mandate provision and its penalty provision establish the kind of national police power that this Court has always rejected. "[W]e *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power." *United States v. Lopez*, 514 U.S. at 584 (Thomas, J., concurring) (citing *New York v. United States*, 505 U.S. 144, 155 (1992)).

"By assigning the Federal Government power over 'certain enumerated objects only,' the Constitution 'leaves to the several States a residuary and inviolable sovereignty over all other objects.' The Federalist No. 39 (J. Madison). The purpose of this design is to preserve the 'balance of power between the States and the Federal Government . . . [that]

protect[s] our fundamental liberties.'" *United States v. Comstock*, 130 S.Ct. at 1982 (Thomas, J., dissenting) (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)).

The federal government's arguments twist a pretzel out of the enumerated interstate commerce power – one where marketplace *inactivity* becomes marketplace *activity* in order to justify the exercise of an obvious police power to compel individual, private conduct. As such, the government seeks not the appropriate use of its power but, instead, unfettered police power, the limits of which the government itself cannot even define.

NEVER in this country's history have these "certain enumerated objects" included the power to command individuals *solely because of their status as human beings* to buy any good or service from another individual or entity.

American history is replete with government efforts to influence the free market through a laundry list of incentives and disincentives. It has become a common practice largely upheld by the courts. Taxes, surtaxes, excise taxes, tax credits, tax deductions, tax abatements – all designed to influence commerce while funding government operations. Myriad federal and state regulations, county and municipal zoning ordinances, and a variety of other government influences affect private market decisions Americans make literally millions of times every day.

Importantly, they do not mandate that private citizens enter into legally binding contracts to purchase goods or services from other private citizens or entities. This further demonstrates the radical departure from history and law demanded by the federal government in this case.

Moreover, it should be emphasized that even where the federal government has required citizens to pay a portion of their earnings into government run benefit programs such as Social Security and Medicare, the payments have been in the form of defined taxes. *See Helvering v. Davis*, 301 U.S. 619, 635 (1937). Here, as explained below, and for whatever reason, Congress made the judgment to specifically avoid a constitutionally sound route for imposing this tax.

II. SECTION 5000A OF THE PPACA ESTABLISHES AN UNCONSTITUTIONAL TAX.

The individual mandate's penalty provision in 26 U.S.C. Section 5000A (2011) cannot be justified as a permissible tax under any Constitutional test. Arguments proffered by the federal government that this provision constitutes a permissible exercise of Congress's taxation authority fail under all established precedents and should be rejected by the Court.

Had Congress determined the penalty provision constituted a tax, it would have labeled it a tax and statements by members of Congress and President Obama made concurrently with its passage would

have reflected as much. The federal government's latest brief concedes the point without realizing it, referring repeatedly to Section 5000A as a "penalty." *See* Petitioner's Brief, 53, 60. Yet even if this Court assumes that Section 5000A is a tax, it still fails to satisfy the constitutional restrictions on taxes set forth in Article I, Section 9, Clause 4 (prohibition on the issuance of capitation or direct taxes unless apportioned among the states), the 16th Amendment (income tax) and the limitations set forth by this Court as applicable to other Article I, Section 8 taxes such as excises.

Section 5000A fails as a constitutionally permissible excise because there is no action on the part of the individual at the time the penalty is imposed. It fails as an income tax because the individual realizes no gain when electing not to purchase insurance. It most closely resembles a direct tax and must be apportioned among the states. As Congress did not take any steps to apportion the penalty, the federal government cannot rely on arguments that it constitutes a valid exercise of congressional authority to raise taxes.

Simply labeling the penalty provision or relying on inapposite case law does not justify the exaction from a constitutional standpoint. The provision must pass scrutiny under the various precedents set forth by this Court. The cursory reasoning provided by the federal government does not justify a levy that exacts a tax for *not* taking any action.

A. The Federal Government Cannot Justify The Penalty Provision As A Permissible Excise Tax.

The penalty provision fails the Constitution's excise tax requirements.[4] Excise taxes require some sort of action or activity on the part of the individual to be assessed. Professor Steven J. Willis and Mr. Nakku Chung cogently describe an excise tax in the following manner, "[an excise tax] involves something an obligor chose to do: purchase a product or service, use a product or service, transfer property, or conduct commercial activity." Steven J. Willis and Nakku Chung, *Constitutional Decapitation and Healthcare,* 2010 TNT 133-6, July 13, 2010.

Traditionally, excise taxes flow from the funds or income derived from a particular business activity. This Court, in *Steward Machine Co. v. Davis*, upheld, as a valid excise tax, employers' Social Security contributions based partly on the rationale that "employment is a business relation, if not itself a business." *Steward Machine Co. v. Davis*, 301 U.S. 548, 581 (1937).

---

[4] The Joint Committee on Taxation labels the penalty provision an "Excise Tax on Individuals." *See* Joint Comm. On Taxation, 111th Cong., Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as amended, in combination with the "Patient Protection and Affordable Care Act" 31, Errata For JCX-18-10, 2 (Mar. 21, 2010, Errata published May 4, 2010). Simply labeling it an excise is not the test for constitutionality.

Accordingly, a tax on the proceeds from the sale of a mining property is considered an excise because the income derived flowed from the operation of a specific business. "The very process of mining is, in sense, equivalent in its results to a manufacturing process. And, however the operation shall be described, the transaction is indubitably 'business'. . . ." *Strattons Independence, Ltd. v. Howbert*, 231 U.S. 399, 415 (1914).

There are instances where courts have gone beyond the business activity threshold and considered additional transactions as justifiably subject to excise taxes. However, in these instances, the excise always originated when the individual or entity engaged in some sort of action or activity. This common theme of action or activity thus proves vital to determining whether a tax is a valid excise.

For example, in *Bromley v. McCaughn*, this Court concluded that a tax levied upon the maker of a gift constituted a viable excise tax. This Court concluded that where an individual exercised a power to give property to another, he or she could be subject to excise taxes. "The Supreme Court has consistently held, almost from the foundation of the government, that a tax imposed upon a particular use or property or the exercise of a single power over property incident to ownership can justifiably be categorized as an excise." *Bromely v. McCaughn*, 280 U.S. 124, 136 (1929). Similarly, in *Murphy v. I.R.S.*, an en banc panel of the D.C. Circuit held that a tax on an individual's award of compensatory damages was a valid

excise tax on the basis that the award was incident to the exercise of a particular right. *Murphy v. I.R.S.*, 493 F.3d 170 (D.C. Cir. 2007).

In *Murphy*, the court considered whether the tax on compensatory damages for mental pain and suffering was "more akin, on the one hand, to a capitation or a tax upon one's ownership of property, or, on the other hand, more like a tax upon a use of property, a privilege an activity or a transaction." *Murphy*, 493 F.3d at 184. Concluding the tax applied only after the individual engaged in a transaction, which occurred in this case at the time she received a compensatory award, the court considered whether the tax could be justified as an excise. Noting the individual did not receive her damages "pursuant to a business activity," the court looked to whether the individual exercised a power "incident to ownership." *Murphy*, 493 F.3d at 185. The individual was "taxed only after she received a compensatory award which makes the tax seem to be laid on a transaction." *Murphy*, 493 F.3d at 184. The taxation of proceeds received from an award of compensatory damages could be favorably compared to a situation where the individual exercises a statutory right or a privilege. This exercise of a right or privilege was crucial to the court's ultimate conclusion that the gift tax passed constitutional muster.

Further reinforcing the principle that action or activity is a necessary component to an excise, this Court has stated, "[Excise taxes] were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and the

sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like." *Steward Machine Co. v. Davis*, 301 U.S. 548, 581 (1937) (quoting *Thomas v. United States*, 192 U.S. 363, 370 (1904)).

The penalty provision does not fall within this framework. Section 5000A imposes a penalty upon the individual who elects not to purchase health insurance. Consider the common thread and rationale in binding precedent. In all of these cases, an individual is engaged in some sort of action. Excise taxes are permissible when the individual sells a business, purchases a product, exercises a power over property or exercises a given right. A tax cannot be properly qualified as an excise when it involves the *absence* of action.

Simply labeling the penalty provision an excise tax does not suffice and efforts to characterize it as valid must be rejected.

B. Rationales Proffered By Petitioner And Lower Courts That The Penalty Provision Constitutes A Justifiable Tax Are Untenable And Should Not Be Adopted By The Court.

No lower court has upheld the penalty provision under the rationale that it constitutes a valid exercise of congressional power to lay and collect taxes. However, at least one judge has erroneously concluded that the provision would be upheld under the plenary

taxing power. In *Liberty University v. Geithner*, writing in concurrence of the circuit court's decision to uphold the constitutionality of the individual mandate, Judge Wynn states that he would uphold the mandate provisions as "independently authorized" under Article I, Section 8, Clause 1. *Liberty University v. Geithner*, No. 10-2347, 2011 U.S. App. LEXIS 18618, *54 (4th Cir. Sept. 8, 2011) (Wynn, J., concurring), petition for cert. pending, No. 11-438 (filed Oct. 7, 2011).

The federal government cites Judge Wynn's test as providing sound constitutional footing. Brief for Petitioner at 53. This reliance, however, is misplaced as Judge Wynn's analysis misconstrues this Court's standards in determining whether a levy passes constitutional muster.

Concluding that the pertinent inquiry is whether something that operates as a tax is "authorized under Congress's taxing power," Judge Wynn sets forth a three part analysis for determining whether a given tax is constitutional. *Id.* at *65-*66. The tax must bear "some reasonable relation" to raising revenue, it must "be imposed for the general welfare," and the tax "must not infringe upon another constitutional right." *Id.* Judge Wynn assembles crucial elements for the test from two of the cases involving *excise taxes*. As explained earlier, the penalty provision cannot be justified as a valid excise tax.

Judge Wynn incorrectly relies on two cases for the proposition that a tax is constitutional provided it

bears some relation to raising revenue.[5] *Id.* These cases, *United States v. Doremus* and *Sozinsky v. United States*, involve challenges to taxes placed on the sale of coca leaves and the sale of firearms respectively. *United States v. Doremus*, 249 U.S. 86 (1919); *Sozinsky v. United States*, 300 U.S. 506 (1937). Like the facts in the excise tax cases referenced above, each scenario involved levies placed upon actions or activity. These fact patterns are readily distinguishable from the present scenario. Under the PPACA, the individual has taken no action, nor engaged in any business activity.[6]

In addition to relying on cases involving clear excise taxes that are not comparable to the present case, Judge Wynn fundamentally misapprehends this Court's criteria for evaluating the constitutional validity of a tax. Specifically, in *Doremus*, this Court stated, "If the legislation enacted has *some reasonable relation to the exercise of the taxing authority conferred by the Constitution*, it cannot be invalidated because of the supposed motives which induced it." *Doremus*, 249 U.S. at 93. Following the dictates of

---

[5] Furthermore, the penalty provision's purpose is to act as an incentive to compel healthy individuals to purchase insurance to offset costs *not* to raise revenue. *See* 42 U.S.C. Section 18091(a)(2)(C)-(I).

[6] *See Doremus*, where the court focuses on the test for evaluating the constitutionality of an excise, "The only limitation upon the Congress to levy *excise taxes* of the character now under consideration is geographical uniformity throughout the United States." *Doremus*, 249 U.S. at 93 (emphasis added).

Doremus, the statute in question must not bear some reasonable relation to raising revenue, it must bear a reasonable relation to the taxing authority conferred by the Constitution. The propriety of a tax should therefore be analyzed within a constitutional framework. It is not enough to conclude that a given tax raises revenue. It must comport with constitutional constraints.

The liberties taken by Judge Wynn regarding the dictates of this Court also extend to his reliance on language proffered by the Court in *Sozinsky*. He relies on this case as standing for the proposition that a tax "*must simply* be 'productive of some revenue.'" *Liberty University,* 2011 U.S. App. LEXIS 18618, at *66. However, the modifier "simply" never appears in the decision. Judge Wynn inserts the term when in actuality, this Court states, "Here, the annual tax of $200 is productive of some revenue." *Sozinsky*, 300 U.S. at 514. The term "simply" indicates that, provided the legislation results in some type of revenue event, it will be considered a viable tax. Judge Wynn never engages in any type of constitutional analysis. For example, he does not examine what type of taxation was in question in the cases he relies upon. He also misapplies the criteria utilized in *Doremus* and *Sozinsky* to create an incorrect test for determining whether a tax is constitutional.

Respectfully, Judge Wynn's analysis is of no useful guidance to this Court.

C. The Federal Government Cannot Justify The Penalty Provision As A Permissible Income Tax.

The 16th Amendment authorizes taxation upon income without apportionment, "The Congress has the power to lay and collect taxes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. Const. Amend. XVI. Admittedly, this conferral vests Congress with broad authority to determine what constitutes "income." However, this power is not absolute. In order to be qualified as "income," an individual or entity must realize a gain.

Instructive in any analysis and application of the 16th Amendment is the seminal case *Eisner v. Macomber* where the Supreme Court, when considering the constitutionality of an income tax on stock dividends, stated, "it becomes essential to distinguish between what is and what is not 'income,' as the term is there used; and to apply the distinction, as cases arise, according to truth and substance, without regard to form." *Eisner v. Macomber*, 252 U.S. 189, 206 (1920). The Court continued, "Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised." *Eisner*, 252 U.S. at 206. The 16th Amendment did not "extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among

the States of taxes laid on income." *Eisner*, 252 U.S. at 206.

The Amendment's language specifies that, to be subject to its mandates, the tax must originate from (1) a "source" and (2) it must be "derived." The penalty provision taxes no income or gain. In fact, there is no source of income and income is not derived. Consider the language of Chief Justice Earl Warren when he described income: "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). In that case, the Supreme Court concluded that, to be considered income and hence subject to taxation under the 16th Amendment, there must be some sort of realization event. The income had to be "clearly realized."

Similarly, in *Commissioner v. Indianapolis Power & Light Co.*, the Supreme Court determined that a loan did not constitute income. "The economic benefit of a loan, however, consists entirely of the opportunity to earn income on the use of the money prior to the time the loan must be repaid. And in that context our system is content to tax these earnings as they are realized." *Commissioner v. Indianapolis Power & Light Co.*, 493 U.S. 203, 208 (1990). The Court continues, "We recognize [Indianapolis Power & Light] derives an economic benefit from these deposits. But a taxpayer does not realize taxable income from every event that improves his economic condition." *Indianapolis Power & Light Co.*, 493 U.S. at 214.

Under Section 5000A, the federal government argues a tax will be incurred for electing not to purchase health insurance. For income tax purposes, there is no realization event and there is not any derived income. The individual has not taken any affirmative action to realize any gain. His or her economic situation may improve as a result of electing not to purchase health insurance, but there is not a realization event and hence no quantifiable income.

Moreover, the penalty provision's floor and ceiling components support the contention it is not an income tax. Certain individuals who elect not to purchase health insurance will either pay the flat dollar amount or their income will be such that they pay the amount capped by the cost of bronze level coverage.[7] In many instances, the tax will not be indexed to income but will be a predetermined flat rate.

---

[7] *See* Erik M. Jensen, *The Individual Mandate and the Taxing Power*, Case Research Paper Series in Legal Studies, Working Paper 2010-33, September 2010, where Professor Jensen provides the following: "Uninsured persons with incomes of $500,000, $1 million, $10 million, $100 million, and $1 billion will have to pay exactly the same penalty – the cost of bronze-level coverage. If that is a 'tax on incomes,' I will eat my insurance card."

D. The Penalty Provision Is Readily Distinguishable From The Social Security Act.

Efforts to justify the penalty provision as constitutionally permissible under the rationale used to uphold the Social Security Act fail for a number of reasons. First, many individuals subject to the penalty provision pay a flat amount whereas individuals who pay the Social Security or FICA tax pay a percent of earnings. Second, the FICA tax is directly linked to wages and earnings where the penalty provision is simply measured by household income. There is no reference in the statute to what is being taxed. Thus, unlike the FICA tax, there is no specific type of income being taxed. Third, and most importantly, the penalty provision provides the individual with nothing whereas the FICA tax provides income when the individual reaches a predetermined age or becomes disabled. *See* Steven J. Willis and Nakku Chung, *Constitutional Decapitation and Healthcare*, 2010 TNT 133-6, July 13, 2010. As explained by Professor Willis and Mr. Chung, those who pay the amounts dictated by the penalty provision "receive no insurance in exchange for their payments. Indeed, no one subject to the [penalty provision] receives anything other than the guarantee that when they become ill, they can purchase insurance despite having a preexisting condition." *Id.* Further, the penalty provision, unlike the FICA tax, is not indexed to any level of benefits. Under the Social Security Act, those who pay larger amounts receive greater

benefits. The penalty provision does not provide any additional benefit (nor can it) to those who are penalized in larger amounts. *Id.*

These characteristics are indicative of a capitation or direct tax rather than an income tax. Although the penalty provision is tied to the income tax – i.e., its rates are partially tied to income – many, if not most individuals will pay either the floor amount or the ceiling. This flat rate component indicates the penalty provision constitutes a direct tax. Such a tax is prohibited unless apportioned among the states.

E. Article I, Section 9, Clause 4 Prohibits The Issuance Of Capitation Or Direct Taxes Unless Apportioned Among The States.

Article I, Section 9, Clause 4 of the Constitution prohibits the levying of capitation or direct taxes unless apportioned among the states, "No Capitation, or other direct tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." The Apportionment Clause was an impediment to Congressional attempts to establish income taxes by statute and not constitutional amendment. The Supreme Court relied on this limitation on direct taxation when it invalidated an income tax on real estate and taxes on the income of personal property. *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895) (*Pollock I*).

In a subsequent decision, *Pollock v. Farmers' Loan and Trust Co.* (*Pollock II*), the Supreme Court recognized the plenary power of Congress to lay taxes apportioned among the states, "The power to lay direct taxes apportioned among the several states in proportion to their representation based on population as ascertained by the census, was plenary and absolute; but to lay direct taxes without apportionment was forbidden." *Pollock v. Farmers' Loan and Trust Co.*, 158 U.S. 601, 618 (1895). The Court then discusses the constitutional prohibition upon direct taxes – absent apportionment: "The Constitution ordains affirmatively that representatives and direct taxes shall be apportioned among the several States according
to numbers, and negatively that no direct tax shall be laid unless in proportion to the enumeration." *Pollock*, 158 U.S. at 621.

Whereas indirect taxes such as excises involve activity and, as such, are avoidable, direct taxes are imposed directly on the individual. The individual has no option in avoiding the exaction.[8] Thomas Cooley, writing in 1876, provided a cogent distinction that resonates in the modern context:

---

[8] Some commentators suggest the penalty provision can be avoided by purchasing health insurance. Brian Galle, *The Taxing Power, the Affordable Care Act, and the Limits of Constitutional Compromise*, 120 Yale L.J. Online 407 (April 5, 2011). In either scenario, purchasing health insurance or paying the penalty for not purchasing health insurance, an exaction has occurred as a result of government coercion.

> Taxes are direct, when they are levied upon and collected from those who were expected to pay them, and indirect, when they are levied upon and collected from one class of persons, with the understanding and expectation that they will be ultimately paid by the consumer or user of the things or property taxed, under the guise of an increase in the price of the property so taxed." Thomas M. Cooley, *A Treatise on the Law of Taxation* 5 (Chicago, Callaghan and Co. 1876) *quoted in* Erik M. Jensen, *The Apportionment of 'Direct Taxes': Are Consumption Taxes Constitutional?* 97 Colum. L. Rev. 2334, 2419 (1997).

It is universally recognized that the *Pollock* decisions help spur the issuance and passage of the 16th Amendment. *See* Steven J. Willis and Nakku Chung, *Constitutional Decapitation and Healthcare,* 2010 TNT 133-6, July 13, 2010, *see also* Jensen, *The Apportionment of 'Direct Taxes': Are Consumption Taxes Constitutional?* 97 Colum. L. Rev. at 2336. After the 16th Amendment's ratification, direct taxes, levied without apportionment, were constitutionally permissible; however, income had to originate from a source and had to be derived. Certain modern commentators believe the 16th Amendment essentially invalidated Article I, Section 9, Clause 4 but recent case law continues to recognize its constraints.

Consider the recent case of *Murphy v. I.R.S.* An en banc panel of the D.C. Circuit Court of Appeals refused to adopt the federal government's arguments that "only 'taxes that are capable of apportionment in

the first instance, specifically, capitation taxes and taxes on land,' are direct taxes." *Murphy v. I.R.S.*, 493 F.3d 170, 182 (D.C. Cir. 2007). In short, the government posited arguments that Article I, Section 9, Clause 4 has been supplanted by the 16th Amendment. The Court concluded otherwise when it stated, " . . . [N]either need we adopt the Government's position that direct taxes are only those capable of satisfying the constraint of apportionment. In the abstract, such a constraint is no constraint at all; virtually any tax may be apportioned by establishing different rates in different states." *Murphy*, 493 F.3d at 184. As stated earlier in this brief, the Court looked to whether the tax at issue was more "akin" to a direct tax or "more like a tax upon a use of property, a privilege, an activity, or a transaction." Murphy, 493 F.3d at 184. The Court concluded the tax at issue (a tax on compensatory damages for mental pain and suffering) qualified as a justifiable excise tax. It did not determine whether this tax would have passed muster as a justifiable direct tax. However, by relying on the principles espoused in *Pollock II*, the Court indicated the constitutional constraints imposed by Article I, Section 9, Clause 4 continue to be valid.[9]

---

[9] *See* Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 Colum. L. Rev. 2334, 2345 (1997) concluding that "A repudiation of *Pollock* is at most a rejection of the Court's conclusion that a tax on income from property is a direct tax; it speaks not at all to other levies that might be direct taxes."

Under the current statutory scheme, many individuals who have taken no action (not purchasing health insurance) will be obligated to pay a flat amount. This is strong evidence that the penalty provision is a direct tax, rather than an income or excise.

F. The Penalty Provision Constitutes An Impermissible Direct Tax Because It Is Not Apportioned Among The States.

The penalty provision does not pass muster as either an excise tax or an income tax. By elimination, the only safe harbor available is a successful justification of the provision as a direct tax. However, there has been no effort to apportion the penalty provision among the states. It therefore fails this constitutional mandate.

If the Court were to justify the penalty provision by determining it constitutes a valid tax, the federal government's taxation power would be without limits. In essence, the government is attempting to constitutionally justify a tax upon an individual who has taken no action. He has not purchased a good or service. He has not realized an economic gain. He has not received anything. He has not produced anything. The penalty provision fails to qualify as a constitutional tax under any scenario.

CONCLUSION

The federal government asks this Court to ignore the history of the Commerce Clause, Supreme Court precedent relating to the Commerce Clause, and both logic and common sense respecting the nature of commerce itself.

The provisions of the PPACA discussed at length in this brief represent an enormous and unprecedented attempt to expand federal power over American citizens. If these provisions are upheld as constitutional, the federal government's authority to regulate citizen activity (or non-activity) under the Commerce Clause and its authority to levy taxes will be limitless. If Congress wishes to reform health care, it is still free to do so, as long as it does so in compliance with the Constitution and this Court's precedents.

Respectfully submitted,

MARK R. LEVIN
MICHAEL J. O'NEILL
MATTHEW C. FORYS
LANDMARK LEGAL FOUNDATION
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176
(703) 554-6100
(703) 554-6119 (Facsimile)

RICHARD P. HUTCHISON
Counsel of Record
LANDMARK LEGAL FOUNDATION
3100 Broadway
Suite 1210
Kansas City, MO 64111
(816) 931-1175
(816) 931-1115 (Facsimile)
Hutchison@landmarklegal.org
Attorneys for Amicus Curiae

AMICUS CURIAE BRIEF

No. 11-398

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

STATE OF FLORIDA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF LAW PROFESSORS BARRY FRIEDMAN, MATTHEW ADLER, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND REVERSAL ON THE MINIMUM-COVERAGE PROVISION ISSUE

BARRY FRIEDMAN
40 Washington Square South, Room 317
New York, NY 10012
(212) 998-6293

MIMI M.D. MARZIANI
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(646) 292-8327

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
MARTIN V. TOTARO
LUCAS M. WALKER
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000
(202) 536-2010
jlamken@verizon.net

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

The minimum-coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, provides that, beginning in 2014, non-exempted federal income taxpayers who fail to maintain a minimum level of health insurance for themselves or their dependents will owe a penalty, calculated in part on the basis of the taxpayer's household income and reported on the taxpayer's federal income tax return, for each month in which coverage is not maintained in the taxable year. 26 U.S.C. § 5000A.

The question presented is whether the minimum-coverage provision is a valid exercise of Congress's power to "regulate Commerce * * * among the several States," U.S. Const. art. I, § 8, cl. 3, or of Congress's power to enact such laws as are "necessary and proper" for carrying out its enumerated powers, *id.* art. I, § 8, cl. 18.

TABLE OF CONTENTS

	Page
Question Presented	i
Interest of *Amici Curiae*	1
Summary of Argument	2
Argument	6
I. The Commerce Clause Was Designed And Has Been Understood To Empower Congress To Address Problems Requiring National Solutions	7
A. The Commerce Clause Was Designed To Afford Congress Broad Power Over National Economic Problems	7
B. Longstanding Practice And Precedent Confirm Congress's Broad Regulatory Authority Under The Commerce Clause	10
II. The Minimum-Coverage Provision Is Consistent With Traditional Understandings Of Congress's Commerce Powers	16
A. The Act Directly Regulates Interstate Commerce To Regularize, Promote, And Protect It	16
B. The Minimum-Coverage Requirement Addresses Economic Conduct With A Profound Effect On Interstate Commerce	18
C. Plaintiffs' Activity/Inactivity Distinction Is Irrelevant To Congress's Commerce Power	19

TABLE OF CONTENTS—Continued

Page

D. Plaintiffs' Claim Is About Substantive Due Process, Not Federalism 23

E. Plaintiffs' Slippery Slope Arguments Fail 26

III. The Minimum-Coverage Requirement Is Necessary And Proper 28

A. The Necessary And Proper Clause Grants Congress Broad Powers To Effectuate Its Enumerated Powers 28

B. The Minimum-Coverage Requirement Falls Comfortably Within Congress's Necessary-and-Proper Authority 30

Conclusion 35

Appendix A – List of *Amici Curiae* 1a

TABLE OF AUTHORITIES

Page

CASES

Bond v. *United States*, 131 S. Ct. 2355 (2011) 24

Carter v. *Carter Coal Co.*, 298 U.S. 238 (1936) 12

Charles C. Steward Mach. Co. v. *Davis*, 301 U.S. 548 (1937) 12, 13

Gibbons v. *Ogden*, 22 U.S. 1 (1824) ..... *passim*

Gonzales v. *Raich*, 545 U.S. 1 (2005) ..... *passim*

Hammer v. *Dagenhart*, 247 U.S. 251 (1918) 12

Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964) 15, 18

Helvering v. *Davis*, 301 U.S. 619 (1937) 12, 26

Jacobson v. *Massachusetts*, 197 U.S. 11 (1905) 25

Jinks v. *Richland County*, 538 U.S. 456 (2003) 35

Katzenbach v. *McClung*, 379 U.S. 294 (1964) 15, 18, 27

The Legal Tender Cases, 79 U.S. 457 (1870) 30

McCulloch v. *Maryland*, 17 U.S. 316 (1819) 29, 30, 33

New York v. *United States*, 505 U.S. 144 (1992) 25

NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) 12, 13, 20, 21

TABLE OF AUTHORITIES—Continued

Page

Perez v. *United States*, 402 U.S. 146 (1971) 23

Printz v. *United States*, 521 U.S. 898 (1997) 25

Seven-Sky v. *Holder*, 661 F.3d 1 (D.C. Cir. 2011) 19, 20

The Shreveport Rate Case, 234 U.S. 342 (1914) 11, 12

Stewart v. *Kahn*, 78 U.S. 493 (1870) 35

Thomas More Law Ctr. v. *Obama*, 651 F.3d 529 (6th Cir. 2011) ..... *passim*

United States v. *Comstock*, 130 S. Ct. 1949 (2010) ..... *passim*

United States v. *Darby*, 312 U.S. 100 (1941) 12, 27, 29, 33

United States v. *Lopez*, 514 U.S. 549 (1995) ..... *passim*

United States v. *Morrison*, 529 U.S. 598 (2000) 15

United States v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) 2, 16, 31

U.S. Dep't of Agric. v. *Moreno*, 413 U.S. 528 (1973) 28

W. Coast Hotel Co. v. *Parrish*, 300 U.S. 379 (1937) 26

Wickard v. *Filburn*, 317 U.S. 111 (1942) 14, 19, 20, 21

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 3 ..... *passim*
U.S. Const. art. I, § 8, cl. 16 34
U.S. Const. art. I, § 8, cl. 18 ..... *passim*

STATUTES

13 U.S.C. § 221(a) 35
13 U.S.C. § 221(b) 35
21 U.S.C. § 301 *et seq.* 21
26 U.S.C. § 5000A 2
28 U.S.C. § 1866(g) 35
42 U.S.C. § 300gg-3(a) 2, 31
42 U.S.C. § 300gg-4(a) 2, 31
42 U.S.C. § 300gg-12 31
42 U.S.C. § 300gg-13(a) 31
42 U.S.C. § 18091(a)(2)(A) 22
42 U.S.C. § 18091(a)(2)(B) 16
42 U.S.C. § 18091(a)(2)(F) 18, 23
42 U.S.C. § 18091(a)(2)(I) 6, 31, 32
42 U.S.C. § 18091(a)(3) 16
49 U.S.C. § 30101 *et seq.* 21
50 App. U.S.C. § 453 35
Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, 271 35
Act of May 8, 1792, ch. 33, § 4, 1 Stat. 271, 272 35

TABLE OF AUTHORITIES—Continued

Page

Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, tit. I, 110 Stat. 1936, 1939 17

Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 195(a)(1), 110 Stat. 1936, 1991 18

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) 2, 6

OTHER AUTHORITIES

Balkin, *Commerce*, 109 Mich. L. Rev. 1 (2010) 9, 14

Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001) 10

Br. for Appellee, *United States* v. *Darby*, 312 U.S. 100 (1941) (No. 82), 1940 WL 47093 27

Calabresi & Terrell, *The Number of States and the Economics of American Federalism*, 63 Fla. L. Rev. 1 (2011) 10, 14

Chandra, *et al.*, *The Importance of the Individual Mandate—Evidence from Massachusetts*, 364 New Eng. J. Med. 293 (2011) 17

Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary, 112th Cong. (Feb. 2, 2011), http://www.judiciary.senate.gov/pdf/11-02-02%20Fried%20Testimony.pdf 25

TABLE OF AUTHORITIES—Continued

Page

Cooter & Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 Stan. L. Rev. 115 (2010) 9, 14

The Debates in the Several State Conventions on the Adoption of the Federal Constitution (Elliot ed., 2d ed. 1836) 8, 9

Dep't of Health & Human Servs., *Coverage Denied* (2009) 16, 17

Elhauge, *The Irrelevance of the Broccoli Argument Against the Insurance Mandate*, 366 New Eng. J. Med. e1 (2012) 20

Friedman, *The Will of the People* (2009) 13

Glied *et al.*, *Consider It Done? The Likely Efficacy of Mandates for Health Insurance*, 26 Health Aff. 1612 (2007) 17

Kirk, *Riding the Bull*, 25 J. Health Pol. Pol'y & L. 133 (2000) 17

LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 San Diego L. Rev. 555 (1994) 8

Legislative and Documentary History of the Bank of the United States (Clarke & Hall eds., 1832) 30, 33

Letters and Other Writings of James Madison (1865) 7, 8

Levy, *Federalism and Collective Action*, 45 U. Kan. L. Rev. 1241 (1997) 8

TABLE OF AUTHORITIES—Continued

Page

Mariner & Annas, *Health Insurance Politics in Federal Court*, 363 New Eng. J. Med. 1300 (2010) 20

McDonald, *100 Years of Safer Railroads* (1993) 11

Pagán & Pauly, *Community-Level Uninsurance and the Unmet Medical Needs of Insured and Uninsured Adults*, 41 Health Servs. Research 788 (2006) 18

The Papers of Alexander Hamilton (Syrett ed., 1962) 8

Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996) 10

Records of the Federal Convention (Farrand ed., 1911) 3, 8, 9, 17

Reed, *The Constitution and the Problems of Today*, 47 Proc. Va. St. Bar Ass'n 277 (1936) 13

Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 Mich. L. Rev. 554 (1995) 10

Rendezvous with Destiny: Addresses and Opinions of Franklin Delano Roosevelt (Hardman ed., 1944) 14

Rosenbaum & Gruber, *Buying Health Care, the Individual Mandate, and the Constitution*, 363 New Eng. J. Med. 401 (2010) 22

TABLE OF AUTHORITIES—Continued

Page

Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 Law & Contemp. Probs. (forthcoming 2012) 24

Smith, *Federalism*, Lochner, *and the Individual Mandate*, 91 B.U. L. Rev. 1723 (2011) 24

Stern, *That Commerce Which Concerns More States Than One*, 47 Harv. L. Rev. 1335 (1934) 10

Story, *Commentaries on the Constitution of the United States* (1833) 29

Supp. Br. for Appellees, *Katzenbach* v. *McClung*, 379 U.S. 294 (1964) (No. 543), 1964 WL 81104 27

Washington, *Letters and Addresses* (Viles ed., 1909) 7

IN THE

Supreme Court of the United States

NO. 11-398

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

STATE OF FLORIDA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF LAW PROFESSORS BARRY FRIEDMAN, MATTHEW ADLER, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND REVERSAL ON THE MINIMUM-COVERAGE PROVISION ISSUE

INTEREST OF *AMICI CURIAE*

Amici are law professors (listed in Appendix A) who have taught, studied, written about, and have expertise in the Constitution, constitutional history, and the structure and requisites of American federalism.[1]

---

[1] Pursuant to this Court's Rule 37.3(a), *amici* certify that all parties consented to the filing of this brief. Copies of the letters granting

Amici take no position on the wisdom of the Patient Protection and Affordable Care Act (the "Act"), Pub. L. No. 111-148, 124 Stat. 119 (2010), a question on which their views diverge. Nonetheless, they have a strong interest in and expertise on the legal issue this Court is asked to decide—whether the Act is within Congress's powers. On that question they are of one mind: The Act is constitutional.

SUMMARY OF ARGUMENT

Plaintiffs do not challenge the vast majority of the Act's provisions. For example, they do not argue that Congress exceeded its powers by prohibiting health insurers from denying coverage of preexisting conditions, or from denying eligibility based on health status. 42 U.S.C §§ 300gg-3(a), 300gg-4(a). No such challenge could prevail: This Court has squarely held that Congress's commerce powers extend to regulation of insurance markets. See *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 539 (1944).

Plaintiffs instead challenge the Act's minimum-coverage requirement—the so-called "individual mandate." That provision requires Americans who otherwise lack health insurance to effectively pay for healthcare in advance by obtaining a minimal level of coverage, instead of purchasing healthcare on the spot market (or obtaining healthcare without paying for it) later. See 26 U.S.C. § 5000A.

---

consent have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* certify that no party's counsel authored this brief in whole or in part, that no such counsel or party contributed money intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution.

Under the time-tested principles this Court employs when determining the scope of congressional power, the minimum-coverage requirement should be upheld. It is a straightforward exercise of Congress's power to "regulate Commerce * * * among the several States," U.S. Const. art. I, §8, cl. 3, and of Congress's power to enact laws "necessary and proper" for carrying out its enumerated powers, *id.* art. I, §8, cl. 18.

I. Since the Constitution's framing, Congress has been understood to possess broad power to act in the economic sphere. Having experienced the inadequacy of the Articles of Confederation, the Framers understood that the national government needed authority "to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." 2 *Records of the Federal Convention* 21 (Farrand ed., 1911).

The federal government has thus long addressed national economic problems that the States acting alone could not solve or, worse, would exacerbate. As the Nation's economy has become more integrated, Congress's exercise of its commerce power naturally has expanded as well. Today, it is beyond argument that the Commerce Clause permits Congress to regulate not merely interstate commerce but also commerce within States that has significant interstate effects.

II. Under established precedent, the minimum-coverage requirement is within Congress's Commerce Clause power. The decisions of millions of Americans to purchase health insurance now, or take a wait-and-see approach, profoundly affect interstate healthcare and health-insurance markets.

The regulation of national healthcare and insurance markets is unquestionably economic legislation aimed at a problem of national concern. The primary object of regulation—health insurance—comprises a significant portion of the Nation's economy. And the healthcare crisis is widely viewed as a major contributor to the country's economic woes. There is no evidence that the States can or will resolve the problem independently.

Plaintiffs' objection to the minimum-coverage requirement goes not to whether Congress *can* regulate the health-insurance market, but to *how* it chose to do so. Since *Gibbons* v. *Ogden*, 22 U.S. 1 (1824), however, this Court has recognized the breadth of the means Congress may employ to regulate commerce. This Court's precedents have long held that Congress has power to regulate the national economy when the States are incompetent to act effectively, while leaving to the States matters that are truly local and non-economic.

In the last half-century, challenges to Congress's exercise of its commerce power typically assert that Congress has stretched that authority to non-economic goals. This Court has responded by inquiring whether the matter being regulated truly implicates national issues of commerce or is better characterized as a purely local concern—a federalism question.

Plaintiffs' claim, however, is of a different nature. Plaintiffs argue, in effect, that the commerce power contains an inherent (but unwritten) limitation that Congress may regulate "activity" affecting the market but cannot regulate "inactivity"—that is, Congress cannot compel activity—no matter how profound the effect on interstate commerce. But that activity/inactivity distinction betrays the true nature of their challenge: While offered as a challenge to Congress's commerce power,

their claim is really about individual liberty, reflecting an instinct about how far *any* government, state or federal, may go in ordering the affairs of its people. Plaintiffs effectively ask this Court to import a substantive due process limitation into the Commerce Clause. Plaintiffs would define means of financing healthcare as beyond "Commerce," not because those means lack the requisite connection to commerce—they *are* decisions about commerce—but because plaintiffs believe the choice to buy or not to buy health insurance is a *personal* economic decision the government cannot regulate.

Properly understood as a challenge only to Congress's means of regulating what is unequivocally interstate commerce, plaintiffs' theory crumbles. The minimum-coverage provision does not implicate federalism concerns. Neither theory nor precedent supplies any basis for distinguishing between prohibiting and requiring behavior as a limitation on Congress's Commerce Clause authority. The minimum-coverage provision, moreover, does not implicate any recognized individual-rights concerns. Absent such concerns, this Court should defer to the means chosen by Congress to regulate commerce.

Congress's power nonetheless remains bounded. Commerce Clause regulations must truly be directed at national economic circumstances. And Congress must have a rational basis for believing the regulation will achieve its intended end. Neither limitation is toothless.

III. The minimum-coverage requirement is independently supported by the Necessary and Proper Clause. A central purpose of the Act is to make insurance more readily available by imposing certain uniform terms on health-insurance contracts sold across the Nation. No one disputes that such direct regulation of health-insurance markets is within Congress's commerce power.

Absent the minimum-coverage requirement, however, many of those regulatory efforts would be futile or counterproductive. A system requiring insurers to cover preexisting conditions cannot endure if individuals do not have to maintain insurance when they are healthy: Experience shows that insurance markets would become dominated by high-cost, high-risk purchasers, with fewer healthy insureds offsetting the costs. Premiums would skyrocket, and cost pressures could drive insurers from the market altogether.

Congress thus recognized that the minimum-coverage requirement is "essential" to key portions of its regulation of insurance markets. 42 U.S.C. § 18091(a)(2)(I). The Necessary and Proper Clause has consistently been interpreted to grant Congress broad authority to enact legislation appropriate or beneficial to the exercise of its enumerated powers. The minimum-coverage requirement satisfies even the narrowest interpretations of Congress's necessary-and-proper authority. It is the indispensable buttress that prevents much of the Act's indisputably valid regulatory edifice from collapsing.

ARGUMENT

Plaintiffs do not challenge the vast majority of the Patient Protection and Affordable Care Act. Provisions regularizing health-insurance contracts and restricting terms like preexisting-condition exclusions and discriminatory pricing are unquestionably within Congress's commerce power. Yet those provisions would be ineffective absent the minimum-coverage requirement that plaintiffs challenge. The Necessary and Proper Clause exists to permit Congress to enact precisely such provisions that it reasonably deems appropriate to effectuating its enumerated powers. The minimum-coverage

requirement, moreover, is a permissible regulation of commerce in its own right.

I. THE COMMERCE CLAUSE WAS DESIGNED AND HAS BEEN UNDERSTOOD TO EMPOWER CONGRESS TO ADDRESS PROBLEMS REQUIRING NATIONAL SOLUTIONS

Having learned firsthand the disastrous consequences of denying the national government authority to address issues of common interest, the Framers drafted a Constitution that empowers Congress to legislate for the general interests of the Nation, where the individual States are incompetent to act, and where individual state legislation might disrupt national harmony. Plaintiffs' position harkens not to the original understanding of the Constitution (or to this Court's cases interpreting it), but to the discredited Articles of Confederation.

A. The Commerce Clause Was Designed To Afford Congress Broad Power Over National Economic Problems

Under the Articles of Confederation, the United States were adrift in a sea of competing and conflicting state laws, the central government unable to maintain order. George Washington lamented, "I do not conceive we can exist long as a nation, without having lodged some where a power, which will pervade the whole Union in as energetic a manner as the authority of the State governments extends over the several States." Washington, *Letters and Addresses* 287 (Viles ed., 1909). James Madison observed that the Articles had failed because of "[w]ant of concert in matters where common interest requires it." 1 *Letters and Other Writings of James Madison* 321 (1865). Without a central government capable of establishing uniform commercial regulations, States enacted protectionist laws not merely "expensive

and vexatious in themselves" but also "destructive of the general harmony." *Ibid.*

The absence of a uniform economic policy exacted a heavy toll. As Alexander Hamilton observed, often "it would be beneficial to all the States to encourage, or suppress[,] a particular branch of trade, while it would be detrimental * * * to attempt it without the concurrence of the rest." 7 *The Papers of Alexander Hamilton* 78 (Syrett ed., 1962). The risk of non-cooperation meant "the experiment would probably be left untried" by any State "for fear of a want of that concurrence." *Ibid.*; see also Levy, *Federalism and Collective Action*, 45 U. Kan. L. Rev. 1241, 1258-1259 (1997).

For example, when States "needed to enact legislation prohibiting British ships from entering American harbors" to give the young Nation leverage in trade negotiations, Massachusetts passed a navigation act restricting foreign vessels' use of its ports. LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 San Diego L. Rev. 555, 595-596 (1994). But "most states did nothing," preferring to take for themselves the "significant amount of trade" Massachusetts's law diverted from its shores. *Ibid.* Massachusetts consequently repealed its legislation. *Ibid.*

Based on that and other experiences, the Framers understood "the necessity of some general and permanent system, which should at once embrace all interests, and, by placing the states upon firm and united ground, enable them effectually to assert their commercial rights." 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 254 (Elliot ed., 2d ed. 1836) (Charles Pinckney). The Constitutional Convention thus resolved that Congress should have power "to legislate in all cases for the general interests of

the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." 2 Farrand, *supra*, at 21; see also 1 *id.* at 21 (Resolution VI of Virginia Plan).

The Committee of Detail then prepared the draft Constitution. James Wilson—a Committee member and later the first Supreme Court Justice—observed that the Convention delegates agreed that federal power must reach "whatever object of government extends in its operation or effects beyond the bounds of a particular state." 2 Elliot, *supra*, at 399. But there was concern that the "application" of that "sound and satisfactory" principle "to particular cases would be accompanied with much difficulty, because * * * room must be allowed for great discretionary latitude of construction of the principle." *Ibid.* "In order to lessen or remove th[at] difficulty," Wilson explained, "an enumeration of particular instances[ ] in which the application of the principle ought to take place, has been attempted with much industry and care." *Ibid.* The Committee thus produced a draft Constitution with enumerated powers, including authority to "regulate Commerce * * * among the several States." U.S. Const. art. I, § 8, cl. 3. But "the purpose of enumeration was not to *displace* the principle" that federal power reaches all matters with "operation or effects beyond the bounds of a particular state"; the purpose instead was "to *enact* it." Balkin, *Commerce*, 109 Mich. L. Rev. 1, 11 (2010).

Scholars of all stripes thus agree that the commerce power must be "understood in light of the collective action problems that the nation faced under the Articles of Confederation." Cooter & Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63

Stan. L. Rev. 115, 165 (2010); see Calabresi & Terrell, *The Number of States and the Economics of American Federalism*, 63 Fla. L. Rev. 1, 6 (2011) ("The most compelling argument in American history for empowering our national government has been the need to overcome collective action problems."); Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 178 (1996); Regan, *How To Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 Mich. L. Rev. 554 (1995); Stern, *That Commerce Which Concerns More States Than One*, 47 Harv. L. Rev. 1335 (1934).

Some urge that certain members of the founding generation understood the Constitution to draw clear lines—such as between commerce and manufacturing—that sharply limited Congress's power. See, *e.g.*, Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001). There may have been no clear consensus among the Constitution's Framers and ratifiers concerning the precise scope of the Commerce Clause. But this case involves direct regulation of commercial transactions in a nationwide market, not manufacturing. And many among the founding generation shared Chief Justice Marshall's understanding that Congress's power over such commerce was broad indeed. See *Gibbons* v. *Ogden*, 22 U.S. 1, 189-198 (1824).

B. Longstanding Practice And Precedent Confirm Congress's Broad Regulatory Authority Under The Commerce Clause

This Court has long held that the Commerce Clause empowers Congress to address national economic problems where action by the individual States is ineffective or deleterious, or where concerted action is otherwise appropriate. That power has proved "'broad enough to

allow for the expansion of the Federal Government's role,'" *United States* v. *Comstock*, 130 S. Ct. 1949, 1965 (2010), in view of the Nation's increasingly interdependent economy.

1. In *Gibbons*, this Court ruled that Congress could regulate steamboat navigation on the Hudson River. Establishing a broad principle that echoed the Constitutional Convention's resolutions, see pp. 8-9, *supra*, Chief Justice Marshall explained that the commerce power extends "to all the external concerns of the nation, and to those internal concerns which affect the States generally," excluding *only* those concerns "completely within a particular State," and "which do not affect other States," 22 U.S. at 195. As to matters within federal jurisdiction, he continued, Congress's power "acknowledges no limitations, other than are prescribed in the constitution." *Id.* at 196.

While *Gibbons* established federal authority over the "deep streams which penetrate our country in every direction," 22 U.S. at 195, railways soon replaced rivers as the dominant means of interstate transportation. But "the requirements of the various state statutes were conflicting and difficult for the railroads to implement." McDonald, *100 Years of Safer Railroads* 1, 6-7 (1993). "[S]tate governments as well as some segments of the railroad industry began to urge Federal legislation to provide a workable set of standards." *Id.* at 7. When railroads balked at federal regulation of intrastate rates, this Court rebuffed their challenges. See *The Shreveport Rate Case*, 234 U.S. 342 (1914). Even if intrastate shipping was not itself under Congress's power, Congress "unquestionably" could "prevent the intrastate operations of [railroads] from being made a means of injury to" its regulation of interstate commerce. *Id.* at 351. Con-

gress was entitled to "take all measures necessary or appropriate to that end." *Id.* at 353.

2. This Court's path has not been unbroken. The Court at times barred Congress from addressing commercial problems the States themselves could not. *Hammer* v. *Dagenhart*, for example, invalidated Congress's prohibition on interstate movement of goods produced using child labor, even though state efforts to prohibit child labor were undermined by competition from States with laxer standards. 247 U.S. 251, 273 (1918); see also *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 307-310 (1936). But this Court has since come to recognize that, in our interdependent national economy, those "earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce." *United States* v. *Lopez*, 514 U.S. 549, 556 (1995); see *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36 (1937). Accordingly, in *United States* v. *Darby*, 312 U.S. 100 (1941), the Court repudiated *Hammer*, holding that Congress could regulate manufacturing to ensure that interstate commerce would not "be made the instrument of [unfair and disruptive] competition" among the States "in the distribution of goods produced under substandard labor conditions." *Id.* at 115, 117.

Time and again, this Court has upheld federal intervention where States face collective-action barriers to addressing widespread economic problems. See, *e.g.*, *Charles C. Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 588 (1937) (sustaining unemployment-benefits legislation under Congress's taxing power given States' unwillingness to enact similar legislation "lest in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors"); *Helvering* v. *Davis*, 301 U.S. 619,

644 (1937) (because "[t]he existence of * * * a system [of old-age benefits] is a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose[,] [o]nly a power that is national can serve the interests of all").[2] That logic echoed President Roosevelt's observation that, "[i]f forty states go along with adequate legislation and eight do not * * * , we get nowhere." Letter from Franklin D. Roosevelt to David Grey (June 17, 1935), quoted in Friedman, *The Will of the People* 208 (2009).

This Court's decisions upholding New Deal labor laws similarly recognized Congress's authority to regulate matters *affecting* interstate commerce, reaffirming Chief Justice Marshall's observation that Congress's commerce power extends "to those internal concerns which affect the States generally" and excludes only matters "completely within a particular State" that "do not affect other States." *Gibbons*, 22 U.S. at 195. "Although activities may be intrastate in character when separately considered," the Court held, "if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." *Jones & Laughlin Steel*, 301 U.S. at 37.

Then-Solicitor General (later Justice) Stanley Reed explained how increasingly interconnected markets required an expanded exercise of federal commerce power: "In a simpler time, when life ordinarily was limited to

---

[2] Indeed, in *Steward Machine*, the Court noted that Massachusetts's then-existing unemployment-benefits act would "not become operative unless the federal bill became a law, or unless eleven of [21 listed] states should impose on their employers burdens substantially equivalent." 301 U.S. at 588 n.9.

community activities, or at most to the boundaries of a single State, the powers granted to the national government were rarely utilized in such manner as to affect the daily existence of the citizen." Reed, *The Constitution and the Problems of Today*, 47 Proc. Va. St. Bar Ass'n 277, 277 (1936). But "[w]ith our social and economic development, with improvements in transportation and communication, with broadening boundaries and increasing population, with industrialization and multiplying world contacts, problems believed to require further exercise of national powers appeared." *Ibid.* Everyone, Reed concluded, "must recognize the desirability of Federal and State legislation of a new type to meet the exigencies of this modern world." *Id.* at 300.

That explanation echoed the understanding that pervaded the Nation. As President Roosevelt observed, "[t]he prosperity of the farmer does have an effect today on the manufacturer in Pittsburgh. The prosperity of the clothing worker in the City of New York has an effect on the prosperity of the farmer in Wisconsin, and so it goes." *Rendezvous with Destiny: Addresses and Opinions of Franklin Delano Roosevelt* 295 (Hardman ed., 1944). This Court correspondingly recognized that, in an integrated economy, even small choices—such as a farmer's otherwise "trivial" consumption of homegrown wheat—can cumulatively have sufficient repercussions throughout national markets to justify federal regulation. *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942); see Cooter & Siegel, *supra*, at 160.

The need for national solutions has also grown as the Nation has increased from 13 to 50 States. Cooter & Siegel, *supra*, at 143; Balkin, *supra*, at 12 n.37. "[A]s the number of members of a federation increases, the amount of regulation of interstate commerce and the

scope of the federal government's power over interstate commerce * * * increase[s] as well." Calabresi & Terrell, *supra*, at 16. And this Court has continued to uphold Congress's power to protect, promote, and regulate interstate commerce. Congress may prohibit discrimination in public accommodations, for example, because such discrimination restricts interstate travelers' choices and impedes the free flow of commerce. See *Katzenbach* v. *McClung*, 379 U.S. 294, 300 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252-253 (1964). The exercise of federal commerce power has thus expanded along with the economy's growing interconnectedness and the concomitant need for national solutions to national problems that would be left unaddressed by individual States—a need the Framers well understood.

Far from rejecting that understanding, this Court's recent decisions enforcing limits on Congress's commerce powers embrace it. In striking down federal laws addressing gun possession near schools and violence against women, the Court explained that those provisions bore only the most "attenuated" connection to anything resembling commerce, *United States* v. *Morrison*, 529 U.S. 598, 612 (2000), and implicated no barriers to effective individual state action, *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). Those decisions nowhere denigrate Congress's commerce authority where the object of regulation itself is commerce, directly implicates economic decisions, and regulates a matter of national concern.

II. THE MINIMUM-COVERAGE PROVISION IS CONSISTENT WITH TRADITIONAL UNDERSTANDINGS OF CONGRESS'S COMMERCE POWERS

A. The Act Directly Regulates Interstate Commerce To Regularize, Promote, And Protect It

In *South-Eastern Underwriters*, this Court held that Congress's commerce power "include[s] a business such as insurance." 322 U.S. at 539; see 42 U.S.C. §18091(a)(3). Health insurance is no exception. Its interstate and commercial nature is inescapable. "Health insurance and health care services" constitute over one-sixth of the U.S. economy. 42 U.S.C. § 18091(a)(2)(B). And "[p]rivate health insurance spending * * * pays for medical supplies, drugs, and equipment that are shipped in interstate commerce." *Ibid.* "[M]ost health insurance is sold by national or regional health insurance companies"; "health insurance is sold in interstate commerce"; and "claims payments flow through interstate commerce." *Ibid.*

There is thus no serious debate that virtually all the Act's provisions addressing the terms of health-insurance contracts fall squarely within Congress's commerce power. Those provisions not only address matters that "substantially affect interstate commerce." *Gonzales* v. *Raich*, 545 U.S. 1, 17 (2005). They *directly regulate* commercial transactions in a nationwide marketplace by regularizing the terms on which health insurance is offered, "prescribing rules for carrying on that intercourse." *Gibbons*, 22 U.S. at 190.

The Act also regulates in an area where the States face collective-action barriers. For instance, many States allow insurance companies to deny "coverage, charge higher premiums, and/or refuse to cover" preexisting medical conditions. Dep't of Health & Human Servs., *Coverage Denied* 1 (2009). As a result, many individuals

cannot obtain insurance. *Ibid.* Yet pioneering States seeking to guarantee coverage for preexisting conditions confront a grave risk of failure. Individuals who cannot obtain coverage elsewhere are drawn to States with more protective laws, driving premiums up. Cf. Glied *et al.*, *Consider It Done? The Likely Efficacy of Mandates for Health Insurance*, 26 Health Aff. 1612, 1613 (2007). Insurers may flee those States, leaving residents with fewer choices and less competition.

Unsurprisingly, "the seven states that had enacted guaranteed issue reforms without minimum coverage provisions suffered detrimental effects to their insurance markets, such as escalating costs and insurance companies exiting the market." *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 547 (6th Cir. 2011). In Kentucky, all but two insurers (one State-run) abandoned the State. See Kirk, *Riding the Bull*, 25 J. Health Pol. Pol'y & L. 133 (2000). Only one State that has attempted to ban preexisting-condition exclusions, Massachusetts, has had anything approaching success; it imposed a mandatory minimum-coverage requirement. See Chandra, *et al.*, *The Importance of the Individual Mandate—Evidence from Massachusetts*, 364 New Eng. J. Med. 293, 295 (2011).

The Act, moreover, prevents the "interrupt[ion]" of "the harmony of the United States" and impediments to interstate commerce that balkanized state regulation might cause. 2 Farrand, *supra*, at 21. Individuals with preexisting medical conditions, for example, often cannot pursue opportunities in States that permit insurers to deny coverage for those conditions. Congress has sought to redress similarly unnecessary and detrimental barriers to interstate migration and commerce in the past. See, *e.g.*, Health Insurance Portability and Accountability

Act of 1996, Pub. L. No. 104-191, tit. I, 110 Stat. 1936, 1939; *id.* § 195(a)(1), 110 Stat. at 1991; cf. *Katzenbach*, 379 U.S. at 300; *Heart of Atlanta Motel*, 379 U.S. at 252-253. Those facts alone are a sufficient basis to sustain the Act.

B. The Minimum-Coverage Requirement Addresses Economic Conduct With A Profound Effect On Interstate Commerce

"No matter how you slice the relevant market—as obtaining health care, as paying for health care, as insuring for health care—all of these activities affect interstate commerce, in a substantial way." *Thomas More*, 651 F.3d at 556 (Sutton, J., concurring). As petitioners explain (at 2-3), Americans necessarily must choose how to finance their healthcare: They can pre-pay for it by purchasing insurance, or risk trying to pay for it on an as-needed basis.

Cumulatively, those individual choices have an enormous impact on interstate commerce. In 2008 alone, the "cost of providing uncompensated care to the uninsured" totaled $43 billion. 42 U.S.C. § 18091(a)(2)(F). "[H]ealth care providers pass on th[at] cost to private insurers, which pass on the cost" by charging families higher premiums, "by on average over $1,000 a year." *Ibid.* Other effects abound: Doctors "curtail unprofitable services and shorten hours of service." Pagán & Pauly, *Community-Level Uninsurance and the Unmet Medical Needs of Insured and Uninsured Adults*, 41 Health Servs. Research 788, 791 (2006). And "lower revenue streams" could force some hospitals to cease operating. *Id.* at 789. Thus, as with the unchallenged provisions of the Act, "Congress had a rational basis for concluding that leaving [healthcare-financing decisions] outside federal control would similarly affect price and market conditions." *Raich*, 545 U.S. at 19.

Since at least *Wickard* v. *Filburn*, 317 U.S. 111 (1942), this Court has recognized that Congress can regulate individual economic decisions where their effect, "taken together with that of many others similarly situated, is far from trivial." *Id.* at 128. Thus, in *Wickard*, this Court upheld a regulation imposing a penalty on farmers for growing wheat in excess of a quota—even for purely personal consumption—because of the effect on demand for wheat sold in the market. *Id.* at 119, 127-129. The cumulative impact of individual healthcare-financing choices on interstate commerce dwarfs the impact of growing wheat for self-consumption at issue in *Wickard*—and by orders of magnitude.

C. Plaintiffs' Activity/Inactivity Distinction Is Irrelevant To Congress's Commerce Power

1. Plaintiffs ask this Court to ignore those direct and undisputable economic effects, urging that the Commerce Clause power extends only to regulation of "activity," not "inactivity" such as an individual's decision to *forgo* health insurance. See Private Respondents' Cert. Br. 14. But "the relevant text of the Constitution does not contain such a limitation." *Thomas More*, 651 F.3d at 560 (Sutton, J., concurring); see *Seven-Sky* v. *Holder*, 661 F.3d 1, 16 (D.C. Cir. 2011) (consulting Founding-era dictionaries to conclude that "regulate" as used in the Commerce Clause encompasses power to "require action"). Regulations that *compel* certain purchases—commercial transactions—regulate and affect commerce no less than those that proscribe purchases.

Nor does plaintiffs' purported limitation draw support from this Court's precedents. This Court has long held that formalistic line-drawing has no place when analyzing whether an effect on interstate commerce is sufficient to sustain federal intervention. As *Wickard* explained,

"recognition of the relevance of the economic effects in the application of the Commerce Clause * * * has made the mechanical application of legal formulas no longer feasible." 317 U.S. at 123-124. Rather, "interstate commerce itself is a practical conception," and "interferences with that commerce must be appraised by a judgment that does not ignore actual experience." *Jones & Laughlin Steel*, 301 U.S. at 41-42. A regulated matter, "'whatever its nature,'" can "'be reached by Congress if it exerts a substantial economic effect on interstate commerce.'" *Lopez*, 514 U.S. at 556 (quoting *Wickard*, 317 U.S. at 125). "Economists accept * * * that some forms of 'inactivity' affect economic health as much as activity does." Mariner & Annas, *Health Insurance Politics in Federal Court*, 363 New Eng. J. Med. 1300, 1301 (2010); see p. 18, *supra*. The purported activity/inactivity distinction thus lacks any foundation when looking at the *impact* on interstate commerce.

Indeed, *Wickard* comes "very close to authorizing" the law challenged here. *Seven-Sky*, 661 F.3d at 17. Farmers like Roscoe Filburn had only two serious options—grow the wheat they required, or purchase it on the open market. By restricting farmers' ability to grow wheat, the law upheld in *Wickard* effectively required market purchases. This Court recognized that reality, holding that Congress could validly restrict "the extent * * * to which one may *forestall resort to the market* by producing [wheat] to meet his own needs," even if it "*forc[ed] some farmers into the market* to buy what they could provide for themselves." 317 U.S. at 127, 129 (emphasis added). "If Congress can regulate a noncommercial activity that causes commercial activity that in turn affects commerce in th[at] relatively minor way, then surely it can directly regulate a commercial inactivity," like failure to purchase insurance, "that affects commerce in" a

"major" way. Elhauge, *The Irrelevance of the Broccoli Argument Against the Insurance Mandate*, 366 New Eng. J. Med. e1, e1(1)-(2) (2012). As a "practical conception," *Jones & Laughlin Steel*, 301 U.S. at 41-42, the two are virtually indistinguishable. Both necessitate the purchase of products—whether wheat or health insurance—in the marketplace. The minimum-coverage requirement simply makes that consequence explicit.

It misses the mark to say that Filburn's economic "mandate" was precipitated by his farming "activity," whereas the minimum-coverage requirement applies automatically. That argument assumes that, had Filburn chosen not to engage in wheat production, he could have avoided all governmental mandates. But the notion that one could shrink from the world and avoid regulatory mandates by abstaining from regulated "activity" was an agrarian fantasy by the early 1900s—and is all the more so today. Americans must engage in "activity" to earn a livelihood, and in doing so are regularly required to comply with countless "mandates" to be licensed, bonded, insured, and so on. Congress also directly regulates countless activities that affect the likelihood that one may require healthcare, from car safety, 49 U.S.C. §30101 *et seq.*, to food content, 21 U.S.C. §301 *et seq.* Congress would not be said to regulate "inactivity" if it required everyone who engages in such health-related activities—*e.g.*, driving a car, buying certain foods, and so on—to obtain health insurance, even though that would cover virtually every American. The minimum-coverage requirement achieves the same result through less convoluted means.

2. Even if the activity/inactivity divide presented a principled limitation—and it does not—the minimum-coverage requirement would fall on the "activity" side.

"No one is inactive when deciding how to pay for health care, as self-insurance and private insurance are two forms of action for addressing the same risk. Each requires affirmative choices; one is no less active than the other; and both affect commerce." *Thomas More*, 651 F.3d at 561 (Sutton, J., concurring). "Far from being passive and noneconomic, the uninsured consume" billions of dollars in uncompensated care, "the costs of which are passed through health care institutions to insured Americans." Rosenbaum & Gruber, *Buying Health Care, the Individual Mandate, and the Constitution*, 363 New Eng. J. Med. 401, 402 (2010). The requirement that Americans pre-pay by insuring themselves now thus regulates present "economic and financial decisions about how and when health care is paid for, and when health insurance is purchased"—whether to pay for healthcare now by buying insurance or to defer payment by attempting to self-insure. 42 U.S.C. § 18091(a)(2)(A).

The requirement likewise regulates the inevitable *future* activity of obtaining healthcare, requiring advance arrangements that ensure an ability to pay for it. Plaintiffs do not dispute that Congress could require uninsured persons to purchase insurance at the moment they seek treatment in healthcare markets. See Pet. App. 118a. Congress surely could also require payment of all back premiums at that time as well. The minimum-coverage requirement does the same thing, without waiting for an individual's (virtually certain) use of the healthcare system.[3]

---

[3] By requiring payment before an individual needs healthcare, moreover, the minimum-coverage requirement is arguably less "coercive" than the alternative plaintiffs would allow: "An individual in need of acute medical care, but without the resources to pay for it, is not apt

Given that most everyone requires healthcare at some point, plaintiffs' argument reduces to the claim that, because some minuscule (perhaps imaginary) number of people (1) refuse to buy health insurance and (2) will never burden the market by seeking healthcare, the entire law is invalid. Even if some individuals might be able to live so remotely as to preclude any resort to the healthcare system, however, Congress is not required "to legislate with scientific exactitude." *Raich*, 545 U.S. at 17. It may, "'[w]hen it is necessary in order to prevent an evil[,] * * * make the law embrace more than the precise thing to be prevented.'" *Perez* v. *United States*, 402 U.S. 146, 154 (1971). "When Congress decides that the '"total incidence"' of a practice poses a threat to a national market, it may regulate the entire class." *Raich*, 545 U.S. at 17. In the aggregate, uninsured individuals seeking healthcare impose an enormous burden on the healthcare system that "affect[s] price and market conditions" of health insurance generally. *Id.* at 19; 42 U.S.C. § 18091(a)(2)(F); see p. 18, *supra*. As a result, "a 'rational basis' exists" for concluding that uninsured individuals "substantially affect interstate commerce." *Raich*, 545 U.S. at 22.

D. Plaintiffs' Claim Is About Substantive Due Process, Not Federalism

1. Plaintiffs' argument is not really a Commerce Clause argument but a substantive due process argument in disguise—as their purported activity/inactivity distinction makes clear. What disturbs plaintiffs is not that Congress has allegedly strayed beyond the regulation of commerce. Buying insurance (whether voluntarily or by mandate) is plainly "Commerce." What bothers

---

to refuse to buy future medical insurance in order to obtain present care * * * ." *Thomas More*, 651 F.3d at 563 (Sutton, J., concurring).

plaintiffs is that they are being *compelled* to obtain health insurance. But the compulsion that offends them does not make the action, or the regulation, any less connected to the "Commerce" Congress can regulate.

To be sure, like other structural aspects of the Constitution, federalism and the enumeration of powers serve to protect individual liberty. See *Bond* v. *United States*, 131 S. Ct. 2355, 2364-2365 (2011). But this Court enforces those protections by ensuring that Congress respects "the constitutional balance between the National Government and the States," *id.* at 2364, not by engrafting substantive due-process limits (like a ban on compelling purchases) onto the Commerce Clause, see *Comstock*, 130 S. Ct. at 1956. Plaintiffs' activity/inactivity distinction is irrelevant to the limits federalism places on Congress's commerce power: "[W]hether a statute regulates an active or passive matter * * * tells us nothing about whether the matter ought to be regulated at the national or instead at the state level"—much less whether it implicates commerce. Smith, *Federalism*, Lochner, *and the Individual Mandate*, 91 B.U. L. Rev. 1723, 1737 (2011). Likewise, Congress's choice to mandate rather than merely "encourage" economic behavior, Pet. App. 107a, has nothing to do with whether a regulation transgresses the line "between what is truly national and what is truly local," *Lopez*, 514 U.S. at 567-568. Categorically prohibiting regulations like the minimum-coverage requirement would improperly deny Congress power to address economic problems that individual States are "separately incompetent" to address. Smith, *supra*, at 1738-1740; see generally Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 Law & Contemp. Probs. (forthcoming 2012); pp. 7-10, *supra*.

Plaintiffs urge that, just as this Court has held that the Commerce Clause prohibits Congress from "commandeer[ing]" *States* by compelling them to administer federal programs, it also bars Congress from "commandeer[ing]" *individuals* by imposing economic mandates. Private Respondents' Cert. Br. 4 (citing *Printz* v. *United States*, 521 U.S. 898, 925 (1997)). But that is upside down. Congress may not commandeer state governments precisely *because* "'the Framers explicitly chose a Constitution that confers upon Congress the power to regulate *individuals*, not States.'" *Printz*, 521 U.S. at 920 (quoting *New York* v. *United States*, 505 U.S. 144, 166 (1992)) (emphasis added). The very reason Congress cannot invoke the Commerce Clause to "compel the States" to act is *because* Congress has the power "to pass laws requiring or prohibiting certain acts" by *individuals*. *New York*, 505 U.S. at 166; see *id.* at 165 (Congress's power of "'legal coercion singles out the * * * individual'" (quoting Oliver Ellsworth)).

2. Plaintiffs' real complaint is that, in their view, the minimum-coverage provision impermissibly interferes with individuals' liberty by "compel[ling] Americans to purchase an expensive health insurance product they have elected not to buy." Pet. App. 187a. But this Court allowed a far more invasive mandate in *Jacobson* v. *Massachusetts*, 197 U.S. 11, 12, 39 (1905), upholding a law requiring individuals to be vaccinated against smallpox—*i.e.*, to submit to bodily invasion—or pay a penalty. As Professor Charles Fried advised Congress, the "requirement that one must purchase health insurance if one can afford it" is, by contrast, a "much less intrusive and less intimate imposition." *Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (Feb. 2, 2011), http://www.judiciary.senate.gov/pdf/11-02-02%20Fried%20Testimony.pdf. It requires

submission only to contract terms, not pathogens. And this Court has held that, of all the liberties substantive due process may protect, the "freedom of contract in particular" must yield to "the interests of the community." *W. Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 391-392 (1937).

The minimum-coverage provision is no more damaging to individual liberty than other, uncontested means of guaranteeing health coverage. No one disputes, for instance, that Congress could tax all Americans and spend those dollars buying insurance for each American "in aid of the 'general welfare.'" Cf. *Helvering*, 301 U.S. at 640-642. Yet the imposition on personal liberty would be no different: Individuals would still pay money and be required to accept insurance. If anything, the minimum-coverage requirement is less intrusive; it removes the government as purchaser and allows individuals, not bureaucrats, to choose their insurer.

E. Plaintiffs' Slippery Slope Arguments Fail

Ultimately, plaintiffs argue that the minimum-coverage requirement is unprecedented and, if upheld, will trigger increasingly invasive uses of federal power. But "[e]very new proposal is in some way unprecedented before it is tried." Pet. App. 222a (Marcus, J., dissenting). And this Court has repeatedly rejected similar claims that an assertion of Congress's commerce power was unprecedented:

- In *Gibbons*, the defendant urged that affording Congress power to regulate commerce on interstate waterways would "mak[e] a wreck of State legislation, leaving only a few standing ruins, that mark the extent of the desolation." 22 U.S. at 102 (argument of appellant).

- In *Darby*, it was protested that the "individual and cumulative effect" of the Fair Labor Standards Act represented an "unprecedented scope of * * * regulation." Br. for Appellee 82, 312 U.S. 100 (No. 82), 1940 WL 47093.
- In *Katzenbach* v. *McClung*, it was urged that the Civil Rights Act's public-accommodation regulations lacked any "statutory precedent." Supp. Br. for Appellees 36, 379 U.S. 294 (No. 543), 1964 WL 81104.

Yet, in each of those cases, this Court looked past the rhetoric to uphold then-novel—but wholly proper—exercises of the commerce power.

This litigation, moreover, does not require this Court to determine the outer limits of the Commerce Clause. Congress acted here on commerce itself—commerce that is interstate and has interstate effects. Limits on the commerce power remain. Congress's ultimate regulatory objective must be economic in nature; a tangential or circuitous relationship to commerce is not enough. The issue regulated must affect more than one State. And the means Congress chooses must bear a rational relationship to those ends.

Those requirements are not toothless. *Lopez* struck down the Gun Free School Zones Act because the regulated activity there did not "arise out of" and was not "connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." 514 U.S. at 561. This Court made clear that attenuated inferences about cause and effect cannot establish the necessary connection between Congress's regulatory choices and lawful goals. See *id.* at 563–564 (refusing to "pile inference upon inference"). The requirement of a logical link between Congress's means

and ends—while necessarily deferential—limits Congress's authority and gives substance to constitutional text. Moreover, this Court need not defer to "wholly unsubstantiated assumptions" presented as the sole justification for an assertion of federal power. *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534-535 (1973).

The Act here, however, survives scrutiny for precisely the same reasons. It does not just regulate conduct that affects commerce. It directly regulates commerce. And it does so to regularize and protect a part of interstate commerce central to our national economy.

III. THE MINIMUM-COVERAGE REQUIREMENT IS NECESSARY AND PROPER

The minimum-coverage requirement is also independently supported by the Necessary and Proper Clause. That Clause at the very least allows Congress, when regulating within its enumerated powers, to enact *additional* provisions that are essential to the effective exercise of those powers. That is precisely how the minimum-coverage requirement operates. Congress unquestionably has authority under the Commerce Clause to prohibit, for example, discriminatory pricing and preexisting-condition exclusions. The minimum-coverage provision prevents those wholly proper regulations from collapsing. If a provision critical to protecting Congress's exercise of Commerce Clause authority from self-destruction is not "necessary and proper," it is hard to imagine what could be.

A. The Necessary And Proper Clause Grants Congress Broad Powers To Effectuate Its Enumerated Powers

Article I, Section 8 of the Constitution "grants Congress broad authority," *Comstock*, 130 S. Ct. at 1956, to "make all Laws which shall be necessary and proper for

carrying into Execution" its enumerated powers, U.S. Const. art. I, §8, cl. 18. Congress legitimately exercises that power "when the means chosen, although not themselves within the granted power, [a]re nevertheless deemed appropriate aids" rationally related "to the accomplishment of some purpose within an admitted power of the national government." *Darby*, 312 U.S. at 121.

Because the Necessary and Proper Clause "empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation," necessary-and-proper legislation in aid of Congress's commerce power need not itself "regulate economic activities that substantially affect interstate commerce." *Raich*, 545 U.S. at 37, 39 (Scalia, J., concurring in judgment). It is sufficient that such provisions advance an otherwise permissible exercise of the commerce power.

That has been true for centuries. In *McCulloch* v. *Maryland*, this Court recognized that "a government, entrusted with" enumerated powers, "must also be entrusted with ample means for their execution." 17 U.S. 316, 408 (1819). "[N]ecessary," Chief Justice Marshall explained, does not mean "absolutely necessary." *Id.* at 414-415; see 3 Story, *Commentaries on the Constitution of the United States* §1243, at 118 (1833); *id.* §1240, at 116. Instead, "the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *Comstock*, 130 S. Ct. at 1956 (quoting *McCulloch*, 17 U.S. at 413, 418). The Necessary and Proper Clause sweeps broadly because the Constitution is "intended to endure for ages to come,

and, consequently, [is] to be adapted to the various *crises* of human affairs." *McCulloch*, 17 U.S. at 415.

McCulloch was not written on a blank slate. Hamilton and Madison had sparred over the meaning of the Necessary and Proper Clause. To Hamilton, the proper focus was on "the *end* to which the measure relates as a *mean*." *Legislative and Documentary History of the Bank of the United States* 99 (Clarke & Hall eds., 1832). "If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution, it may safely be deemed to come within the compass of the national authority." *Ibid.* Madison took a narrower view, that the Clause endows Congress with power only to provide a "direct and incidental means" to support the exercise of an enumerated power. *Id.* at 42. In the end, Hamilton prevailed: "The interpretation given by Mr. Hamilton was substantially followed by Chief Justice Marshall, in *McCulloch* * * *." *The Legal Tender Cases*, 79 U.S. 457, 642 (1870) (Field, J., dissenting). But the minimum-coverage provision survives even under Madison's more limited interpretation.

B. The Minimum-Coverage Requirement Falls Comfortably Within Congress's Necessary-and-Proper Authority

To be valid under the Necessary and Proper Clause, a statute need only "constitut[e] a means that is rationally related to the implementation of a constitutionally enumerated power." *Comstock*, 130 S. Ct. at 1956. "'If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination

alone.'" *Id.* at 1957. The minimum-coverage requirement fits comfortably within that authority.

1. Plaintiffs do not challenge the validity of the vast majority of the Act's provisions. They do not argue that Congress exceeded its powers by:

- Prohibiting insurers from denying coverage of preexisting conditions, 42 U.S.C § 300gg-3(a);
- Banning insurers from discriminating or denying eligibility based on health status, *id.* § 300gg-4(a);
- Prohibiting rescission of insurance contracts, *id.* § 300gg-12; or
- Requiring insurers to pay for certain preventive care, *id.* § 300gg-13(a).

Any challenge to those provisions would be futile: This Court has squarely held that Congress's commerce powers extend to insurance-market regulation. *South-Eastern Underwriters*, 322 U.S. at 539.

The minimum-coverage requirement's constitutionality follows ineluctably: The minimum-coverage requirement is necessary and proper to ensuring that the unchallenged provisions do not collapse under the weight of a massive adverse-selection problem. Absent the minimum-coverage requirement, the prohibition on exclusions for preexisting conditions would encourage individuals *not* to buy insurance until they have a condition needing coverage. "[I]f there were no requirement" that individuals maintain insurance, Congress observed, "many individuals"—particularly healthy individuals—"would wait to purchase health insurance until they needed care," 42 U.S.C. § 18091(a)(2)(I), secure in the knowledge that coverage could not be denied. Insurance markets would become dominated by high-cost, high-risk individuals in need of immediate care. Premi-

ums would skyrocket, defeating the objectives Congress sought to achieve—making insurance more widely and readily available to the American public.

Congress concluded that the appropriate means of preventing that adverse-selection problem, and protecting the Act's guarantee of coverage for preexisting conditions and similar provisions, was to require all qualified individuals (healthy and unhealthy alike) to participate by obtaining insurance. 42 U.S.C. § 18091(a)(2)(I). The minimum-coverage requirement, Congress thus found, is "essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of preexisting conditions can be sold." *Ibid.*

That "'judgment of Congress,'" *Comstock*, 130 S. Ct. at 1957, is not merely entitled to judicial respect. It is based on unassailable economics. Experience proves that, absent a minimum-coverage requirement, adverse selection drives up premiums: The States attempting healthcare reform without a minimum-coverage requirement are now among those with the most expensive health insurance. By contrast, when Massachusetts coupled its limit on preexisting-condition exclusions with a minimum-coverage requirement, the adverse-selection problem was somewhat ameliorated. See p. 17, *supra*. To be necessary and proper, a provision need only "constitut[e] a means that is rationally related to the implementation of a constitutionally enumerated power." *Comstock*, 130 S. Ct. at 1956. Here, the minimum-coverage requirement is not merely "rationally related" to Congress's regulation of the terms of insurance under its Commerce Clause authority. It is critical to Congress's exercise of that authority.

2. The argument that the Necessary and Proper Clause does not allow Congress to enact any provision that would otherwise be beyond its enumerated powers must fail. Cf. Pet. App. 346a. The Necessary and Proper Clause allows Congress to "enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation." *Raich*, 545 U.S. at 39 (Scalia, J., concurring in judgment); see *Comstock*, 130 S. Ct. at 1957-1958; *Darby*, 312 U.S. at 121. Under *McCulloch*, a provision need only be "convenient, or useful" or "conducive" to Congress's exercise of an enumerated power, 17 U.S. at 413, 418, a standard the minimum-coverage requirement comfortably meets. Indeed, the requirement satisfies any conceivable interpretation of the Necessary and Proper Clause. The requirement survives review whether one requires "a tangible link to commerce," *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring in judgment), an "'appropriate' link between a power conferred by the Constitution and the law enacted by Congress," *id.* at 1970 (Alito, J., concurring in judgment), an "'"obvious, simple, and direct relation"' to an exercise of Congress' enumerated powers," *id.* at 1975 n.7 (Thomas, J., dissenting), or, as Madison thought, a "direct and incidental" connection to a constitutional end, Clarke & Hall, *supra*, at 42. Quite simply, the minimum-coverage requirement is directly necessary to the efficacy of a comprehensive regulatory scheme otherwise within Congress's Commerce Clause authority. See *Lopez*, 514 U.S. at 561.

While this Court has *rejected* the claim that "Necessary and Proper" legislation "can be no more than one step removed from a specifically enumerated power," *Comstock*, 130 S. Ct. at 1963; see also *id.* at 1965-1966 (Kennedy, J., concurring in judgment), the minimum-coverage requirement would meet even that test. It is

only one step removed because, without it, many of the Act's direct regulations of insurance terms in interstate commerce would collapse. No inference-piling is needed. See pp. 27-28, *supra*; *Comstock*, 130 S. Ct. at 1963; *Raich*, 545 U.S. at 36 (Scalia, J., concurring in judgment). Experience has shown that the non-discrimination requirements and the prohibition against preexisting-condition exclusions—both proper exercises of core Commerce Clause powers—could not function effectively absent a requirement that everyone (healthy and unhealthy alike) be insured. It is not "merely possible for a court to think of a rational basis on which Congress might have perceived" a linkage between the minimum-coverage provision and otherwise permissible regulations of insurance under the Act. *Comstock*, 130 S. Ct. at 1970 (Alito, J., concurring in judgment). The "substantial link to Congress' constitutional powers" is readily apparent. *Ibid.*

3. The Necessary and Proper Clause also obviates any activity/inactivity distinction. "[W]here Congress has the authority to enact a regulation of interstate commerce, 'it possesses *every power* needed to make that regulation effective.'" *Raich*, 545 U.S. at 36 (Scalia, J., concurring in judgment) (emphasis added). Even if plaintiffs' activity/inactivity distinction had any merit in the Commerce Clause context—and it does not—there is no room in the Necessary and Proper Clause for artificial distinctions between compelling and prohibiting conduct.

History makes clear that individual mandates can be "necessary and proper" means of effectuating enumerated powers. In the Republic's earliest days, Congress discharged its authority to "provide for organizing, arming, and disciplining, the Militia," U.S. Const. art. I, §8, cl. 16, by compelling activity: It mandated militiamen to obtain particular arms and supplies. See Act of May 8,

1792, ch. 33, § 1, 1 Stat. 271, 271-272 (persons liable for service must provide "a good musket or firelock, a sufficient bayonet and belt, two spare flints," and ammunition); *id.* § 4, 1 Stat. at 272-273 (horses and uniforms). Congress has also prohibited inactivity by requiring people to respond to the census, 13 U.S.C. § 221(a)-(b), report for jury duty, 28 U.S.C. § 1866(g), and register for selective service, 50 App. U.S.C. § 453. Congress thus has a long history of compelling conduct in service of other enumerated powers. The Commerce Clause—one of Congress's broadest powers—should not be viewed any differently. Cf. *Jinks* v. *Richland County*, 538 U.S. 456, 462 (2003) (citing *Stewart* v. *Kahn*, 78 U.S. 493, 507 (1870)).

CONCLUSION

The minimum-coverage provision should be upheld.

Respectfully submitted.

BARRY FRIEDMAN
40 Washington Square South, Room 317
New York, NY 10012
(212) 998-6293

MIMI M.D. MARZIANI
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(646) 292-8327

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
MARTIN V. TOTARO
LUCAS M. WALKER
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000 (telephone)
(202) 536-2010 (facsimile)
jlamken@verizon.net

Counsel for Amici Curiae

JANUARY 2012

APPENDIX A
LIST OF *AMICI CURIAE*[1]

Matthew Adler
Leon Meltzer Professor of Law
University of Pennsylvania Law School

Rebecca L. Brown
Newton Professor of Constitutional Law
University of Southern California Gould School of Law

Jesse H. Choper
Earl Warren Professor of Public Law
University of California, Berkeley, School of Law

Thomas B. Colby
Professor of Law
The George Washington University Law School

Neal Devins
Goodrich Professor of Law
William & Mary School of Law

Michael C. Dorf
Robert S. Stevens Professor of Law
Cornell University Law School

Daniel Farber
Sho Sato Professor of Law
University of California, Berkeley, School of Law

---

[1] Institutional affiliations are listed for identification purposes only.

Barry Friedman
Jacob D. Fuchsberg Professor of Law
New York University School of Law

Michael Gerhardt
Samuel Ashe Distinguished Professor
in Constitutional Law
Director, Center for Law and Government
University of North Carolina School of Law

William P. Marshall
Kenan Professor of Law
University of North Carolina School of Law

Gene Nichol
Professor of Law
Director, Center on Poverty, Work & Opportunity
University of North Carolina School of Law

William J. Novak
Professor of Law
The University of Michigan Law School

Richard A. Primus
Professor of Law
The University of Michigan Law School

Judith Resnik
Arthur Liman Professor of Law
Yale Law School

Theodore W. Ruger
Professor of Law
University of Pennsylvania Law School

David L. Shapiro
William Nelson Cromwell Professor, Emeritus
Harvard Law School

Suzanna Sherry
Herman O. Loewenstein Professor of Law
Vanderbilt University Law School

Neil S. Siegel
Professor of Law and Political Science
Co-Director, Program in Public Law
Duke University School of Law

Peter J. Smith
Professor of Law
George Washington University Law School

Adam Winkler
Professor of Law
UCLA School of Law

AMICUS CURIAE BRIEF

NO: 11-398

In The
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL,
Petitioners,

V.

STATE OF FLORIDA ET AL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF LIBERTY LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

(MINIMUM COVERAGE PROVISION)

Van R. Irion
LIBERTY LEGAL FOUNDATION
9040 Executive Park Drive, Suite 200
Knoxville, TN 37923
(423) 208-9953

QUESTION PRESENTED

This brief will address the following question:

Whether Congress had the authority under Article I of the Constitution to enact the minimum coverage provision of the Patient Protection and Affordable Care Act, 26 U.S.C.A. § 5000A.

TABLE OF CONTENTS

Questions Presented		i
Table of Contents		ii
Table of Authorities		iii
Statement of Interest		1
Summary of Argument		2
Argument		3
I.	*Wickard* and Its Effect	3
II.	Proper Scope of the Commerce Clause Must Be Reestablished	4
III.	Standard for Overturning Precedent	10
IV.	*Wickard* Drastically Departed from 150 Years of Prior Commerce Clause Precedent	12
V.	Experience has Confirmed that the Substantial Effects Test Leaves No Limits on Congressional Authority	16
VI.	Continued Adherence to the Substantial Effects Test Will Impede Stability of Future Cases	19
VII.	Returning to Intrinsically Sounder Doctrine Will Better Serve Stare Decisis	23
Conclusion		28

TABLE OF AUTHORITIES

Cases	Page
Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)	11, 23
Alderman v. United States, 131 S.Ct. 700 (2011)	16
Bond v. United States, 131 S.Ct. 2355 (2011)	9
Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932)	10
Carter v. Carter Coal Co., 298 U.S. 238 (1936)	13, 26
Champion v. Ames, 188 U.S. 321 (1903)	17
Citizens United v. FEC, 130 S.ct. 876 (2011)	10,11,19,23
Florida v. U.S. Dept. of HHS, 648 F.3d 1235 (11th Cir. 2011)	17, 22
Gonzalez v. Raich, 545 U.S. 1 (2005)	18
Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964)	25

TABLE OF AUTHORITIES

Cases	Page
Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922)	26
Helvering v. Hallock, 309 U.S. 106 (1940)	10,11,23
Liberty University Inc. v. Geithner, __F.3d__, 2011 WL 3962915 (4th Cir. 2011).	19
Marbury v. Madison, 5 U.S. 137 (1803)	9,14,15,25
Montejo v. Louisiana, 129 S.Ct. 2079 (2009)	11,19,24
Newberry v. United States, 256 U.S. 232 (1921)	13, 14
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	4, 25
Oliver Iron Co. v. Lord, 262 U.S. 172 (1923)	26
Pearson v. Callahan, 129 S.Ct. 808 (2009)	11,19,24

TABLE OF AUTHORITIES

Cases	Page
Runyon v. McCrary 427 U.S. 160 (1976)	11
Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011)	16,19-20
Shreveport Rate Cases, 234 U.S. 342 (1914)	26
Smith v. Allwright, 321 U.S. 649 (1944)	10
Southern R. Co. v. United States, 222 U.S. 20 (1911)	26
Thomas More Law Center v. Obama, 651 F.3d 529, (6th Cir. 2011)	19,18,21
United States v. Darby, 312 U.S. 100 (1941)	4, 25
United States v. E.C. Knight Co., 156 U.S. 1 (1879)	13, 14
United States v. Lopez, 514 U.S. 549 (1995)	12,14-18
United States v. Morrison, 529 U.S. 598 (2000)	8,25-26

TABLE OF AUTHORITIES

Cases	Page
Wickard v. Filburn, 317 U.S. 111 (1942)	Passim
Dictionary	
Black's Law Dictionary (Bryan Garner ed., 7th Ed., West 1999)	13
Other Authority	
The Federalist No. 45, Madison	9
The Nature of the Judicial Process, B. Cardozo (1921)	11
A Compilation of the Messages and Papers of the presidents, 1789-1897, Richardson, (U.S.Gov. Print. Off. 1902)	13
Historical Tables, Budget of the U.S. Government, (Off. of Man. & Budg. 2012)	5-7
Federal Register, Agency List, (National Archives Off. Fed. Register, 2012)	6-7
Federal Register, Pages Published 1836-2012 (National Archives Off. Fed. Register, 2012)	6-7
Voting and Registration, Time Series Tables, Tables A-7 and A-9 (U.S. Census Bureau, 2012)	8

STATEMENT OF INTEREST[1]

Liberty Legal Foundation is a nonpartisan, non-profit organization dedicated to restoring Constitutional government by strategically challenging flawed precedent. Liberty Legal Foundation currently has over 32,000 members from all 50 states.

In response to increasing governmental intrusion into personal health decisions, Liberty Legal Foundation filed a lawsuit in Federal court on behalf of its members, challenging the authority of Congress to regulate personal health decisions. See *Enloe v. Obama*, Docket #5:11-cv-26-C (N.D. Tex.). That action is pending and will likely be directly affected by this Court's decision in the instant action.

Unlike many parties and amici curie to the instant litigation, Liberty Legal Foundation doesn't stand to make billions of dollars from health care related businesses. Liberty Legal Foundation's members are not looking to control millions of Americans, or gain political authority. This brief was prepared and filed in a genuine effort to restore and protect the Constitutional structure of our government.

---

[1] Pursuant to This Court's Rule 37.6 all parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Since 1942 this Court's Commerce Clause precedent has left no meaningful limitations on Congressional authority to regulate non-criminal matters. The minimum coverage provision at issue is simply the latest in a long line of Congressional invasions into the private lives of all Americans. This creeping invasion of Congress into all aspects of society is a predictable and inevitable result of this Court's *Wickard v. Filburn* decision. 317 U.S. 111 (1942).

All parties to the instant litigation appear to begin their analysis by assuming that this Court's current Commerce Clause precedent properly reflects the Constitutional limitations placed upon Congress. This assumption is incorrect. Any attempts to find meaningful limits within current Commerce Clause precedent will result in compounding the problem, because *Wickard* and its progeny amount to a house of cards built upon a shaky foundation.

The faulty *Wickard* precedent has introduced a systemic and potentially fatal disease to our system of government. The brilliant structure of our government, balancing power between the three branches as well as between the states, federal government, and citizens, simply cannot survive when proper limitations on that power are not maintained. Since *Wickard* Congress has been genuinely *unable* to control its own assertion of power.

This conclusion is not intended to be an indictment of Congress, or the individuals that make up that body, or any political party, or the voting citizens of the United States. Without Constitutional limitations Congress has no ability function properly. Seventy years of history have proven this conclusion. After *Wickard* no political party nor any individual member of Congress has had the political ability to prevent unchecked governmental growth.

The problem is a systemic problem that arose when this Court removed all meaningful limits on Congressional authority to regulate. The only cure is for this Court to correct its Commerce Clause precedent. Without such correction Congress will *inevitably* continue its invasion into all aspects of American life. Without correction, whatever freedom Americans still have will be completely lost. It is just a matter of time.

ARGUMENT

I. *Wickard* and Its Effect

In 1942 this Court ruled that Congress had authority under the Commerce Clause to forbid an individual farmer from growing wheat on his own land, for use on his own farm to feed his own family and livestock.[2] *Wickard v. Filburn*, 317 U.S. 111 (1942).

---

[2] By the time the *Wickard* reached the Supreme Court, the facts had been stipulated that none of the product that Mr. Filburn produced allegedly in violation of the Agriculture Adjustment

The "substantial effects test" applied in *Wickard* has its roots in two previous rulings from the New Deal Court. See *United States v. Darby*, 312 U.S. 100 (1941); and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). However, *Wickard* completed the creation of what are now known as the "substantial effects" and "aggregation" doctrines. Under these doctrines, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as direct or indirect." *Wickard*, 317 U.S. at 125.

Seventy years of subsequent history has proven that *Wickard*'s substantial effects and aggregation doctrines leave no meaningful limits on Congressional authority to regulate non-criminal activities.

II. Proper Scope of the Commerce Clause Must Be Reestablished

While every decision of this Court changes the future of the United States, the instant case is

---

Act of 1938 left the farm, much less the state. Therefore, the clean question arose: does the Commerce Clause grant Congress power to regulate personal property that is produced and consumed on private land and that is never sold to anyone.

unique. The instant case will likely determine whether the United States will survive the 21st Century. Without re-establishment of Constitutional limits on Congressional authority, America simply cannot survive in its present form.

This stark conclusion is supported by equally stark facts. In 1940 the federal government spent $72 per year per American. *Historical Tables, Budget of the U.S. Government*, at 21, Table 1.1 (Off. of Man. & Budg. 2012) (total budget divided by total U.S. population for 1940 as per the U.S. Census Bureau). In 2010 the federal government spent $11,194 per American. *Id.* That is a 156 fold increase, or 15,600%.[3] The annual federal budget has increased 364 fold from $10 Billion in 1940 to $3,456 Billion in 2010. *Id.* The federal debt has ballooned from $51 Billion in 1940 to $13,529 Billion in 2010. *Id.* at 23, Table 7.1. Every American child born today owes over $53,000 at birth. *Id.* To put this into perspective the current average household income is $51,914 per year, for the entire household, not per earner. *QuickFacts, People*, (U.S. Census Bureau, 2012). This statistic is confirmed by the related statistic that America's debt is now estimated to be 105.3% of its GDP for 2012. *Historical Tables, Budget of the U.S. Government*, at 21, Table 7.1 (Off. of Man. & Budg. 2012). Such unchecked growth in debt and spending is simply unsustainable.

---

[3]According to the Office of Management and Budget these numbers have been "adjusted to provide comparability over time." *Historical Tables, Budget of the U.S. Government*, at 1 (Off. of Man. & Budg. 2012).

The number of federal regulations, federal agencies, and federal codes have similarly skyrocketed since *Wickard*. In 1940 the federal government had 97 agencies. *Federal Register, Agency List*, (National Archives Off. Fed. Register, 2012). It now has 529 agencies. *Id.* In 1940 there were 5,307 pages of federal regulations. *Federal Register, Pages Published 1836-2012*, (National Archives Off. Fed. Register, 2012). Now there are 82,480 pages of federal regulations. *Id.*

This dramatically increased regulation reflects Congress actively picking winners and losers in our formerly free-market economy. Preferential treatment via the federal tax code, for example, coupled with punitive taxes against competitors has become a primary method for large businesses to squash smaller and more innovative businesses. Manipulation of the tax code and other federal regulations create unfair business advantages for those with influence, decreases innovation, raises costs, increases inflation, and decreases GDP. All of this makes it more difficult to pay America's debt. All of this was made possible by *Wickard*.

In stark contrast, statistics for the same parameters reflecting pre-*Wickard* years reveal slow, steady growth in the federal government. *See generally Historical Tables, Budget of the U.S. Government*, (Off. of Man. & Budg. 2012); *Federal Register, Agency List*, (National Archives Off. Fed. Register, 2012); *Federal Register, Pages Published*

1836-2012, (National Archives Off. Fed. Register, 2012). Before 1942 federal government growth mirrored increases in population coupled with inflation. Before *Wickard* the federal government grew in direct proportion to the country's population and economy. After *Wickard* federal expansion grew like a cancer, reflecting exponential increases decade after decade. Seventy years later we are experiencing the vertical spike present in every exponential growth curve.

Unchecked Congressional power has also led to a complete lack of respect for the Constitution by Congress and the Executive branch. Upon passage of the Patient Protection and Affordable Care Act a reporter asked then-Speaker of the House Nancy Pelosi if the Act was constitutional. Her response was to look surprised at the question, scoff, and ask the reporter "Are you serious?" Sam Baker, *Court Angst for Left Over Health Care*, The Hill, (Jan. 18, 2012). The clear implication was that she did not think the Constitution needed to be considered. This is just one example of rampant disrespect for the Constitution coming from both ends of the political spectrum, reflecting a pervasive and growing attitude in our nation's capitol.

Such disregard for the Constitution is a direct result of *Wickard*. Justice Thomas explained:

> "By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that

> the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce." *United States v. Morrison*, 529 U.S. 598, (2000) (Thomas, Justice concurring).

While members of Congress and the Executive branch have lost respect for the Constitution, members of the public have lost faith in our form of government. Decreased voter turnout reflects this additional destructive effect of *Wickard*. Voter turnout nationwide is approximately 20% lower than it was in 1960 and has trended steadily downward over the past 50 years. *See Voting and Registration, Time Series Tables,* Tables A-7 and A-9 (U.S. Census Bureau, 2012)). Such low turnout persists despite recent increased public concern and interest in national elections. This seeming contradiction is explained by the fact that the public understands that its government is broken. The public has learned through decades of frustration that its input no longer matters. The growth of the federal government has gone unchecked regardless of which political party is in power and regardless of who the public elects to represent them in Congress. Such lack of change in policy regardless of the outcome of elections has not gone unnoticed by the public. Faith in our representative form of government has been lost. Decreasing voter turnout is the undeniable evidence of this fact. This too was caused by *Wickard*.

Our Founding Fathers feared too much power being in the hands of the federal government and were determined to prevent our elected officials from becoming a ruling class. This is why both early and recent Supreme Court precedent confirms that a primary purpose of the Constitution is to permanently limit the scope of Congressional authority:

> "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

> "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond v. United States*, 131 S.Ct. 2355, 2364 (2011); *see also The Federalist* No. 45 (Madison).

If these precedent and the words of the Constitution are to have any meaning, *Wickard* and its progeny must be overturned. The minimum coverage provision at issue here simply reflects the latest step in a long line of federal abuses of authority. The instant case presents this Court with an opportunity to correct a 70 year-old mistake, and save America from the unchecked government growth rooted in *Wickard*.

III. Standard for Overturning Precedent

Stare decisis is not an inexorable command, but is instead a principle of policy. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Its purpose is to serve a Constitutional ideal: consistent rule of law. *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 921 (2011) (Roberts, Chief J., concurring). When it becomes clear that continued adherence to a particular rule does more harm than good to consistent, Constitutional rule of law, this Court has departed from such precedent. *See cases collected in Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 410 (1932); *and Smith v. Allwright*, 321 U.S. 649 at FN 10 (1944).

> "When convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment, and not upon legislative action, this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions."[4] *Smith*, 321 U.S. at 665.

---

[4] While the instant case involves legislative action, the legislation is based upon authority presumably granted to Congress via a decision of this Court construing the Constitutional scope of authority within the Commerce Clause. Therefore, the question presented to this Court is properly founded upon Constitutional construction rather than statutory construction.

When determining whether prior decisions were in error, this Court has considered several factors:

First, the degree to which the precedent under consideration itself departed from this Court's earlier jurisprudence. *Citizens United*, 130 S.Ct. at 921 (Roberts, Chief J., concurring).

Second, whether the precedent under consideration, "after being 'tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.'" *Runyon v. McCrary*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring), *quoting* B. Cardozo, *The Nature of the Judicial Process* 149 (1921).

Third, whether adherence to precedent actually impedes the stable and orderly adjudication of future cases. *Citizens United*, 130 S.Ct. at 921 (Roberts, Chief J., concurring) (*citing Pearson v. Callahan*, 129 S.Ct. 808, 817 (2009); *Montejo v. Louisiana*, 129 S.Ct. 2079, 2088-89 (2009)).

Finally, whether returning to the "intrinsically sounder doctrine established in prior cases may better serve the values of stare decisis." *Id.* (*citing Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231 (1995); *see also Helvering*, 309 U.S. 106, 119).

IV. *Wickard* Drastically Departed from 150 Years of Prior Commerce Clause Precedent

The *Wickard* Court itself acknowledged that its decision represented a departure from precedent: "there is no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof." 317 U.S. at 120.

In 1995 Justice Thomas provided a detailed history of Commerce Clause precedent and compared pre-*Wickard* principals to the current substantial effects test:

> "[O]ur case law has drifted far from the original understanding of the Commerce Clause...I am aware of no cases prior to the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test. My review of the case law indicates that the substantial effects test is but an innovation of the 20th Century." *United States v. Lopez*, 514 U.S. 549, 584 & 596 respectively (1995) (Thomas, J., concurring).

The conclusion that the substantial effects test drastically conflicts with the original understanding of the Commerce Clause is supported by the writings and acts of the "Father of the Constitution," President James Madison. In 1817 President Madison vetoed a public works bill that was intended

to provide "for the construction of roads and canals, and improving the navigation of water courses, in order to facilitate, promote, and give security to internal commerce among the several states." President Madison's letter to Congress explaining his veto stated "The legislative powers vested in Congress are specified and enumerated in the eighth section of the first article of the Constitution, and it does not appear that the power proposed to be exercised by the bill is among the enumerated powers." Richardson, *A compilation of the messages and papers of the presidents, 1789-1897,* (U.S.Gov. Print. Off. 1902). Either the Father of the Constitution misunderstood the document that he helped draft, or the original intent of the Commerce Clause has been completely destroyed.

As late as 1936 it was well established that "commerce" did not include agriculture, manufacturing, or mining. *Carter v. Carter Coal Co.*, 298 U.S. 238, 301 (1936). If federal power extended to these types of production "comparatively little of business operations and affairs would be left for state control." *United States v. E.C. Knight Co.*, 156 U.S. 1, 16 (1879). It was well understood, at least prior to *Wickard*, that commerce is the sale and transport of tangible products that have *already been produced. Id.* at 14-16; *see also Newberry v. United States*, 256 U.S. 232, 257 (1921).

This understanding of the limitations on the Commerce Clause flows from a plain meaning understanding of the term "commerce." Commerce is "the exchange of goods and services, especially on a large scale involving transportation between cities,

states, and nations." *Black's Law Dictionary* 263 (Bryan A. Garner ed., 7th ed., West 1999). A company selling or transporting products across state lines is clearly engaged in commerce "among the several states." In contrast, however, a farmer growing wheat on his farm cannot "grow among the several states." Similarly a factory worker building a car cannot "build among the several states." It is simply contrary to plain meaning of the word "commerce" to decree such activities within interstate commerce. *See Id.*; *Newberry*, 256 U.S. at 257; *E.C. Knight Co.*, 156 U.S. at 16.

Prior to *Wickard* this Court's rule was exactly opposite to *Wickard*'s substantial effects test: "It is settled...that the power to regulate interstate and foreign commerce does not reach whatever is essential thereto. Without agriculture, manufacturing, mining, etc., commerce could not exist, but this fact does not suffice to subject them to the control of Congress." *Newberry*, 265 U.S. at 257.

The fact that prior precedent ran opposite to *Wickard* is not surprising when considering first principles of Constitutional construction: "It cannot be presumed that any clause in the Constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it." *Marbury v. Madison*, 5 U.S. 137, 174 (1805).

Yet *Wickard*'s substantial effects and aggregation doctrines leave much of the Constitution without meaning. If Congress may regulate all matters that substantially affect commerce as

established by these doctrines, then there is no need for article I section 8 to specify that Congress may enact bankruptcy laws, or coin money, or punish counterfeiters. Under current precedent Congress already has all these powers under the Commerce Clause because all these other powers substantially effect interstate commerce in the aggregate. *See Lopez*, 514 U.S. at 588-89 (Thomas, J., concurring).

Similarly, under the substantial effects test Congress wouldn't need separate authority to protect discoveries and writings via patent and copyright law, or to establish post offices, or to regulate land and naval forces, or to punish acts of piracy on the high seas. All of these things are within Congressional authority via the commerce clause, as interpreted by *Wickard*. The Commerce Clause under the substantial effects test leaves the rest of article I "without effect." *Id*. Such a construction violates first principles of Constitutional construction. *Marbury*, 5 U.S. at 174.

Wickard and its progeny fundamentally changed the way our government operates, destroying federalism and leaving Congress with essentially unlimited power. While granting Congress unfettered authority certainly has the advantage of giving it the power to solve national problems, our Founders understood that such unchecked power always leads to despotism.

V. Experience Has Confirmed that the Substantial Effects Test Leaves No Limits on Congressional Authority

Seventy years of subsequent history has proven that *Wickard*'s substantial effects test leaves no meaningful limits on Congressional authority to regulate non-criminal activities. This conclusion has been admitted by the federal government on several occasions:

> "When asked at oral argument if there were any limits to the Commerce Clause, the Government was at a loss for words." *United States v. Lopez*, 514 U.S. 549, 600 (1995) (Thomas J., concurring).

> "The Government actually conceded at oral argument in the Ninth Circuit that Congress could ban possession of French fries that have been offered for sale in interstate commerce." *Alderman v. United States*, 131 S.Ct. 700 (2011) (Thomas, J., dissenting from denial of cert; Scalia, J., joining in dissent.)

> "The Government concedes the novelty of the [individual] mandate and the lack of any doctrinal limiting principles; indeed, at oral argument, the Government could not identify any mandate to purchase a product or service in interstate commerce that would be unconstitutional, at least under the Commerce Clause." *Seven-Sky v. Holder*, 661 F.3d 1, 14-15 (D.C. Cir. 2011).

In the instant case the Eleventh Circuit found the individual mandate to be beyond Congressional authority, even under the substantial effects test. *Florida v. U.S. Dept. of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011). However, its ruling rested on the "activity" "non-activity" dichotomy. While the Court buttressed this conclusion with an extensive discussion of "truly local activity" versus "truly national activity," a cursory reading of this discussion reveals that it does nothing to create any real limitations on Congressional authority. Nor does it really support the Circuit Court's proposed new "activity" "non-activity" standard.

The only real test established by the Eleventh Circuit rests on the "activity" "non-activity" dichotomy. However, this test also leaves no real limits on Congressional authority. Such a test would simply require Congress to change its description of the inactivity it wishes to regulate so that the inactivity reflects an activity. The instant case provides an example: not purchasing health insurance may be inactivity. However, *choosing* to not have insurance is the same behavior, but is now linguistically an activity. It can also be described as actively risking financial obligations.

The activity/non-activity test also fails because the power to regulate includes the power to prescribe and proscribe. *See Champion v. Ames*, 188 U.S. 321, 328 (1903).

The distinction upon which the Eleventh Circuit rests its decision unfortunately serves as further demonstration that the substantial effects test lacks outer limits. Logical attempts to create such limits simply prove that the test defies logic.

Justices O'Connor and Thomas have both, independently confirmed this conclusion:

> "To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic." *Gonzalez v. Raich*, 545 U.S. 1, 50 (2005) (O'Connor J., dissenting).

> "The aggregation principle is clever, but has no stopping point...Under our jurisprudence, if Congress passed an omnibus 'substantially affects interstate commerce' statute, purporting to regulate every aspect of human existence, the Act apparently would be constitutional." *United States v. Lopez*, 514 U.S. 549, 600 (1995) (Thomas J., concurring). "Such a formulation of federal power is no test at all: It is a blank check. At an appropriate juncture, I think we must modify our Commerce Clause jurisprudence." *Id.* at 602.

Seventy years of experience has proven that the substantial effects test leaves no limits on Congressional authority. This extreme result is completely inconsistent with our Federalist system of government and threatens to destroy our nation.

VI. Continued Adherence to the Substantial Effects Test Will Impede Stability of Future Cases

Where adherence to precedent actually impedes the stable and orderly adjudication of future cases, its stare decisis effect is diminished. *Citizens United v. FEC*, 130 S.Ct. 876, 921 (2011) (Roberts, Chief J., concurring) (*citing Pearson v. Callahan*, 129 S.Ct. 808, 817 (2009); *Montejo v. Louisiana*, 129 S.Ct. 2079, 2088-89 (2009)).

> "This can happen... when the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases, when its rationale threatens to upend our settled jurisprudence in related areas of law, and when the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake" *Citizens United* 130 S.Ct. at 921.

Current Commerce Clause precedent as applied to the individual mandate has resulted in numerous courts expressing discomfort with their own rulings. *See Seven-Sky v. Holder*, 661 F.3d 1, 18 (D.C. Cir. 2011); *Thomas More Law Center v. Obama*, 651 F.3d 529, 554-55 (6th Cir. 2011) *Liberty University Inc. v. Geithner*, __F.3d__, 2011 WL 3962915 (4th Cir. 2011). In addition to conflicting rulings between Circuits, almost every Circuit to

review the individual mandate has encountered *internal* disagreement on the issue. *See Id.* All of this disagreement arises from the conflict between foundational principals of federalism and *Wickard*. The substantial effects test has become a hindrance to stare decisis.

Courts reviewing the individual mandate have expressed concern over the apparent lack of limitations on Congressional authority under the substantial effects test:

> "We acknowledge some discomfort with the Government's failure to advance any clear doctrinal principles limiting congressional mandates that any American purchase any product or service in interstate commerce. But to tell the truth, those limits are not apparent to us, either because the power to require the entry into commerce is symmetrical with the power to prohibit or condition commercial behavior, or because we have not yet perceived a qualitative limitation. That difficulty is troubling..." *Seven-Sky*, 661 F.3d at 18.

> "A short history of decisions in this area shows that the Court has given Congress wide berth in regulation of commerce, frequently adopting limits on that authority and just as frequently abandoning them, all while continuing to deny that Congress has unlimited national police powers...[O]ne tilts at hopeless causes in proposing new categorical limits on the commercial

> power...[T]he Court either should stop saying that a meaningful limit on Congress's commercial powers exists or prove that it is so." *Thomas More Law Center*, 651 F.3d at 554-55.

While the Sixth Circuit upheld the individual mandate at issue in the instant case, it appears to be unhappy with its own conclusion. The three-judge panel wrote three separate opinions with one dissenting. All three opinions agreed on one point: *Wickard* leaves no appreciable limitations on Congressional authority. See *Id.* at 554-55 and 573. The only real disagreement between the Sixth Circuit's panel was what to do about this conflict between the clear meaning of the Constitution and *Wickard*. Two judges decided to follow stare decisis with one of those two writing separately to describe reservations about the decision. The third, dissenting judge was so opposed to this clear violation of Constitutional limits on federal authority that he instead read a limitation into *Wickard* that simply doesn't exist. *See Id.* at 573 (Judge Graham, dissenting).

In his dissent Judge Graham summarizes the problem and openly urges this Court to correct its Commerce Clause precedent:

> "In *Lopez* the Supreme Court recognized that the direction of its existing Commerce Clause jurisprudence threatened the principle of a federal government of defined and limited powers,... I believe the Court remains

> committed to the path laid down by Chief Justice Rehnquist, and Justices O'Connor, Scalia, Kennedy, and Thomas to establish a framework of meaningful limitations on congressional power under the Commerce Clause. The current case is an opportunity to prove it so. If the exercise of power is allowed and the mandate upheld, it is difficult to see what the limits on Congress's Commerce Clause authority would be. What aspect of human activity would escape federal power?... Such a power feels very much like the general police power that the Tenth Amendment reserves to the States and the people." *Id.* at 573.

In the instant case the 11th Circuit concluded, "The 'substantial effects' doctrine, along with the related 'aggregation' doctrine, expanded the reach of Congress's commerce power exponentially." *Florida v. U.S. Dept. of Health and Human Services*, 648 F.3d 1235, 1269 (11th Cir. 2011). Circuit Judge Marcus' dissent serves as yet another example of how the substantial effects test has become a "hotly contested" issue.

All of this disagreement among Circuit judges is easily understood if we recognize that current precedent directly contradicts the foundations of our federalist government. This Court continues to insist that Congress does not have unlimited police powers. Yet when current commerce clause precedent is tested in the real world, neither the government nor the Courts can identify any non-criminal activity that Congress cannot reach. This forces Circuit

judges to decide between following precedent that completely destroys federalism, or violating stare decisis. Many have tried valiantly to create exceptions out of this Court's dicta and generalizations, but all such attempts have required weak reasoning or intellectual dishonesty.

All of this controversy points to the same cause: the substantial effects and aggregation doctrines are fundamentally flawed. No correction or buttressing of these doctrines can lead to consistent, enforceable limits on Congressional authority. These doctrines must be abandoned.

This Court should take this opportunity to return to a sounder foundation for its commerce clause jurisprudence, starting with express rejection of *Wickard* and all other cases using substantial effects and aggregation doctrine.

VII. Returning to Intrinsically Sounder Doctrine Will Better Serve Stare Decisis

Where the precedent under consideration has itself departed from this Court's earlier jurisprudence, returning to the "intrinsically sounder doctrine established in prior cases may better serve the values of stare decisis." *Citizens United v. FEC*, 130 S.Ct.876, 921 (2011) (Roberts, Chief J., concurring) (*citing Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231 (1995); *see also Helvering*, 309 U.S. 106, 119). In such cases abrogating the

errant precedent better preserves the law's coherence and curtails the precedent's disruptive effects. *Id.* (*citing Pearson v. Callahan*, 129 S.Ct. 808, 817 (2009); *Montejo v. Louisiana*, 129 S.Ct. 2079, 2088-89 (2009)).

For 150 years Congress regulated interstate commerce within the bounds of the Constitution. This left the individual states free to determine when and to what extent intrastate activities required regulation. More importantly, the restraints placed upon Congress allowed that branch of government to function properly, without exponential growth and without corrupting the free market economy.

While many may argue that modern problems wouldn't allow for a return to functional federalism, such an argument fails to recognize that most of our modern problems are a direct result of our 70-year departure from Constitutional federalism. The only solution is to re-establish the government that has been lost.

So-called "reliance considerations," should not prevent this Court from restoring federalism. As we have shown above, the current lack of restrictions on federal authority has caused systemic problems that will destroy America if the situation is not corrected. Whatever reliance has been placed upon *Wickard*, such reliance will not survive the collapse of our nation and the resulting global economic effects.

More importantly, reliance considerations should never effect this Court's decisions. Citing

reliance to support sustaining the status quo amounts to admitting that precedent did not accurately reflect the Constitution, yet should continue to be followed. Such reasoning requires a conscious disregard for the duty of this Court to uphold the Constitution. No circumstances can justify ignoring our most fundamental rights and principles, even temporarily. This Brief shows that ignoring principles in order to address temporary circumstances always leads to more devastating circumstances. Once a principle is forced to bend to circumstance it ceases to be a principle. "[T]hat those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

Both fidelity to founding principles and practical considerations require a return to pre-*Wickard*, pre-*Darby*, pre-*Laughlin Steel* standards. 317 U.S. 111 312 U.S. 100; 301 U.S. 1, *respectively*.

Such a return to founding principles would not require complex re-drafting of Commerce Clause precedent: The first two categories from *Morrison* should remain unaffected: "'First, Congress may regulate the use of the channels of interstate commerce.' 514 U.S., at 558, 115 S.Ct. 1624 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); *United States v. Darby*, 312 U.S. 100, 114, 61 S.Ct. 451, 85 L.Ed. 609 (1941)). 'Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.' 514

U.S., at 558, 115 S.Ct. 1624 (citing *Shreveport Rate Cases,* 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1914); *Southern R. Co. v. United States,* 222 U.S. 20, 32 S.Ct. 2, 56 L.Ed. 72 (1911); *Perez, supra,* at 150, 91 S.Ct. 1357)." *Morrison*, 529 U.S. 598, 609 (2000).

The third category from *Morrison* should be abandoned and replaced by the standards that were in place before *Wickard, Darby,* and *Laughlin Steel.* 317 U.S. 111 312 U.S. 100; 301 U.S. 1, *respectively*. Specifically, production or manufacturing is not subject to federal regulation under the commerce clause. *Carter v. Carter Coal Co.*, 298 U.S. 238, 301 (1936). Mining and agriculture are not interstate commerce; these are local businesses and are subject to local regulation. *Id.* (*citing Oliver Iron Co. v. Lord*, 262 U.S. 172, 178 (1923)). This is true regardless of whether a commodity manufactured or produced within a state is intended for interstate commerce. *Id.* at 302 (*citing Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 259 (1922)). A commodity that is meant to be sold in interstate commerce is not considered to be part of interstate commerce before the commencement of its movement from the state. *Id.* at 309. Federal regulatory power ceases when interstate commerce ends; and, the power does not attach until interstate commercial intercourse begins. *Id.* Finally, if the production of any commodity by a single person does not have a direct effect on interstate commerce, then the production of that commodity by many people also cannot have a direct effect on interstate commerce. *Id.* at 308.

Applying these venerable standards to the individual mandate reveals how far from

foundational principles *Wickard* has taken us. An individual purchasing health care insurance doesn't necessarily involve channels of interstate commerce or instrumentalities of interstate commerce and is not a person or thing moving in interstate commerce. Even if health insurance is "a commodity that is meant to be sold in interstate commerce," at the point where the individual mandate touches the individual, the insurance has not yet commenced its movement from the state. Therefore, it is not part of interstate commerce. Purchase of health insurance by a single individual does not have a direct effect upon interstate commerce. Therefore, purchase of health insurance by many people cannot be considered to directly "effect" interstate commerce.

The substantial effects and aggregation doctrines represented a radical power shift in our federalist system. The *Wickard* Court eliminated all meaningful limitations on Congressional authority. Returning to pre-*Wickard* principles would not be a radical move by this Court, but would instead reflect a necessary correction of the *Wickard* Court's radical departure from our Constitutional system of government.

Returning to the intrinsically sounder doctrines discussed here will return balance to our federalist system of government, will return federal spending to sustainable levels, and will revitalize our free market economy. This Court has the ability, authority, and duty to restore our federalist form of government.

CONCLUSION

For the reasons discussed above this Court should correct its commerce clause precedent to restore Constitutional limits on Congressional authority. Restoration of intrinsically sounder doctrine would result in the common-sense conclusion that the individual mandate is far beyond Congressional authority.

Respectfully submitted,

Van R. Irion
LIBERTY LEGAL FOUNDATION
9040 Executive Park Drive, Suite 200
Knoxville, TN 37923
(423) 208-9953

February 6, 2012

AMICUS CURIAE BRIEF

No. 11-398

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et. al.
Petitioners.

v.

STATE OF FLORIDA, et. al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Brief Of Amici Liberty University, Inc., Michele Waddell And Joanne Merrill In Support Of The Petitioners And Respondents On The Anti-Injunction Act

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Liberty Counsel
1055 Maitland Center Commons, 2d Floor
Maitland, FL 32751
(800) 671-1776
court@lc.org

Stephen M. Crampton
Mary E. McAlister
Liberty Counsel
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 3

I. THIS COURT'S PRECEDENTS CALLING FOR A MORE PRECISE OF "JURISDICTION" COMPEL THE CONCLUSION THAT THE AIA IS NOT A JURISDICTIONAL BAR..... 3

II. THIS COURT'S PRECEDENTS NARROWING THE CONCEPT OF "JURISDICTION" CAST DOUBT UPON *WILLIAMS PACKING*'S STATEMENT THAT THE AIA "WITDRAWS JURISDICTION FROM THE COURTS." 13

III. CASES ADDRESSING THE AIA SINCE *WILLIAMS PACKING* AND A COMPARATIVE ANALYSIS OF THE LANGUAGE OF THE AIA VIS-À-VIS THE PROHIBITORY LANGUAGE OF THE TAX INJUNCTION ACT FURTHER DEMONSTRATE THAT THE AIA IS NOT A JURISDICTIONAL BAR. 17

A. This Court's Continuing Acknowledgment Of The Exceptions Created By *Williams Packing* Illustrates That The AIA Is Not Jurisdictional. 188

B. This Court's Disallowance Of Exceptions To True Jurisdictional Statutes Further Demonstrates That The AIA Is Not Jurisdictional. 26

IV. OTHER THAN THE FOURTH CIRCUIT, EVERY FEDERAL COURT TO HAVE ADDRESSED THE ANTI-INJUNCTION ACT HAS RULED CONSISTENTLY WITH PRECEDENT THAT IT DOES NOT BAR CHALLENGES TO THE ACT. 311

CONCLUSION 40

TABLE OF AUTHORITIES

Cases

Alexander v. "Americans United" Inc.,
416 U.S. 752 (1974) 18

Arbaugh v. Y&H Corp.,
546 U.S. 500 (2006) 7, 9, 13

Arkansas v. Farm Credit Serv's of Central Arkansas,
520 U.S. 821 (1997) 27, 28

Bob Jones University v. Simon,
416 U.S. 725 (1974) 15, 18

Bowles v. Russell,
551 US 205 (2007) 16, 19, 27

Commissioner v. Shapiro,
424 US 614 (1976) 19, 20

Da Silva v. Kinsho International Corporation,
229 F.3d 358 (2d Cir. 2000) 8

Eberhart v. United States,
546 U.S. 12 (2005) 7

Enoch v. Williams Packing & Navigation Co.,
370 U.S. 1 (1962) 12, 13, 14, 16, 21, 22

Ex parte McCardle,
7 Wall. 506 (1868) 5

Florida ex. Attorney General v. Dep't of Health and Human Servs.,
648 F.3d 1235 (11th Cir. 2011) 35, 36

Florida ex. rel McCollum v. Dep't of Health and Human Servs.,
716 F. Supp. 2d 1120 (ND Fla. 2010) 35

Goudy-Bachman v. U.S. Dep't of Health & Human Servs.,
764 F.Supp.2d 684 (M.D.Pa. 2011) 31-33

Great Southern Fire Proof Hotel Co. v. Jones,
177 U.S. 449, 453 (1900)..... 5

Henderson v. Shinseki,
131 S.Ct. 1197 (2011)..... 12, 13, 40

Hibbs v. Winn,
542 U.S. 88 (2004)..... 27-30

In re Leckie Smokeless Coal,
99 F.3d 573 (4th Cir. 1996) 22

Kontrick v. Ryan,
540 US 443 (2004)..... 6

Laing v. United States,
423 U.S. 161 (1976)..... 21

Liberty Univ., Inc. v. Geithner,
753 F. Supp. 2d 611 (W.D. Va. 2010)24, 31, 35

Liberty University, Inc. et al v. Timothy Geithner, et. al.,
2011 WL 3962915 (4th Cir. 2011)..... 1, 36-39

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,
429 U.S. 274 (1977)..... 5

Reed-Elsevier v. Muchnick,
130 S.Ct. 1237 (2010)..... 4, 10, 11

Scarborough v. Principi,
541 U.S. 401 (2004)..... 6, 7

Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011)..... 31, 34, 35

South Carolina v. Regan,
465 US 367 (1984)..... 22, 23, 36

Steel Co. v. Citizens for Better Environment,
523 U.S. 83 (1998)..... 4-6, 9

Stern v. Marshall,
131 S. Ct. 2594 (2011)..... 12, 40

Thomas More Law Ctr. v. Obama,
651 F.3d 529(6th Cir. 2011)..... 34

Thomas More Law Ctr. v. Obama,
720 F.Supp.2d 882 (E.D. Mich. 2010) 24,31, 32

U.S. Citizens Assoc. v. Sebelius,
754 F.Supp.2d 904 (N.D.Ohio 2010) 31, 36

Union Pacific Railroad Co., v. Brotherhood of Locomotive Engineers and Trainmen,
130 S.Ct. 584 (2009) 9, 10

United States v. American Friends Service Committee, 419 U.S. 7 (1974) 18

United States v. Clintwood Elkhorn Min. Co.,
553 U.S. 1 (2008) 21

Statutes

26 U.S.C. §7421(a) 1, 2, 12, 27

28 U.S.C. § 1341 28

Other Authorities

Obama: Requiring Health Insurance is Not a Tax Increase, CNN, Sept. 29, 2009, http://www.cnn.com/2009/POLITICS/09/20/obama.health.care/index.html 33

http://cciio.cms.gov/resources/files/approved_applications_for_waiver.html (last visited January 30, 2012). 25-26

http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited January 30, 2012). 25-26

Treatises

2 J. Moore et al., MOORE'S FEDERAL PRACTICE § 12.30[1] (3d ed.2005) 8

INTEREST OF AMICI CURIAE[1]

Amici Liberty University, Inc., Michele G. Waddell and Joanne V. Merrill are plaintiffs in *Liberty University, Inc. et al v. Timothy Geithner, et. al.*, 2011 WL 3962915 (4th Cir. 2011), *petition for cert. filed,* (No. 11-438). Amici filed the first private party lawsuit challenging provisions of the Patient Protection and Affordable Care Act (the "Act") on the day it was enacted. Amici also brought the only lawsuit that challenged both the individual and employer insurance mandates on the grounds that the provisions violate the First Amendment as well as being *ultra vires* acts exceeding Congress' enumerated powers under Article I §8 of the United States Constitution.

Amici's lawsuit is the only challenge to the Act that was dismissed based upon the

---

[1] Counsel for a party did not author this Brief in whole or in part, an no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this Brief. The parties have filed consents to the filing of Amicus Briefs on behalf of either party or no party.

Anti-Injunction Act, 26 U.S.C. §7421(a) ("AIA"). In fact, the Fourth Circuit's determination that the AIA barred Amici's claims represents the only time that a federal court reviewing the AIA in the context of challenges to the Act found that the AIA applied. The Fourth Circuit found the AIA applicable even though both parties agreed that it was not. In fact, the government respondents who had asserted the AIA in the district court specifically told the Fourth Circuit that they had determined that the AIA did not apply to Amici's claims.

As the only parties to have had their claims dismissed based upon the AIA, Amici have a unique perspective on and direct stake in the outcome of this Court's determination of the question of whether the AIA is a jurisdictional bar to challenges to the Act. Consequently, Amici can provide this Court with a more complete picture of the effects of its decision regarding the AIA.

Amici have extensively researched the AIA and developed information that will greatly assist the Court in addressing the issue that is pivotal to Amici's challenge. Amici respectfully submit this Brief for the Court's consideration.

SUMMARY OF ARGUMENT

The extant controversy regarding whether the AIA should be applied to challenges to the Act is reflective of an ongoing problem with profligate use of the term "jurisdiction" which has transformed a basic procedural concept into a word with so many meanings and applications as to be almost meaningless as a legal construct.

This Court has worked to rein in the over-use of the term in recent years, and should do so again in this case by finding, consistent with its precedents and every other federal court save the Fourth Circuit, that the AIA is not a jurisdictional bar to challenges to the insurance mandates and other provisions of the Act.

ARGUMENT

I. THIS COURT'S PRECEDENTS CALLING FOR A MORE PRECISE UNDERSTANDING OF THE CONCEPT OF "JURISDICTION" COMPEL THE CONCLUSION THAT THE AIA IS NOT A JURISDICTIONAL BAR.

The unusual alignment of the parties on the question of whether the AIA applies–all parties

agree that it does not so that an Amicus must argue that it does—elucidates how what should be a clear distinction between "jurisdictional conditions and claim-processing rules can be confusing in practice." *Reed-Elsevier v. Muchnick*, 130 S.Ct. 1237, 1243 (2010). That confusion is the result of imprecise use of the term "jurisdiction" so that it has become a word of "many, too many, meanings." *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 90 (1998). The present controversy illustrates how casual use of what should be a precise legal concept can create conflict and confusion. This Court has recognized the scope of the problem and consistently called for greater precision in use of the term "jurisdiction." The present analysis of the AIA should be examined in light of those precedents, which compel the conclusion that the AIA is not jurisdictional and does not bar challenges to the Act.

In *Steel Co.*, this Court addressed confusion that had arisen when a lower court referred to the absence of a viable cause of action as being a "jurisdictional" problem. 523 U.S. at 88-89. This Court explained that the absence of a valid cause of action does not implicate subject-matter jurisdiction, which is the courts' statutory or constitutional power to adjudicate the case. *Id.* at 89. The Court rejected the argument that reference to a court's "jurisdiction" in a statute delineating remedies

for violation of an environmental regulation somehow transformed the elements of the cause of action into a jurisdictional prerequisite. *Id.* at 90. Casually referring to such statutes as "jurisdictional" are no more than "drive by jurisdictional rulings" that have no precedential value. *Id.* at 91. "Jurisdiction," properly defined is the "power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.* at 94 (citing *Ex parte McCardle*, 7 Wall. 506, 514 (1868).

Far from being a question of whether a party before the court has stated a viable claim, jurisdiction is the fundamental issue of whether Article III permits a party to petition the court at all. *See id.* at 101. For example, if a party's claim does not meet the minimum threshold for damages, then a district court has no power to consider the claim. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 276 (1977). Similarly, if the parties do not have diversity of citizenship, then the court has no authority to hear the case. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900). Critical to each of these factors is that they cannot be waived and are not subject to any exceptions. *Id.* If a case lacks any of these elements, the court has no authority.

By contrast, rules such as filing deadlines are "claim-processing rules that do not delineate what cases...courts are competent to adjudicate." *Kontrick v. Ryan*, 540 US 443, 454 (2004). "Classifying time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction' can be confounding." *Id.* at 455. Citing the statement from *Steel Co.* that jurisdiction "is a word of many, too many, meanings," this Court clarified that "jurisdiction" should be reserved solely for "prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Id.* (citing *Steel Co.* 523 U.S. at 90).

Citing *Kontrick,* this Court further clarified that the question of whether a party was time-barred from seeking attorneys' fees "does not concern the federal courts' "subject-matter jurisdiction." *Scarborough v. Principi,* 541 U.S. 401, 413 (2004). "Rather, it concerns a mode of relief (costs including legal fees) ancillary to the judgment of a court that has plenary jurisdiction of [the civil] action in which the fee application is made." *Id.* More particularly, the dispute presented a question of time, *i.e.,* when a fee applicant had to make his claim, not whether he could make the claim. *Id.* The provision at issue did not describe what classes of cases the court was competent to

adjudicate, but, rather, post-judgment proceedings for cases already under consideration. *Id.* at 414. Consequently, the provision's deadlines and other specifications could not be classified as "jurisdictional." *Id.*

This Court further emphasized the need for precision in use of the term "jurisdictional" in the context of the confusion caused by over-use of the term "mandatory and jurisdictional" when referring to "emphatic" time prescriptions in rules of court. *Eberhart v. United States*, 546 U.S. 12, 18 (2005). Courts have been less that meticulous in using the term "jurisdictional," and the resulting imprecision has often obscured the true meaning of such time limits, *i.e.,* that parties must be meticulous about complying and the government must be meticulous about objecting to untimely filings. *Id.*

Citing *Kontrick, Scarborough* and *Eberhart*, this Court rejected a lower court's categorization of the 15-employee minimum for claims under Title VII as "jurisdictional." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 504 (2006). The numerical threshold does not circumscribe federal-court subject-matter jurisdiction, but relates to the substantive adequacy of a Title VII claim. *Id.* It cannot be raised defensively for the first time at the end of trial. *Id.*

In the subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy, this Court and others have been less than meticulous. "Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief-a merits-related determination." 2 J. Moore et al., MOORE'S FEDERAL PRACTICE § 12.30[1], p. 12-36.1 (3d ed.2005) (hereinafter Moore). Judicial opinions, the Second Circuit incisively observed, "often obscure the issue by stating that the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim." *Da Silva [v. Kinsho International Corporation*], 229 F.3d [358], at 361 [(2d Cir. 2000)]. We have described such unrefined dispositions as "drive-by jurisdictional rulings" that should be accorded "no precedential effect" on the question

> whether the federal court had authority to adjudicate the claim in suit. *Steel Co.*, 523 U.S., at 91.

Id. at 511. The Court further explained that since subject matter jurisdiction involves a court's power to hear a case it can never be forfeited or waived. *Id.* at 514. Consequently, requirements such as the monetary minimum for damages in a diversity case cannot be waived since they truly are jurisdictional, but provisions such as the 15-employee threshold can be waived since they are not. *Id.* at 515.

This Court again cautioned against the profligate use of "jurisdiction" in *Union Pacific Railroad Co., v. Brotherhood of Locomotive Engineers and Trainmen*, 130 S.Ct. 584, 596 (2009). In *Union Pacific*, the Court found that an agency had improperly labeled a statutory requirement for pre-litigation settlement conferences as "jurisdictional." *Id.* at 599. "In this case . . . our grant of certiorari enables us to address a matter of some importance: We can reduce confusion, clouding court as well as Board decisions, over matters properly typed 'jurisdictional.'" *Id.* at 596. "Not all mandatory 'prescriptions, however emphatic, are . . . property typed jurisdictional.'" *Id.* (citation omitted). Subject matter jurisdiction, properly understood, refers to a court's power to hear a case, something which can never be forfeited or

waived. *Id.* By contrast, a "claim-processing rule . . . even if unalterable on a party's application, does not reduce the adjudicatory domain of a tribunal and is ordinarily forfeited if the party asserting the rule waits too long to raise the point." *Id.*

In *Reed Elsevier*, this Court again referred to the difference between a claims processing rule, such as the requirement that copyright holders register their works before suing for infringement, and a jurisdictional requirement. 130 S.Ct. at 1243-1244. "Jurisdiction" refers to "a court's adjudicatory authority," so the term "jurisdictional" properly applies only to "prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)" implicating that authority. *Id.* at 1243. While courts sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, "[o]ur recent cases evince a marked desire to curtail such 'drive-by jurisdictional rulings, which too easily can miss the 'critical difference[s]' between true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Id.* (citations omitted).

The *Reed Elsevier* Court looked at three factors to determine whether the copyright registration requirement was jurisdictional or

non-jurisdictional: (1) Whether the statute clearly said that it was jurisdictional; (2) Whether the statute is located separately from the provisions that grant the federal courts jurisdiction over the respective claims and (3) Whether there are exceptions to the prohibition on civil actions. *Id.* at 1245-1246. Applying those factors to the copyright registration statute, this Court found that the provision was not jurisdictional. *Id.* at 1247. The pertinent text of the statute under consideration in *Reed Elsevier* is particularly relevant to the Court's analysis of the AIA in this case:

> Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), *no civil action for infringement of the copyright in any United States work shall be instituted* until preregistration or registration of the copyright claim has been made in accordance with this title.

17 U.S.C. §411(a)(emphasis added). Similarly, the AIA provides:

> Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, *no*

> *suit for the purpose of restraining the assessment or collection of any tax shall be maintained* in any court by any person, whether or not such person is the person against whom such tax was assessed.

26 U.S.C. § 7421(a)(emphasis added). Applying the *Reed-Elsevier* factors to the AIA yields the same result as did application of the factors to the copyright statute, *i.e.*, the AIA is not jurisdictional. Section 7421 does not clearly state that it is jurisdictional. Section 7421 is located in Title 26 of the United States Code, not in Title 28, which describes federal court jurisdiction. Finally, there are twelve listed exceptions as well as least two judicially created exceptions to the prohibition against injunctive relief. *See Enoch v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), discussed *infra*. Under *Reed Elsevier*, the AIA is non-jurisdictional and does not bar the extant challenges to provisions in the Act.

"Because '[b]randing a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system,' we are not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such." *Stern v. Marshall*, 131 S. Ct. 2594, 2606-07 (2011) (citing *Henderson v. Shinseki*, 131

S.Ct. 1197, 1201–03 (2011). The AIA is not framed as such and should not be so branded.

II. THIS COURT'S PRECEDENTS NARROWING THE CONCEPT OF "JURISDICTION" CAST DOUBT UPON *WILLIAMS PACKING*'S STATEMENT THAT THE AIA "WITDRAWS JURISDICTION FROM THE COURTS."

In light of these most recent pronouncements narrowing and clarifying the concept of jurisdiction, the Fourth Circuit's and Court-appointed Amicus' reliance upon *Williams Packing*'s 50-year-old statement that the AIA "withdraws jurisdiction" from the courts is, at best, questionable. *Williams Packing*, 370 U.S. at 5. This is particularly true in light of this Court's oft-repeated admonition that "drive-by jurisdictional rulings," *i.e.*, allusions to "jurisdiction" that are not pivotal to the outcome of the case and not accompanied by analysis, have "no precedential effect." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006). The *Williams Packing* statement upon which the Court-appointed Amicus and Fourth Circuit built their defense of the AIA is just such a "drive-by" ruling. Consequently, Amicus' and the Fourth Circuit's dogged reliance notwithstanding, the statement that the AIA "withdraws jurisdiction" from the courts should

be accorded "no precedential effect" on the question of whether courts have the authority to adjudicate the challenges to the Act. *Id.*

In *Williams Packing*, the pivotal question was whether the petitioner could pre-emptively escape liability for past due employment taxes by claiming that paying the taxes would bankrupt the business. *Williams Packing*, 370 U.S. at 5. In finding that the employer could not avoid tax liability merely by claiming that the payments would hurt its business, this Court stated that the object of the AIA was to "withdraw jurisdiction" from the courts to "entertain suits seeking injunctions prohibiting the collection of federal taxes." *Id.* The Court did not say that the lower courts were without power to hear the case, but determined that the employer had not established sufficient evidence to enjoin collection of taxes. *Id.* The Court's objective was not to establish that the courts had no power to hear the case, but to determine whether the party could obtain an injunction based merely upon an allegation that payment of taxes would cause irreparable injury to its business. *Id.* at 6. This Court answered that question in the negative, but said that a party can obtain an injunction if: 1. It is clear that under no circumstances could the Government ultimately prevail, and 2. Equity jurisdiction otherwise exists. *Id.* at 7. "Thus, in general, the Act prohibits suits for

injunctions barring the collection of federal taxes when the collecting officers have made the assessment and claim that it is valid." *Id.* at 8.

Placed in its proper context, therefore, *Williams Packing* does not restrict courts' power to hear cases, but clarifies the scope of exceptions to the AIA's general prohibition against pre-enforcement injunctions. *Bob Jones University v. Simon*, 416 U.S. 725, 737 (1974). In *Bob Jones*, this Court said that *Williams Packing* gave the AIA *almost* literal effect, not literal effect, and permitted injunctive relief when a party proved both irreparable injury and certainty of success on the merits. *Id.* Notably, in saying that the party could prove irreparable injury and certainty of success and proceed with a claim, the Court implicitly affirmed that the AIA does not divest the courts of authority to hear the claim, since a truly jurisdictional statute cannot contain exceptions. *Id.* Instead, under *Williams Packing* and *Bob Jones University*, the AIA acts like a claims processing rule which limits the court's ability to proceed with a claim if certain prerequisites are absent.

The Court's recognition of exceptions to the prohibition described in the AIA in *Williams Packing*, as well as the twelve enumerated statutory exceptions compels the

conclusion that the AIA is not "jurisdictional" in the proper sense of the term. *Bowles v. Russell*, 551 US 205, 212-213 (2007). "[T]his Court has no authority to create equitable exceptions to jurisdictional requirements." *Id.* at 214. Consequently, the creation and continuing recognition of exceptions to the AIA as described in *Williams Packing* means that the AIA is not jurisdictional.

Williams Packing's discussion of the purpose of the AIA further demonstrates the error in relying upon it to support the argument that the AIA should bar Respondents and Amici's challenges to the Act.

> [T]he manifest purpose of s 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention and to require that the legal right to the disputed sums be determined in a suit for a refund. In this manner the United States is assured of prompt collection of its lawful revenue.

Williams Packing, 370 U.S. at 7. In other words, the AIA is intended to protect the United States from judicially imposed delays in tax collection efforts. *Id.* However, if, as is true in this case, the United States is not invoking the AIA, but is saying that it does not apply,

then proceeding with the extant challenges to the Act will not thwart Congress' purpose in enacting the AIA. Since the United States is joining the parties in asking that the challenges proceed, the manifest purpose of the AIA would not be frustrated in this case, even if it could be found to be applicable (which it is not).

III. CASES ADDRESSING THE AIA SINCE *WILLIAMS PACKING* AND A COMPARATIVE ANALYSIS OF THE LANGUAGE OF THE AIA VIS-À-VIS THE PROHIBITORY LANGUAGE OF THE TAX INJUNCTION ACT FURTHER DEMONSTRATE THAT THE AIA IS NOT A JURISDICTIONAL BAR.

When addressing the applicability of the AIA to particular scenarios, this Court has consistently referred to the exceptions established in *Williams Packing* as just that, *i.e.*, exceptions to the prohibition on pre-enforcement challenges, further establishing that the AIA is not jurisdictional. In addition, a review of the language of and cases examining the Tax Injunction Act reveals substantial differences that belie claims that the AIA bars challenges to the Act.

A. This Court's Continuing Acknowledgment Of The Exceptions Created By *Williams Packing* Illustrates That The AIA Is Not Jurisdictional.

In two cases decided the same day, this Court re-affirmed that *Williams Packing* established a two-part exception to the AIA's prohibition against pre-enforcement injunctions. *Bob Jones University v. Simon*, 416 U.S. 725, 737 (1974), *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 761-62 (1974). The Court reiterated that a party seeking to avoid the AIA pre-enforcement bar must provide both irreparable injury and likelihood of success on the merits. *Bob Jones*, 416 U.S. at 745-746, *"Americans United,"* 416 U.S. at 763. Allowing a taxpayer to enjoin tax collection after showing only irreparable injury would render the AIA "quite meaningless." *Bob Jones*, 416 U.S. at 745-746. In addition, the question of whether there is an adequate legal remedy is an objective, not subjective, determination. *Id.* The fact that a refund suit might affect a taxpayer's financial solvency or otherwise be less than ideal is not sufficient to show "inadequacy" and therefore cannot establish even one part of the two-part *Williams Packing* exception. *"Americans United,"* 416 U.S. at 763. Most importantly, the

fact that the Court affirmed that *Williams Packing* set forth a judicially created exception to the AIA demonstrates that it cannot be jurisdictional. *See Bowles v. Russell*, 551 US 205, 214 (2007) ("this Court has no authority to create equitable exceptions to jurisdictional requirements").

That point was further established in *United States v. American Friends Service Committee*, 419 U.S. 7 (1974), where this Court found that the petitioner did not fall with the "*Williams Packing* exception." *Id.* "Here as in *'Americans United', supra*, the employees will have a 'full opportunity to litigate' their tax liability in a refund suit. *Id.* "Even though the remitting of the employees to a refund action may frustrate their chosen method of bearing witness to their religious convictions, a chosen method which they insist is constitutionally protected, the bar of the Anti-Injunction Act is not removed." *Id.* at 10-11. Implicit in that conclusion is the determination that the bar of the AIA can be removed, which means it cannot be jurisdictional.

In *Commissioner v. Shapiro*, 424 US 614, 627-628 (1976), this Court again held that the AIA did not require dismissal of a taxpayers' challenge. The Court characterized *Williams Packing* as permitting injunctive relief if the taxpayer shows that the government could not

ultimately prevail and that he would suffer irreparable injury. *Id.* at 627. In order for the taxpayer to make that showing, it is necessary for the government to disclose the information upon which it bases its assessment. *Id.* That does not mean, as the government claimed, that the burden of proof shifts to the government to prove a valid assessment. *Id.* Instead, it means only that the taxpayer needs access to the information in order to provide it to the court. *Id.* The taxpayer must still plead and prove facts establishing that his remedy in the Tax Court or in a refund suit is inadequate to repair any injury that might be caused by an erroneous assessment or collection of an asserted tax liability. *Id.* at 628. "In any event we are satisfied that under *the exception to the Anti-Injunction Act* described in the *Williams Packing* case this case may be resolved by reference to that Act alone." *Id.* (emphasis added). The government had done little more than assert that taxes were owed based upon a bank deposit and unsubstantiated claim that he had received income from selling drugs. *Id.* That did not provide the information necessary to determine whether the government had any chance of prevailing on the merits, *Id.* Consequently, the AIA did require that the suit be dismissed. *Id.* at 632.

This Court again confirmed that the AIA is subject to several exceptions, which means it

cannot be jurisdictional, in *Laing v. United States*, 423 U.S. 161, 185 n27 (1976). In *Laing*, the Court did not explicitly discuss the *Williams Packing* exception, but focused on one of the statutory exceptions under the Internal Revenue Code. *Id.* The AIA "does not forbid suits to enjoin the assessment of a deficiency, or a levy or proceeding in court for its collection, if the taxpayer has not been mailed a notice of deficiency and afforded an opportunity to secure a final Tax Court determination." *Id.* When the IRS fails to follow enumerated procedures for establishing a tax deficiency, then the AIA does not apply and a suit to enjoin the collection of the jeopardy deficiency may be brought. *Id.*

In rejecting taxpayers' attempt to use *Williams Packing* to shore up their challenge to refund proceedings, this Court again confirmed that the AIA is not a jurisdictional bar. *United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 12 (2008). "Despite that Act's [the AIA] broad and mandatory language, we explained that 'if it is clear that under no circumstances could the Government ultimately prevail,...the attempted collection may be enjoined if equity jurisdiction otherwise exists. In such a situation the exaction is merely in 'the guise of a tax.'" *Id.* (citing *Williams Packing*, 370 U.S., at 7). Consequently, the AIA cannot be said to deprive the courts of jurisdiction, but merely to

limit judicial review to those situations where a taxpayer has demonstrated that the government cannot prevail and the taxpayer has no legally cognizable remedy to redress the injury that will occur if a tax is assessed. *Williams Packing,* 370 U.S. at 7.

The Fourth Circuit found that the AIA did not bar debtors' actions challenging the imposition of successor tax liability on companies purchasing their assets. *In re Leckie Smokeless Coal,* 99 F.3d 573, 584 (4th Cir. 1996). Since the debtors did not have any "alternative legal way" to challenge the imposition of tax liability on the purchasers, the AIA did not bar the district courts from reaching the merits of the cases and ordering the appropriate relief. *Id.*

One of the clearest statements of the non-jurisdictional nature of the AIA appears in *South Carolina v. Regan,* 465 US 367, 378-380 (1984), which the Fourth Circuit relied upon in *Leckie Smokeless Coal.* "In sum, the Act's purpose and the circumstances of its enactment indicate that Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy." *Id.* at 378. In that case, if the state issued bearer bonds without resolving the question of the constitutionality of a tax on interest earned on bonds, then the bondholders,

not the state, would be liable for taxes on the interest earned. *Id.* at 379. "Under these circumstances, the State will be unable to utilize any statutory procedure to contest the constitutionality of § 310(b)(1). Accordingly, the Act cannot bar this action." *Id.* at 380.

Amici and the Respondents here face the same remedies problem under the Act. Many of the Act's provisions related to the insurance mandates have already gone into effect and are already affecting citizens' constitutional rights. Even the provisions that will not go into effect until 2014 require significant financial planning and restructuring which will not be recoverable in a later action for a refund of any penalties paid, as Judge Moon noted in his district court decision in *Liberty University v. Geithner:*

> Parts of the Act have already taken effect, and the employer and individual coverage requirements are to take effect in 2014. Plaintiffs' allegations plausibly state that, were the Act in force today, Plaintiffs would be obligated by the health insurance coverage requirements to purchase or provide coverage. Although Defendants are correct that there is some uncertainty whether, in 2014,

> Plaintiffs will continue to fall under the auspices of the Act, Plaintiffs' allegations, which I take as true, show that they have good reason to believe they will. Because the future expenditure required by the Act entails significant financial planning in advance of the actual purchase of insurance in 2014, Plaintiffs allege that they must incur the preparation costs in the near term, without knowledge of what their status under the Act will be in 2014.

Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611, 624 (W.D. Va. 2010) *vacated*, 2011 WL 3962915 (4th Cir. 2011), *petition for cert. filed*, (U.S. Oct. 7, 2011) (No. 11-438) (citing *Thomas More Law Ctr. v. Obama*, 720 F.Supp.2d 882, 889 (E.D. Mich. 2010)). Since the Act was signed into law on March 23, 2010, many provisions affecting employers such as Liberty University have already become effective, including provisions regarding annual coverage limits for health plans. Those limits posed problems for many employers who offered employees limited coverage, low cost plans, leading to hundreds of applications for waivers

of the requirements.[2] As of January 6, 2012, the Department of Health and Human Services ("HHS") had approved waivers for 1,231 employers, covering more than 2 million employees.[3] A refund action in 2015 would not remedy the injuries suffered by employers and employees who would have had to comply with the new limits or discontinue coverage between 2010 and 2014. With no adequate remedy, *Regan* instructs that challenges to the Act would not be barred by the AIA.

Similarly, a refund action will do nothing to redress the injuries caused by other regulations taking effect before 2014. For example, on January 20, 2012, HHS announced final regulations regarding the provision of contraceptives under mandated health insurance plans.[4] Effective August 1, 2012, most employers will be required to offer their employees health insurance plans that cover the costs of contraceptives with no copayments

---

[2] http://cciio.cms.gov/resources/files/approved_applications_for_waiver.html (last visited January 30, 2012).

[3] *Id.*

[4] http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited January 30, 2012).

or deductibles.[5] Unless they meet a very narrow exemption, nonprofit employers like Liberty University which, based on religious beliefs, do not currently provide contraceptive coverage in their insurance plan, will be required to provide that coverage by August 1, 2013 in order for their health insurance plans to comply with the new law.[6] For those employers, waiting until the insurance mandate goes into effect, failing to comply, being assessed a penalty and then suing for a refund will do nothing to redress the injury they will suffer in having to choose between violating their religious beliefs or paying prohibitive penalties.

Consequently, under *Regan* and other precedents, it is clear that the AIA is not a jurisdictional bar.

B. This Court's Disallowance Of Exceptions To True Jurisdictional Statutes Further Demonstrates That The AIA Is Not Jurisdictional.

Cases such as *Bowles*, discussing a deadline for filing an appeal, and cases addressing the Tax Injunction Act, 28 U.S.C.

---

[5] *Id.*

[6] *Id.*

§1341, *i.e.*, genuine jurisdictional statutes, further illustrate why the AIA is not jurisdictional. *Bowles*, 551 US at 214; *Arkansas v. Farm Credit Serv's of Central Arkansas*, 520 U.S. 821, 823-824 (1997); *Hibbs v. Winn*, 542 U.S. 88, 96 (2004).

In *Bowles*, this Court differentiated between its precedents clarifying the distinction between claims-processing rules and jurisdictional rules and "our longstanding treatment of statutory time limits for taking an appeal as jurisdictional." 551 U.S. at 210. "Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them," and particularly that a court cannot hear a case after a certain period has elapsed following final judgment. *Id.* at 212-213. "The timely filing of a notice of appeal in a civil case is a jurisdictional requirement," and since the Court has no authority to create equitable exceptions to jurisdictional requirements, it cannot use doctrines such as "unique circumstances" to excuse a party's failure to comply with the statute. *Id.* at 214. Notably, unlike the AIA, which is contained in 26 U.S.C., the time limit at issue in *Bowles* was contained in 28 U.S.C., in which Congress delineates the jurisdiction of the federal courts. *Id.* at 213.

Similarly, the Tax Injunction Act is contained with Title 28, and, therefore directly addresses the jurisdiction of the courts, unlike the AIA, which addresses the government's ability to raise revenues. "The Tax Injunction Act, 28 U.S.C. § 1341, restricts the power of federal district courts to prevent collection or enforcement of state taxes." *Arkansas Farm Credit*, 520 U.S. at 823. The Tax Injunction Act contains prohibitory language not present in the AIA: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. Unlike the AIA, the Tax Injunction Act does withdraw jurisdiction from the federal courts when it more properly lies with the state courts, so when organizations such as the Arkansas Farm Credit organization want to challenge a state tax assessment they must pursue state court remedies. *Id.* at 824.

In *Hibbs*, this Court analyzed the legislative history of the Tax Injunction Act and found that (unlike the AIA) there was a clearly stated congressional intent to limit the federal courts' ability to hear certain kinds of cases. 542 U.S. at 104. "The Act was designed expressly to restrict 'the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes.'" *Id.*

> Specifically, the Senate Report commented that the Act had two closely related, state-revenue-protective objectives: (1) to eliminate disparities between taxpayers who could seek injunctive relief in federal court—usually out-of-state corporations asserting diversity jurisdiction—and taxpayers with recourse only to state courts, which generally required taxpayers to pay first and litigate later; and (2) to stop taxpayers, with the aid of a federal injunction, from withholding large sums, thereby disrupting state government finances. *Id.*, at 1-2. In short, in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority.

Id. at 104-105. The *Hibbs* court went on to caution that the TIA did not "announce a sweeping congressional direction to prevent 'federal-court interference with all aspects of state tax administration.'" *Id.* (citations omitted). Instead, the TIA, like the AIA, applies only to challenges aimed at inhibiting the

collection of taxes, not to third party constitutional challenges to tax benefits. *Id.* at 108-110. Since the challenge at issue in *Hibbs* was a third party challenge to a state tax credit program, it did not fall within the TIA's prohibition and could proceed. *Id.* at 110-112.

Similarly, in this case, Respondents and Amici are not trying to inhibit the collection of taxes, but are challenging the constitutionality of the underlying statutory scheme, *i.e.*, the requirement that virtually all Americans acquire and maintain health insurance. Consequently, the challenges to the Act do not fall within the explicit language of the AIA, regardless of whether it is seen as jurisdictional or non-jurisdictional.

Prevailing precedent, however, compels the conclusion that the AIA is not jurisdictional. Instead, it operates similarly to a claim processing rule that does not deprive a court of the authority to hear a matter, but limits its authority to cases in which certain prerequisites are present.

IV. OTHER THAN THE FOURTH CIRCUIT, EVERY FEDERAL COURT TO HAVE ADDRESSED THE ANTI-INJUNCTION ACT HAS RULED CONSISTENTLY WITH PRECEDENT THAT IT DOES NOT BAR CHALLENGES TO THE ACT.

With the notable exception of the Fourth Circuit, every federal court that has addressed the applicability of the AIA to challenges to the Act has, consistently with precedent, found the AIA does not apply. Notably, even when the courts have agreed with the government regarding the constitutionality of the insurance mandates, they have still found that the AIA does not apply. *See Thomas More Law Center v. Obama*, 720 F.Supp.2d 882, 890-91 (E.D.Mich.2010) *aff'd*, 651 F.3d 529 (6th Cir. 2011); *Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, 764 F.Supp.2d 684, 695 (M.D.Pa. 2011); *Liberty Univ., Inc. v. Geithner*, 753 F.Supp.2d 611 (W.D.Va. 2010) *vacated*, 2011 WL 3962915 (4th Cir. 2011), *petition for cert. filed*, (No 11-438); *U.S. Citizens Assoc. v. Sebelius*, 754 F.Supp.2d 904, 909 (N.D.Ohio 2010); *Seven-Sky v. Holder*, 661 F.3d 1, 7 (D.C. Cir. 2011). While none of the lower court rulings are determinative of the issue, the contrast between those rulings, which generally track this Court's precedents, and the Fourth Circuit's contrary finding further strengthens

the conclusion that the AIA is not jurisdictional.

Citing to *Bob Jones University* and *Williams Packing*, the Michigan district court noted that "[c]ases in which the Anti–Injunction Act has been found to bar a suit all involve a challenge to an action of the IRS which resulted in, or was expected to result in, the assessment or collection of a tax." *Thomas More Law Ctr.* 720 F. Supp. 2d at 890. "Defendants have advanced no authority for applying the Anti–Injunction Act to bar lawsuits when no attempt to collect, or otherwise act affirmatively, has been taken by the IRS." *Id.* at 891. Not only had the IRS not taken any steps to assess or collect a "tax," such steps might never be taken since the plaintiffs in the *Thomas More* case indicated that they would purchase health insurance rather than pay the penalty. *Id.* Consequently, the AIA did not apply to the plaintiffs' challenges to the Act. *Id.*

In *Goudy-Bachman*, the Pennsylvania district court similarly described the nature of cases falling under the AIA and held that the AIA was not implicated in the plaintiffs' challenges to the mandate to purchase insurance. 764 F.Supp.2d at 695. "All of the cases upon which the government relies involve challenges to activities inextricably tied to the

assessment or collection of taxes, such as audits and investigations by the IRS, and attempts to collect taxes by the IRS." *Id.* The court noted that the plaintiffs were not trying to prevent any action by the IRS, but to enjoin the government from "forcing them to purchase health insurance, a purpose completely unrelated to the assessment or collection of taxes." *Id.* "The court finds that the individual mandate itself is not a tax, nor is it intimately connected with the assessment or collection of a tax. Therefore, it does not implicate the AIA bar." *Id.*

Other courts have concluded that the AIA is inapplicable based upon a distinction between a revenue raising tax, which is subject to the AIA, and penalties, which are not.[7] In

---

[7] These decisions are consistent with President Obama's analysis that the mandate's payments are not taxes, as recounted by Judge Vinson in Florida: "When confronted with the dictionary definition of a "tax" during a much-publicized interview widely disseminated by all of the news media, and asked how the penalty did not meet that definition, the President said it was "absolutely not a tax" and, in fact, "[n]obody considers [it] a tax increase." *See, e.g.*, Obama: Requiring Health Insurance is Not a Tax Increase, CNN, Sept. 29, 2009, available at: http://www.cnn.com/2009/POLITICS/09/20/oba

upholding the lower court's ruling in *Thomas More*, the Sixth Circuit held that the payment for noncompliance with the insurance mandate is not a penalty treated as a "tax" as are other penalties in the Internal Revenue Code. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 540 (6th Cir. 2011). The court said it should and would respect Congress' distinction, particularly since the penalties under the Act, unlike other penalties listed in the IRC, have "nothing to do with tax enforcement." *Id.* Consequently, they do not implicate the AIA. *Id.*

Citing the Sixth Circuit's holding, the District of Columbia Circuit similarly held that Congress did not intend for the AIA to cover penalties such as those under the Act which are unconnected to tax liability or enforcement. *Seven-Sky v. Holder*, 661 F.3d at 7. "Taxes and penalties carry distinct meanings and Congress has been deliberate when it wants certain penalties to be treated as taxes." *Id.* Unlike the penalties that Congress has treated as taxes, the payment for noncompliance with the insurance mandate do not relate to noncompliance with tax payment and reporting

---

ma.health.care/index.html." *Florida ex rel McCollum*, 716 F.Supp.2d at 1133 n5.

obligations. *Id.* Consequently, they are outside the scope of the AIA. *Id.*

In *Liberty University v. Geithner*, the district court also concluded that the payments for noncompliance with the insurance mandate "function as regulatory penalties–they encourage compliance with the Act by imposing a punitive expense on conduct that offends the Act." 753 F.Supp.2d at 629. Consequently, "the Anti–Injunction Act does not divest this Court of jurisdiction to hear the present challenge." *Id.*

The district court below likewise found that Congress' deliberate characterization of the payments for noncompliance with the insurance mandate as "penalties" meant that the AIA did not apply. *Florida ex. rel McCollum v. Dep't of Health and Human Servs.*, 716 F. Supp. 2d 1120, 1141-1142 (ND Fla. 2010), *aff'd in part, rev'd in part, sub nom. Florida ex. Attorney General v. Dep't of Health and Human Servs.*, 648 F.3d 1235 (11th Cir. 2011).

> It would be inappropriate to give tax treatment under the Anti–Injunction Act to a civil penalty that, by its own terms, is not a tax; is not to be enforced as a tax; and does not bear any meaningful relationship to the revenue-generating purpose of the tax code.

> Merely placing a penalty (which virtually all federal statutes have) in the IRS Code, even though it otherwise bears no meaningful relationship thereto, is not enough to render the Anti–Injunction Act (which only applies to true revenue-raising exactions) applicable to this case.

Id. The Ohio district court incorporated that language into its opinion as an appendix and relied upon it to reject the government's claim that the AIA barred plaintiff's challenge in *U.S. Citizens Assoc.*, 754 F.Supp.2d at 909.

In keeping with those precedents and this Court's precedents, Judge Davis, the dissenting vote on the Fourth Circuit panel in *Liberty University,* explained why the AIA is not applicable to the challenges to the Act. 2011 WL 3962915 at *25 (4th Cir. 2011) (Davis, J., dissenting).

> The Anti–Injunction Act was intended to "protect[ ] the expeditious collection of revenue." *South Carolina v. Regan*, 465 U.S. 367, 376, 104 S.Ct. 1107, 79 L.Ed.2d 372 (1984). Revenue from the individual mandate's penalty provision will not be assessed and collected until the year after the

mandate becomes operative–2015. Judicial review of the mandate in 2011 most assuredly will not frustrate "the expeditious collection of revenue" four years later. I also note that Congress forbid the Internal Revenue Service from employing its primary enforcement mechanisms to collect this penalty: the IRS may not seek the institution of criminal prosecutions by the Justice Department or impose a lien or levy on an individual's property for failure to pay the penalty. 26 U.S.C. § 5000A(g)(2). This indicates that Congress had scant concern for "the expeditious collection of revenue" from the penalty provision. A failure to provide immediate judicial review in reliance on a rather strained construction of the AIA, on the other hand, might undermine the core purpose of the Affordable Care Act. In the absence of a conclusive ruling from the federal courts, some individuals may well decide for themselves that the Act is unconstitutional and thus can be ignored. In the case of an ordinary tax this would simply result in some lost revenue and the

> costs of tax prosecutions; here, it would push the nation farther from Congress's goal of attaining near-universal health insurance coverage. And, as leaving the constitutionality of the Act unsettled would seem likely to create uncertainty in the health insurance and health care industries, which might depress these major sectors of the economy, it seems that application of the AIA would be at cross-purposes with the Act's reforms. Thus, I believe that there is ample reason for me to conclude that Congress had no design that the Anti–Injunction Act might apply to the individual mandate's penalty provisions.

Id. "In the final analysis, the majority's approach essentially imposes a clear-statement rule on Congress, making the AIA applicable to all exactions, regardless of statutory language and in disregard of apparent Congressional intent, unless Congress had the foresight to expressly exempt an exaction from the AIA." *Id.* at *33. "Given that the Supreme Court has never recognized such a clear-statement rule, it seems to me that this turns the ordinary principles of statutory interpretation on their head." *Id.* Judge Davis questioned the

majority's contention that permitting the challenge to proceed might have serious long-term consequences for revenue collection. *Id.* at *34. "I would simply note again that the Secretary of the Treasury is a party before us and argues that the AIA does not apply. Indeed, I cannot find a Supreme Court case where the AIA has been applied over the objection of the Secretary." *Id.*

The Fourth Circuit majority's conclusion that the AIA was a jurisdictional bar is not only contrary to the government's position, but also, and more importantly, in contravention of this Court's precedents interpreting the AIA and its more recent cases calling for precision in use of the word "jurisdiction."

As did the Court-appointed Amicus, the Fourth Circuit majority relied upon the statement in *Williams Packing* that the AIA "withdraws jurisdiction" from the courts without considering the statement in context of either the *Williams Packing* decision or this Court's recent precedents which have narrowed the concept of jurisdiction. As this Court has instructed, the term "jurisdiction" should be judiciously applied only to those statutes that truly limit the power of federal courts. "'Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system,'" so statutes should

not be interpreted as creating a jurisdictional bar unless they are explicitly worded in that manner. *Stern v. Marshall*, 131 S. Ct. 2594, 2606-07 (2011) (citing *Henderson v. Shinseki*, 131 S.Ct. 1197, 1201–03 (2011)). Both the explicit language and the presence of statutory and judicial exceptions in the AIA demonstrate that it is not intended to limit the power of federal courts. The parties, including the government, which is the intended beneficiary of the AIA, agree with that assessment, as should this Court.

CONCLUSION

As all but one of the courts to consider the issue have determined, the AIA is not a jurisdictional bar to challenges to the insurance mandate provisions in the Act. That determination is consistent with this Court's narrowing of the concept of jurisdiction.

Consequently, this Court should hold that the AIA does not apply to the challenges to the Act's insurance mandates.

February 2012.

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Liberty Counsel
1055 Maitland Center
Commons, 2d Floor
Maitland, FL 32751
(800) 671-1776
court@lc.org

Stephen M. Crampton
Mary E. McAlister
Liberty Counsel
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org

AMICUS CURIAE BRIEF

No. 11-398

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et. al.
Petitioners.

v.

STATE OF FLORIDA, et. al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Brief Of Amici Liberty University, Inc., Michele Waddell And Joanne Merrill In Support Of The Respondents On The Minimum Coverage Provision

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Liberty Counsel
1055 Maitland Center Commons, 2d Floor
Maitland, FL 32751
(800) 671-1776
court@lc.org

Stephen M. Crampton
Mary E. McAlister
Liberty Counsel
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

LEGAL ARGUMENT 4

I. CONGRESS' POWER UNDER THE COMMERCE CLAUSE DOES NOT EXTEND TO MANDATING THAT VIRTUALLY ALL CITIZENS PURCHASE AND MAINTAIN HEALTH INSURANCE OR PAY A PENALTY. 4

A. *Raich* Does Not Support The Administration's Expansive Re-Definition Of Congress' Commerce Clause Authority. 9

B. *Wickard* Also Does Not Support The Expansive Re-definition of Congress' Commerce Clause Power. . 13

C. *Lopez* And *Morrison* Illustrate How The Mandates Contradict The Supreme Court's Restrained Approach To Congress' Commerce Clause Authority. 16

D. The Mandate Provisions Are Not Merely Further Examples Of Congress' Regulation Of The Business Of Health Insurance. 20

II. MANDATING THE CONTENT OF HEALTH INSURANCE POLICIES THAT MUST BE PURCHASED BY VIRTUALLY ALL CITIZENS IS NOT REASONABLY RELATED TO CONGRESS' STATED OBJECTIVES FOR THE AFFORDABLE CARE ACT AND THEREFORE CANNOT BE FOUND TO BE NECESSARY AND PROPER TO CONGRESS' EXERCISE OF ITS ENUMERATED POWERS. 28

A. Directing What Insurance Policies Must Cover Does Not Further The Objectives Of Congress As Described By The Administration. 29

B. The Deference Accorded To Congressional Findings Cannot Be Used To Justify Congress' Coercive Intrusion Into Private Financial Matters. 33

CONCLUSION 48

TABLE OF AUTHORITIES

Cases

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 46

Employment Div., Dept. of Human Res. of Oregon v. Smith,
494 U.S. 872 (1990) 45, 46

Florida ex. rel. Bondi v. Dep't Health and Human Servs.,
780 F.Supp.2d 1256 (N.D. Fla. 2011) 7

Gonzales v. Raich,
545 U.S. 1 (2005) 9-11, 14, 21, 33

Heart of Atlanta Motel, Inc. v. United States,
379 U.S. 241 (1964) 15

Hosanna-Tabor Evangelical Lutheran Church and School,
132 S.Ct. 694 (2012) 44, 45, 47

Katzenbach v. McClung,
379 U.S. 294 (1964) 15

Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America,
344 U.S. 94 (1952) 44, 47

Liberty University, Inc. et al v. Timothy Geithner, et. al.,
2011 WL 3962915 (4th Cir. 2011) 1

Maryland v. Wirtz,
392 U.S. 183 (1968) 16

McCulloch v. Maryland,
4 Wheat. 316 (1819) 30-32

McDaniel v. Paty,
435 U.S. 618 (1978) 45

Perez v. United States,
402 U.S. 146 (1971) 10

Prudential Insurance Co. v. Benjamin,
328 U.S. 408 (1946) 22

United States v. Comstock,
130 S.Ct. 1949 (2010) 28, 30

United States v. Lopez,
514 U.S. 549 (1995) 9, 11, 16, 17, 34

United States v. Morrison,
529 U.S. 598 (2000)..... 9, 16, 18, 19, 34

United States v. South-Eastern Underwriters Association,
322 U.S. 533 (1944)..... 20-21

Wickard v. Filburn,
317 U.S. 111 (1942)..... 5, 9, 13

Yates v. Hendon,
541 U.S. 1 (2004)..... 25

Statutes

15 U.S.C. §§ 1011-1015..... 21

26 U.S.C. §5000A .....*passim*

29 U.S.C. §§ 1001 24

42 U.S.C. §1395..... 24

42 U.S.C. §18022(b) 29, 31

Pub. L. No. 104-191, 110 Stat. 1936 26

Pub. L. No. 99-272, 100 Stat. 82 26

Other Authorities

1974 USCCAN 4639 25

http://www.usccb.org/news/2012/12-013.cfm.... 4

Jennifer Staman, Cynthia Brougher, REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS, CONGRESSIONAL RESEARCH SERVICE 7-5700 (July 24, 2009) www.crs.gov..... 2, 8

ReasonTV, Wheat, Weed, and Obamacare: How the Commerce Clause Made Congress All-Powerful, August 25, 2010..... 7

Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius, January 20, 2012, http://www.hhs.gov/news/press/2012pres/01/20120120a.html 3, 37, 38

Timothy M. Dolan, Op-Ed., *Obamacare and Religious Freedom,* WALL STREET JOURNAL, January 25, 2012, http://online.wsj.com /article/SB10001424052970203718504577178

833194483196.html?KEYWORDS=Timothy+
M+ Dolan 43

INTEREST OF AMICI CURIAE[1]

Amici Liberty University, Inc., Michele G. Waddell and Joanne V. Merrill are plaintiffs in *Liberty University, Inc. et al v. Timothy Geithner, et. al.*, 2011 WL 3962915 (4th Cir. 2011), *petition for cert. filed,* (No. 11-438). Amici filed the first private party lawsuit challenging provisions of the Patient Protection and Affordable Care Act (the "Act") on the day it was enacted. Amici also brought the only lawsuit that challenged both the individual and employer insurance mandates ("minimum coverage provision" or "Insurance Mandate") on the grounds that the provisions violate the First Amendment as well as being *ultra vires* acts exceeding Congress' enumerated powers under Article I §8 of the United States Constitution.

---

[1] Counsel for a party did not author this Brief in whole or in part, an no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this Brief. The parties have filed consents to the filing of Amicus Briefs on behalf of either party or no party.

Lead counsel with Liberty Counsel representing Amici argued against the constitutionality of the challenged law at the District Court and before the Forth Circuit Court of Appeals. Amici filed a Petition for Writ of Certiorari before this Court and it is being held pending the outcome of the instant case. Amici have extensively researched the issues raised by Congress' broad redefinition of its enumerated powers in the minimum coverage provision and the dangerous consequences of its implementation. Amici have developed information that will greatly assist the Court in addressing the issues that are pivotal to this case and to Amici's challenge. Amici respectfully submit this Brief for the Court's consideration.

SUMMARY OF ARGUMENT

Even Congress' advisors warned that it was treading in unchartered waters when it included the minimum coverage provision in the Affordable Care Act.[2] Never before had Congress attempted to compel people who were

---

[2] Jennifer Staman, Cynthia Brougher, REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS, CONGRESSIONAL RESEARCH SERVICE 7-5700 (July 24, 2009) www.crs.gov., discussed *infra*.

not engaged in commerce to enter into the marketplace or pay penalties. [3]

The minimum coverage provision not only compels participation in the health insurance market, but also dictates how that participation will look. Only insurance policies that provide what the Department of Health and Human Services determines to be "minimum essential coverage" will satisfy the insurance mandate. That additional layer of regulation further expands Congress' power to include dictating the contents of contracts between citizens and private third party insurance companies. While Congress has long regulated those who voluntarily participate in the insurance market, it has never before compelled involuntary participation in the market in accordance with strict instructions.

Congress is trampling upon fundamental First Amendment rights by dictating that faith-based organizations choose between their religious beliefs and complying with the law.[4] The dangerous consequences of this

---

[3] *Id.*

[4] Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius, January 20, 2012, http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited February 8, 2012), discussed *infra*.

determination was aptly described by Cardinal-designate Timothy M. Dolan, Archbishop of New York:

> Never before has the federal government forced individuals and organizations to go out into the marketplace and buy a product that violates their conscience. This shouldn't happen in a land where free exercise of religion ranks first in the Bill of Rights.[5]

Congress has over-stepped its bounds by enacting the minimum coverage provision. This Court should reject the attempt to re-define Congress' enumerated powers and find that the minimum coverage provision is unconstitutional.

LEGAL ARGUMENT

I. CONGRESS' POWER UNDER THE COMMERCE CLAUSE DOES NOT EXTEND TO MANDATING THAT VIRTUALLY ALL CITIZENS PURCHASE AND MAINTAIN HEALTH INSURANCE OR PAY A PENALTY.

---

[5] http://www.usccb.org/news/2012/12-013.cfm

When it enacted the minimum coverage provision as part of the Affordable Care Act, Congress journeyed far beyond the outer limits this Court has placed on the Commerce Clause by seeking to regulate non-economic inactivity. The Insurance Mandate forces inactive bystanders into the stream of commerce by compelling virtually all American citizens to purchase and maintain government-defined health insurance or pay penalties enforceable by the Internal Revenue Service. 26 U.S.C. §5000A. As district court Judge Vinson explained, the breadth of the Commerce Clause power envisioned by Congress is virtually limitless:

> For example, everyone must participate in the food market. Instead of attempting to control wheat supply by regulating the acreage and amount of wheat a farmer could grow as in *Wickard* [*v. Filburn,* 317 U.S. 111 (1942)] under this logic, Congress could more directly raise too-low wheat prices merely by increasing demand through mandating that every adult purchase and consume wheat bread daily, rationalized on the grounds that because everyone must participate in the market for food, non-consumers of wheat bread

adversely affect prices in the wheat market. Or, as was discussed during oral argument, Congress could require that people buy and consume broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because people who eat healthier tend to be healthier, and are thus more productive and put less of a strain on the health care system. Similarly, because virtually no one can be divorced from the transportation market, Congress could require that everyone above a certain income threshold buy a General Motors automobile–now partially government-owned–because those who do not buy GM cars (or those who buy foreign cars) are adversely impacting commerce and a taxpayer-subsidized business.

I pause here to emphasize that the foregoing is not an irrelevant and fanciful "parade of horribles." Rather, these are some of the serious concerns implicated by the individual mandate that are being discussed and debated by legal

scholars. For example, in the course of defending the Constitutionality of the individual mandate, and responding to the same concerns identified above, often-cited law professor and dean of the University of California Irvine School of Law Erwin Chemerinsky has opined that although "what people choose to eat well might be regarded as a personal liberty" (and thus unregulable), "Congress could use its commerce power to require people to buy cars." *See ReasonTV, Wheat, Weed, and Obamacare: How the Commerce Clause Made Congress All-Powerful*, August 25, 2010, available at: http://reason.tv/video/show/wheat-weed-and-obamacare-how-t. When I mentioned this to the defendants' attorney at oral argument, he allowed for the possibility that "maybe Dean Chemerinsky is right." See Tr. at 69. Therefore, the potential for this assertion of power has received at least some theoretical consideration and has not been ruled out as Constitutionally implausible.

Florida ex. rel. Bondi v. Dep't Health and Human Servs., 780 F.Supp.2d 1256, 1289 (N.D. Fla. 2011). Even Congress' advisors at the Congressional Research Service agreed that using the Commerce Clause to justify an insurance mandate is unprecedented:

> Despite the breadth of powers that have been exercised under the Commerce Clause, it is unclear whether the clause would provide a solid constitutional foundation for legislation containing a requirement to have health insurance. Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service.[6]

While merely being novel does not, *per se* make a law unconstitutional, in this case, the novelty coupled with the expansive over-reaching of the

---

[6] Staman and Brougher, REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS, CONGRESSIONAL RESEARCH SERVICE 7-5700 (July 24, 2009) www.crs.gov.

Insurance Mandate creates an unprecedented and unsustainable re-definition of Congress' enumerated powers. Congress has attempted to plow new ground that is not authorized by the text of Article I, §8 of the Constitution or this Court's precedents and goes far beyond anything envisioned by the Founders.

A. *Raich* Does Not Support The Administration's Expansive Re-Definition Of Congress' Commerce Clause Authority.

The Administration and others who argue that the Insurance Mandate is constitutional point to this Court's most recent Commerce Clause decision, *Gonzales v. Raich*, 545 U.S. 1 (2005) as supporting Congress' broad re-definition of the Commerce Clause to include mandate that individuals purchase a particular product. However, *Raich,* an as-applied challenge to an admittedly proper exercise of the Commerce Clause, is factually inapposite to the facial challenge at issue in this case. Furthermore, the statute at issue in *Raich* involved voluntary activity, while the Insurance Mandate here transforms inactivity into involuntary economic activity. The Administration has downplayed the

activity/inactivity differentiation, but this Court has consistently recognized that the Commerce Clause encompasses the regulation of *activity, not inactivity*. *Raich*, 545 U.S. at 22-23; *United States v. Morrison*, 529 U.S. 598, 610 (2000); *United States v. Lopez*, 514 U.S. 549, 561 (1995); *Wickard v. Filburn*, 317 U.S. 111, 128-129, (1942).

In *Raich*, the plaintiffs challenged the inclusion of their *activity* of cultivating marijuana for medicinal use, which is legal is California, as a violation of the Controlled Substances Act ("CSA"). *Raich*, 545 U.S. at 15 (emphasis added). Unlike here, where Respondents and Amici are challenging Congress' authority to enact the Insurance Mandate, the plaintiffs in *Raich* did not challenge Congress' authority to regulate interstate commerce in illegal drugs. *Id.* Instead, they asked this court to carve out an exception for their activity of growing marijuana for medical uses. *Id.* This Court rejected plaintiffs' request, stating, "we have often reiterated that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class'" *Id.* at 23 (citing *Perez v. United States*, 402 U.S. 146, 154 (1971)). Trying to excise the plaintiffs' cultivation activities from the CSA would leave a gaping hole that would

undermine the concededly valid statutory scheme enacted by Congress, a step this Court was unwilling to take. *Id.* at 22.

As Justice Scalia noted, since *Perez*, "our cases have mechanically recited that the Commerce Clause permits congressional regulation of three categories: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that "substantially affect" interstate commerce." *Raich*, 545 U.S. at 33-34 (Scalia, J., concurring). Regulation of activities that "substantially affect" interstate commerce in turn, includes the power to regulate economic *activities* that substantially affect interstate commerce, non-economic *activities* that substantially affect interstate commerce, and non-economic *activities* "which in a substantial way interfere with or obstruct the exercise of the granted power." *Id.* at 36-37. The *Raich* plaintiffs' *activity* of cultivating marijuana for medicinal purposes fell within the third category. *Id.* "Congress may regulate noneconomic intrastate *activities* only where the failure to do so 'could ... undercut' its regulation of interstate commerce." *Id.* at 38 (citing *Lopez*, 514 U.S. at 561) (emphasis added). Notably, in every sub-category the underlying requirement was *activity*, either economic or non-economic.

By contrast, in this case, Congress is seeking to regulate *inactivity*. The mere status of being an American citizen without health insurance is not an activity, either economic or noneconomic, that can be said to fall within the category of activities having a substantial effect on interstate commerce. Through the Insurance Mandate, Congress is trying to force those who are not engaging in any activity or participating in any market to become active participants in the market. Furthermore, Congress is attempting to then regulate the involuntary participants to the point of dictating the contents of the product they are compelled to purchase, all under the threat of IRS-enforced penalties.

Of particular importance to this case, the plaintiffs in *Raich* could avoid Congress' oversight entirely by discontinuing their activity of growing marijuana. By contrast, here, citizens cannot escape Congress' grasp because the Insurance Mandate requires that all citizens who do not qualify under narrow exemptions must purchase and maintain health insurance or pay the penalty. 26 U.S.C. §5000A. There is no underlying activity that citizens can discontinue to avoid having to comply with the law. Instead, so long as a citizen is living legally in the United States he must meet the insurance requirement or face IRS-enforced penalties.

Even in its most expansive definition of Congress' Commerce Clause power this Court did not abandon the underlying requirement that an individual must be engaged in an activity before he can be subject to congressional oversight. In this case, there is no underlying activity, either economic or non-economic that can be subject to Congress' control.

B. *Wickard* Also Does Not Support The Expansive Re-definition of Congress' Commerce Clause Power.

As was true in *Raich*, in *Wickard*, Mr. Filburn could discontinue cultivating wheat and avoid the Congressional regulation that he challenged, setting that case apart from this case. *Wickard*, 317 U.S. at 128-129. As was true in *Raich*, in *Wickard* this Court found that Mr. Filburn's activity of growing and harvesting wheat fell within the category of activities that "substantially affect" interstate commerce. *Id.* As was true with the *Raich* plaintiffs' cultivation of marijuana, Mr. Filburn's cultivation of wheat for personal use would affect the supply of the commodity overall and undercut Congress' regulation of an interstate market. *Id.*

Consequently, as was true in *Raich*, the *Wickard* Court concluded that Congress had a

rational basis for believing that, when viewed in the aggregate, Mr. Filburn's *activity* of growing wheat for home consumption would have a substantial influence on price and market conditions and therefore was within its Commerce Clause power. "*Wickard* thus establishes that Congress can regulate purely intrastate *activity* that is not itself "commercial," in that it is not produced for sale, if it concludes that failure to regulate that class of *activity* would undercut the regulation of the interstate market in that commodity." *Raich*, 545 U.S. at 18 (emphasis added). Like *Raich*, therefore, *Wickard* addressed the question of whether an entirely intrastate, non-commercial economic *activity* could be regulated by Congress. In both cases, this Court confirmed that these economic *activities* fell within the third category of Commerce Clause authority, *i.e.*, *activities* that "substantially affect" interstate commerce.

That is not the case with the Insurance Mandate. Rather than regulating voluntary activity such as Mr. Filburn's cultivation of wheat, the Insurance Mandate seeks to compel those who are not participating in the market to involuntarily enter into activity. If the law at issue in *Wickard* were comparable, then it would have required that Mr. Filburn purchase land and plant a wheat crop to then be subject to the regulations regarding the amount of

wheat that can be grown. Unlike Mr. Filburn, the citizens here have not voluntarily entered the market for health insurance. Since there is no activity, there is nothing that citizens can discontinue to avoid the regulation. Mr. Filburn could stop growing wheat and no longer be subject to congressional oversight. However, in this case, citizens cannot avoid paying a penalty or purchasing health insurance. Congress is attempting to exercise plenary police power in the guise of a Commerce Clause regulation.

For the same reason, the Insurance Mandate is also unlike the anti-discrimination laws upheld in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964). In *Heart of Atlanta* and *Katzenbach*, the proprietors could discontinue operating a motel or restaurant, respectively, and no longer be subject to the challenged law. Congress did not try to compel the parties to go into the motel and restaurant business in order to increase the pool of available rooms or dining places, but merely said that if a party wants to operate such a business, then it must comply with the anti-discrimination law. *Heart of Atlanta*, 379 U.S. at 261; *Katzenbach*, 379 U.S. at 304. In both cases, unlike here, Congress was seeking to regulate economic *activities*, not merely the status of living in the United States.

C. *Lopez* And *Morrison* Illustrate How The Mandates Contradict The Supreme Court's Restrained Approach To Congress' Commerce Clause Authority.

Contrary to the active market participation in *Raich* and Wickard, merely possessing a firearm near a school or committing a violent crime against a woman is not an activity that "substantially affects" interstate commerce so as to be a permissible exercise of Congress' Commerce Clause power. *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 610. As is true in this case, and was untrue in *Raich*, in both *Lopez* and *Morrison* the parties asserted that the challenged statute fell outside of Congress' commerce power. *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 610. Therefore, as was true in *Lopez* and *Morrison*, in this case, the parties are not asking "'to excise, as trivial, individual instances' of the class." *Perez*, 402 U.S., at 154 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)) (emphasis added). Instead, as occurred in *Lopez* and *Morrison*, Respondents and Amici are asserting that the statutory scheme is itself invalid and should be struck down as outside the scope of Congress' Commerce Clause powers.

In *Lopez*, this Court found that the statute at issue was a criminal statute that "by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561. Neither was the statute "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* Therefore, the statute could not be sustained under the Court's jurisprudence "upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.* "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567. This Court emphasized the importance of limiting Congress' enumerated powers to protect fundamental liberties. *Id.* at 552. The government defendants in *Lopez* presented a chain of events that they claimed brought possession of a firearm in a school zone under the Commerce Clause. *Id.* at 563. The government argued that possessing a firearm in a school zone might result in violence which might affect the national economy by spreading costs throughout the population, reducing travel and threatening productivity by threatening the learning environment. *Id.* This

Court responded, "if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* at 564.

Relying upon *Lopez*, the *Morrison* court struck down a portion of the Violence Against Women Act that Congress argued was a valid exercise of its Commerce Clause power. 529 U.S. at 614. As in Lopez, the *Morrison* Court rejected the argument that a remote chain of inferences can justify the regulation of non-economic activity. *Id.* at 607. "*Lopez* emphasized . . . that even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds." *Id.* at 608. "[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate *activity* only where that *activity* is economic in nature." *Id.* at 613 (emphasis added). "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* "Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in Lopez, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." *Id.* at 615-616. "We accordingly

reject the argument that Congress may regulate non-economic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce." *Id.* at 617. As in *Lopez*, in *Morrison*, this Court compared Congress' claim that the VAWA fell under the Commerce Clause to the enactment of a prohibited federal police power. *Id.* at 618. The fact that Congress might have stated that there was a sufficient connection did not establish the concept. *Id.* at 616. "Under our written Constitution . . . the limitation of congressional authority is not solely a matter of legislative grace." *Id.*

The same is true of Congress' claim that the Insurance Mandate is a valid exercise of its Commerce Clause power in this case. The mandates are more troubling than were the provisions struck down in Lopez and Morrison since those statutes were at least aimed at actions taken by individuals, i.e., obtaining a firearm and possessing it near a school and engaging in criminal conduct against a woman, while the mandate is aimed at people who have not taken any action. If the statutes in *Lopez* and *Morrison* were outside of Congress' authority, then the mandate is even more so.

D. The Mandate Provisions Are Not Merely Further Examples Of Congress' Regulation Of The Business Of Health Insurance.

Congress also cannot justify the Insurance Mandate by pointing to its power to regulate the business of health insurance. *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944). Neither is the Insurance Mandate simply another example of Congress' regulation of health insurance through Medicare, the Employee Retirement and Income Security Act of 1974 ("ERISA"), Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), and Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), as the Administration contends. (Petitioners' Brief on the Minimum Coverage Provision, p. 5).

In *South-Eastern Underwriters*, this Court confirmed that the insurance industry is subject to regulation under the Commerce Clause. 322 U.S. at 553. The plaintiffs in *South-Eastern Underwriters* challenged indictments charging violation of the Sherman Anti-Trust Act, claiming that insurance was not subject to the Sherman Act or Congress' power over interstate commerce. *Id.* at 536. The Supreme Court rejected both contentions. *Id.* at

552-553. "No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance." *Id.* at 553. Congress' "power to determine the rules of intercourse across state lines was essential to weld a loose confederacy into a single, indivisible nation; its continued existence is equally essential to the welfare of that nation." *Id.* at 552. But, the authority to regulate aspects of the insurance industry does not grant Congress the power to dictate that all citizens participate by either purchasing government-defined policy or paying a penalty. Regulating an interstate industry to protect against anti-competitive or other injurious conduct can be said to fall within Congress' authority "to devise rules for the governance of commerce between States but also to facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants." *Raich*, 545 U.S. at 35 (Scalia, J. concurring). However, compelling non-participants to participate against their will cannot fit into that definition.

That is all the more true in light of this Court's determination that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, does not supersede state taxation and regulation of

insurance. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 421 (1946). This Court clarified that *South-Eastern Underwriters* did not require the invalidation of states' taxation and regulation of insurance within their borders. *Id.* at 432. "The McCarran Act is, in effect, a determination by Congress that the business of insurance, though done in interstate commerce, is not of such a character as to require uniformity of treatment" across the country. *Id.* at 431. Consequently, Congress cannot assert that the Commerce Clause grants it plenary power over all aspects of the business of insurance, and particularly over individuals' decisions regarding whether they will obtain insurance and what it will contain.

Congress' enactment of ERISA, COBRA, HIPAA and similar laws are examples of Congress exercising its authority to facilitate interstate commerce by regulating those who have voluntarily entered into the stream of commerce. By contrast, the Insurance Mandate is an attempt to compel those who have deliberately not entered into commerce to become unwilling participants who can then be regulated. Forcing people into commerce cannot be compared to regulating those who voluntarily participate.

Under the current statutory scheme, insurance companies and employers are only regulated if they choose to enter into the

insurance market by either insuring or offering insurance. Neither insurance companies nor employers are forced to insure or offer insurance. Now, however, the Act forces employers to offer a government-defined insurance program at the level and cost set by the government. Moreover, none of the current insurance regulations regulate individuals per se, or most importantly, force individuals to buy insurance. Here, the Act forces unwilling individuals to purchase a government-defined health insurance package.

Of critical importance to the Commerce Clause analysis is the fact that in enacting ERISA, HIPAA, COBRA and Medicare, Congress made clear that it was not interfering with individual freedom. Congress emphasized the continuing importance of individual liberties when it enacted what became known as Medicare in 1965:

> Nothing in this subchapter shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided, or over the selection, tenure, or compensation of any officer or employee of any institution, agency, or person providing health services; or to

> exercise any supervision or control over the administration or operation of any such institution, agency, or person.

42 U.S.C. §1395. Congress was explicit about its concern regarding individual freedom in what became 42 U.S.C. §1395a, stating:

> Basic freedom of choice–Any individual entitled to insurance benefits under this subchapter may obtain health services from any institution, agency, or person qualified to participate under this subchapter if such institution, agency, or person undertakes to provide him such services.

In the Health Insurance for the Aged and Disabled Act (Medicare), Congress did not attempt to override the will of individuals or employers and compel participation under penalty. The Insurance Mandate here is not merely a natural extension of Medicare. Individuals may choose to not take Medicare and doctors may choose not to accept Medicare patients. By contrast, the Act forces individuals to obtain and maintain insurance and employers to provide it.

Similarly, when it enacted ERISA, 29 U.S.C. §§ 1001 *et. seq.*, Congress was cognizant of the voluntary nature of employee pension

plan benefits. H.R. Rep. 93-533 on Public Law 93-406 1974 USCCAN 4639. Congress enacted ERISA to protect the interests of participants in existing employee benefit plans. *Yates v. Hendon*, 541 U.S. 1, 6 (2004). ERISA established reporting requirements, vesting and funding standards and fiduciary obligations to protect employees' investments in pension plans, and, in particular, to protect employees from losses when pension plans are under funded. *Id.* at 6-7. Congress was clear that it wanted to encourage employers to offer these plans to employees, but that employers and employees retained their freedom to make decisions regarding the plans. 1974 USCCAN at 4647. Unlike the mandate here, ERISA does not compel employers to offer such plans, nor employees to participate in them. Instead, as is true with other Commerce Clause legislation, ERISA regulates those who have voluntarily engaged in an activity or entered into an agreement. Employers do not have to create and offer pension plans, but if they decide to, then they will have to comply with ERISA. ERISA is unlike the Insurance Mandate under the Act and does not support a finding that the Act is a valid exercise of Congress' enumerated powers.

In Title X of COBRA Congress instituted standards to protect employees who voluntarily agreed to participate in group health plans that

their employers voluntarily agreed to offer. Public L. No. 99-272, §§ 10001-10003 (1986), 100 Stat. 82, The relevant provisions in COBRA provide that an employee must be permitted to continue participating in the group health insurance program for a period of time after the employment ends. *Id.* at § 10001(c). COBRA provides that if an employer decides to no longer offer group health plans to its employees, then the continuation provisions in COBRA no longer apply. *Id.* In other words, employers retain their freedom to not offer or discontinue offering employee health insurance benefits. *Id.* As is true with ERISA, COBRA contains provisions that regulate employers who have voluntarily agreed to provide group health plan benefits and benefit employees who have voluntarily agreed to participate in the plans. *Id.* If either party decides to no longer participate in the program, then no one is compelled to do so. *Id.* COBRA does not support the proposition that Congress can use its authority under the Commerce Clause to compel employers to offer group health plans and employees to participate in them.

HIPAA also does not support the conclusion that the mandate provisions are a natural extension of Congress' regulation of the health insurance industry. Pub. L. No. 104-191, 110 Stat. 1936 (codified in various sections beginning with 42 U.S.C. §300gg). As is true

with ERISA and COBRA, HIPAA does not mandate that companies or individuals participate in the health insurance industry, but regulates companies which have voluntarily agreed to offer health insurance to individuals and groups. *See id.*, Title I, 110 Stat. at 1939-1991. No individual or organization is compelled to offer or purchase health insurance against his/its will. *Id.* Instead, organizations that want to provide health insurance coverage to others must agree, as a part of engaging in that business, to abide by certain rules and regulations sent forth in HIPAA. *Id.* Unlike the Act here, HIPAA does not demand that companies either partake in the health insurance industry or pay punitive sanctions.

Far from merely being a logical extension of Congress' authority to regulate the insurance industry, the mandate provisions are a giant leap into uncharted territory. Congress is attempting to move from regulating voluntary conduct that affects the national economy to managing private decisions and even inactivity. Congress is attempting to extend its reach from economic activities to non-economic non-activities and to regulate personal decision making. The intrusive and expansive power exemplified in the mandates is without precedent.

II. MANDATING THE CONTENT OF HEALTH INSURANCE POLICIES THAT MUST BE PURCHASED BY VIRTUALLY ALL CITIZENS IS NOT REASONABLY RELATED TO CONGRESS' STATED OBJECTIVES FOR THE AFFORDABLE CARE ACT AND THEREFORE CANNOT BE FOUND TO BE NECESSARY AND PROPER TO CONGRESS' EXERCISE OF ITS ENUMERATED POWERS.

When determining whether a law falls within the Necessary and Proper Clause, "we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 130 S.Ct. 1949, 1956 (2010). However, the rational relationship analysis under the Necessary and Proper Clause is not the same as the analysis under due process, *i.e.*, "it might be thought that the particular legislative measure was a rational way to correct" an evil. *Id.* at 1966 (Kennedy, J. concurring). There must be "a tangible link to commerce, not a mere conceivable rational relation." *Id.* "The rational basis referred to in the Commerce Clause context is a demonstrated link in fact, based on empirical demonstration." *Id.*

When viewed under the lens of this rational relationship test using the purposes

articulated by the Administration, the Insurance Mandate cannot be substantiated under the Necessary and Proper Clause. That is particularly true when the Court looks beyond the provision that virtually all citizens must purchase and maintain health insurance to the further directive that only insurance policies which contain what the Administration defines as "minimum essential coverage" will fulfill the Mandate. 26 U.S.C. §5000A, 42 U.S.C. §18022(b). Mandating not only that virtually all Americans purchase health insurance, but also what that insurance must contain transcends rationality to become an unprecedented assertion of government control over the private affairs of American citizens.

A. Directing What Insurance Policies Must Cover Does Not Further The Objectives Of Congress As Described By The Administration.

Focusing on the über-intrusive provision that only insurance policies containing those products and services that the government defines as "minimum coverage," it is apparent that the Insurance Mandate cannot be reconciled with Congress' limited enumerated powers under Article I §8.

The Administration has described the "minimum coverage provision" as "integral to

the ACA's insurance reforms which are part of the Act's broad framework of economic regulation and incentives designed to address the terms on which health insurance is offered, rationalize the timing and method of payment for health care services expand access to health care, and reduce shifting of risks and costs. (Petitioners' Brief p. 24). The Administration further argues that "the minimum coverage provision is necessary to make effective the Act's core reforms of the insurance market, *i.e.*, the guaranteed-issue and community-rating provisions." (*Id.*). "And the minimum coverage provision itself regulates economic conduct with substantial effects on interstate commerce—the manner in which individuals finance and pay for services in the health care market." (*Id.* at 24-25). Even if requiring that all Americans purchase health insurance or pay a penalty could be said to be rationally related to these goals (which it cannot), dictating the provisions within that policy certainly is not.

As Justice Alito stated in *Comstock*, the "Necessary and Proper Clause does not give Congress carte blanche." *Comstock*, 130 S.Ct. at 1970 (Alito, J. concurring). "Although the term 'necessary' does not mean 'absolutely necessary' or indispensable, the term requires an 'appropriate' link between a power conferred by the Constitution and the law enacted by Congress." *Id.* (citing *McCulloch v. Maryland*, 4

Wheat. 316, 415, (1819)). "And it is an obligation of this Court to enforce compliance with that limitation." *Id.* As Justice Kennedy said, that link is not merely conceivable rational relationship, but a tangible, demonstrable link. *Id.* at at 1966 (Kennedy, J. concurring).

There is no such link between the Administration's avowed purposes, *i.e.*, increasing the pool of insured individuals and rationalizing the timing and payment of health care services and directing what services must be included in an individual's insurance policy. Ordering that all individuals purchase health insurance (if constitutionally permissible) could increase the number of people who have health insurance. However, directing that all insurance policies must include, at a minimum, "ambulatory patient services, emergency services, hospitalization, maternity and newborn care, mental health and substance use disorder services, including behavioral health treatment, prescription drug coverage, rehabilitative and habilitative services and devices, laboratory services, preventive and wellness services, chronic disease management and pediatric services, including oral and vision care," (42 U.S.C. §18022(b)), does nothing to increase the number of people who have health insurance or when or how they pay for health care.

Instead, adding compulsory types of coverage to compulsory insurance coverage creates the kind of impermissible exercise of authority that Justice Marshall described in *McCulloch*, 4 Wheat. at 423:

> Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.

While Congress might have been entrusted with regulating those who have voluntarily entered into the stream of commerce, it has not been entrusted with dictating the contents of private contracts between citizens and third party insurance providers. Therefore, this Court should exercise its obligation to determine that the Insurance Mandate exceeds Congress' power under the Necessary and Proper Clause.

B. The Deference Accorded To Congressional Findings Cannot Be Used To Justify Congress' Coercive Intrusion Into Private Financial Matters.

Even if the mandated contents of a "minimum coverage" policy are set aside and the language requiring that the purchase and maintenance of health insurance is examined in isolation, it is evident that the provision does not have the necessary relational link to the purposes set forth by Congress. In fact, the Insurance Mandate, as worded, does not do anything to address the problems that Congress says the Act is designed to address.

This Court has stated that "[i]n assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one." *Raich*, 545 U.S. at 22. "We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Id.* This Court might defer to Congress' findings, but only after determining that the means are rationally related to the ends they are supposed to address. As this Court said in *Morrison*, "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of

Commerce Clause legislation." 529 U.S. at 614. "As we stated in *Lopez*, '[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.' " *Id.* "Rather, '[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.' " *Id.* (citing *Lopez*, 514 U.S. at 557).

The Administration argues that the Insurance Mandate is a reasonable means to attain Congress' goal of addressing "a crisis in the national health care market." (Petitioners' Brief p. 2). In fact, however, the provision does nothing to address the problems Congress claimed to address.

The Administration claims that "the minimum coverage provision" will prevent health care consumers from waiting to buy insurance until the last minute, *i.e.*, when they are sick or injured. (Petitioners' Brief p. 29). However, there is nothing in the language of the statute to prevent such last-minute purchases. Individuals can pay the penalty, not purchase health insurance and be in compliance with the law. There is nothing to prevent individuals from later purchasing health insurance when they become sick or

injured, dropping coverage when they recover and return to paying the penalty. The problem of last minute purchases is not resolved by the "minimum coverage provision."

The Administration also argues that the "minimum coverage provision" is a reasonable means to diminish uncompensated health care. (Petitioners' Brief p. 19). This assertion is based upon the faulty premise that every person who is not presently insured will become insured when the provision goes into effect in 2014. However, the provision only requires that individuals choose between purchasing and maintaining insurance *or* paying a penalty. 26 U.S.C. §5000A. If an individual decides to pay the penalty, which is not designated to be applied to purchasing insurance, then the person could still remain uninsured and perhaps fail to pay for health care services. This argument is built not only upon the false premise that all uninsured persons will become insured when Section 5000A takes effect, but also upon the fallacy that everyone who does not purchase health insurance does not pay for his health care costs through other means. The Administration does not offer any evidence to support the proposition that those who do not have health insurance do not pay their medical bills while those with insurance pay every penny.

Neither the words of the statute nor any of the scholarly opinions and reports cited by Petitioners support the conclusion that the Mandates will solve economic problems associated with health care costs, increase demand for health insurance, or decrease the number of uninsured Americans. The Administration's logically unsupportable arguments are wholly inadequate to justify Congress' unprecedented expansion of the Commerce Clause to reach into the private financial affairs of virtually all American citizens. This Court should not defer to Congress' findings, which do not hold up under scrutiny. Congress has not established the necessary rational relationship between the means chosen and the desired ends. Therefore, the "minimum coverage provision" cannot be validated as necessary and proper to Congress' exercise of its enumerated powers.

III. CONGRESS CANNOT EXERCISE ITS ENUMERATED POWERS IN A WAY THAT VIOLATES THE FIRST AMENDMENT BY DEMANDING THAT CITIZENS PURCHASE HEALTH INSURANCE POLICIES WITH PROVISIONS THAT VIOLATE CITIZENS' FREE EXERCISE RIGHTS.

The Administration has brought the deleterious effects of Congress' unprecedented intrusion into the private lives of American citizens into sharp focus with its determination that faith-based organizations will be required to provide health insurance that fully compensates for the cost of contraceptives, sterilization and medical abortifacents, regardless of an organizations' sincerely held religious beliefs that forbid such practices.[7] On January 20, 2012, the Department of Health and Human Services announced that it would not permit faith-based organizations (other than those that such as churches which only employ adherents to their faith) to be exempt from the regulation that defines "preventative

---

[7] Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius, January 20, 2012, http://www.hhs.gov /news/press/2012pres/01/20120120a.html (last visited February 8, 2012).

care" under the "minimum essential coverage" provision to include fully compensated contraception and sterilization services.[8] Instead of being exempt from the provision that violates their religious beliefs, faith-based organizations will merely be given an additional year, from August 1, 2012 to August 1, 2013, to comply with the law.[9]

The devastating consequences of this unprecedented expansion of congressional power to violate fundamental First Amendment freedoms were cogently described by Archbishop Dolan, president of the United States Conference of Catholic Bishops:

> Religious freedom is the lifeblood of the American people, the cornerstone of American government. When the Founding Fathers determined that the innate rights of men and women should be enshrined in our Constitution, they so esteemed religious liberty that they made it the first freedom in the Bill of Rights.
>
> In particular, the Founding Fathers fiercely defended the right of

---

[8] *Id.*

[9] *Id.*

conscience. George Washington himself declared: "The conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be extensively accommodated to them." James Madison, a key defender of religious freedom and author of the First Amendment, said: "Conscience is the most sacred of all property."

Scarcely two weeks ago, in its *Hosanna-Tabor* decision upholding the right of churches to make ministerial hiring decisions, the Supreme Court unanimously and enthusiastically reaffirmed these longstanding and foundational principles of religious freedom. The court made clear that they include the right of religious institutions to control their internal affairs.

Yet the Obama administration has veered in the opposite direction. It has refused to exempt religious institutions that serve the common good—including Catholic schools, charities and hospitals—from its

sweeping new health-care mandate that requires employers to purchase contraception, including abortion-producing drugs, and sterilization coverage for their employees.

Last August, when the administration first proposed this nationwide mandate for contraception and sterilization coverage, it also proposed a "religious employer" exemption. But this was so narrow that it would apply only to religious organizations engaged primarily in serving people of the same religion. As Catholic Charities USA's president, the Rev. Larry Snyder, notes, *even Jesus and His disciples would not qualify for the exemption in that case, because they were committed to serve those of other faiths.*

Since then, hundreds of religious institutions, and hundreds of thousands of individual citizens, have raised their voices in principled opposition to this requirement that religious institutions and individuals violate

their own basic moral teaching in their health plans. Certainly many of these good people and groups were Catholic, but many were Americans of other faiths, or no faith at all, who recognize that their beliefs could be next on the block. They also recognize that the cleverest way for the government to erode the broader principle of religious freedom is to target unpopular beliefs first.

Now we have learned that those loud and strong appeals were ignored. On Friday, the administration reaffirmed the mandate, and offered only a one-year delay in enforcement in some cases—as if we might suddenly be more willing to violate our consciences 12 months from now. As a result, all but a few employers will be forced to purchase coverage for contraception, abortion drugs and sterilization services even when they seriously object to them. All who share the cost of health plans that include such services will be forced to pay for them as well. Surely it violates freedom of religion to force religious ministries

and citizens to buy health coverage to which they object as a matter of conscience and religious principle.

The rule forces insurance companies to provide these services without a co-pay, suggesting they are "free"—but it is naïve to believe that. There is no free lunch, and you can be sure there's no free abortion, sterilization or contraception. There will be a source of funding: you.

Coercing religious ministries and citizens to pay directly for actions that violate their teaching is an unprecedented incursion into freedom of conscience. Organizations fear that this unjust rule will force them to take one horn or the other of an unacceptable dilemma: Stop serving people of all faiths in their ministries—so that they will fall under the narrow exemption—or stop providing health-care coverage to their own employees.

The Catholic Church defends religious liberty, including freedom of conscience, for everyone. The

Amish do not carry health insurance. The government respects their principles. Christian Scientists want to heal by prayer alone, and the new health-care reform law respects that. Quakers and others object to killing even in wartime, and the government respects that principle for conscientious objectors. By its decision, the Obama administration has failed to show the same respect for the consciences of Catholics and others who object to treating pregnancy as a disease.

This latest erosion of our first freedom should make all Americans pause. When the government tampers with a freedom so fundamental to the life of our nation, one shudders to think what lies ahead.[10]

---

[10] Timothy M. Dolan, Op-Ed., *Obamacare and Religious Freedom,* WALL STREET JOURNAL, January 25, 2012, http://online.wsj.com/article/SB10001424052970203718504577178833194483196.html?KEYWORDS=Timothy+M+Dolan (last visited February 8, 2012) (emphasis added).

As Archbishop Dolan stated, the Administration's announcement came only days after this Court unanimously re-affirmed the primacy of the First Amendment's protection of religious freedom and denounced governmental interference with the internal affairs of religious organizations. *Hosanna-Tabor Evangelical Lutheran Church and School*, 132 S.Ct. 694 (2012). In *Hosanna Tabor*, this Court upheld the ministerial exception to employment actions against faith-based organizations, and firmly re-established the pre-eminence of the First Amendment. *Id.* at 707. This Court's precedents radiate "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 704 (citing *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116, (1952)). This Court found that the ministerial exception proceeded from the same spirit of freedom and protected faith-based employers from unreasonable government interference. *Id.* at 706. By contrast, permitting the EEOC to challenge the organization's employment decision would be akin to the New York law struck down in *Kedroff,* which intruded the "power of the state into the forbidden area of religious freedom contrary to

the principles of the First Amendment." *Id.*, at 119. (citing *Kedroff*, 344 U.S. at 119).

In *Hosanna-Tabor* this Court affirmed that "the Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious *beliefs* as such." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (emphasis added). The fact that the employment action in *Hosanna-Tabor* involved the inner workings of the church based upon its core beliefs set that case apart from *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877-78, (1990), which involved government regulation of only physical acts, not internal beliefs. *Hosanna-Tabor,* 132 S.Ct. at 707.

As this Court explained in *Smith*, "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." 494 U.S. at 877-78.

> Thus, the First Amendment obviously excludes all "governmental regulation of religious beliefs as such"....The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false,

> impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

Id. (citations omitted). *Accord, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (a law targeting religious beliefs as such is never permissible).

Through the Insurance Mandate, Congress and the Administration are imposing special disabilities on those whose religious views proscribe contraception and medically induced abortions by requiring those individuals and organizations to choose between obeying the law and practicing their faith. Congress and the Administration are punishing individuals and organizations through the imposition of penalties because the government believes that their religious views against contraception are false. The government is seeking to regulate religious belief by dictating what constitutes "preventative medical care." The Administration insists that this intrusion into the private lives of American citizens is an "eminently reasonable" exercise of Congress' Commerce Clause authority. (Petitioners' Brief, p. 19). According to the Administration, the "minimum coverage provision" is a "reasonable

and humane way" of motivating uninsured individuals to obtain health insurance. (Petitioners' Brief, p. 38). The Administration does not and cannot explain how forcing individuals to choose between their religion beliefs and complying with the law, *i.e.*, violating the First Amendment is either reasonable or humane.

The Insurance Mandate places the Administration's expansive view of Congress' Commerce Clause authority on a collision course with the First Amendment, and particularly with this Court's precedent firmly establishing the pre-eminence of free exercise rights. *Hosanna-Tabor*, 132 S.Ct. at 707. The clash with the First Amendment illustrates why this Court should not condone Congress' attempt to expand its Commerce Clause authority to include the mandated purchase of government-defined health insurance that violates free exercise rights or payment of a penalty. Upholding the Insurance Mandate as a proper exercise of Congress' Commerce Clause authority would threaten the "spirit of freedom for religious organizations" and "independence from secular control or manipulation" upon which the country was founded. *See*, *Kedroff*, 344 U.S. at 116. This Court should not permit such an erosion of the core foundations of the country.

CONCLUSION

The Insurance Mandate creates a dangerous, unprecedented expansion of congressional power that threatens fundamental First Amendment rights. Amici respectfully request that this Court reject the attempted re-definition of Congress' power by finding that the mandate provision is unconstitutional.

February 2012.

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
Horatio G. Mihet
Liberty Counsel
1055 Maitland Center
Commons, 2d Floor
Maitland, FL 32751
(800) 671-1776
court@lc.org

Stephen M. Crampton
Mary E. McAlister
Liberty Counsel
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
court@lc.org

AMICUS CURIAE BRIEF

No. 11-398

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR COURT-APPOINTED AMICUS CURIAE SUPPORTING VACATUR (ANTI-INJUNCTION ACT)

ROBERT A. LONG, JR.
Counsel of Record
EMIN TORO
MARK W. MOSIER
HENRY B. LIU
DANIELLE S. BARBOUR
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. NW
Washington, DC 20004
(202) 662-6000
rlong@cov.com

January 2012

QUESTION PRESENTED

Whether the Anti-Injunction Act, 26 U.S.C. § 7421(a), bars the suit brought by Respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

INTEREST OF AMICUS CURIAE 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT 2

SUMMARY OF ARGUMENT 10

ARGUMENT 15

I. THE ANTI-INJUNCTION ACT LIMITS THE COURTS' SUBJECT-MATTER JURISDICTION. 15

II. THE ANTI-INJUNCTION ACT BARS THIS SUIT. 22

A. The Relevant Statutory Text Bars This Suit. 23

1. The Anti-Injunction Act Applies Because Congress Specified That The Section 5000A Penalty Shall Be Assessed And Collected In

The Same Manner As Taxes 24

2. The Section 5000A Penalty Is A "Tax" Within The Meaning Of The Anti-Injunction Act 36

B. The Anti-Injunction Act Cannot Be Avoided By Characterizing This Case As A Challenge To The Minimum Coverage Requirement Rather Than The Penalty Provision 44

C. The Anti-Injunction Act Applies To The State Respondents 48

D. Policy Considerations Do Not Justify A Departure From The Anti-Injunction Act 57

CONCLUSION 60

STATUTORY APPENDIX 1a

26 U.S.C. § 5000A 1a

26 U.S.C. § 6201 ..... 16a

26 U.S.C. § 6665(a) 17a

26 U.S.C. § 6671(a) 18a

26 U.S.C. § 7421(a) 19a

TABLE OF AUTHORITIES

CASES PAGE(S)

Alexander v. "Americans United" Inc.,
416 U.S. 752 (1974) ..... *passim*
Alfred L. Snapp & Son, Inc. v. Puerto Rico,
458 U.S. 592 (1982) 53
Allen v. Wright, 468 U.S. 737 (1984) 57
Am. Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951) 58
Andrus v. Glover Constr. Co.,
446 U.S. 608 (1980) 59
Ankenbrandt v. Richards, 504 U.S. 689 (1992) 21
Arbaugh v. Y & H Corp., 546 U.S. 500 (2006) ... 15, 19
Arkansas v. Farm Credit Servs. of Cent. Ark.,
520 U.S. 821 (1997) 18, 21
Bailey v. Drexel Furniture Co.,
259 U.S. 20 (1922) 38
Bailey v. George, 259 U.S. 16 (1922) 38, 48
Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cnty.,
115 F.3d 1372 (8th Cir. 1997) 47
Bennett v. Spear, 520 U.S. 154 (1997) 52
Bob Jones Univ. v. Simon,
416 U.S. 725 (1974) ..... *passim*
Bowles v. Russell, 551 U.S. 205 (2007) 10, 20, 58
Brushaber v. Union Pac. R.R. Co.,
240 U.S. 1 (1916) 16
Callaway v. Comm'r of Internal Revenue,
231 F.3d 106 (2d Cir. 2000) 31
Chamber of Commerce v. Edmondson,
594 F.3d 742 (10th Cir. 2010) 47

Chickasaw Nation v. United States,
208 F.3d 871 (10th Cir. 2000) 51
Church of Scientology of Cal. v. Internal Revenue Serv.,
792 F.2d 153 (D.C. Cir. 1986) 31
Cohen v. United States,
650 F.3d 717 (D.C. Cir. 2011) 25
DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 56
Davis v. Fed. Election Comm'n,
554 U.S. 724 (2008) 56
Dodge v. Osborn, 240 U.S. 118 (1916) 16
Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.,
651 F.3d 722 (7th Cir. 2011) 47
Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004) 37
Enochs v. Williams Packing & Navigation Co.,
370 U.S. 1 (1962) ..... *passim*
Florida v. Mellon, 273 U.S. 12 (1927) 55
Fort Stewart Sch. v. Fed. Labor Relations Auth., 495 U.S. 641 (1990) 31
Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) 56
Gardner v. United States,
211 F.3d 1305 (D.C. Cir. 2000) 17
Graham v. Du Pont, 262 U.S. 234 (1923) 6
Helvering v. Davis,
301 U.S. 619 (1937) 11, 21, 22, 23
Helwig v. United States, 188 U.S. 605 (1903) 37
Henderson ex rel. *Henderson v. Shinseki*,
131 S. Ct. 1197 (2011) 15, 19, 20
Hibbs v. Winn, 542 U.S. 88 (2004) 17, 18

Hoogerheide v. Internal Revenue Serv.,
637 F.3d 634 (6th Cir. 2011) 17
Hornthall v. The Collector,
76 U.S. (9 Wall.) 560 (1869) 16
In re J.J. Re-Bar Corp., Inc.,
644 F.3d 952 (9th Cir. 2011) 17
Jefferson Cnty. v. Acker, 527 U.S. 423 (1999).... 16, 17
John R. Sand & Gravel Co. v. United States,
552 U.S. 130 (2008) 20
Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 15
Lange v. Phinney,
507 F.2d 1000 (5th Cir. 1975) 17
Levin v. Commerce Energy, Inc.,
130 S. Ct. 2323 (2010) 17
Lewis v. Casey, 518 U.S. 343 (1996) 56
Liberty Univ., Inc. v. Geithner,
__ F.3d __, 2011 WL 3962915 (4th Cir.
Sept. 8, 2011) 41
Markham v. Allen, 326 U.S. 490 (1946) 21
Massachusetts v. Envtl. Prot. Agency,
549 U.S. 497 (2007) 53
Massachusetts v. Mellon,
262 U.S. 447 (1923) 14, 53, 54
Mathes v. United States,
901 F.2d 1031 (11th Cir. 1990) 17
McConnell v. Fed. Election Comm'n,
540 U.S. 93 (2003) 59
Microsoft Corp. v. i4i Ltd. P'ship,
131 S. Ct. 2238 (2011) 31, 32
Miller v. Standard Nut Margarine Co.,
284 U.S. 498 (1932) 6
Nat'l Taxpayers Union, Inc. v. United States,
68 F.3d 1428 (D.C. Cir. 1995) 57

Nw. Austin Mun. Util. Dist. No. 1 v. Holder,
129 S. Ct. 2504 (2009) 58
Ohio v. Helvering, 292 U.S. 360 (1934) 13, 49, 50
Pac. Gas & Elec. Co. v. United States,
417 F.3d 1375 (Fed. Cir. 2005) 40
Pagonis v. United States,
575 F.3d 809 (8th Cir. 2009) 17
Pennsylvania v. New Jersey,
426 U.S. 660 (1976) 54
Phillips v. Comm'r of Internal Revenue,
283 U.S. 589 (1931) 12, 37
Raines v. Byrd, 521 U.S. 811 (1997) 59
Randell v. United States,
64 F.3d 101 (2d Cir. 1995) 17
Rappaport v. United States,
583 F.2d 298 (7th Cir. 1978) 17
Reed Elsevier, Inc. v. Muchnik,
130 S. Ct. 1237 (2010) 19
Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) ..... *passim*
Sherman v. Nash,
488 F.2d 1081 (3d Cir. 1973) 17
Sierra Club v. Envtl. Prot. Agency,
294 F.3d 155 (D.C. Cir. 2002) 60
Sigmon Coal Co., Inc. v. Apfel,
226 F.3d 291 (4th Cir. 2000) 17
Simon v. E. Ky. Welfare Rights Org.,
426 U.S. 26 (1976) 55, 57
Sims v. United States,
359 U.S. 108 (1959) 13, 50, 51
Snyder v. Marks, 109 U.S. 189 (1883) 16
Sonzinsky v. United States,
300 U.S. 506 (1937) 6, 38

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 56
South Carolina v. Regan,
465 U.S. 367 (1984) ..... *passim*
State Railroad Tax Cases, 92 U.S. 575 (1875) 5
Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 54
Sterling Consulting Corp. v. United States,
245 F.3d 1161 (10th Cir. 2001) 17
Thomas More Law Ctr. v. Obama, 651 F.3d
529 (6th Cir. 2011) 26, 34, 41, 42
Trailer Marine Transp. Corp. v. Rivera Vazquez, 977 F.2d 1 (1st Cir. 1992) 38
Turner Broad. Sys., Inc. v. Fed. Commnc'ns Comm'n, 512 U.S. 622 (1994) 59
United Parcel Serv., Inc. v. Flores-Galarza,
318 F.3d 323 (1st Cir. 2003) 17
United States v. Am. Friends Serv. Comm.,
419 U.S. 7 (1974) 34
United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1 (2008) 28
United States v. Galletti, 541 U.S. 114 (2004) 25
United States v. Sahadi,
555 F.2d 23 (2d Cir. 1977) 51
United States v. Sanchez, 340 U.S. 42 (1950) 38
United States v. Thompson/Ctr. Arms Co.,
504 U.S. 505 (1992) 31
Virginia v. Sebelius,
656 F.3d 253 (4th Cir. 2011) 53
Warth v. Seldin, 422 U.S. 490 (1975) 57

STATUTES AND REGULATIONS

Act of Mar. 2, 1867 ..... 4, 51

Anti-Injunction Act, 26 U.S.C. § 7421(a) ..... *passim*
Patient Protection and Affordable Care Act,
Pub. L. No. 111-148, 124 Stat. 119 2
26 U.S.C. § 501(c)(3) 45, 46, 47
26 U.S.C. § 527(j)(1) 35, 36
26 U.S.C. § 5000A ..... *passim*
26 U.S.C. § 5000A(a) 2, 3
26 U.S.C. § 5000A(b) 3, 40
26 U.S.C. § 5000A(b)(2) 3
26 U.S.C. § 5000A(c) 3
26 U.S.C. § 5000A(f) 3
26 U.S.C. § 5000A(g)(1) ..... *passim*
26 U.S.C. § 5000A(g)(2) 3, 28, 34, 59
26 U.S.C. § 5114(c)(3) 35, 36
26 U.S.C. § 5684(b) 35, 36
26 U.S.C. § 5761(e) 35, 36
26 U.S.C. § 6015(e) 18
26 U.S.C. § 6038(b) 43
26 U.S.C. § 6038A(d) 43
26 U.S.C. § 6038B(c) 43
26 U.S.C. § 6038C(c) 43
26 U.S.C. § 6201(a) 13, 39, 40, 43
26 U.S.C. § 6203 25
26 U.S.C. § 6206 27
26 U.S.C. § 6207(a) 27
26 U.S.C. § 6213(a) 18, 27, 29
26 U.S.C. § 6225(b) 18, 27
26 U.S.C. § 6227 27
26 U.S.C. § 6229 27
26 U.S.C. § 6230(c)(2) 27
26 U.S.C. § 6246 27
26 U.S.C. § 6246(b) 18
26 U.S.C. § 6301 39
26 U.S.C. § 6302 27

26 U.S.C. § 6321 ..... 33, 34
26 U.S.C. § 6323(a) 34
26 U.S.C. § 6330(e)(1) 18, 27
26 U.S.C. § 6331(d)(2) 27
26 U.S.C. § 6331(i) 27
26 U.S.C. § 6332 50
26 U.S.C. § 6335(d) 27
26 U.S.C. § 6402(a) 33
26 U.S.C. § 6502(a) 25
26 U.S.C. § 6532(a)(1) 28
26 U.S.C. § 6601(e)(2) 29
26 U.S.C. § 6651(a)(3) 29
26 U.S.C. § 6665(a) 32, 35, 36
26 U.S.C. § 6671 33
26 U.S.C. § 6671(a) ..... *passim*
26 U.S.C. § 6685 35
26 U.S.C. § 6711 35
26 U.S.C. § 6720A 35
26 U.S.C. § 6861 25
26 U.S.C. § 6862 25
26 U.S.C. § 6862(a) 34
26 U.S.C. § 7403 ..... 28, 33
26 U.S.C. § 7422 28
26 U.S.C. § 7422(a) 28
26 U.S.C. § 7426(a) 18
26 U.S.C. § 7426(b)(1) 18
26 U.S.C. § 7429 25
26 U.S.C. § 7433(a) 30
26 U.S.C. § 7701(a)(1) 13, 49
26 U.S.C. § 7701(b) (1954) 50
26 U.S.C. § 7701(c) 13, 49
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1341 17
28 U.S.C. § 1346(a)(1) 28

28 U.S.C. § 2201(a) 5
42 U.S.C. § 1396d(y)(1) 56
42 U.S.C. § 18091(a)(2)(C) 2
42 U.S.C. § 18091(a)(2)(F) 2
42 U.S.C. § 18091(a)(2)(G) 2
26 C.F.R. § 601.103(a) 25

OTHER AUTHORITIES

Americans Need a Health Care Ruling Act, H.R. 3558, 112nd Cong. (2011) 59
Bittker & Lokken, *Federal Taxation of Income, Estates and Gifts* (3d ed. 1993-2003 & 2011 Cum. Supp. No. 3) 31, 35
Bittker, McMahon & Zelenak, *Federal Income Taxation of Individuals* (3d ed. 1993-2003, updated Nov. 2011 and visited on Jan. 5, 2012) 29, 35
Cong. Budget Office, *CBO's Analysis of the Major Health Care Legislation Enacted in March 2010 Before the H. Subcomm. on Health, Comm. on Energy and Commerce* (Mar. 30, 2011) (statement of Douglas W. Elmendorf, Director), *available at* http://www.cbo.gov/ftpdocs/121xx/doc12119/03-30-healthcarelegislation.pdf 3, 4, 39
Exec. Task Force for the Comm'r's Penalty Study, *Report on Civil Tax Penalties* (1989) 42
Florida KidCare Program: Amendment to Florida's Title XXI Child Health Ins. Plan Submitted to the Ctrs. for Medicare & Medicaid Servs. (July 1, 2010) 54

Internal Revenue Manual 20.1.9.1.1(2) (Apr. 22, 2011) 43
Internal Revenue Manual 34.6.2.4(1) (Aug. 11, 2004) 40
Noah Webster, *An American Dictionary of the English Language* (rev. by Chauncy A. Goodrich) (1860) 12, 37
Office of Tax Policy, Dep't of the Treasury, *Report to the Congress on Penalty & Interest Provisions of the Internal Revenue Code* (1999) 41, 43

BRIEF FOR COURT-APPOINTED AMICUS CURIAE

INTEREST OF AMICUS CURIAE

This brief is submitted in response to the Court's order appointing counsel to brief and argue this case as *amicus curiae* in support of the position that the Anti-Injunction Act, 26 U.S.C. § 7421(a), bars the suit brought by Respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-273a, is reported at 648 F.3d 1235. The district court's order granting summary judgment, Pet. App. 274a-368a, is reported at 780 F. Supp. 2d 1256. The district court's order and opinion granting in part, and denying in part, the federal government's motion to dismiss, Pet. App. 394a-475a, is reported at 716 F. Supp. 2d 1120.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). For the reasons set forth in this brief, this suit is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a).

STATUTES INVOLVED

Pertinent statutory provisions are set forth in the appendix to this brief. *See* App., *infra*, 1a-19a.

STATEMENT

1. The Affordable Care Act

In March 2010, Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 ("Affordable Care Act"). The statute is intended to "increase the number and share of Americans who are insured," "lower health insurance premiums," and "improve financial security for families." 42 U.S.C. § 18091(a)(2)(C), (F), & (G); *see also Seven-Sky v. Holder*, 661 F.3d 1, 4 (D.C. Cir. 2011) (statute is intended to "reform our nation's health insurance and health care delivery markets with the aims of improving access to those markets and reducing health care costs and uncompensated care.").

The Affordable Care Act amends the Internal Revenue Code ("Code") by requiring "applicable individual[s]" to "ensure" that they and their dependents maintain "minimum essential coverage" for health care costs beginning in 2014. 26 U.S.C. § 5000A(a). This requirement can be satisfied by enrolling in an employer-sponsored insurance plan, an individual plan, a "grandfathered" health plan, a government-sponsored program (such as Medicare or

Medicaid), or obtaining other federally-recognized coverage. *Id.* § 5000A(f).[1]

Taxpayers who fail to maintain minimum essential coverage for themselves and their dependents must pay a penalty. *Id.* § 5000A(b). This penalty is calculated as a percentage of the taxpayer's income (subject to a floor), and is capped at the national average premium for the lowest-level plan providing "minimum essential coverage." *Id.* § 5000A(c). The penalty is included with the taxpayer's income tax return. *Id.* § 5000A(b)(2).

The statute directs that "[t]he penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." *Id.* § 5000A(g)(1). The exceptions in paragraph (2) prohibit criminal prosecutions, notices of lien with respect to any property of a taxpayer, or levying any property of a taxpayer for failing to pay the penalty. *Id.* § 5000A(g)(2).

The Congressional Budget Office has estimated that the penalty provision will produce between five and six billion dollars per year in annual revenue for the U.S. Treasury by the end of this decade. *See* Cong. Budget Office, *CBO's Analysis of the Major Health Care Legislation Enacted in March 2010*

---

[1] The full text of Section 5000A is set out in the appendix to this brief. *See* App., *infra*, 1a-15a.

Before the H. Subcomm. on Health, Comm. on Energy and Commerce, 111th Cong. at 14 tbl.2 (Mar. 30, 2011) (statement of Douglas W. Elmendorf, Director), *available at* http://www.cbo.gov/ftpdocs/121xx/doc12119/03-30-healthcarelegislation.pdf [hereinafter *CBO Analysis*].

2. The Anti-Injunction Act

The Anti-Injunction Act bars pre-enforcement challenges to tax laws unless an exception to the Act applies. The statute provides:

> Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), and 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

26 U.S.C. § 7421(a).

The Anti-Injunction Act originally provided that "no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 475. The Revised Statutes added the term "any," so that the statute read: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." *South Carolina v. Regan*, 465 U.S. 367, 373 n.10 (1984).

Although the Anti-Injunction Act appears to have no recorded legislative history, *see Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974), this Court concluded that Congress acted with "the sense . . . of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence." *State Railroad Tax Cases*, 92 U.S. 575, 613 (1875). The "principal purpose" of the Act is "protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference, 'and to require that the legal right to the disputed sums be determined in a suit for refund.'" *Bob Jones*, 416 U.S. at 736 (quoting *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962)).[2]

"During the first half century of the [Anti-Injunction] Act's existence, the Court gave it literal force, without regard to the character of the tax, the nature of the pre-enforcement challenge to it, or the status of the plaintiff." *Bob Jones*, 416 U.S. at 742. In 1922, however, the Court "seized upon" dicta in earlier cases suggesting that "extraordinary and exceptional circumstances might justify an injunction despite the Act" as support for three decisions approving pre-enforcement injunctions

---

[2] Congress has included a similar limitation in the Declaratory Judgment Act, which authorizes federal courts to issue declaratory judgments in any case within the courts' jurisdiction, "except with respect to Federal taxes." 28 U.S.C. § 2201(a). This limitation is "at least as broad as the Anti-Injunction Act." *Bob Jones*, 416 U.S. at 732 n.7.

"against tax statutes that were viewed as penalties or as adjuncts to the criminal law." *Id.* at 743. "Shortly thereafter," the Court retreated from these decisions, making clear that they "were of narrow scope and had no application to pre-enforcement challenges to truly revenue-raising tax statutes." *Id.* (citing *Graham v. Du Pont*, 262 U.S. 234 (1923)). The Court "subsequently abandoned" the "distinctions between regulatory and revenue-raising taxes." *Bob Jones*, 416 U.S. at 741 n.12 (citing *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)).

In the 1930s, the Court held in two cases that the Anti-Injunction Act "is merely 'declaratory of the principle' of cases prior to its passage that equity usually, but not always, disavows interference with tax collection." *Id.* at 744 (quoting *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 509 (1932)). "Read literally," the Court's decision in *Standard Nut* "effectively repealed the Act, since the Act was viewed as requiring nothing more than equity doctrine had demanded before the Act's passage." *Bob Jones*, 416 U.S. at 744.

The "incongruity" of the Court's interpretation in *Standard Nut* "led directly" to the Court's unanimous decision in *Williams Packing*, which marked "the second time the Court has undertaken to rehabilitate the Act following debilitating departures from its explicit language." *Id.* at 744-45. In *Williams Packing*, the Court "switched the focus of the extraordinary and exceptional circumstances test from a showing of the degree of harm to the plaintiff absent an injunction to the requirement

that it be established that the Service's action is plainly without a legal basis." *Id* at 745.

The Court has viewed *Williams Packing* as "the capstone to judicial construction of the Act," declaring that it "spells an end to a cyclical pattern of allegiance to the plain meaning of the Act, followed by periods of uncertainty caused by a judicial departure from that meaning, and followed in turn by the Court's rediscovery of the Act's purpose." *Id.* at 742. Following *Williams Packing*, the Court has returned to giving the Anti-Injunction Act "literal force, without regard to the . . . nature of the pre-enforcement challenge." *Id.*

3. This Case

a. Respondents—26 States, two individuals, and the National Federation of Independent Business—filed this action in the Northern District of Florida challenging the constitutionality of several provisions of the Affordable Care Act, including the minimum coverage provision. The district court held that an individual respondent, Mary Brown, has standing to challenge the minimum coverage provision. Pet. App. 292a.[3] The district court also held that Idaho and Utah have standing to challenge the minimum coverage provision because they

---

[3] Respondent Brown has since declared bankruptcy, and Respondents have filed a motion for leave to add two individuals as parties to this case. *See* Private Resp. Unopposed Mot. for Leave to Add Parties Dana Grimes & David Klemencic (filed Jan. 4, 2012).

enacted statutes purporting to exempt their residents from that provision. *Id.* at 293a-95a.

In the district court, the federal government moved to dismiss Respondents' lawsuit on the ground that it is barred by the Anti-Injunction Act. The district court held that the Anti-Injunction Act does not bar this suit. *Id.* at 401a-25a. The court concluded that the penalty is not "collected and treated 'in the same manner as taxes' in light of the fact that Congress specifically divorced the penalty from the tax code's traditional collection and enforcement mechanisms." *Id.* at 424a. In addition, the court held that the Anti-Injunction Act does not apply to penalties that are "'imposed for substantive violations of laws not directly related to the tax code.'" *Id.* (citation omitted).

On the merits, the district court held that the minimum coverage provision is not a valid exercise of Congress's commerce or taxing powers. *Id.* at 296a-350a, 401a-24a. The court held that the minimum coverage provision cannot be severed from the rest of the statute, and therefore entered a declaratory judgment invalidating the Affordable Care Act in its entirety. *Id.* at 350a-64a.

b. A divided court of appeals affirmed in part and reversed in part. Before the court of appeals, the federal government did not raise the Anti-Injunction

Act issue.[4] The court of appeals opinion did not address the issue.

The court of appeals held that Respondent Brown has standing to challenge the minimum coverage provision, and did not decide whether the Respondent States also have standing to challenge that provision. *Id.* at 9a-10a. On the merits, the court of appeals affirmed the district court's ruling that the minimum coverage provision is not a valid exercise of Congress's commerce or taxing powers. The court of appeals reversed the district court's conclusion that the minimum coverage provision is not severable, and held that the remainder of the Affordable Care Act may stand. *Id.* at 172a-86a.

c. Before this Court, no party takes the position that the Anti-Injunction Act bars this suit. The federal government suggested that the Court direct the parties to brief this question and appoint counsel as amicus curiae to argue that the suit is barred by the Anti-Injunction Act. By orders dated November 14, 2011 and November 18, 2011, the Court adopted both suggestions.

---

[4] In a supplemental brief filed at the request of the Fourth Circuit, the federal government explained that it had reconsidered its position on the Anti-Injunction Act and "concluded that the [Act] does not foreclose the exercise of jurisdiction in these cases." U.S. Supp. Br. at 2, *Liberty Univ., Inc. v. Geithner*, __ F.3d __, 2011 WL 3962915 (4th Cir. Sept. 8, 2011) (No. 10-2347).

SUMMARY OF ARGUMENT

1. The Anti-Injunction Act limits the courts' jurisdiction by directing that "no suit . . . shall be maintained in any court." 26 U.S.C. § 7421(a). Consistent with this language, the Court has held repeatedly that the Anti-Injunction Act is a jurisdictional statute. *See, e.g.*, *Bob Jones Univ. v. Simon*, 416 U.S. 725, 749 (1974); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962). The Court has also concluded that the Tax Injunction Act, a closely-related statute that was modeled on the Anti-Injunction Act, is jurisdictional in nature. Congress has amended the Anti-Injunction Act on multiple occasions without disturbing this Court's holdings that the statute is jurisdictional.

This Court's recent decisions analyzing whether particular statutory provisions are "jurisdictional prescriptions" or "claim-processing rules" do not support a different conclusion. The Anti-Injunction Act does more than simply "promote the orderly progress of litigation"; it addresses the courts' "adjudicatory capacity." Even if that were not so, when a provision has been treated as jurisdictional in a long line of this Court's decisions, the Court has considered the provision to be jurisdictional. *See, e.g.*, *Bowles v. Russell*, 551 U.S. 205, 209 n.2, 210-11 (2007).

The decisions in *Williams Packing* and *South Carolina v. Regan*, 465 U.S. 367 (1984), are not to the contrary. In those cases, the Court construed the Anti-Injunction Act in light of its purpose and structure, while continuing to affirm that the statute

is jurisdictional. The decision in *Helvering v. Davis*, 301 U.S. 619 (1937), which accepted the federal government's waiver of a defense under the Anti-Injunction Act, is insufficient to negate the long line of decisions, both before and after *Davis*, affirming that the statute is jurisdictional. In this case, moreover, the federal government has argued that the Anti-Injunction Act bar is non-waivable.

2.a. The text of the Anti-Injunction Act bars any "suit for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a). This suit falls within the scope of the Anti-Injunction Act for two reasons. *First*, Congress provided that the penalty imposed by Section 5000A shall be "assessed and collected in the same manner" as taxes. *Second*, the term "tax" is broad enough to include the Section 5000A penalty, particularly in light of statutory provisions that define "taxes" to include "assessable penalties" for purposes of assessment and collection.

i. Congress expressly directed that "[t]he penalty provided by this section . . . shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." *Id.* § 5000A(g)(1). Congress further directed that "[t]he penalties . . . provided by [subchapter B of chapter 68] . . . shall be assessed and collected in the same manner as taxes." *Id.* § 6671(a). If taxpayers (and others) can pursue litigation to restrain the assessment or collection of the Section 5000A penalty without regard to the Anti-Injunction Act, the penalty will not be assessed and collected in the same manner as taxes.

When the Anti-Injunction Act applies, taxpayers wishing to challenge a tax must either pay the tax and then file for a refund, or wait for the federal government to bring a collection action. Absent the Anti-Injunction Act, taxpayers and other plaintiffs could sue at a time of their own choosing, without paying the tax in advance, giving the Internal Revenue Service notice and an opportunity to respond administratively, or subjecting themselves to additional penalties if the government prevails in a collection action.

ii. Even if Congress had not provided that the Section 5000A penalty shall be assessed and collected in the same manner as a tax, the Anti-Injunction Act would still apply. When Congress enacted the Anti-Injunction Act, the ordinary meaning of "tax" "includ[ed] almost every species of imposition on persons or property for supplying the public treasury." Noah Webster, *An American Dictionary of the English Language* 1132 (rev. by Chauncy A. Goodrich) (1860). Consistent with this meaning, the Court has construed the Anti-Injunction Act broadly, as applying to an "exaction [that] is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue." *Phillips v. Comm'r of Internal Revenue*, 283 U.S. 589, 596 (1931). The Section 5000A penalty falls within the ordinary meaning of "tax" because it is codified in the Code, calculated as part of the taxpayer's federal income tax liability, assessed and collected by the IRS, and paid into the federal government's general revenues. This conclusion is reinforced by statutory provisions making clear that, for purposes of assessment and

collection, "assessable penalties" are "taxes." *See* 26 U.S.C. § 6201(a).

b. The Anti-Injunction Act cannot be avoided by characterizing this suit as a challenge only to the minimum coverage requirement, rather than the penalty provision. Respondents have challenged both the penalty provision and the minimum coverage requirement. Even if they had purported to challenge only the minimum coverage requirement, their suit would be barred, because invalidating that requirement would make it impossible for the Secretary to assess and collect the penalty. This Court has rejected similar arguments aimed at avoiding the Anti-Injunction Act as "circular" and "unpersuasive." *See Alexander v. "Americans United" Inc.*, 416 U.S. 752, 760-62 (1974).

c. The Anti-Injunction Act applies to the State Respondents as well as the Private Respondents. The definitional provisions of the Code state that a "person" includes certain specified entities, and that the term "includes" "shall not be deemed to exclude other things otherwise within the meaning of the term defined." 26 U.S.C. §§ 7701(a)(1), (c). This Court and other courts have interpreted the term "person" in the Code to include States. *See, e.g.*, *Sims v. United States*, 359 U.S. 108 (1959); *Ohio v. Helvering*, 292 U.S. 360 (1934). Congress added the term "person" to the Anti-Injunction Act in 1966 to reaffirm the broad scope of the statute, and to prevent suits by third parties whose property rights compete with federal tax liens. Consequently, there is no basis for concluding that the addition of the

"any person" language exempted States from coverage.

Nor are the State Respondents "aggrieved parties" for purposes of the implied exception recognized in *South Carolina v. Regan*, 465 U.S. at 378. The States are not liable for the penalty, and they are not authorized to sue as *parens patriae* to protect citizens of the United States from the operation of federal statutes. *See Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923). The States also cannot qualify as "aggrieved parties" by arguing that the minimum coverage provision will induce individuals who were previously eligible for Medicaid to enroll in the program. This claim is both speculative and premature, and in any event a State is not injured when eligible individuals enroll in a state-sponsored program intended for their benefit.

d. Policy considerations cannot justify departing from the explicit statutory language of a jurisdictional statute. Congress can, at any time, authorize immediate judicial review of the constitutionality of the minimum coverage provision, but it has not done so in this case. Moreover, an immediate decision would be contrary to the policy that courts avoid deciding constitutional issues unless it is necessary to do so.

ARGUMENT

I. THE ANTI-INJUNCTION ACT LIMITS THE COURTS' SUBJECT-MATTER JURISDICTION.

In the district court, the federal government moved to dismiss this case on the ground that it is barred by the Anti-Injunction Act. *See* Pet. App. 424a. Although the federal government subsequently abandoned this position, it has recognized that the issue implicates the Court's subject-matter jurisdiction. *See* U.S. Pet. 32-34. Subject-matter jurisdiction "involves a court's power to hear a case," and therefore "courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (citations and internal quotations omitted).

1. The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). As the Court has explained, a statutory provision is jurisdictional if "it governs a court's adjudicatory capacity," *Henderson* ex rel. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011), or "speak[s] to the power of the court rather than to the rights or obligations of the parties," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (citation and internal quotations omitted). The Anti-Injunction Act's command that no suit "shall be maintained in any court" is jurisdictional because it

imposes a limitation on the courts' capacity to hear and decide cases seeking to restrain the assessment or collection of taxes.

Consistent with the language of the Anti-Injunction Act, the Court has held repeatedly that "[t]he object of § 7421(a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes." *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962). *See also Jefferson Cnty. v. Acker*, 527 U.S. 423, 434 (1999) (Act is a "measure depriving courts of jurisdiction over suits brought 'for the purpose of restraining the assessment or collection' of any federal tax."); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 749 (1974) (Act "deprived the District Court of jurisdiction to issue the injunctive relief petitioner sought."); *Dodge v. Osborn*, 240 U.S. 118, 119 (1916) (affirming dismissal "for want of jurisdiction" because the Act barred the lawsuit); *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 10 (1916) (applicability of the Act is "a question of jurisdiction"); *Snyder v. Marks*, 109 U.S. 189, 194 (1883) (Congress enacted the Act "to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues."); *Hornthall v. The Collector*, 76 U.S. (9 Wall.) 560, 566 (1869) (Act implicates "the jurisdiction of the court."). In addition, the courts of

appeals uniformly hold that the Anti-Injunction Act is a jurisdictional statute.[5]

The jurisdictional nature of the Anti-Injunction Act is also evident from the Court's interpretation of a closely-related statute, the Tax Injunction Act. The Tax Injunction Act provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. This Court has noted that, "[i]n composing the [Tax Injunction Act's] text, Congress drew particularly on . . . the Anti-Injunction Act." *Hibbs v. Winn*, 542 U.S. 88, 102-03 (2004); *see also Jefferson Cnty.*, 527 U.S. at 434 ("Congress modeled the Tax Injunction Act" on the Anti-Injunction Act.). As with the Anti-Injunction Act, the Court has held repeatedly that the Tax Injunction Act limits the jurisdiction of federal courts. *See Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2335 n.10 (2010); *Hibbs*, 542 U.S. at

---

[5] *See United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 331 n.12 (1st Cir. 2003); *Randell v. United States*, 64 F.3d 101, 106 (2d Cir. 1995); *Sherman v. Nash*, 488 F.2d 1081, 1083 (3d Cir. 1973); *Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291, 298-99 (4th Cir. 2000); *Lange v. Phinney*, 507 F.2d 1000, 1003 (5th Cir. 1975); *Hoogerheide v. Internal Revenue Serv.*, 637 F.3d 634, 638 (6th Cir. 2011); *Rappaport v. United States*, 583 F.2d 298, 300-01 (7th Cir. 1978) (per curiam); *Pagonis v. United States*, 575 F.3d 809, 813-15 (8th Cir. 2009); *In re J.J. Re-Bar Corp., Inc.*, 644 F.3d 952, 955 (9th Cir. 2011); *Sterling Consulting Corp. v. United States*, 245 F.3d 1161, 1167 (10th Cir. 2001); *Mathes v. United States*, 901 F.2d 1031, 1033 (11th Cir. 1990); *Gardner v. United States*, 211 F.3d 1305, 1310-11 (D.C. Cir. 2000).

104 ("The Act was designed expressly to restrict 'the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes.'" (quoting S. Rep. No. 75-1035, at 1 (1937))); *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 825 (1997) (Act creates a "broad jurisdictional barrier" (citation and internal quotations omitted)).

The amendments to the Anti-Injunction Act confirm that the Act is jurisdictional. Congress has amended the Anti-Injunction Act on numerous occasions without disturbing the Court's decisions holding that the Act is jurisdictional. To the contrary, Congress has reinforced those decisions by framing exceptions to the Anti-Injunction Act in explicitly jurisdictional terms.[6]

2. The Private Respondents argue that the Anti-Injunction Act is not jurisdictional, and thus the Court need not address it. *See* Private Resp. Cert. Stage Br. 16-18. Their arguments are unpersuasive.

---

[6] *See* 26 U.S.C. § 6015(e) (Tax Court "shall have jurisdiction" in specified cases, and is authorized to enjoin levies and collection actions "[n]otwithstanding the provisions of section 7421(a)."); *id.* § 6213(a) ("Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund . . . unless" specified conditions are met.); *id.* § 6225(b) (same, conferring authority "notwithstanding section 7421(a)"); *id.* § 6246(b) (same); *id.* § 6330(e)(1) (same); *id.* §§ 7426(a), (b)(1) (authorizing certain civil actions but providing that "[t]he district court shall have jurisdiction to grant only" limited forms of relief); *id.* § 7429(b)(2)(A) (providing that, with certain exceptions, district courts "shall have exclusive jurisdiction over any civil action for a determination under this subsection").

a. The Private Respondents contend that the language of the Anti-Injunction Act does not create a jurisdictional limitation under the Court's recent decisions, which have analyzed whether particular statutory provisions are "claim-processing rules" or "jurisdictional prescriptions." *Reed Elsevier, Inc. v. Muchnik*, 130 S. Ct. 1237, 1243-44 (2010). *See, e.g.*, *Henderson*, 131 S. Ct. 1197; *Arbaugh*, 546 U.S. 500. According to these cases, statutes that "govern[] a court's adjudicatory capacity" are jurisdictional, while "rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times" are not. *Henderson*, 131 S. Ct. at 1202-03.

The Court's recent decisions provide no basis for overruling the long line of decisions that have treated the Anti-Injunction Act as jurisdictional. *See supra* p. 16. By directing that "no suit for the purpose of restraining the assessment or collection of any tax *shall be maintained in any court*," 26 U.S.C. § 7421(a) (emphasis added), the Anti-Injunction Act does more than simply "promote the orderly progress of litigation." Instead, it governs the court's adjudicatory capacity by commanding that suits for the purpose of restraining the assessment or collection of taxes shall not be "maintained in any court."

Moreover, the Courts' recent decisions give dispositive weight to longstanding precedent that a statute is jurisdictional. *See Henderson*, 131 S. Ct. at 1203 ("When a long line of this Court's decisions left undisturbed by Congress has treated a similar requirement as jurisdictional, we will presume that

Congress intended to follow that course." (citation and internal quotations omitted)); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134-36 (2008); *Bowles v. Russell*, 551 U.S. 205, 206 (2007) (Court has "long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature."). Altering the Act's jurisdictional status would "require the repudiation of a century's worth of precedent and practice in American courts." *Bowles*, 551 U.S. at 209 n.2. Consequently, the Court's recent decisions support continued adherence to past decisions treating the Anti-Injunction Act as jurisdictional.

b. Nor is there any merit to the Private Respondents' contention that the limitations on the scope of the Anti-Injunction Act recognized in *Williams Packing* and *South Carolina v. Regan*, 465 U.S. 367 (1984), demonstrate that the statute is non-jurisdictional. *Williams Packing* and *Regan* did not repudiate the Anti-Injunction Act's jurisdictional status. To the contrary, *Williams Packing* expressly reaffirmed that the Act "withdraw[s] jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes." 370 U.S. at 5.

In both cases, the Court construed the statute based on its purpose and structure. In *Williams Packing*, the Court explained that, "if it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable." *Id.* at 7. Likewise, in *Regan*, the Court concluded that "the Act's purpose and the circumstances of its enactment indicate that

Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy." 465 U.S. at 378.

The Court's reliance on statutory purpose and structure does not imply that the Anti-Injunction Act is non-jurisdictional. The Court has construed other jurisdictional statutes to permit exceptions not expressly set out in the text of the statute, yet none of those exceptions made the statutes any less jurisdictional. *See Farm Credit Servs.*, 520 U.S. at 823 (Tax Injunction Act "on its face, yields no exception to the jurisdictional bar save where the state remedy is wanting, but at least one other exception is established by our cases."); *Ankenbrandt v. Richards*, 504 U.S. 689, 700 (1992) (discussing domestic relations exception to diversity jurisdiction); *Markham v. Allen*, 326 U.S. 490, 494 (1946) (discussing probate exception to diversity jurisdiction).

c. Contrary to the Private Respondents' assertion, the Court's decision in *Helvering v. Davis*, 301 U.S. 619, 639-40 (1937), does not demonstrate that the Anti-Injunction Act is non-jurisdictional. In *Davis*, the federal government acknowledged that the Anti-Injunction Act was jurisdictional, and that, in its view, the Act barred the plaintiffs' suit. Br. for Pet'rs Helvering & Welch at 28, 31, *Helvering v. Davis*, 301 U.S. 619 (1937) (No. 36-910). The federal government nevertheless argued that it would further the purpose of the Anti-Injunction Act if the government were permitted to waive any defenses that it had under the Act. *Id.* at 22-23, 31.

In writing for the Court, Justice Cardozo noted that he and three other Justices would have dismissed the case without reaching the merits. *Davis*, 301 U.S. at 639. But five Justices concluded that the case had "extraordinary features making it fitting in their judgment" to issue a decision. *Id.* at 640. The Court's limited explanation of the basis for this ruling does not indicate that five Justices had concluded—notwithstanding the Court's prior decisions—that the Anti-Injunction Act is non-jurisdictional.

Davis's treatment of the Anti-Injunction Act has not been relied upon as support for the view that the Anti-Injunction Act is non-jurisdictional. To the contrary, notwithstanding *Davis*, the Court has continued to hold that "[t]he object of § 7421(a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes." *Williams Packing*, 370 U.S. at 5.[7]

II. THE ANTI-INJUNCTION ACT BARS THIS SUIT.

The text of the Anti-Injunction Act "could scarcely be more explicit." *Bob Jones*, 416 U.S. at 736. The

---

[7] The *Davis* Court's decision to permit the federal government to waive a jurisdictional issue has been characterized as "an anomaly predating more stringent jurisdictional limitations." *Seven-Sky v. Holder*, 661 F.3d 1, 13 (D.C. Cir. 2011). The Court need not revisit *Davis* in this case because the federal government has not purported to waive a valid defense under the Anti-Injunction Act.

statute provides, with specified exceptions, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). Respondents do not contend that their suit falls within any of the express exceptions to the Anti-Injunction Act. Nor do they contend that their suit can proceed because "it is clear that under no circumstances could the Government ultimately prevail." *Williams Packing*, 370 U.S. at 7. And Respondents do not contend that constitutional challenges are exempt from the Act, because the "decisions of this Court make it unmistakably clear that the constitutional nature of a taxpayer's claim . . . is of no consequence under the Anti-Injunction Act." *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 759 (1974). The critical question is thus whether this is a "suit for the purpose of restraining the assessment or collection of any tax" within the meaning of the Anti-Injunction Act. The answer to that question is "yes."

A. The Relevant Statutory Text Bars This Suit.

The Anti-Injunction Act bars pre-enforcement challenges to the Section 5000A penalty for two distinct reasons. *First*, Congress provided that the penalty should be assessed and collected in the same manner as taxes, which makes suits challenging Section 5000A subject to the Anti-Injunction Act. *Second*, the Anti-Injunction Act's reference to "any tax" includes the penalty, particularly in light of provisions specifying that "taxes" include "assessable penalties" for assessment and collection purposes.

1. The Anti-Injunction Act Applies Because Congress Specified That The Section 5000A Penalty Shall Be Assessed And Collected In The Same Manner As Taxes.

a. In the Affordable Care Act, Congress directed that the penalty created by Section 5000A "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." 26 U.S.C. § 5000A(g)(1). Subchapter B of chapter 68, in turn, provides that "[t]he penalties and liabilities provided by this subchapter . . . shall be assessed and collected *in the same manner as taxes*." *Id.* § 6671(a) (emphasis added). By cross-referencing subchapter B of chapter 68, Congress expressly provided that the Section 5000A penalty "shall be assessed and collected in the same manner as taxes." *Id.*[8]

---

[8] As Judge Kavanaugh explained, Congress appeared undecided over whether to label the Section 5000A penalty a "tax" or a "penalty." *See Seven-Sky*, 661 F.3d at 30 n.13 (Kavanaugh, J., dissenting) (quoting Staff of Joint Comm. on Taxation, JCX-27-10, Errata for JCX-18-10, at 2 (2010) (stating that the Section 5000A "penalty is an excise tax")). Congress ultimately (i) labeled the payment a "penalty," (ii) placed Section 5000A in chapter 48 (entitled "'Miscellaneous Excise Taxes"), and (iii) cross-referenced chapter 68 subchapter B to direct that the penalty shall be assessed and collected in the same manner as taxes. As Judge Kavanaugh noted, both "Assessable Penalties" under subchapter B of chapter 68 and "Miscellaneous Excise Taxes" under chapter 48 are subject to the Anti-Injunction Act. *See* 661 F.3d at 30 n.13.

The Anti-Injunction Act bars any "suit for the purpose of restraining the assessment or collection of any tax." *Id.* § 7421(a). "[T]he term 'assessment' refers to . . . the calculation or recording of a tax liability." *United States v. Galletti*, 541 U.S. 114, 122 (2004). The assessment process typically begins with the submission of a tax return. *See* 26 C.F.R. § 601.103(a). "In most cases, the Secretary accepts the [taxpayer's] self-assessment and simply records the liability of the taxpayer." *Galletti*, 541 U.S. at 122. "Where the taxpayer fails to file the form of return or miscalculates the tax due," the Secretary may "'record[] the liability of the taxpayer in the office of the Secretary'" in accordance with the Secretary's rules. *Id.* (quoting 26 U.S.C. § 6203).[9]

Assessment by the Secretary triggers "collection," which is the "actual imposition of a tax." *Cohen v. United States*, 650 F.3d 717, 726 (D.C. Cir. 2011) (en banc). Collection begins with a notice that the taxpayer is liable for an unpaid amount and a demand that the taxpayer pay it. 26 C.F.R. § 601.103(a). If the taxpayer fails to pay the tax, the Secretary can take additional steps to collect it, including offsetting tax refunds otherwise due to the taxpayer or bringing a collection action under 26 U.S.C. § 6502(a).

---

[9] When the Secretary believes that the collection of a tax will be jeopardized by delay, he may assess the tax immediately. 26 U.S.C. §§ 6861-62. A taxpayer may seek administrative and judicial review of such "jeopardy assessments." *Id.* § 7429.

The Anti-Injunction Act addresses the manner in which taxes are assessed and collected by prohibiting (with limited exceptions) judicial interference in the assessment and collection process. If pre-enforcement challenges to the Affordable Care Act are allowed, the Section 5000A penalty will not be assessed and collected in the same manner as taxes, because judicial review will be available before, rather than after, the penalty is assessed and collected. The Anti-Injunction Act must apply in order to give effect to Congress's choice of the manner in which the Section 5000A penalty is assessed and collected.

b. Courts of appeals have held that the "manner" of assessing and collecting taxes refers only to the "methodology and procedures" for assessment and collection, and not the "timing" of those actions. *Seven-Sky*, 661 F.3d at 11; *see also Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 540 (6th Cir. 2011) (concluding that "manner" of assessment and collection refers only to "mechanisms the Internal Revenue Service employs to enforce penalties, not to the bar against pre-enforcement challenges to taxes").

Contrary to the courts of appeals' view, timing is a critical component of the assessment and collection of taxes. This Court has recognized that the purpose of the Anti-Injunction Act is to ensure "prompt collection" of revenue. *Williams Packing*, 370 U.S. at 7; *see also Bob Jones*, 416 U.S. at 747 (government has "powerful" interests in "protecting the administration of the tax system from premature judicial interference"). As Judge Kavanaugh noted,

"[t]he whole theory of the Anti-Injunction Act rests on the fact that there is a significant difference for purposes of the Government's tax assessment and collection efforts between a tax assessed and collected in Year 1 and a tax assessed and collected in Year 2." *Seven-Sky*, 661 F.3d at 32.

The Code's provisions on assessment (codified in chapter 63) and collection (codified in chapter 64) include detailed provisions specifying the timing of various steps in the process, including when a taxpayer can restrain the process by going to court.[10] Indeed, many of the express exceptions to the Anti-Injunction Act refer to assessment or collection provisions in chapters 63 or 64 of the Code.[11]

Even if the distinction between timing and methodology were valid, the courts of appeals' decision would still be incorrect because the availability of pre-enforcement review affects more than just the timing of assessment and collection. If the Anti-Injunction Act does not apply and the taxpayer successfully challenges the Section 5000A

---

[10] *See, e.g.*, 26 U.S.C. § 6206 (assessment period); *id.* § 6213(a) (time for filing petition); *id.* § 6229 (limitations period for assessments); *id.* § 6302 (time of collection); *id.* § 6331(d)(2) (timing of levy); *id.* § 6335(d) (timing of sale of seized property).

[11] *See* 26 U.S.C. § 6213(a) (restriction on assessment); *id.* § 6225(b) (restriction on premature assessment and collection); *id.* § 6246 (restriction on premature adjustments and collection); *id.* § 6330(e)(1) (suspension of collections); *id.* § 6331(i) (restriction on levies). *See also id.* § 6207(a) (cross-referencing Anti-Injunction Act).

penalty, the Secretary will be enjoined from assessing and collecting the penalty. In this situation, the penalty will *never* be assessed or collected.

In contrast, if the Anti-Injunction Act applies, the Secretary is free to assess the Section 5000A penalty without judicial interference. Taxpayers who wish to dispute the penalty have two options. *First*, a taxpayer can pay the penalty and sue for a refund in in federal district court or the Court of Federal Claims. *See* 28 U.S.C. § 1346(a)(1); 26 U.S.C. § 7422; *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 4-5 (2008). A taxpayer who chooses this option may not file suit immediately after paying the penalty. Instead, the taxpayer must first file a refund claim with the IRS explaining why she is not liable for the penalty, and then wait at least six months to give the IRS a chance to resolve the claim administratively or marshal its defense. 26 U.S.C. §§ 6532(a)(1) & 7422(a).

Second, the taxpayer can decline to pay the penalty and wait for the IRS to file a collection action. *See id.* § 7403. The IRS is barred from using levies to collect the amounts owed, which means that a taxpayer can avoid paying the penalty until the court issues a ruling. *Id.* § 5000A(g)(2)(B)(ii). If the IRS prevails, however, the taxpayer may be liable for

statutory penalties as well as interest on the amount owed. *Id.* §§ 6601(e)(2) & 6651(a)(3).[12]

Regardless of which avenue the taxpayer chooses, judicial review is available only after the penalty has been assessed and either (i) collected or (ii) made the subject of a collection proceeding initiated by the federal government.

Contrary to the lower courts' view, a penalty that is never assessed and collected has not been "assessed and collected in the same manner" as a penalty that was assessed and collected but later refunded. Apart from challenges to the minimum coverage provision, it appears that no court has ever accepted an argument that a penalty can be assessed and collected in the same manner as taxes without being subject to the Anti-Injunction Act. Rather, as a leading treatise notes, "because § 6671(a) provides that penalties shall be *assessed and collected as taxes*, the Anti-Injunction Act bars taxpayers from seeking to enjoin the assessment of penalties." Bittker, McMahon & Zelenak, *Fed. Inc. Tax'n of Indiv.* § 51.10 (3d ed. 1993-2003, updated Nov. 2011 and visited on Jan. 5, 2012) (emphasis added).

---

[12] For taxes imposed by subtitles A or B or chapters 41, 42, 43, or 44 of the Code, a notice and demand for payment from the IRS triggers a 90-day period during which the taxpayer is permitted to file a petition for review with the Tax Court. *See* 26 U.S.C. § 6213(a). The filing of such a petition generally stays collection efforts by the IRS. *Id.* Because Section 5000A is codified in Chapter 48 of subtitle D, this option is not available to taxpayers wishing to challenge the Section 5000A penalty.

c. In addition to stating that penalties under Subchapter B of chapter 68 "shall be assessed and collected in the same manner as taxes," Section 6671(a) provides that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by [Subchapter B]." 26 U.S.C. § 6671(a). The D.C. Circuit concluded that it is this second sentence of section 6671(a) that makes the Anti-Injunction Act applicable to Subchapter B penalties. *Seven-Sky*, 661 F.3d at 11-12. The court reasoned that the first sentence cannot require the same result or else "the last sentence of section 6671 would be superfluous." *Id.* at 12.

The court of appeals' reasoning is flawed. Interpreting the first sentence of Section 6671 as triggering the Anti-Injunction Act does not render the last sentence superfluous. The first sentence addresses only "assessment and collection"; it triggers the Anti-Injunction Act because that statute directly addresses restraints on assessment and collection. In contrast, the second sentence equates Subchapter B penalties with taxes for all purposes under the Code. Thus, for example, the second sentence provides that penalties imposed by chapter 68 are subject to Section 7433(a), which gives taxpayers a right of action against IRS employees who violate any provision of the Code in collecting a tax. 26 U.S.C. § 7433(a). Because the first sentence of Section 6671 does not make provisions like Section 7433 applicable to assessable penalties, the last sentence is not superfluous regardless of whether the first sentence triggers the Anti-Injunction Act.

Even if that were not so, the anti-surplusage canon would not justify a decision to distort the meaning of the first sentence. As the Court recently explained, "[t]here are times when Congress enacts provisions that are superfluous." *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2249 (2011) (citation and internal quotations omitted). This is certainly true of the Code. *See Callaway v. Comm'r of Internal Revenue*, 231 F.3d 106, 131 (2d Cir. 2000) ("[I]n a statutory scheme as complex as the Internal Revenue Code and its implementing Treasury Regulations, we should not be surprised to find repetitive 'surplusage.'"); *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 520 (1992) (Scalia, J., concurring) (concluding that the language in Section 5845(i) of the Code "may well be redundant," but that such "residual provisions . . . are often meant for insurance, to cover anything the draftsman might inadvertently have omitted"); *Church of Scientology of Cal. v. Internal Revenue Serv.*, 792 F.2d 153, 161 (D.C. Cir. 1986) ("[*A*]*ny* interpretation of [Section 6103(b)(2) of the Code] . . . creates some redundancy.").

Similar statutory redundancies—where a specific statutory command is accomplished by a general command that encompasses the specific—are not uncommon in the Code. *See, e.g.*, Bittker & Lokken, *Fed. Tax'n of Income, Estates and Gifts* § 111A.5.1 (3d ed. 1993-2003 & 2011 Cum. Supp. No. 3) (noting that "[t]he statutory language [of § 6331(a) of the Code] is redundant"); *see generally Fort Stewart Sch. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 646 (1990) ("It might reasonably be argued, of course, that these two exceptions are indeed technically

unnecessary, and were inserted out of an abundance of caution—a drafting imprecision venerable enough to have left its mark on legal Latin (*ex abundanti cautela*).").

In any event, the principle that statutes should be interpreted to avoid redundancy is not applicable here, because *no* reasonable interpretation of Section 6671(a) avoids redundancy. *See Microsoft*, 131 S. Ct. at 2248 (canon against superfluity "assists only where a competing interpretation gives effect to every clause and word of a statute" (citation and internal quotations omitted)). Under the D.C. Circuit's interpretation, the first sentence of Section 6671(a) is surplusage. Moreover, there is inevitable redundancy between Sections 6671(a) and 6665(a), which provides that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by [Chapter 68]." 26 U.S.C. § 6665(a).

In sum, the second sentence of Section 6671(a) is broader than the first sentence, but that does not alter the conclusion that the language of the first sentence brings challenges to penalty within the scope of the Anti-Injunction Act.

d. No intent to allow pre-enforcement challenges to the Affordable Care Act can be inferred from Congress's decision to prohibit criminal prosecutions, notices of liens with respect to any property of a taxpayer, or levying any property of a taxpayer for failing to pay the Section 5000A penalty. The federal government has argued that "[t]hose actions are

among the principal tools the federal government uses to collect unpaid taxes," and because they "are unavailable in the context of the minimum coverage provision, it makes sense that Congress would regard it as unnecessary to apply the" Anti-Injunction Act. U.S. Supp. Br. at 5-6, *Liberty Univ.*, 2011 WL 3962915 (No. 10-2347).

This argument lacks merit because the IRS retains other tools to collect the Section 5000A penalty. Specifically:

- The IRS may offset the penalty against any refund to which the taxpayer would otherwise be entitled. 26 U.S.C. §§ 6402(a), 6671.

- The IRS may bring an action to collect the penalty. *Id.* § 7403.

- Failure to pay the penalty creates a statutory lien against the taxpayer. *Id.* § 6321. Although Section 5000A prohibits the IRS from filing a *notice* of lien, a tax lien arises automatically, as a matter of law, when the IRS assesses a tax, sends the taxpayer a notice and demand for payment, and the taxpayer fails to pay in full. *Id.* The statutory lien attaches to "all property and rights to property" belonging to the taxpayer, including the taxpayer's home

and any future property that the taxpayer acquires. *Id.*[13]

- The IRS can use the "jeopardy assessment" procedures if it believes that the taxpayer will dissipate her assets. *Id.* § 6862(a).

Because pre-enforcement challenges would restrain these collection methods, as well as the assessment of penalties, the federal government is wrong to argue that Congress's decision to make other collection methods unavailable eliminates any reason to apply the Anti-Injunction Act. *See United States v. Am. Friends Serv. Comm.*, 419 U.S. 7, 10 (1974) (holding that a suit seeking to restrain even one method of assessment or collection is barred by the plain language of the Anti-Injunction Act).

e. There is also no merit to the suggestion that this suit will not restrain the assessment or collection of taxes because the minimum coverage provision does not take effect until 2014. *See Thomas More*, 651 F.3d at 540. The scope of the Anti-Injunction Act is not limited to lawsuits seeking to restrain "current" or "imminent" assessment and collection of taxes. Instead, the statute provides, in sweeping terms, that "*no* suit for the purpose of restraining the assessment or collection of *any* tax shall be maintained in any court by any person." 26

---

[13] Although Section 5000A(g)(2)'s prohibition against filing a notice of lien does not affect the existence of a tax lien, it does affect the Service's position vis-à-vis third-party creditors. *See* 26 U.S.C. § 6323(a).

U.S.C. § 7421(a) (emphasis added). As Judge Kavanaugh observed, "there is no 'early-bird special' exception to the Anti-Injunction Act." *Seven-Sky*, 661 F.3d at 46. Judicial creation of such an exception "would pose a host of arbitrary line-drawing problems." *Id.*

f. "The [Internal Revenue] Code contains 'a mind-numbing assortment' of civil penalties." Bittker & Lokken, *Federal Taxation of Income, Estates and Gifts* § 114.2 (citation omitted).[14] Several provisions of the Code expressly state that specified penalties are treated as taxes, including for purposes of assessment and collection. *See, e.g.*, 26 U.S.C. §§ 5114(c)(3), 5684(b), 5761(e), 6665(a), 6671(a). A leading treatise summarizes the effect of these provisions by stating that "[v]irtually all civil penalties are assessed, collected, and subject to statutes of limitations in the same manner as taxes." Bittker et al., *Federal Income Taxation of Individuals* § 50.03.

The federal government takes the position that the Anti-Injunction Act applies to other penalties that, like the Section 5000A penalty, are codified

---

[14] For example, Congress has imposed penalties on political organizations that fail to disclose contributions and expenditures, 26 U.S.C. § 527(j)(1); on tax-exempt organizations that fail to comply with public inspection requirements, *id.* § 6685, or fail to disclose that the information or services they provide are available without charge from the federal government, *id.* § 6711; and on entities that sell or offer to sell diesel fuel that does not meet EPA standards, *id.* § 6720A.

outside chapter 68 but cross-reference chapter 68. U.S. Supp. Br. at 4, *Liberty Univ.*, 2011 WL 3962915 (No. 10-2347). For example, Sections 5114(c)(3), 5684(b), and 5761(e) of the Code provide that penalties for violation of certain laws related to alcohol and tobacco "shall be assessed, collected and paid in the same manner as taxes." The government acknowledges that these penalties are subject to the Anti-Injunction Act, but attempts to distinguish them from the Section 5000A penalty on the ground that they expressly provide that the penalties shall be assessed and collected in the same manner as taxes, and expressly cross-reference Section 6665(a).

The government's effort to distinguish these provisions is unconvincing. Congress included a cross-reference expressly providing that the Section 5000A penalty shall be assessed and collected in the same manner as taxes. Congress must be presumed to know that it has repeatedly provided that certain penalties should be treated as taxes, and that, as a result of these provisions, the Anti-Injunction Act prevents pre-enforcement challenges to those penalties. Had Congress intended a different result for the Section 5000A penalty, it would have said so explicitly. Instead, it explicitly provided that this penalty shall be assessed and collected in the same manner as taxes.

2. The Section 5000A Penalty Is A "Tax" Within The Meaning Of The Anti-Injunction Act.

Even if Congress had not enacted specific statutory language providing that the Section 5000A penalty shall be assessed and collected in the same

manner as a tax, the Anti-Injunction Act would still bar this suit. The Anti-Injunction Act bars suits seeking to restrain the assessment and collection of "any tax." 26 U.S.C. § 7421(a). That statutory language encompasses assessable penalties such as the Section 5000A penalty.

a. The Anti-Injunction Act does not define the term "tax." The Court should therefore presume that Congress intended to give the term its ordinary meaning. *See Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). When Congress enacted the Anti-Injunction Act, it would have understood the term "tax" to refer broadly to any "sum of money assessed on the person or property of a citizen by government, for the use of the nation or state." Noah Webster, *An American Dictionary of the English Language* 1132 (1860). Indeed, a leading dictionary at the time defined "tax" as "a term of general import, including almost every species of imposition on persons or property for supplying the public treasury, as tolls, tribute, subsidy, excise, impost, or customs." *Id.*

Consistent with this ordinary meaning, the Court has broadly construed the term "tax" in applying the Anti-Injunction Act. For example, the Court has said that the Act applies to an "exaction [that] is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue." *Phillips v. Comm'r of Internal Revenue*, 283 U.S. 589, 596 (1931); *see also Helwig v. United States*, 188 U.S. 605, 613 (1903) (in the tax context, labels do not "change the nature and character of the enactment"). The Court has held

that an exaction qualifies as a "tax" even if it raises "obviously negligible" revenue, and even if the primary goal of the exaction is regulation. *United States v. Sanchez*, 340 U.S. 42, 44 (1950). *See also Sonzinsky v. United States*, 300 U.S. 506, 514 (1937).

This Court's decision in *Bailey v. George*, 259 U.S. 16 (1922), demonstrates the broad scope of the Anti-Injunction Act. In a related case decided on the same day, the Court held that the Child Labor Tax was a regulatory measure that fell outside Congress's taxing power. *See Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922). The Court nevertheless held that, for purposes of the Anti-Injunction Act, this very same provision was a "tax," and thus was not subject to a pre-enforcement challenge. *George*, 259 U.S. at 19-20; *see also Bob Jones*, 416 U.S. at 740 (Anti-Injunction Act applies to a "regulatory measure [that is] beyond the taxing power of Congress").

The ordinary meaning of the term "tax" in the Anti-Injunction Act includes the penalty imposed by Section 5000A. The penalty is codified in the Code, calculated as part of taxpayer's federal income tax liability, assessed and collected by the Secretary of the Treasury, and paid into the federal government's general revenues upon notice and demand by the Secretary. The amount of the penalty depends in part on the taxpayer's income, and on whether the taxpayer is otherwise obligated to file a federal income tax return. Although the Anti-Injunction Act would apply even if the minimum coverage provision were expected to raise only "negligible" revenue, the provision is expected to produce revenues of $5 to 6

billion per year, an amount that is far from negligible. *See CBO Analysis* at 14.

b. Although the ordinary meaning of "tax" is broad enough to encompass the penalty imposed by Section 5000A, the Court need not rely solely on the ordinary meaning of "tax" to resolve this case. The Anti-Injunction Act addresses "the assessment or collection of any tax," 26 U.S.C. § 7421(a), and therefore the relevant question is whether the Section 5000A penalty is a tax for purposes of assessment and collection. Other provisions of the Code demonstrate that it is.

Section 6201, which addresses the Secretary's assessment authority, provides that "[t]he Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (*including interest, additional amounts, additions to the tax, and assessable penalties*) imposed by this title . . . ." 26 U.S.C. § 6201(a) (emphasis added). Had Congress thought that "assessable penalties" were not "taxes," it would have authorized the Secretary to assess *both* taxes *and* assessable penalties. Instead, Congress authorized only assessment of "all taxes," and expressly noted that "assessable penalties" are included within the meaning of "taxes" for assessment purposes. Thus, at least insofar as assessment is concerned, Congress has made clear that "assessable penalties" are "taxes."

Section 6301, which addresses the Secretary's collection authority, provides that "[t]he Secretary shall collect the taxes imposed by the internal

revenue laws." *Id.* § 6301. By operation of this provision, the Secretary is required to collect the taxes that must be assessed under Section 6201. Those "taxes" expressly include "assessable penalties." *Id.* § 6201(a). Accordingly, sections 6201 and 6301 make clear that, when Congress addresses the assessment and collection of taxes, it uses the term "taxes" in a broad manner that includes exactions not expressly labeled as taxes. As a result, the Anti-Injunction Act's prohibition on suits restraining the "the assessment or collection of any tax," *id.* § 7421(a), applies to suits that seek to restrain the assessment or collection of assessable penalties.

There is no dispute that the Section 5000A penalty is a "penalty." *See id.* § 5000A(b) (expressly describing the "shared responsibility payment" as a "penalty"). The penalty is also "assessable." The statute expressly states that it "shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." *Id.* § 5000A(g)(1).[15] Because the Section 5000A penalty is an "assessable penalty" for purposes of Section 6201(a), it is included in the definition of "tax" for

---

[15] Assessable penalties are "components of tax liability" that may be assessed by the Secretary and collected through an administrative action; non-assessable penalties "cannot be determined to be due and collectable" by the IRS. *Pac. Gas & Elec. Co. v. United States*, 417 F.3d 1375, 1383 (Fed. Cir. 2005) (citation omitted). *See, e.g.*, *Internal Revenue Manual* 34.6.2.4(1) (Aug. 11, 2004) (liability for failure to comply with a levy "is not assessable but must be collected by suit").

purposes of assessment and collection. As a result, the Anti-Injunction Act bars suits to restrain the assessment or collection of the Affordable Care Act penalty.

c. The courts of appeals have divided over whether the Section 5000A penalty is a "tax" within the meaning of the Anti-Injunction Act. *Compare Liberty Univ.*, 2011 WL 3962915, at *5-*16 (holding that Section 5000A penalty is a "tax" under the Anti-Injunction Act), *with Seven-Sky*, 661 F.3d at 6-11 (holding that Section 5000A penalty is not a "tax"); *and Thomas More*, 651 F.3d 529, 539-40 (6th Cir. 2011) (same). The courts that have held the Anti-Injunction Act to be inapplicable have not based their holding on the ordinary meaning of "tax." Instead, those courts have held that "tax" must be interpreted to exclude the Section 5000A penalty in order to give effect to Congress's decision to refer to the payment as a "penalty" rather than a "tax." *Seven-Sky*, 661 F.3d at 5-8; *Thomas More*, 651 F.3d at 539-40. This reasoning is unpersuasive.

Congress's decision to refer to the Section 5000A penalty as a "penalty" provides no basis for interpreting "tax" contrary to its ordinary meaning. To be sure, Congress debated whether to call the payment a "tax" or a "penalty," but nothing in the legislative history suggests that this debate had anything to do with whether the payment would be subject to the Anti-Injunction Act. As the federal government has repeatedly recognized, referring to an exaction as a "penalty" signals to the taxpayer that noncompliance is unacceptable. *See, e.g.*, Office of Tax Policy, Dep't of the Treasury, *Report to the*

Congress on Penalty & Interest Provisions of the Internal Revenue Code 36 (1999) ("[P]enalties clearly signal that noncompliance is not acceptable behavior. . . . In establishing social norms and expectations, subjecting the noncompliant behavior to any penalty may be as important as the exact level of the penalty . . . .") [hereinafter "*Penalty Report*"]; Exec. Task Force for the Comm'r's Penalty Study, *Report on Civil Tax Penalties* at II-4 (1989) (penalty is adverse consequence for failure to comply with a rule); *id.* at III-1 ("Penalties as a consequence of violating a standard of behavior remind taxpayers of their duty."). By labeling the Section 5000A penalty a "penalty," Congress signaled to taxpayers that they are expected to comply with the minimum coverage requirement.

The D.C. Circuit's view that the Section 5000A penalty is not even an "assessable penalty," *see Seven-Sky*, 661 F.3d at 8, also lacks merit. The court of appeals did not dispute that Section 5000A imposes a "penalty," nor did it deny that the penalty is "assessable." Instead, the court noted that the term "assessable penalties" is "generally used to refer to Chapter 68, subchapter B penalties." *Id.* In the court's view, the term "assessable penalties" cannot include the Section 5000A penalty because, if it did, "Congress's deliberate efforts to treat the shared responsibility payment as a penalty, not a tax, would be inexplicable." *Id.*

Congress's decision to treat the Section 5000A penalty as a "penalty" is not inexplicable if it is treated as an "assessable penalty." The legislative history does not suggest that the debate over

terminology was related to whether the Anti-Injunction Act would apply. In contrast, Congress's use of "penalty" is significant regardless of the Anti-Injunction Act's applicability because of its importance in "establishing social norms and behavior." *Penalty Report* at 36.

Likewise, the fact that "assessable penalties" are "generally" found in Subchapter B is irrelevant, because "assessable penalties" are also located outside of Chapter 68. *See* 26 U.S.C. §§ 6038(b), 6038A(d), 6038B(c), 6038C(c); *see also Internal Revenue Manual* 20.1.9.1.1(2) (Apr. 22, 2011) (penalties in Sections 6038-6038C of chapter 61 "are assessable penalties"). Section 6201 cannot be limited to "assessable penalties" contained in Subchapter B because the provision expressly extends to "all taxes (including . . . assessable penalties) imposed by *this title*." 26 U.S.C. § 6201(a) (emphasis added).

In sum, the term "taxes" includes the Section 5000A penalty. Congress reinforced that conclusion by providing that, for purposes of assessment and collection, the term "taxes" includes "assessable penalties" such as the Section 5000A penalty. Accordingly, the relevant statutory language requires that the Anti-Injunction Act insulate this penalty from pre-enforcement suits.

B. The Anti-Injunction Act Cannot Be Avoided By Characterizing This Case As A Challenge To The Minimum Coverage Requirement Rather Than The Penalty Provision.

In holding that the Anti-Injunction Act did not bar the litigation in *Seven-Sky*, the D.C. Circuit deemed it "critical" that plaintiffs' suit was "center[ed]" on challenging the constitutionality of the minimum coverage requirement. *See* 661 F.3d at 9. The court concluded that the Anti-Injunction Act was inapplicable because the plaintiffs "brought suit for the purpose of enjoining a regulatory command, the individual mandate, that requires them to purchase health insurance from private companies, produces no revenues for the Government, and imposes obligations independent of the shared responsibility payment." *Id.* at 8. This argument does not justify a decision that the Anti-Injunction Act is inapplicable to this case.

First, Respondents have challenged the penalty imposed by Section 5000A as well as the minimum coverage requirement. Counts One and Two of the Amended Complaint challenge the allegedly "Unconstitutional Mandate That All Individuals Have Healthcare Insurance Coverage *Or Pay A Penalty*." J.A. 122, 125 (emphasis added). The Amended Complaint also seeks an injunction against "enforcement" of the Act. *Id.* at 124, 126. "[T]he 'enforcement' contemplated by the statute is the assessment and collection of the tax penalties by the IRS." *Seven-Sky*, 661 F.3d at 41 n.29 (Kavanaugh, J., dissenting). The allegations in the Amended

Complaint "leave little doubt that a primary purpose of this lawsuit is to prevent the Service from assessing and collecting" the Section 5000A penalty. *Bob Jones*, 416 U.S. at 738.

Second, even if Respondents had attempted to challenge only the minimum coverage requirement and not the penalty, the Anti-Injunction Act would bar their suit. Arguments that the Anti-Injunction Act can be avoided in this way are "circular" and "unpersuasive." *Alexander v. "Americans United" Inc.*, 416 U.S. 752, 760-61 (1974). *See also Bob Jones*, 416 U.S. at 731-32.

In *Americans United*, plaintiffs sought to challenge an IRS decision to revoke a non-profit corporation's tax-exempt status under 26 U.S.C. § 501(c)(3). The Court dismissed as "irrelevant" the corporation's argument that it did "'not seek in this lawsuit to enjoin the assessment or collection of its own taxes,'" because "a suit to enjoin the assessment or collection of *anyone's* taxes triggers the literal terms of § 7421(a)." 416 U.S. at 760 (citation omitted) (emphasis added). The Court also rejected the plaintiffs' argument that the Act was inapplicable because "restraining the assessment or collection of taxes was at best a collateral effect of respondent's action." *Id.* (citation and internal quotations omitted). The Court held that, "[u]nder any reasonable construction of the statutory term 'purpose,'" the corporation's purpose was "to restore advance assurance that donations to it would qualify as charitable deductions .... Indeed, [the corporation] would not be interested in obtaining the declaratory and injunctive relief requested if that

relief did not effectively restrain the taxation of its contributors." *Id.* at 760-61. The Court concluded that it was "circular" to describe the plaintiffs' "primary design" as "avoid[ing] the disposition of contributed funds away from the corporation," rather than "remov[ing] the burden of taxation from those presently contributing." *Id.* at 761 (citation and internal quotations omitted). The first "goal is merely a restatement of" the second "and can be accomplished only by restraining the assessment and collection of a tax in contravention of § 7421(a)." *Id.*

Similarly, in *Bob Jones*, the plaintiff University argued that its lawsuit was "intended solely to compel the Service to refrain from withdrawing [the University's] § 501(c)(3) ruling letter and from depriving [its] donors of advance assurance of deductibility." 416 U.S. at 738. The University argued that its purpose was "the maintenance of the flow of contributions, not the obstruction of revenue." *Id.* The Court held that the Anti-Injunction Act would apply even if "petitioner would owe no federal income taxes if its § 501(c)(3) status were revoked," because the University was seeking "to restrain the collection of taxes from its donors." *Id.* at 738-39. The Court rejected the University's argument that the IRS was "attempt[ing] to regulate the admissions policies of private universities" rather than "an effort to protect the revenues," because the University could not show "that the Service's action [was] without an independent basis in the requirements of the Code." *Id.* at 739-40.

The D.C. Circuit attempted to distinguish *Americans United* and *Bob Jones* on the ground that

the minimum coverage requirement and the Section 5000A penalty are not "inextricably linked." *Seven-Sky*, 661 F.3d at 10. According to the court of appeals, the provisions impose distinct legal obligations, as evidenced by the fact that some "applicable individuals" subject to the minimum coverage requirement are exempt from the penalty provision. *Id.* at 9-10.

This attempt to distinguish *Americans United* and *Bob Jones* fails. This Court did not characterize the regulations and taxes at issue in those cases as "inextricably linked," much less rely on such a characterization in holding that the Anti-Injunction Act applied. To the contrary, the Court has "abandoned" any "distinctions between regulatory and revenue-raising taxes." *Bob Jones*, 416 U.S. at 741 n.12. Indeed, the Court has applied the Anti-Injunction Act even to regulatory provisions that are beyond the taxing power of Congress. *See Bailey v. George*, 259 U.S. 16.[16]

---

[16] Some courts of appeals have interpreted the State Tax Injunction Act to allow challenges to the regulatory aspect of state exactions. *See, e.g.*, *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 761-63 (10th Cir. 2010); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin Cnty.*, 115 F.3d 1372, 1382-83 (8th Cir. 1997). There are strong arguments that these cases were wrongly decided. *See Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722, 727-30 (7th Cir. 2011) (en banc) (Posner, J.). In any event, the Court's decisions in *Americans United* and *Bob Jones* foreclose that interpretation of the Anti-Injunction Act.

Moreover, the minimum coverage requirement and the penalty provision *are* tightly linked. The penalty provision, which immediately follows and cross-references the minimum coverage requirement, is the sole means of enforcing that requirement. Absent the penalty provision, there would be no legally-prescribed consequences for non-compliance. As a practical matter, taxpayers could choose whether to obtain minimum coverage for themselves and their dependents, just as they did before the Affordable Care Act was enacted. Moreover, the revenues generated by the penalty provision will offset some of the additional expenses incurred by the federal government when uninsured patients consume health care services.

It is irrelevant that some individuals may be subject to the minimum coverage requirement but exempt from the penalty. That hypothetical situation has no application to this case, in which the Private Respondents have sued to avoid paying the penalty. It is far from clear that an "applicable individual" who is exempt from the penalty would have standing to challenge the minimum coverage provision. Even assuming such an individual were to bring suit, establish standing, and prevail, the result would be to reduce the penalties of other taxpayers. Because the Anti-Injunction Act precludes a lawsuit to reduce "anyone's taxes," *Americans United,* 416 U.S. at 760, such an action would be barred.

C. The Anti-Injunction Act Applies To The State Respondents.

The State Respondents contend that the Anti-Injunction Act does not bar their suit, even if it bars

the Private Respondents' suit. State Resp. Cert. Stage Br. 14. In support of this contention, the State Respondents argue that (i) a State is not a "person" within the meaning of the Anti-Injunction Act and (ii) they are "'aggrieved parties for whom [Congress] has not provided an alternative remedy.'" *Id.* at 14-15 (quoting *Regan*, 465 U.S. at 378). Both contentions lack merit.

1. The Anti-Injunction Act provides that no suit to restrain "the assessment or collection of any tax shall be maintained in any court *by any person, whether or not such person is the person against whom such tax was assessed.*" 26 U.S.C. § 7421(a) (emphasis added). The Act does not define the term "person," but the general definitional provisions of the Code state that "person" "shall be construed to mean *and include* an individual, a trust, estate, partnership, association, company or corporation." *Id.* § 7701(a)(1) (emphasis added). Another definitional provision states that the term "includes" "shall not be deemed to exclude other things otherwise within the meaning of the term defined." *Id.* § 7701(c). This Court has construed these definitions and held that the term "person," as used in various provisions of the Code, includes States.

In *Ohio v. Helvering*, 292 U.S. 360, 370 (1934), the Court held that a State is a "person" subject to a statutory provision imposing a federal tax on "every person who sells" liquor. The Court acknowledged that the definition of "person" in the Code does not expressly include States; rather, it defined "person" in essentially the same way that it is defined today: "the word 'person,' as used in this title, shall be

construed to mean and include a partnership, association, company, or corporation, as well as a natural person." *Id.* at 367 (citation and internal quotations omitted). The Court explained that whether the term "person" "includes a state or the United States depends upon the connection in which the word is found." *Id.* at 370. After reviewing the many cases holding that State is a "person" within the meaning of other statutory provisions, the Court concluded that a State is a "person" under the tax law at issue. *Id.* at 370-71.

Similarly, in *Sims v. United States*, 359 U.S. 108, 110-14 (1959), the Court held that the IRS was authorized to levy the salaries of state employees to collect delinquent federal taxes, and that a State Auditor who refused to honor the levies (and instead issued paychecks to the state employees) was personally liable for the amount of the paychecks. Rather than relying on the Code's general definition of "person," the provision at issue in *Sims* provided a narrower definition of "person." *See* 26 U.S.C. § 6332 (The term "person" "includes an officer or employee of a corporation or a member or employee of a partnership, who . . . is under a duty to surrender the property or rights to property, or to discharge the obligation."). The Court reasoned that this definition, while not explicitly including States, also does not exclude them, and that Congress has directed that the term "includes" should not be read "'to exclude other things otherwise within the meaning of the term defined.'" *Sims*, 359 U.S. at 112 (quoting 26 U.S.C. § 7701(b) (1954)). More generally, the Court explained that in construing "federal revenue measures expressed in terms of general

application," it "has ordinarily found them operative in the case of state activities even though States were not expressly indicated as subjects of tax." *Id.* (quoting *Wilmette Park Dist. v. Campbell*, 338 U.S. 411, 416 (1949)).

The State Respondents' argument is further undermined by *Regan*, 465 U.S. 367, which considered whether the Anti-Injunction Act barred a suit brought by a State. Although some members of this Court specifically noted that a State "is not a 'person' within the meaning of the Due Process Clause," *see id.* at 394 (O'Connor, J., concurring), not a single Justice suggested that South Carolina was not a "person" for purposes of the Anti-Injunction Act.[17]

The amendment history of the Anti-Injunction Act confirms that the term "person" was not intended to exclude States from its coverage. From 1867 to 1966, the Act provided simply that "no suit . . . shall be maintained in any court." *See* Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 475 (current version at 26 U.S.C. § 7421(a)). Congress added the "by any person" language to prevent suits by "third parties

---

[17] *See also Chickasaw Nation v. United States*, 208 F.3d 871, 879 (10th Cir. 2000) (holding that Indian tribes are "persons" under Section 4401(c), and concluding that "Congress unambiguously intended for the word 'person,' as used in § 7701(a)(1), to encompass all legal entities . . . that are the subject of rights and duties"); *United States v. Sahadi*, 555 F.2d 23, 26 n.3 (2d Cir. 1977) (State is included in "any person" under § 4424).

whose property rights competed with federal tax liens." *Regan*, 465 U.S. at 377 (citing *Bob Jones*, 416 U.S. at 732 n.6). At the same time, Congress enacted Section 110(a) of the Tax Lien Act, which "gave such third parties a right of action against the United States." *Id.* The addition of the "by any person" language "to the Anti-Injunction Act was primarily designed to insure that the right of action granted by § 110(a) of the Federal Tax Lien Act was exclusive," and also served "as a reaffirmation of the plain language of the Act." *Id.* at 377 & n.16. The 1966 amendment thus provides no basis for holding that the States are now excluded from coverage under the Anti-Injunction Act.

2. Nor is there any merit to the State Respondents' assertion that their suit may proceed under the exception recognized in *Regan*, which held that "Congress did not intend the [Anti-Injunction] Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy." *Id.* at 378. An "aggrieved party" must, at a minimum, establish that it has suffered an injury sufficient to satisfy the standing requirements of Article III. *See, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 162 (1997). The State Respondents have not made that showing.

a. Unlike the tax provision at issue in *Regan*, Section 5000A does not directly injure the States. *Regan* involved a provision that "impose[d] a tax on the interest earned on state obligations issued in bearer form," and thus directly affected South Carolina's "freedom to issue obligations in the form that it chooses." 465 U.S. at 371-32. The Court held

that the State was an "aggrieved party" because the statute interfered with the State's sovereignty under "the Tenth Amendment and the doctrine of intergovernmental tax immunity." *Id.* at 370. Here, the minimum coverage provision imposes liability on individual citizens. Even if the State Respondents incur additional costs as a result of the provision's implementation, the rights they are seeking to protect are constitutional rights of individual taxpayers, not those of the States.

b. The States lack standing to assert claims on behalf of their citizens. Because citizens of a State "are also citizens of the United States," a State cannot act as *parens patriae* and sue "to protect citizens of the United States from the operation of the statutes thereof." *Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923). *See also Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 520 n.17 (2007) (*Mellon* prohibits a State from suing "'to protect her citizens from the operation of federal statutes.'" (citation omitted)). A State's interest in exercising sovereign power over its residents, including by "creat[ing] and enforc[ing] a legal code," *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982), does not extend to exempting state residents from complying with federal law. As the Fourth Circuit recently held, a state law providing that state residents are not required to purchase health insurance "regulates nothing and provides for the administration of no state program. Instead, it simply purports to immunize [state] citizens from federal law." *Virginia v. Sebelius*, 656 F.3d 253, 270 (4th Cir. 2011). To permit States to grant themselves standing by enacting such laws would

negate *Mellon* and "convert the federal judiciary into a 'forum' for the vindication of a state's 'generalized grievances about the conduct of government.'" *Id.* at 271 (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)).

c. The State Respondents assert standing based on "the effect the mandate will have on States' financial obligations under Medicaid." State Resp. Cert. Stage Br. 16. Specifically, the States contend that the minimum coverage provision will cause "individuals who were previously eligible for Medicaid but declined to enroll" to become enrolled, increasing the States' Medicaid costs. *Id.* This contention is also insufficient to establish standing.

First, the States' alleged injury is not legally cognizable because it results "from decisions by their respective state legislatures." *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (per curiam). *See also Mellon*, 262 U.S. at 480 (noting that Massachusetts chose to participate in the Maternity Act program). The States have chosen to participate in the Medicaid program, and Florida has a longstanding policy of *encouraging* full participation in Medicaid. *See Florida KidCare Program: Amendment to Florida's Title XXI Child Health Ins. Plan Submitted to the Ctrs. for Medicare & Medicaid Servs.* at 17 (July 1, 2010) (Florida "has a strong historical commitment to Medicaid outreach" and has taken steps to encourage eligible individuals to enroll). A State is not injured when eligible individuals enroll in a state program in furtherance of a state policy that encourages them to do so.

Second, the States' alleged economic harm is "conjectural or hypothetical." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (citation and internal quotations omitted). The Court has distinguished direct injury to States from indirect fiscal injury caused by private citizens responding to federal law. *See Florida v. Mellon*, 273 U.S. 12 (1927); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976). In *Florida v. Mellon*, the State challenged a federal tax on the ground that it would "have the result of inducing potential taxpayers to withdraw property from the state, thereby diminishing the subjects upon which the state power of taxation may operate." 273 U.S. at 17-18. The Court held that Florida lacked standing because the state was not in immediate danger of sustaining "any direct injury as a result of the enforcement of the act in question." *Id.* at 18; *see also Simon*, 426 U.S. at 42-43 (noting that it was "purely speculative" that hospitals had denied services to indigents due to a Revenue Ruling rather than from "decisions made by the hospitals without regard to the tax implications"). Here, eligible individuals may enroll in Medicaid for a variety of reasons. The States' assumptions about the future choices of private actors, and the reasons for those choices, are too conjectural to provide a basis for standing.[18]

---

[18] The federal government contends that the Affordable Care Act will *decrease*, rather than increase, the States' Medicaid costs. Defendants' Response to Plaintiffs' "Statement of Material Facts in Support of Plaintiffs' Motion for Summary Judgment" ¶¶ 12, 15, *Florida v. Dep't of Health & Human* (continued...)

Third, the States' claim of economic harm is not only speculative, but premature. The minimum coverage provision does not take effect until 2014, and the federal government will pay 100 percent of the costs of benefits to the newly eligible Medicaid participants through 2016. 42 U.S.C. § 1396d(y)(1). As the Court has previously held, a State lacks standing to challenge a federal law before it has been enforced in the State. *See South Carolina v. Katzenbach*, 383 U.S. 301, 317 (1966).

d. Before the court of appeals, the States argued that they have standing because they are injured by provisions of the Affordable Care Act that expand Medicaid eligibility, and those provisions are not severable from the minimum coverage provision. Br. for Appellee/Cross-Appellant States at 68-69, *Florida v. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (Nos. 11-11021, 11-11067). This contention fails. The Court has held that "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). "[A] plaintiff must demonstrate standing for each claim he seeks to press" and "'for each form of relief sought.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)). Accordingly, a plaintiff with standing to challenge one provision of a statute may not challenge other provisions, whether or not

---

Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (No. 3:10-cv-00091-RV/EMT).

those provisions are severable. *See also Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733-34 (2008).

e. Even if the State Respondents could demonstrate an injury sufficient to support Article III standing, they lack standing to assert "the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). This Court has held repeatedly that plaintiffs do not have standing to challenge the tax liability of a third party. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 757-59 (1984); *Simon*, 426 U.S. at 42-43 (1976). Because the minimum coverage provision does not impose tax liability on the State Respondents, they do not have standing to litigate on behalf of affected individual taxpayers. *See also Simon*, 426 U.S. at 46 (Stewart, J., concurring) ("I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else."); *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) ("It is well-recognized that the standing inquiry in tax cases is more restrictive than in other cases.").

In sum, the Anti-Injunction Act applies to the State Respondents as well as the Private Respondents.

D. Policy Considerations Do Not Justify A Departure From The Anti-Injunction Act.

It can be argued that public policy considerations favor a prompt answer to the question whether the minimum coverage provision is constitutional. But

even if those arguments were persuasive, the language of the Anti-Injunction Act "could scarcely be more explicit." *Bob Jones*, 416 U.S. at 736. Courts may not disregard clear statutory language based on their views of public policy. That principle applies with special force to statutes that limit the jurisdiction of courts. *See Bowles*, 551 U.S. at 214 ("[T]his Court has no authority to create equitable exceptions to jurisdictional requirements."). Moreover, there are countervailing policy arguments for applying the Anti-Injunction Act according to its terms.

First, an immediate decision in this case would be contrary to the policy that courts avoid deciding constitutional issues unless it is necessary to so do. *See Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2508 (2009). Here, it is possible that the Private Respondents will never have to pay a penalty under Section 5000A. Moreover, it is possible that Congress could amend or repeal the Affordable Care Act at some point before penalties are assessed and collected, beginning in 2015. An amendment could avoid the need for this Court to decide the constitutional issue presented in this case. *See Seven-Sky*, 661 F.3d at 47-50 (Kavanaugh, J., dissenting) (arguing that relatively minor amendments to the Affordable Care Act would make the penalty clearly constitutional under the Taxing Power).

Second, separation of powers principles strongly favor allowing Congress, not the courts, to decide whether to make an exception to the Anti-Injunction Act. *See Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17-

18 (1951) ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation."). There is no doubt that Congress can, at any time, enact a law permitting pre-enforcement challenges to the minimum coverage provision. A bill that would create such an exception is pending before Congress. *See* Americans Need a Health Care Ruling Act, H.R. 3558, 112nd Cong. (2011). To date, however, Congress has not expressed an intention to allow such challenges.

Congress knows how to create exceptions to the Anti-Injunction Act. *See* 26 U.S.C. § 7421(a) (setting out fourteen express exceptions). It did not adopt an express exception for challenges to Section 5000A. The absence of such an exception is particularly striking, because Congress *did* make express exceptions for criminal penalties, liens, and levies. *Id.* § 5000A(g)(2). Moreover, it directed that, apart from these express exceptions, the Section 5000A penalty shall be assessed and collected in the same manner as taxes. *Id.* § 5000A(g)(1). This statutory language indicates that Congress did not intend to allow other, implied exceptions. *See, e.g.*, *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a [statute], additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."). Moreover, Congress did not adopt a special provision providing for judicial review of the constitutionality of the Affordable Care Act, as it has sometimes done with major legislation. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 132-33 (2003) (Bipartisan Campaign Reform Act); *Raines v. Byrd*, 521 U.S. 811,

817-18 (1997) (Line Item Veto Act); *Turner Broad. Sys., Inc. v. Fed. Commnc'ns Comm'n*, 512 U.S. 622, 634-35 (1994) (must-carry provisions of the Cable Television Consumer Protection and Competition Act).

In short, if Congress decides that policy considerations justify pre-enforcement challenges to the constitutionality of the Affordable Care Act, it can enact legislation providing for immediate review. Unless and until such legislation is enacted, pre-enforcement challenges are barred by the Anti-Injunction Act.

CONCLUSION

The decision of the court of appeals should be vacated and remanded for dismissal of Respondents' challenge to Section 5000A for lack of jurisdiction.

Respectfully submitted,

ROBERT A. LONG, JR.
EMIN TORO
MARK W. MOSIER
HENRY B. LIU
DANIELLE S. BARBOUR
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. NW
Washington, DC 20004
(202) 662-6000
rlong@cov.com

January 2012

STATUTORY APPENDIX

26 U.S.C. § 5000A

Requirement to maintain minimum essential coverage

(a) Requirement to maintain minimum essential coverage.—An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

(b) Shared responsibility payment.—

(1) In general.—If a taxpayer who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).

(2) Inclusion with return.—Any penalty imposed by this section with respect to any month shall be included with a taxpayer's return under chapter 1 for the taxable year which includes such month.

(3) Payment of penalty.—If an individual with respect to whom a penalty is imposed by this section for any month—

(A) is a dependent (as defined in section 152) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

(B) files a joint return for the taxable year including such month, such individual and the spouse of such individual shall be jointly liable for such penalty.

(c) Amount of penalty.—

(1) In general.—The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to failures described in subsection (b)(1) shall be equal to the lesser of

(A) the sum of the monthly penalty amounts determined under paragraph (2) for months in the taxable year during which 1 or more such failures occurred, or

(B) an amount equal to the national average premium for qualified health plans which have a bronze level of coverage, provide coverage for the applicable family size involved, and are offered through Exchanges for plan years beginning in the calendar year with or within which the taxable year ends.

(2) Monthly penalty amounts.—For purposes of paragraph (1)(A), the monthly penalty amount with respect to any taxpayer for any month during which any failure described in subsection (b)(1) occurred is

an amount equal to 1/12 of the greater of the following amounts:

(A) Flat dollar amount.—An amount equal to the lesser of—

(i) the sum of the applicable dollar amounts for all individuals with respect to whom such failure occurred during such month, or

(ii) 300 percent of the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

(B) Percentage of income.—An amount equal to the following percentage of the excess of the taxpayer's household income for the taxable year over the amount of gross income specified in section 6012(a)(1) with respect to the taxpayer for the taxable year:

(i) 1.0 percent for taxable years beginning in 2014.

(ii) 2.0 percent for taxable years beginning in 2015.

(iii) 2.5 percent for taxable years beginning after 2015.

(3) Applicable dollar amount.—For purposes of paragraph (1)—

(A) In general.—Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $695.

(B) Phase in.—The applicable dollar amount is $95 for 2014 and $325 for 2015.

(C) Special rule for individuals under age 18.—If an applicable individual has not attained the age of 18 as of the beginning of a month, the applicable dollar amount with respect to such individual for the month shall be equal to one-half of the applicable dollar amount for the calendar year in which the month occurs.

(D) Indexing of amount.—In the case of any calendar year beginning after 2016, the applicable dollar amount shall be equal to $695, increased by an amount equal to—

(i) $695, multiplied by

(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year, determined by substituting "calendar year 2015" for "calendar year 1992" in subparagraph (B) thereof. If the amount of any increase under clause (i) is not a multiple of $50, such increase shall be rounded to the next lowest multiple of $50.

(4) Terms relating to income and families.—For purposes of this section—

(A) Family size.—The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year.

(B) Household income.—The term "household income" means, with respect to any taxpayer for any taxable year, an amount equal to the sum of—

(i) the modified adjusted gross income of the taxpayer, plus

(ii) the aggregate modified adjusted gross incomes of all other individuals who—

(I) were taken into account in determining the taxpayer's family size under paragraph (1), and

(II) were required to file a return of tax imposed by section 1 for the taxable year.

(C) Modified adjusted gross income.—The term "modified adjusted gross income" means adjusted gross income increased by—

(i) any amount excluded from gross income under section 911, and

(ii) any amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax.

[**(D) Repealed.** Pub. L. 111-152, Title I, § 1002(b)(1), Mar. 30, 2010, 124 Stat. 1032]

(d) Applicable individual.—For purposes of this section—

(1) In general.—The term "applicable individual" means, with respect to any month, an individual other than an individual described in paragraph (2), (3), or (4).

(2) Religious exemptions.—

(A) Religious conscience exemption.—Such term shall not include any individual for any month if such individual has in effect an exemption under section 1311(d)(4)(H) of the Patient Protection and Affordable Care Act which certifies that such individual is—

(i) a member of a recognized religious sect or division thereof which is described in section 1402(g)(1), and

(ii) an adherent of established tenets or teachings of such sect or division as described in such section.

(B) Health care sharing ministry.—

(i) In general.—Such term shall not include any individual for any month if such individual is a member of a health care sharing ministry for the month.

(ii) Health care sharing ministry.—The term "health care sharing ministry" means an organization—

(I) which is described in section 501(c)(3) and is exempt from taxation under section 501(a),

(II) members of which share a common set of ethical or religious beliefs and share medical expenses among members in accordance with those beliefs and without regard to the State in which a member resides or is employed,

(III) members of which retain membership even after they develop a medical condition,

(IV) which (or a predecessor of which) has been in existence at all times since December 31, 1999, and medical expenses of its members have been shared continuously and without

interruption since at least December 31, 1999, and

(V) which conducts an annual audit which is performed by an independent certified public accounting firm in accordance with generally accepted accounting principles and which is made available to the public upon request.

(3) Individuals not lawfully present.—Such term shall not include an individual for any month if for the month the individual is not a citizen or national of the United States or an alien lawfully present in the United States.

(4) Incarcerated individuals.—Such term shall not include an individual for any month if for the month the individual is incarcerated, other than incarceration pending the disposition of charges.

(e) Exemptions.—No penalty shall be imposed under subsection (a) with respect to—

(1) Individuals who cannot afford coverage.—

(A) In general.—Any applicable individual for any month if the applicable individual's required contribution (determined on an annual basis) for coverage for the month exceeds 8 percent of such individual's household income for the taxable year

described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act. For purposes of applying this subparagraph, the taxpayer's household income shall be increased by any exclusion from gross income for any portion of the required contribution made through a salary reduction arrangement.

(B) Required contribution.—For purposes of this paragraph, the term "required contribution" means—

> **(i)** in the case of an individual eligible to purchase minimum essential coverage consisting of coverage through an eligible-employer-sponsored plan, the portion of the annual premium which would be paid by the individual (without regard to whether paid through salary reduction or otherwise) for self-only coverage, or
>
> **(ii)** in the case of an individual eligible only to purchase minimum essential coverage described in subsection (f)(1)(C), the annual premium for the lowest cost bronze plan available in the individual market through the Exchange in the State in the rating area in which the individual resides (without regard to whether the individual purchased a qualified health plan through the Exchange), reduced by the

amount of the credit allowable under section 36B for the taxable year (determined as if the individual was covered by a qualified health plan offered through the Exchange for the entire taxable year).

(C) Special rules for individuals related to employees.—For purposes of subparagraph (B)(i), if an applicable individual is eligible for minimum essential coverage through an employer by reason of a relationship to an employee, the determination under subparagraph (A) shall be made by reference to required contribution of the employee.

(D) Indexing.—In the case of plan years beginning in any calendar year after 2014, subparagraph (A) shall be applied by substituting for '8 percent' the percentage the Secretary of Health and Human Services determines reflects the excess of the rate of premium growth between the preceding calendar year and 2013 over the rate of income growth for such period.

(2) Taxpayers with income below filing threshold.—Any applicable individual for any month during a calendar year if the individual's household income for the taxable year described in section 1412(b)(1)(B) of the Patient Protection and Affordable Care Act is less than the amount of gross

income specified in section 6012(a)(1) with respect to the taxpayer.

(3) Members of Indian tribes.—Any applicable individual for any month during which the individual is a member of an Indian tribe (as defined in section 45A(c)(6)).

(4) Months during short coverage gaps.—

(A) In general.—Any month the last day of which occurred during a period in which the applicable individual was not covered by minimum essential coverage for a continuous period of less than 3 months.

(B) Special rules.—For purposes of applying this paragraph—

(i) the length of a continuous period shall be determined without regard to the calendar years in which months in such period occur,

(ii) if a continuous period is greater than the period allowed under subparagraph (A), no exception shall be provided under this paragraph for any month in the period, and

(iii) if there is more than 1 continuous period described in subparagraph (A) covering months in a calendar year, the exception provided by this paragraph

shall only apply to months in the first of such periods.

The Secretary shall prescribe rules for the collection of the penalty imposed by this section in cases where continuous periods include months in more than 1 taxable year.

(5) Hardships.—Any applicable individual who for any month is determined by the Secretary of Health and Human Services under section 1311(d)(4)(H) to have suffered a hardship with respect to the capability to obtain coverage under a qualified health plan.

(f) Minimum essential coverage.—For purposes of this section—

(1) In general.—The term "minimum essential coverage" means any of the following:

(A) Government sponsored programs.—Coverage under—

(i) the Medicare program under part A of title XVIII of the Social Security Act,

(ii) the Medicaid program under title XIX of the Social Security Act,

(iii) the CHIP program under title XXI of the Social Security Act,

(iv) medical coverage under chapter 55 of title 10, United States Code,

including coverage under the TRICARE program;

(v) a health care program under chapter 17 or 18 of title 38, United States Code, as determined by the Secretary of Veterans Affairs, in coordination with the Secretary of Health and Human Services and the Secretary,

(vi) a health plan under section 2504(e) of title 22, United States Code (relating to Peace Corps volunteers); or

(vii) the Nonappropriated Fund Health Benefits Program of the Department of Defense, established under section 349 of the National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337; 10 U.S.C. 1587 note).

(B) Employer-sponsored plan.—Coverage under an eligible employer-sponsored plan.

(C) Plans in the individual market.—Coverage under a health plan offered in the individual market within a State.

(D) Grandfathered health plan.—Coverage under a grandfathered health plan.

(E) Other coverage.—Such other health benefits coverage, such as a State health benefits risk pool, as the Secretary of Health

and Human Services, in coordination with the Secretary, recognizes for purposes of this subsection.

(2) Eligible employer-sponsored plan.—The term "eligible employer-sponsored plan" means, with respect to any employee, a group health plan or group health insurance coverage offered by an employer to the employee which is—

(A) a governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act), or

(B) any other plan or coverage offered in the small or large group market within a State.

Such term shall include a grandfathered health plan described in paragraph (1)(D) offered in a group market.

(3) Excepted benefits not treated as minimum essential coverage.—The term "minimum essential coverage" shall not include health insurance coverage which consists of coverage of excepted benefits—

(A) described in paragraph (1) of subsection (c) of section 2791 of the Public Health Service Act; or

(B) described in paragraph (2), (3), or (4) of such subsection if the benefits are provided under a separate policy, certificate, or contract of insurance.

(4) Individuals residing outside United States or residents of territories.—Any applicable individual shall be treated as having minimum essential coverage for any month—

> **(A)** if such month occurs during any period described in subparagraph (A) or (B) of section 911(d)(1) which is applicable to the individual, or
>
> **(B)** if such individual is a bona fide resident of any possession of the United States (as determined under section 937(a)) for such month.

(5) Insurance-related terms.—Any term used in this section which is also used in title I of the Patient Protection and Affordable Care Act shall have the same meaning as when used in such title.

(g) Administration and procedure.—

(1) In general.—The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Special rules.—Notwithstanding any other provision of law—

> **(A) Waiver of criminal penalties.**—In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such

taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure.

(B) Limitations on liens and levies.—The Secretary shall not—

> **(i)** file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or
>
> **(ii)** levy on any such property with respect to such failure.

26 U.S.C. § 6201

Assessment Authority

(a) Authority of Secretary

The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. * * *

26 U.S.C. § 6665(a)

Applicable rules

(a) Additions treated as tax

Except as otherwise provided in this title—

(1) the additions to the tax, additional amounts, and penalties provided by this chapter shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes; and

(2) any reference in this title to "tax" imposed by this title shall be deemed also to refer to the additions to the tax, additional amount, and penalties provided by this chapter.

26 U.S.C. § 6671(a)

Rules for application of assessable penalties

(a) Penalty assessed as tax

The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

26 U.S.C. § 7421(a)

Prohibition of suits to restrain assessment or collection

(a) Tax

Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), and 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

AMICUS CURIAE BRIEF

No. 11-398

IN THE

Supreme Court of the United States

DEPT. OF HEALTH AND HUMAN SERVICES, *ET AL.*,
Petitioners,

v.

STATE OF FLORIDA, *ET AL.*, *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Brief *Amicus Curiae* of Virginia Delegate Bob Marshall, Virginia Senator Dick Black, Oklahoma Representative Charles Key, Institute on the Constitution, U.S. Justice Foundation, Gun Owners Foundation, The Lincoln Institute for Research and Education, The United States Constitutional Rights Legal Defense Fund, Inc., Conservative Legal Defense and Education Fund, Policy Analysis Center, Downsize DC Foundation, Gun Owners of America, Inc., The Liberty Committee, Public Advocate of the United States, American Life League, Inc., and DownsizeDC.org in Support of Respondents (Minimum Coverage Provision)

GARY G. KREEP
U.S. JUSTICE FOUNDATION
932 D Street, Suite 2
Ramona, CA 92065
(760) 788-6624
Counsel for USJF
Attorney for U.S. Justice Foundation

WILLIAM J. OLSON*
HERBERT W. TITUS
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

**Counsel of Record*
February 13, 2012

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. CONGRESS EXCEEDED ITS COMMERCE CLAUSE POWERS IN ENACTING PPACA, YET FOUND SUBSTANTIAL SUPPORT FROM CERTAIN OF THIS COURT'S DECISIONS, NECESSITATING THEIR REEXAMINATION.

A. This Court's Commerce Clause Jurisprudence Has Eviscerated Textual Limits on Congressional Power 5

B. The Court Has Demonstrated a Willingness to Re-examine Its Constitutional Jurisprudence When Necessary 7

C. The Court's United States v. Darby and Wickard v. Filburn Decisions Were Politicized and Should Be Re-Examined . . 11

II. THE CONSTITUTIONALITY OF PPACA SHOULD BE DECIDED BY THE TEXT OF THE CONSTITUTION, NOT BY CASE PRECEDENT . 14

III. THE INDIVIDUAL MANDATE IS NOT AN EXERCISE OF POWER TO REGULATE COMMERCE, MUCH LESS INTERSTATE COMMERCE 18

IV. THE INDIVIDUAL MANDATE IS NOT AN EXERCISE OF POWER TO MAKE ALL LAWS NECESSARY AND PROPER TO CARRY INTO EXECUTION THE COMMERCE POWER 23

A. The Government's Claim that PPACA Is an "Economic Regulation" of "Economic Conduct" Is False 24

B. The Commerce Clause Does Not Vest in Congress Any Power to Adopt a National Health Care Policy 29

C. The Means Chosen by Congress to Establish Its National Health Care Services System Was Not an Exercise of Legislative Power 32

VI. PPACA IS AN IMMORAL MANDATE UNWORTHY OF A FREE PEOPLE 37

CONCLUSION 39

TABLE OF AUTHORITIES

Page

HOLY BIBLE

Exodus 18:16 17
Matthew 4:1-11 21
Luke 10:25-36 28

U.S. CONSTITUTION

Article I, Section 1 . . . . . 17, 33
Article I, Section 8, Clause 1 15
Article I, Section 8, Clause 3 . . . . . 3, *passim*
Article I, Section 8, Clause 18 . . . . . 4, *passim*
Article VI, Clause 2 . . . . . 14, 16, 20
Amendment II 9
Amendment IV 9
Amendment X 32

STATUTES

Patient Protection and Affordable Care Act, Pub. L. 111-148 . . . . . 2, *passim*
26 U.S.C. § 5000A 25
42 U.S.C. § 18091(a)(2)(A) 25

CASES

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932) 8
Carter v. Carter Coal Co., 298 U.S. 238 (1936) . . 11
Champion v. Ames, 188 U.S. 321 (1902) 29, 30
Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990) 39
District of Columbia v. Heller, 554 U.S. 570 (2008) 8, 9
FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007) 8

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) . . . . . 12, *passim*
Gonzales v. Raich, 545 U.S. 1 (2005) 6, 7, 32
Holmes v. Jennison, 39 U.S. (14 Peters) 540 (1847) 19
Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803) 15, 16, 21
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 30, 31, 37
National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 11
Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) 17
Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) 11
United States v. Darby, 312 U.S. 100 (1941) . . . . . 3, *passim*
United States v. Jones, 2012 U.S. Lexis 1063 (Jan. 23, 2012) 9, 10
United States v. Lopez, 514 U.S. 549 (1995) . 16, 21
United States v. Southeastern Underwriters Association, 322 U.S. 533 (1944) 18, 19, 20
Wickard v. Filburn, 317 U.S. 111 (1942) . . 3, *passim*

MISCELLANEOUS

Alternative Medicine: Expanding Medical Horizons (1992) 26
W. Blackstone, Commentaries on the Laws of England (U. of Chicago, facsimile ed. 1765) . . 33
H. Clark, Biblical Law (Metro Press, Portland: 1943) 28
T. Cooley, A Treatise on Constitutional Limitations (5th ed. Little, Brown: 1883) 28

D. Currie, The Constitution in Congress: The Federalist Period, 1978-1801 (1999) 5
D. Harrison, M.D., Family Research Council Blog (Sept. 28, 2011) 38
E.D. Hirsch, Validity in Interpretation (Yale Univ. Press, 1967) 21
D. Hogberg, "ObamaCare Rule May Bar HSAs, Low-Cost Health Plans Investors," Investors.com (Dec. 7, 2011) 34
A. Kozinski, "Introduction to Volume Nineteen," 19 HARV. J. L & PUB. POL. 1 (1995) 6
R. Pear, "Obama Reaffirms Insurers Must Cover Contraception," *The New York Times* (Jan. 20, 2012) 37, 38
F.D. Roosevelt, Fireside Chat on Reorganization of the Judiciary (Mar. 9, 1937) 11
A. Roy, "How ObamaCare May Disrupt Your Health Plan," Forbes.com (Sept. 29, 2010) ... 34
J. Shesol, Supreme Power: Franklin Roosevelt vs. the Supreme Court (Norton, 2010) 12
N. Webster's 1828 Dictionary 22, 30, 33
Webster's 1964 Third New International Dictionary 35
http://www.breitbart.tv/nancy-pelosi-we-need-to-pass-health-care-bill-to-find-out-whats-in-it/ .. 5
http://cnsnews.com/news/article/when-asked-where-constitution-authorizes-congress-order-Americans-buy-health-insurance 6
http://www.medicare.com/services-and-procedures/alternative-therapies.html?ht= ... 18
"New Regulations Threaten Insurance for CAM Patients," http://www.anh-usa.org/new-regulations-threaten-insurance-for-cam-patients/print/ 34

INTEREST OF THE *AMICI CURIAE*[1]

Delegate Bob Marshall is a senior member of the Virginia House of Delegates, and was the Chief Patron of the "Virginia Health Care Freedom Act"[2] which undergirds Commonwealth of Virginia *ex rel.* Kenneth T. Cuccinelli, II v. Kathleen Sebelius, discussed *infra*. **Senator Dick Black** is a member of the Virginia State Senate. **Representative Charles Key** is a member of the Oklahoma House of Representatives. All have worked against federal usurpation of powers reserved to the states and to the people under the Tenth Amendment.

The **Institute on the Constitution** ("IOTC") is an educational organization reconnecting Americans with the history of the Republic. The **U.S. Justice Foundation** ("USJF"), **Gun Owners Foundation** ("GOF"), **The Lincoln Institute for Research and Education** ("Lincoln"), **The United States Constitutional Rights Legal Defense Fund, Inc.**, **Conservative Legal Defense and Education Fund** ("CLDEF"), **American Life League, Inc.** ("ALL"), **Policy Analysis Center** ("PAC"), and **Downsize DC Foundation** ("DDCF") are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC").

---

[1] It is hereby certified that the parties filed blanket consents with the Court, no counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] 2010 Acts of the Assembly Chapter 818; codified as section 38.2-2430.1:1, Code of Virginia.

Gun Owners of America, Inc. ("GOA"), **The Liberty Committee** ("TLC"), **Public Advocate of the United States** ("PA"), and **DownsizeDC.org** ("DDC") are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Each organization is interested in the proper construction of state and federal constitutions and statutes.

Delegate Marshall filed an *amicus curiae* brief in the U.S. Court of Appeals for the Fourth Circuit in support of the challenge to the Patient Protection and Affordable Care Act brought by the Commonwealth of Virginia — Commonwealth of Virginia *ex rel.* Kenneth T. Cuccinelli, II v. Kathleen Sebelius.[3] Co-*amici* were GOA, GOF, ALL, IOTC, Lincoln, PA, CLDEF, TLC, DDCF, DDC, and PAC. Delegate Marshall filed an *amicus curiae* brief in support of Virginia's Petition for Writ of Certiorari before this Court (No. 11-420), which is pending.[4] Co-*amici* were Senator Black, DDCF, DDC, GOA, GOF, TLC, USJF, CLDEF, and Lincoln. USJF filed an *amicus curiae* brief in the present case in support of granting certiorari in October 2011, and in the related case of National Federation of Independent Business v. Sebelius, No. 11-393, on the issue of severability on January 6, 2012.

---

[3] Brief *Amicus Curiae* of Virginia Delegate Bob Marshall, *et al.*, U.S. Court of Appeals, 4th Cir., Nos. 11-1057 and 11-1058 (Apr. 4, 2011), http://lawandfreedom.com/site/health/VA_v_Sebelius_Amicus.pdf.

[4] Brief *Amicus Curiae* of Virginia Delegate Bob Marshall, *et al.* in Support of Petitioner (Nov. 3, 2011), http://lawandfreedom.com/site/health/VA_v_Sebelius_Amicus_SC.pdf.

SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act ("PPACA") is a remarkable law, not just imposing plenary federal control over the private health insurance industry and health care practices, but also placing the federal government into that business and practice. Purporting to be an exercise of Congress' Commerce Clause power, this law goes beyond any prior Congressional exercise of the Commerce power, mandating that individuals purchase private insurance, overriding any religious, moral, or practical scruples that they may have.

The Government believes that this law is fully justified under this Court's Commerce Clause jurisprudence, particularly relying on United States v. Darby and Wickard v. Filburn. These revolutionary Supreme Court decisions cast aside settled constitutional doctrine for reasons of political expediency in the wake of President Franklin D. Roosevelt's threat to pack the Court. The time has come that they should be re-examined and overturned, lest Congress conclude that it can compel whatever behavior it believes would make us a more healthy People — leading us to a totalitarian state where everything not prohibited is mandated.

In conducting its re-examination of its Commerce Clause jurisprudence, this Court should return to the text of the Constitution as "the supreme Law of the Land" giving no deference to its own decisions, rather examining the issue afresh. Such an examination demonstrates that the individual mandate is not an

exercise of power to regulate interstate commerce. The individual mandate is not regulation of voluntary commercial intercourse; it is more akin to forcible economic rape.

The government attempts to justify its individual mandate as being a constitutionally permissible means of regulating interstate commerce, as a law which is a "Necessary and Proper" means to achieve a legitimate end. However, the Government admits the purpose of PPACA is to "expand access to health care" — making it a social welfare program designed to achieve a moral objective — a power not constitutionally authorized. The Commerce Clause does not empower Congress to adopt a national health care policy. Under the Government's theory, the combination of the Commerce Clause and the Necessary and Proper Clause becomes a pretext to confer on Congress a general police power which it was never intended to have.

PPACA is designed to put the government into the health care insurance business. The ramifications of this coercive measure are just now being felt with mandates for abortifacient contraceptives, converting the federal government into the master over the bodies and the morals of a heretofore sovereign people.

ARGUMENT

I. CONGRESS EXCEEDED ITS COMMERCE CLAUSE POWERS IN ENACTING PPACA, YET FOUND SUBSTANTIAL SUPPORT FROM CERTAIN OF THIS COURT'S DECISIONS, NECESSITATING THEIR REEXAMINATION.

A. This Court's Commerce Clause Jurisprudence Has Eviscerated Textual Limits on Congressional Power.

There was a time that Members of Congress took their oath to the Constitution seriously, becoming students of the Constitution. Often, argument on complex constitutional issues in the halls of Congress rivaled the work of advocates before the Supreme Court.[5] However, during Congressional consideration of the Patient Protection and Affordable Care Act ("PPACA" or "the Act"), few, if any, Members of Congress even claimed to have read H.R. 3590 — a 1,928 page bill — before voting on it.[6]

---

[5] *See generally* David Currie, The Constitution in Congress: The Federalist Period, 1978-1801 (1999) ("It was in the legislative and executive branches, not in the courts, that the original understanding of the Constitution was forged.... [T]he quality of argument remained astoundingly high...." p. 296).

[6] Speaker Pelosi said, "We have to pass the bill so you can find out what is in it...." http://www.breitbart.tv/nancy-pelosi-we-need-to-pass-health-care-bill-to-find-out-whats-in-it/. *Amicus* DownsizeDC.org has drafted a bill which would require members of Congress to read bills before voting on them, but thus far has

When then-Speaker of the House Nancy Pelosi was asked about the constitutional authority of Congress to pass PPACA, she replied: "Are you serious? Are you serious?"[7] While many viewed that statement to indicate a lack of regard for constitutional limitations generally, the Speaker's reply bespoke the common assumption that Congress' powers under the Commerce Clause are virtually unlimited. That view would have ample support in the decisions of this Court. Indeed, Chief Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit characterized modern Commerce Clause decisions as follows:

> [Y]ou wonder why anyone would make the mistake of calling it the Commerce Clause instead of the "Hey, you-can-do-whatever-you-feel-like Clause?" [A. Kozinski, "Introduction to Volume Nineteen," 19 HARV. J.L. & PUB. POL'Y. 1 (1995).]

Ten years later, in Gonzales v. Raich, 545 U.S. 1 (2005), with respect to federal regulation of marijuana that had never been sold, had never crossed state lines, and had no effect on the national market, Justice Thomas observed in dissent:

> If Congress can regulate this under the

---

not found a single Congressman willing to introduce it. https://secure.downsizedc.org/etp/rtba/.

[7] http://cnsnews.com/news/article/when-asked-where-constitution-authorizes-congress-order-americans-buy-health-insurance.

> Commerce Clause, then it can regulate virtually anything ... quilting bees, clothes drives, and potluck suppers throughout the 50 States. [*Id.*, 545 U.S. at 57-58, 69.]

B. The Court Has Demonstrated a Willingness to Re-examine Its Constitutional Jurisprudence When Necessary.

The Government's brief adopts this virtually unlimited view of the Commerce Clause, repeatedly invoking two of this Court's most expansive statements of the commerce power — United States v. Darby, 312 U.S. 100 (1941) and Wickard v. Filburn, 317 U.S. 111 (1942) (five times each). In contrast, after quoting the text of the Commerce Clause in the first sentence of its Argument, the Government abandons any discussion of the Clause itself. Pet. Br., p. 21. Likewise, Respondents also appear content, or resigned, to argue the instant case in accordance with prior decisions of this Court.[8]

The principle of *stare decisis* should not impede a regular return to the constitutional text — particularly in a case such as this which has generated so much public opposition and controversy. As Justice Brandeis explained:

> *Stare decisis* is usually the wise policy.... [b]ut

---

[8] *See* Brief for State Respondents on the Minimum Coverage Provision, pp. 16-17, 19; Brief for Private Respondents, p. 15.

> in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.... [Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-407 (1932) (Brandeis, J., dissenting).]

On many occasions, however, the Court addresses the constitutional text secondarily, if at all. In a recent case, Chief Justice Roberts engaged in some Court-deprecating humor, in stating near the end of the opinion: "Yet, as is often the case in this Court's First Amendment opinions, we have gotten this far in the analysis without quoting the Amendment itself.... The Framers' actual words put these cases in proper perspective." FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 480-82 (2007).

These *amici* urge this Court in this historic case to opt to re-examine its Commerce Clause jurisprudence under the actual text of the Commerce Clause. Indeed, on two important recent occasions in which these *amici* have been involved, this Court has demonstrated its willingness to go beyond an inquiry into decisional "law."

In District of Columbia v. Heller, 554 U.S. 570 (2008),[9] after stating the facts and issue presented,

---

[9] On February 11, 2008, *amicus curiae* herein Gun Owners of America, Inc., and a number of other organizations filed an *amicus* brief on the merits in this Court in the Heller case. http://lawandfreedom.com/site/constitutional/DCvHellerAmicus.pdf.

Justice Scalia's opinion for the Court began with the text of the Second Amendment. The Court then laboriously parsed the Amendment in a search for meaning, examining historical documents and legal scholarship. Only when that search was complete did the Court examine "how the Second Amendment was interpreted from immediately after its ratification...." *Id.* at 605. In the end, the Court's decision was guided by the constitutional text, not modern "case law":

> [T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.... Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct. [*Id.*, p. 636.]

In United States v. Jones, __ U.S. __, 2012 U.S. Lexis 1063 (Jan. 23, 2012),[10] the Government

---

[10] On May 16, 2011, *amicus curiae* herein Gun Owners of America and other organizations filed the only *amicus* brief at the Petition stage in the Jones case, urging this Court to take this case and use it to re-examine the original property-based text and purpose of the Fourth Amendment. Granting certiorari, this Court added the property issue for parties to address: "Whether the government violated respondent's Fourth Amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent." http://www.supremecourt.gov/Search.aspx?FileName=/docketfil

contended that the attachment of a GPS device to Jones' Jeep Cherokee was neither a search nor a seizure, because in this technological age, Jones had no reasonable expectation of privacy from the Government tracking him on a public roadway. Opening with a citation to a 1765 English case, Entick v. Carrington, a majority of this Court stated:

> The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted. [Jones, p. *8.]

Then, in a remarkably frank admission as to how far from the text the Court has strayed, Justice Scalia explained that:

> our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century [but] [o]ur later cases ... have deviated from that exclusively property-based approach [in favor of a more flexible, modernist analysis based upon the court's perceptions of a] "reasonable expectation of privacy." [*Id.*, pp. *9-*10.]

---

es/10-1259.htm. On October 3, 2011, *amici* herein Gun Owners of America was joined by another, ideologically diverse group in filing an *amicus curiae* brief addressing the original property bases of the Fourth Amendment. http://lawandfreedom.com/site/constitutional/USvJones Amicus Merits.pdf.

It is this type of candid and transparent analysis which gives the Court credibility with the bar and the public, and which is needed now with respect to the Commerce Clause.

C. The Court's United States v. Darby and Wickard v. Filburn Decisions Were Politicized and Should Be Re-Examined.

It is no secret that this Court's Commerce Clause jurisprudence undertook a sharp turn after President Franklin Roosevelt's proposal of the Judicial Procedures Reform Bill of 1937 — the court-packing plan. The Court's decisions that many of the President's early New Deal initiatives were unconstitutional evoked a highly political attack on the Court. While these cases involved a variety of constitutional provisions, the Court's decisions in Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) invalidating the National Industrial Recovery Act, and in Carter v. Carter Coal Co., 298 U.S. 238 (1936), invalidating the Bituminous Coal Conservation Act, were Commerce Clause cases.

President Roosevelt's March 1937 Fireside chat[11] and his proposal to add up to six additional justices to the U.S. Supreme Court was closely followed by Judge Owen Robert's April 1937 Commerce Clause reversal in National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), rejecting well-established precedents to uphold the constitutionality

---

[11] *See, e.g.*, F.D. Roosevelt, Fireside Chat on Reorganization of the Judiciary (Mar. 9, 1937), http://www.hpol.org/fdr/chat/.

of the National Labor Relations Act, signaling the Court's lack of will for a political showdown.

By the time some of the Court's most extreme Commerce Clause cases — Darby and Wickard — were decided in 1941 and 1942, respectively, the tide had firmly turned. The effect of the court-packing plan on Supreme Court jurisprudence has been the grist for law review articles and books.[12] There are many reasons to believe that, in cases like Darby and Wickard, political expediency overrode constitutional fidelity, justifying re-examination of these two revolutionary Commerce Clause cases.

In United States v. Darby, the Court found that the Commerce Clause vested in Congress the plenary power to regulate interstate commerce for any purpose. *Id.*, 312 U.S. 100, 115-16 (1941). Purporting to rely upon Chief Justice Marshall's opinion in Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824), the Darby Court stated that the "purpose of a regulation of interstate commerce are matters for legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control." 312 U.S. at 115. In support of this constitutional proposition, the Darby Court quoted the Gibbons statement that the power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution." Gibbons, 22 U.S. at 196.

---

[12] *See e.g.*, J. Shesol, Supreme Power: Franklin Roosevelt vs. the Supreme Court, Norton (2010).

Omitted entirely from the Darby opinion was Chief Justice Marshall's follow-up statement that "the sovereignty of Congress, though limited to specified **objects**, is plenary as to those **objects**." Gibbons, 22 U.S. at 197 (emphasis added). Contrary to the Darby Court's misinterpretation of Gibbons, the true Marshall legacy is that the Commerce Clause does not vest in Congress complete discretion as to the permissible "object" or "end" of the exercise of power over the subject of interstate commerce. Rather, the permissible "object" or "end" of the exercise of that power, or any other enumerated power, was determined by the constitutional text.

Wickard v. Filburn is considered by many to be among the least principled Supreme Court cases. Although the Constitution grants Congress the power to regulate "commerce ... among the several States..." the Court allowed the Department of Agriculture the power to regulate home grown and consumed wheat that never traveled in interstate commerce. The Court reached its decision based on a completely utilitarian analysis:

> This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices. [*Id.*, 317 U.S. at 128-29.]

The Court did not even tip its cap to the constitutional

text, removing altogether the last textual restraint on the Commerce power.

The day has come for these relics of a politicized era to be reconsidered and overturned.

II. THE CONSTITUTIONALITY OF PPACA SHOULD BE DECIDED BY THE TEXT OF THE CONSTITUTION, NOT BY CASE PRECEDENT.

Bound by this Court's case precedents applying the Commerce Clause and the Necessary and Proper Clause, the court of appeals measured the constitutionality of the individual mandate in PPACA solely by " existing Commerce Clause doctrines that [it] as an inferior Article III court, must apply." Florida v. Department of Health and Human Services ("Florida"), 648 F.3d 1235, 1269 (11th Cir. 2011). The question in this Court, however, is not whether PPACA complies with Supreme Court "doctrine," but, as stated by the Government in its opening brief, "whether the minimum coverage provision is a valid exercise of Congress's powers under Article I of the Constitution." Pet. Br., p. 1. After all, it is "this Constitution, and the Laws of the United States ... made in Pursuance thereof [that is] the supreme Law of the Land,"[13] **not** this Court's opinions and Congress' laws made in pursuance of those opinions. As Chief Justice John Marshall recognized in Marbury v. Madison, "the

---

[13] United States Constitution, Article VI, Clause 2.

framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature." *Id.*, 5 U.S. (1 Cranch.) 137, 179-80 (1803). Otherwise, as Chief Justice Marshall observed, why does the Constitution "direct the judges to take an oath to support" the Constitution, and "[w]hy does a judge swear to discharge his duties agreeably to the Constitution of the United States if that Constitution forms no rule for his government"? *Id.*, 5 U.S. at 189.

This first principle upon which judicial review rests is especially important in this case. As the court of appeals below observed, the individual mandate, the vortex of this case, is "so unprecedented ... that the government has been unable, either in its briefs or at oral argument, to point this Court to Supreme Court precedent that addresses [its] constitutionality." Florida, 648 F.3d at 1288. Indeed, the court of appeals acknowledged that its own "independent review [did not] reveal such a precedent." *Id.* Rather, that review yielded additional confirmation from both the Congressional Research Service and the Congressional Budget Office, each of which found it to be a completely "novel" proposition that Congress has the power to "require[] people to buy any good or service as a condition of lawful residence in the United States." *Id.*

In its opening brief, however, the Government attempts to obscure the unprecedented nature of the individual mandate with an avalanche of words distilled from this Court's Commerce, Necessary and Proper, and Tax Clause cases. *See* Pet. Br., p. 17 *et seq.* The Government's lawyers insult the intelligence

of this Court when they describe this case as run-of-the-mill, "well within the full scope of [Congress's] authority" (Pet. Br., p. 26). Not once does the Government pause to examine the mandate under the microscope of the Constitution. There is a simple reason for this. As Justice Thomas observed in his concurring opinion in United States v. Lopez, 514 U.S. 549 (1995), the "substantial effect" test (employed by the Government in its opening brief) "taken to its logical extreme, would give Congress a 'police power' over all aspects of American life." *Id.* at 584 (Thomas, J., concurring) (emphasis added). And, as Justice Thomas concluded, "[a]ny interpretation of the Commerce Clause that even suggests that Congress could regulate such matters [as marriage, littering, or cruelty to animals] is in need of reexamination." *Id.* at 585.

An unprecedented legislative measure, such as the individual mandate, must not be tested solely by precedent, lest the language of the judicial branch of Government become the operative language of the Constitution, contrary to the Supremacy Clause of Article VI. As Chief Justice Marshall stated in Marbury v. Madison, the language of Article VI "confirms and strengthens the principle, supposed to be essential to all written constitutions ... that courts, as well as other departments, are **bound** by that instrument." *Id.*, 5 U.S. at 180 (emphasis added). In short, Article VI of the Constitution requires judicial opinions to be subordinate to the Constitutional text, not the other way around. It is, therefore, illegitimate to elevate this Court's opinion above the law as it is written in the Constitution. Rather, it is this Court's

duty "to say what the law is" (*id.*, 5 U.S. at 177), not to make the law say what this Court wills it to be.[14]

Since a reexamination of the application of the words of the Commerce Clause and the Necessary and Proper Clause as applied to PPACA could not be undertaken below, it must now be performed by this Court. If this is not done here, then Article I, Section 1, which states that only those "legislative powers **herein granted** [are] **vested** in [the] Congress of the United States" (emphasis added), will have been declared a dead letter by this Court.

---

[14] *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824) ("Judicial power is never exercised for giving effect to the will of the judge," but "always for the purpose of giving effect ... to the will of the law."). *See also Exodus* 18:16 ("When they have a matter, they come unto me; and I [Moses] judge between one and another, and I do make them know the statutes of God and his laws.").

III. THE INDIVIDUAL MANDATE IS NOT AN EXERCISE OF POWER TO REGULATE COMMERCE, MUCH LESS INTERSTATE COMMERCE.

In pertinent part, Article I, Section 8, Clause 3, states that "[t]he Congress shall have the Power ... [t]o regulate Commerce ... among the several States." If the individual mandate is to be justified under this provision, the decision of an individual whether or not to purchase a health insurance product must, at the very least, be "commerce." According to the Government, the decision **not** to purchase health care insurance is "commerce" because it is "economic conduct" (Pet. Br., pp. 18-19, 26, 33) or "economic activity" (Pet. Br., p. 23), or "economic, commercial activity" (Pet. Br., p. 46). Indeed, the Government points out that Congress, itself, "expressly found [that] the minimal coverage provision 'regulates **activity** that is **commercial** and **economic** in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased.'" Pet. Br., p. 33. Petitioner's brief is devoid of any discussion or analysis of the question of whether the decision **not** to purchase health care insurance is "commerce" within the meaning of that term in Article I, Section 8, Clause 3. And, of course, the Government's brief assumes, *sub silentio*, that the original meaning of "commerce" is irrelevant.

However, as Justice Hugo Black acknowledged in 1944, "[o]rdinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the **common**

parlance of the times in which the Constitution was written." United States v. Southeastern Underwriters Association, 322 U.S. 533, 539 (1944) (emphasis added). Indeed, 100 years before Justice Black wrote these words, this Court had adopted a rule of construction that required the Court to unearth the original meaning of the constitutional text:

> In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition.... Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning.... [Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1847).]

There is, then, no room for the kind of atextual freelancing engaged in by the Government in its brief. Thus, this Court must not let the Government get away with citing Southeastern Underwriters to support its contention that "Congress understood the economic reality that health insurance and health care financing are inherently integrated, and it was **permitted to regulate on that basis.**" *See* Pet. Br., p. 41 (emphasis added). To the contrary, Article I, Section 8, Clause 3 emphatically does **not** empower

Congress to **define** what commerce means, and then to enact the minimum coverage provision pursuant to its own definition. That would undermine Article VI, which requires Congress to enact laws only in "pursuance" of the Constitution. Thus, unlike the Government's brief, Justice Black's analysis in Southeastern Underwriters began with a search for the meaning of commerce in "the dictionaries, encyclopedias, and other books of the period" to determine whether "trading in insurance," like trading in other products and services, constituted "commerce," as that term was understood by the American people in the founding era. Southeastern Underwriters, 322 U.S. at 539.

The Government's approach in this case is the antithesis of that employed in Southeastern Underwriters. Instead of assessing whether the minimum coverage provision of PPACA fits within the original meaning of "commerce" in Article I, Section 8, Clause 3, the Government addresses instead the question whether the "Minimum Coverage Provision" is an integral part of a comprehensive scheme of economic regulation. *See* Pet. Br., p. 24. Thus, the Government would have this Court conform the meaning of "commerce" to fit Congress's view of "economic realities" instead of determining whether PPACA's individual mandate is a subject matter within the original meaning of "commerce." *See* Pet. Br., pp. 24-32. This approach stands the Constitution on its head, in shameless defiance of the essential nature and purpose of a written constitution, substituting the will of Congress over the will of the people, violating the principle:

> That the people have an original right to establish, for their **future** government, such **principles as, in their opinion**, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.... The **principles,** therefore, so established, are deemed **fundamental**. And as the authority, from which they proceed, is **supreme** ... they are designed to be **permanent**.... The **powers of the legislature are defined, and limited;** and that those **limits may not be mistaken, or forgotten**, the constitution is **written**. [Marbury, 5 U.S. at 176 (emphasis added).[15]]

Applying the well-established rule that the meaning of the words in the Constitution is the ordinary one, extant at the time the Constitution was written,[16] Justice Marshall got it right in Gibbons v. Ogden, stating that "commerce" is "commercial intercourse." *Id.*, 22 U.S. (9 Wheat.) 1, 189-90 (1824). Or, as elaborated upon by Justice Thomas in his Lopez concurrence, commerce is the "'exchange of one thing for another; interchange of any thing; trade; traffick.'" Lopez, 514 U.S. at 586 (Thomas, J., concurring).

---

[15] The temptation to substitute the Court's opinions for the written Constitution is strong and recurrent. Indeed, it is in the very nature of mankind to attempt to conform external reality to one's reason. Such temptation must be resisted no matter what the circumstances or cost. *See Matthew* 4:1-11, especially verses 4, 7, and 10 ("It is written").

[16] *See, e.g.*, E.D. Hirsch, Jr., Validity in Interpretation, pp. 5-6, 212-213 (Yale Univ. Press: 1967).

Whether "commerce" is defined as "intercourse, exchange, or interchange," it connotes "mutuality." "Interchange" for example, meant "to give and take mutually," or "to reciprocate." N. Webster's 1828 Dictionary. Likewise, "exchange" was "the act of giving one thing or commodity for another; barter ... the act of giving and receiving reciprocally." *Id.* "Intercourse" meant a "connection by reciprocal dealings between persons or nations, either in common affairs and civilities, in trade, or correspondence by letters." *Id.*

In contrast, the individual mandate is obligatory and coercive, backed by the full force of the government, in the form of a monetary penalty. As the Government admits, the individual mandate is designed specifically to "internalize" the risks and costs of health care, which it has the temerity to call "classic economic regulation of economic conduct." *See* Pet. Br., pp. 19, 34. In fact, the mandate is classic sumptuary legislation, prohibiting personal spending choices which offend the moral or religious beliefs of Congress. *See* Pet. Br., pp. 39-40. Thus, the Government's individual mandate is not a regulation of commerce; it is a compelled societal duty. Indeed, the individual mandate is not voluntary commercial intercourse; it is forcible economic rape.

IV. THE INDIVIDUAL MANDATE IS NOT AN EXERCISE OF POWER TO MAKE ALL LAWS NECESSARY AND PROPER TO CARRY INTO EXECUTION THE COMMERCE POWER.

While the Government has erroneously assumed that the individual mandate is "commerce" within the meaning of Article I, Section 8, Clause 3, it has correctly understood that, standing alone, the mandate cannot be sustained as a Constitutional exercise of the Commerce power. *See, e.g.*, Pet. Br., p. 17. Rather, the Government contends that the mandate is constitutional because it is a constitutionally permissible means of regulating interstate commerce, as vested by Article I, Section 8, Clause 18 in Congress, namely, "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers...." In short, the Government contends that, because PPACA as a whole is a regulation of interstate commerce, the individual mandate component is a constitutional means to reach that constitutional end. *See* Pet. Br., pp. 17-19. The broad questions before this Court, then, are whether PPACA is a Constitutional exercise of power to regulate interstate commerce, and if so, whether the individual mandate qualifies as a "necessary and proper" means to that end.

As the court of appeals below stated, one must first "know[] what is in the Act," that is, what the "Act says and does." Florida, 648 F. 3d at 1241. In a nutshell, the Government has captured both the purpose of the Act and the means employed by the Act to accomplish that purpose:

> The Act in general, and the insurance reforms in particular, culminated a nearly century-long national effort to **expand access to health care** by making **affordable health insurance** more widely available. [Pet. Br., pp. 12-13 (emphasis added).]

Here, the Government admits that the purpose of the Act is to "expand access to health care," and the means chosen is "making affordable health insurance more widely available." The specific questions in this case, therefore, are whether the Commerce Clause vests in Congress the power to "expand access to health care" and, if so, whether the Necessary and Proper Clause vests in Congress the power of "making affordable health care insurance more widely available." A careful examination of the terms of the Act, and the text of both clauses, demonstrates that neither power is constitutionally authorized.

A. The Government's Claim that PPACA Is an "Economic Regulation" of "Economic Conduct" Is False.

In an effort to fit PPACA and its individual mandate under the Commerce Clause by applying the so-called "substantial effects" test, the Government contends that the Act, as a whole, and the mandate in particular, are nothing more than economic regulations of economic conduct. *See* Pet. Br., pp. 17-19, 21-37. On closer look, however, PPACA and the individual mandate only appear to implement an economic measure to achieve economic objectives. The economic claims made by the Government are little more than a

facade designed to camouflage what is really an enactment of a public morals policy governing personal and familial decisions concerning the physical, emotional, and spiritual health of individual human beings, a power not found among those enumerated in the Constitution.

In justification of the individual mandate, Congress characterized the individual decision to take care of one's body to be an "activity that is commercial and economic in nature: economic and financial decisions about **how and when** health care is paid for, and **when** health insurance is purchased." *See* 42 U.S.C. § 18091(a)(2)(A) (emphasis added). In its brief, the Government agrees with Congress that health care decisions are just a matter of dollars and cents. *See* Pet. Br., pp. 33, 41. By requiring everyone to purchase a government-approved health insurance policy, the Government presumes everyone will have the same access to the health care that they need and want. Both Congress and the Government are mistaken. The health care system approved by PPACA is only one of several available. Yet, PPACA and the individual mandate force everyone, except the precious few who have been given a statutory exemption,[17] to pay for a service that many persons would not voluntarily choose to utilize, for a variety of reasons that have nothing to do with money.

For example, typical government-subsidized health care programs, such as Medicare, exclude from

---

[17] *See* 26 U.S.C. § 5000A(d) and (e).

coverage alternative therapy, such as "homeopathy, naturopathy, acupuncture, holistic therapies, midwifery and herbal medicines."[18] According to the Government, PPACA "supplements" Medicare, so there is no reason to expect that PPACA will expand the "health care market" to include alternatives to the conventional, pharmaceutical-centered, allopathic medicine. In short, there is no monolithic health care market as represented by the Government in its brief. *See, e.g,* Pet. Br., pp. 3-5. *See* Alternative Medicine: Expanding Medical Horizons: A Report to the National Institutes of Health on Alternative Medical Systems and Practices in the United States, pp. xi-xxxi (1992) ("The Chantilly Report").[19]

In further "economic" justification of the individual mandate, the Government contends that "as [a] class, the uninsured shift tens of billions of dollars of costs for the uncompensated care they receive to other market participants annually." Pet. Br., p. 2. As the Government explains, the individual mandate is specifically designed to solve this "economic" problem:

> [T]he uninsured as a class presently externalize the risks and costs of much of their

---

[18] *See* http://www.medicare.com/services-and-procedures/alternative-therapies.html?ht=.

[19] "Worldwide, only an estimated 10 percent to 30 percent of human health care is delivered by conventional, biomedically oriented practitioners. The remaining 70 percent to 90 percent ranges from self-care according to folk principles to care given in an organized health care system based on alternative tradition or practice." The Chantilly Report, p. xv.

> health care; the minimum coverage provision will require that they internalize them (or pay a tax penalty). This is classic economic regulation of economic conduct. [*See* Pet. Br., p. 19.]

But the unilateral economic decision of the uninsured does not externalize the cost and risk of his or her own health care. Rather, as the Government concedes, the uninsured receives health care because of "the **well-established legal duty** of health care providers to provide emergency care **regardless of ability to pay**." *See* Pet. Br., p. 20 (emphasis added). Thus, the rule mandating the near universal purchase of government-approved insurance for government-approved health services is justified, according to the Government, not because restrictions at the point of sale are said to be "infeasible" economically, but because failure to purchase health insurance is morally "inhumane." *Id.* After all, the "legal duty" to provide health care services to someone, regardless of the recipient's ability to pay, is said to arise out of "deeply rooted societal values" and "ethical duties" of health care providers, without regard for monetary considerations. *See* Pet. Br., p. 7. Thus, the individual mandate is not a "classic economic regulation of economic conduct" (Pet. Br., p. 19), but a classic public morals regulation requiring, what Congress has determined to be one's moral duty.[20]

---

[20] Indeed, the individual mandate is designed to force the American people to behave like the Good Samaritan, who voluntarily spent his money to cover the medical expenses of a man lying by the wayside. But the parable of the Good Samaritan

Finally, the individual mandate, along with other PPACA provisions, are designed to (i) equalize the financial burdens borne by the healthy and the unhealthy (Pet. Br., pp. 5-6, 10, 18); and (ii) provide better health care for the poor (Pet. Br., p. 9). Indeed, the "market reforms [to] end discriminatory practices under which millions of Americans are denied coverage, or charged unaffordable rates, based on medical condition or history" (Pet. Br., p. 18), remove from consideration a major economic risk factor in setting the price for a health insurance policy. Such reforms are not based upon economic considerations, but on moral ones.

In sum, PPACA and the individual mandate are classic examples of social welfare legislation which subordinates financial concerns to humanitarian ones. Yet, the Government insists that "the Act's broad framework of economic regulations and incentives" are economic in nature and purpose, well within the scope of the Commerce Clause. *See* Pet. Br., pp. 24-30. To the contrary, PPACA, as a whole, and the individual mandate in particular, are social welfare legislation, a classic example of the exercise of the police power reserved to the States. *See* T. Cooley, A Treatise on Constitutional Limitations, p. 706 and n.1 (5th ed. Little, Brown: 1883).

---

teaches what one must do to meet God's commandment to "love thy neighbor as thyself." *See Luke* 10:25-36. Coercing behavior to fulfill the law of love is, however, destructive of that very command, love necessarily being a voluntary, unconditional act. *See* H. Clark, Biblical Law, § 23, pp. 11-12 (Metro Press, Portland: 1943).

B. The Commerce Clause Does Not Vest in Congress Any Power to Adopt a National Health Care Policy.

As Chief Justice John Marshall recognized in Gibbons v. Ogden, it "has always been understood [that] the sovereignty of Congress [is] limited to specified **objects**." *Id.*, 22 U.S. at 197 (emphasis added). Among the enumerated powers in the United States Constitution, there is none that empowers Congress to enact any law, the **object** of which is health care. As Chief Justice Marshall observed in Gibbons, "**health laws** of every description ... are component parts" of the "immense mass of legislation, which embraces every thing within the territory of a State, **not** surrendered to the general government." *Id.*, 22 U.S. at 203 (emphasis added). Because "[n]o direct general power over these **objects** is granted to Congress," Chief Justice Marshall continued, "they remain subject to State legislation." *Id.*

Almost 80 years later, echoing Chief Justice Marshall, Chief Justice Melville Fuller wrote:

> The power of the State to impose restraints and burdens on persons and property in ... promotion of the **public health** ... is a power originally and always **belonging to the States, not surrendered** by them to the General Government ... and **essentially exclusive**.... [Champion v. Ames, 188 U.S. 321, 364-65 (1902) (Fuller, C.J., dissenting) (emphasis added).]

Chief Justice Fuller continued, concluding:

> To hold that Congress has general police power would be to hold that it may accomplish **objects** not entrusted to the General Government, and to defeat the operation of the Tenth Amendment.... [*Id.*]

According to Webster's 1828 dictionary, the word "object" meant "end" or "ultimate purpose." *Id.* Five years before Chief Justice Marshall handed down his Gibbons opinion, he wrote McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) in which he stated that it was of the very "nature" of a constitution that:

> [O]nly its great **outlines** should be marked, its important **objects** designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. [*Id.* at 407 (emphasis added).]

Thus, by its very nature, the exercise of an enumerated power was limited to the "object" or "end" of the exercise of that power, as determined by the constitutional text, not by the will of Congress.

In McCulloch, Chief Justice Marshall captured this very principle in his seminal test for determining whether a statute enacted by Congress was authorized by the Necessary and Proper Clause:

> Let the **end** be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that **end**, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional. [*Id.* at 421 (emphasis added).]

While the McCulloch test is regularly repeated by this Court, and appears in the Government's opening brief in this case (Pet. Br., p. 23), it has been stripped of all meaning by the assumption that Congress has plenary power under the Commerce Clause to pursue any object, end, or purpose with respect to any subject matter that it chooses. *See* Pet. Br., pp. 21-24. If any end will do, then the Commerce Clause, enhanced by the Necessary and Proper Clause, means that Congress is no longer a government of enumerated powers. *See* Raich, 545 U.S. at 66-71 (Thomas, J., dissenting).

Such a result is inconsistent with Marshall's textual legacy, as is plainly evident from that portion of the McCulloch decision explaining its end/means test:

> [S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of **objects not entrusted** to the government, such [acts are] not the law of the land. [*Id.*, 17 U.S. at 423 (emphasis added).]

Such a result is also inconsistent with the text and structure of the Constitution. As Justice Thomas has

most recently observed, the Necessary and Proper Clause, attached to the Commerce Clause, has been construed to "confer on Congress a general 'police power' over the Nation," thereby "subvert[ing] basic principles of federalism and dual sovereignty." Gonzales v. Raich, 545 U.S. 1, 65 (2005) (Thomas, J., dissenting). This would, Justice Thomas has further noted, "convert the Necessary and Proper Clause into precisely what" Chief Justice Marshall's test would never countenance — "a 'pretext ... for the accomplishment of **objects** not intrusted to the government.'" *Id.* at 66. Applying that test here, under the pretext of exercising its power to regulate commerce, Congress produced PPACA, and its individual mandate, as a public health care measure, the enactment of which is outside the scope of any of its enumerated powers and, thus, is an unconstitutional usurpation of the police powers reserved to the States by the Tenth Amendment to the U.S. Constitution.

C. The Means Chosen by Congress to Establish Its National Health Care Services System Was Not an Exercise of Legislative Power.

While Article I, Section 8, Clause 18 is a grant of legislative power to Congress, it is not without limits. As the text states, Congress is authorized to "make ... laws" that are "necessary and proper," not to take any action that it might deem necessary to reach a purportedly constitutional object or end. Thus, by its very language, the Necessary and Proper Clause vests in Congress only those powers that are "legislative" in

nature. *See also* Article I, Section 1. To be justified as an exercise of power under the Necessary and Proper Clause, then, PPACA must be legislative in nature, namely, "rule[s] ... prescribed by the supreme power of a state to its subjects, for regulating their actions." Webster's 1828 Dictionary. *See also* I W. Blackstone, Commentaries on the Laws of England, p. 38 (U. of Chicago, facsimile ed. 1765) ("Law ... is a rule of action, which is prescribed by some superior, and which the inferior is bound to obey...."). More particularly, the Necessary and Proper Clause only authorizes Congress to make "rule[s] of civil conduct ... commanding what its subjects are to do, and prohibiting what they are to forbear." *See* Webster's 1828 Dictionary. *See also* I Blackstone's Commentaries at 44. By definition, then, the Necessary and Proper Clause, as applied to the Commerce Clause, does **not** authorize Congress to **engage** in commerce, but "to regulate [it]; that is, to prescribe the rule by which commerce is to be governed." *See* Gibbons, 22 U.S. at 196.

According to the Government, PPACA is a "comprehensive framework of economic regulation and incentives that will improve the functioning of the national market for health care by regulating the **terms** on which insurance is offered, **controlling costs**, and **rationalizing** the timing and method of payment for health care services." Pet. Br., pp. 2-3 (emphasis added). But under PPACA, the federal government does not "regulate" the interstate health care insurance business; rather, it engages in that business by authorizing the Secretary of Health and Human Services to make business decisions, not to execute rules of conduct by which nongovernment

entities are to conduct their businesses.

First, under PPACA, the Secretary of Health and Human Services is empowered to set the Medical Loss Ratio ("MLR"), that is, the percentage of premium dollars that must be applied to health care expenses and quality improvement, rather than to sales, overhead, and profits — a quintessential business decision previously left largely to private insurance companies. *See* A. Roy, "How ObamaCare May Disrupt Your Health Plan," Forbes.com (Sept. 29, 2010). If companies fail to meet the Government's MLR, then they are required to provide a rebate to their customers. *See* "New Regulations Threaten Insurance for CAM Patients," p. 1.[21] The rebate requirement, in turn, will discriminate against health plans with high deductibles and health savings accounts used by many to help "pay for complementary and alternative medical (CAM) treatments not covered by regular insurance," because the payments made for such services will not count as payments for health care under the conventional medicine policy. *Id.* As a result, insurance companies will likely move away from plans that have high deductibles, and Health Savings Accounts will largely disappear from the marketplace.[22] *Id.*

---

[21] http://www.anh-usa.org/new-regulations-threaten-insurance-for-cam-patients/print/.

[22] Plans with low deductibles, with more "first dollar" coverage are relatively more expensive, as they have high administrative costs. *See, e.g.*, D. Hogberg, "ObamaCare Rule May Bar HSAs, Low-Cost Health Plans Investors," Investors.com (Dec. 7, 2011), http://news.investors.com/Article/594079/20111207

Second, under PPACA, the Secretary "**controls health care costs** by reforming the terms on which health insurance is offered...." Pet. Br., p. 17 (emphasis added). "Cost control" is the "use by management of cost analyses and their interpretation in corrective measures towards increasing efficiency and economy of operation." N. Webster, Third New International Dictionary (1964), p. 515. PPACA controls costs by vesting in Government the power to decide what kinds of health care insurance products may be made available for purchase in the marketplace. For example, no one will be able to purchase a health care product that is "based on medical condition or history." *See* Pet. Br., p. 18. Instead, PPACA ensures that there will be no health care insurance product that "discriminates" on the basis of risk, so that persons who might otherwise not be able to afford health care insurance will have such market access at a price set by the Secretary, not at a price set by the market. *See* Pet. Br., p. 17. This is another classic business decision that would be implemented under the guise of the exercise of executive power, pursuant to a rule enacted by Congress. *See* Pet. Br., pp. 17-18.

Third, under PPACA, the Secretary would "expand[] access to health care services ... by ... **rationalizing** the timing and means of payment for health care services." *See* Pet. Br., p. 17 (emphasis added). "Rationalize" is defined by Webster as "apply[ing] the principles of scientific management to

---

1853/obamacare-rule-hits-hsa-high-deductible-plans.htm.

(a factory, industrial process, or industry)." Webster's 1964 Third New International Dictionary at 1885. The "rationalizing" power governs the "timing" and "means" of payment for the purchase of the insurance product offered by the Government-run health care insurance market. Again, the individual mandate "plays a critical role," requiring that everyone must buy the Government's health care insurance product at the "time" and using the "means" determined by the Government. *See* Pet. Br., pp. 17-19. Traditionally, the decision of whether to purchase a product is an individual one, based upon numerous factors, only one of which is affordability. Not so, however, under the new scientific management system implemented by PPACA. Under PPACA's collectivist health care service system, almost everyone must participate as a buyer in the market, and the Secretary is given the executive power to establish and solidify the Government's newly-established monopoly.

What appears to be modern and enlightened, however, is feudal and enslaving. Under PPACA, the Government acts as if it is a sole monopolistic proprietor, empowered to exercise virtual ownership of both sellers and buyers of health care insurance in a market in which the Government determines the demand for health care insurance, sets the terms and price, and keeps out the competition. But the Necessary and Proper Clause rests upon an entirely different political and legal foundation, wherein civil authorities are empowered to administer justice by means of democratically and constitutionally enacted rules of civil conduct governing an entrepreneurial people, not to exercise monopolistic dominion like that

employed by a feudal lord over the serfs living on a king's land. To read the Necessary and Proper Clause, as the Government has done in this case, would invert the relationship of government officials and the people, transforming the former into the role of the master, and the latter into role of the servant. Such an inversion directly contradicts the principle upon which the Necessary and Proper Clause, as well as all other enumerated powers, rests, namely, that "[t]he government of the Union ... is, emphatically, and truly, a government of the people," constituted by them to exercise only those powers "granted by them." McCulloch, 17 U.S. at 404-05. Under the American national charter, the Declaration of Independence, it is the government's role to secure the people's God-given rights to life, liberty, and the pursuit of happiness, not to displace those rights with socialistic experiments like PPACA.

VI. PPACA IS AN IMMORAL MANDATE UNWORTHY OF A FREE PEOPLE.

On January 20, 2012, the Obama administration announced that, in order to be compliant with PPACA's mandate that all health insurers cover "preventive health services," employers will be required to furnish, without charge, "the full range of contraceptive methods approved by the Food and Drug Administration"[23]:

---

[23] R. Pear, "Obama Reaffirms Insurers Must Cover Contraception," *The New York Times* (Jan. 20, 2012).

> Among the drugs and devices that must be covered are emergency contraceptives including pills known as ella and Plan B. The rule also requires coverage of sterilization procedures for women without co-payments or deductibles. [*Id.*]

Amongst these drugs and devices are potions and instruments that kill the most helpless among us — unborn children.[24]

In support of this new mandate, the Secretary of Health and Human Services stated that the new rule, with only a narrow exception for churches, "strikes the appropriate balance between respecting religious freedom and increasing access to important preventive services." *Id.* Not surprisingly, the Secretary's announcement lit up a firestorm of protest, in Catholics and Protestants alike. The National Association of Evangelicals proclaimed that "[e]mployers with religious objections to contraception will be forced to pay for services and procedures they believe to be morally wrong." *Id.*

In response, President Obama announced that religious employers would be given a year to comply. The Catholic Archbishop replied: "In effect, the president is saying that we have a year to figure out how to violate our consciences." *Id.*

Throughout its brief in this case, the Government

---

[24] *See* D. Harrison, M.D., Family Research Council Blog (Sept. 28, 2011), http://www.frcblog.com/2010/09/ella-vs-plan-b/.

has repeatedly referred to "health care," as if it were a self-defining, morally-benign term, governed only by economic considerations (*see* Pet. Br., pp. 18-19, 33-34) and, because "'[h]ealth care and the means of paying for it are "quintessentially economic"'" (*id.* at 46), PPACA is "well within the established scope of Congress's power." *Id.* at 23-24. The January 20 "contraceptives" mandate that extends to abortifacients, issued just two days before the 39th anniversary of Roe v. Wade, shatters the PPACA economic masquerade. The new employer mandate exposes PPACA and its individual mandate for what they really are, a stealth attack unleashing government bureaucrats to intrude into an area of life that has long been governed by the dictates of individual conscience and by a person's relationship to those closest to him — his family, his friends, and his God. *See* Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 269-71 (1990). Even if the current exemption for churches were extended to church-run hospitals, the Government would still be compelling Catholic and Christian businessmen to fund health care that violates their religious beliefs and moral conscience. PPACA's individual mandate is inherently coercive, intruding into areas never before violated by the federal government, which is why it should never be tolerated by a sovereign people.

CONCLUSION

For the reasons set out above, the decision of the Court of Appeals should be affirmed with respect to the individual mandate.

Respectfully submitted,

GARY G. KREEP
U.S. JUSTICE FOUNDATION
932 D Street, Ste. 2
Ramona, CA 92065
(760) 788-6624
Counsel for USJF
Attorney for U.S. Justice Foundation

**Counsel of Record*

WILLIAM J. OLSON*
HERBERT W. TITUS
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

February 13, 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

FILED
JAN 13 2012
OFFICE OF THE CLERK

No. 11-398

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners,

v.

STATE OF FLORIDA, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE STATES OF MARYLAND, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, NEW MEXICO, NEW YORK, OREGON, AND VERMONT, THE DISTRICT OF COLUMBIA, AND THE VIRGIN ISLANDS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

(Addressing Minimum-Coverage Provision)

DOUGLAS F. GANSLER
Attorney General of Maryland

JOHN B. HOWARD, JR.
Deputy Attorney General

WILLIAM F. BROCKMAN
Acting Solicitor General
Counsel of Record

JOSHUA N. AUERBACH
STEPHEN M. RUCKMAN
SARAH W. RICE
Assistant Attorneys General
200 Saint Paul Place
Baltimore, Maryland 21202
wbrockman@oag.state.md.us
(410) 576-7055

Attorneys for Amici Curiae

(Additional Counsel Listed on Inside Cover)

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Library of Congress

KAMALA D. HARRIS
Attorney General of California
1300 I Street
Sacramento, California 95814

GEORGE JEPSEN
Attorney General of
Connecticut
55 Elm Street
Hartford, Connecticut 06106

JOSEPH R. BIDEN, III
Attorney General of Delaware
820 N. French Street
Wilmington, Delaware 19801

DAVID M. LOUIE
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street,
12th Floor
Chicago, Illinois 60601

TOM MILLER
Attorney General of Iowa
1305 East Walnut Street
Des Moines, Iowa 50319

GARY KING
Attorney General of
New Mexico
P.O. Drawer 1508
Sante Fe, New Mexico 87504

ERIC T. SCHNEIDERMAN
Attorney General of New York
120 Broadway, 25th Floor
New York, New York 10271

JOHN R. KROGER
Attorney General of Oregon
1162 Court Street NE
Salem, Oregon 97301

WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, Vermont 05609

IRVIN B. NATHAN
Attorney General for the
District of Columbia
441 4th Street, N.W., Suite
600 South
Washington, D.C. 20001

VINCENT F. FRAZER
Attorney General of the Virgin
Islands
Department of Justice
3438 Kronprindsens Gade
GERS Complex
St. Thomas, Virgin Islands 00802

QUESTION PRESENTED

Does Congress have the power, under Article I of the Constitution, to enact the minimum-coverage provision of the Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A, which requires non-exempt individuals to maintain a minimum level of health insurance or pay a tax penalty?

TABLE OF CONTENTS

QUESTION PRESENTED i

TALBE OF CONTENTS ii

TABLE OF AUTHORITIES v

INTEREST OF AMICI STATES 1

INTRODUCTION 2

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. THE HEALTHCARE REFORMS CONGRESS ADOPTED IN THE AFFORDABLE CARE ACT FALL SQUARELY WITHIN THE HISTORICAL UNDERSTANDING OF THE COMMERCE POWER AS A TOOL FOR ADDRESSING INTERSTATE PROBLEMS THAT STATES CANNOT EFFECTIVELY ADDRESS ALONE.. 7

A. The Commerce Clause Enables Congress to Regulate Interstate Commerce Comprehensively 8

1. The Framers Empowered Congress to Act to Address Problems of National Scope 8

2. Congress Has the Power to Regulate Individual Conduct that Substantially Affects Interstate Commerce 11

B. Longstanding Precedent Confirms the Understanding of the Commerce Power as a Means of Enabling Congress to Address Problems that Require Coordination and Cooperation Among the States 13

C. Our Nation's Healthcare Crisis Is an Interstate Problem that States Cannot Fully Address on Their Own, and Is Thus a Proper Subject for the Exercise of Congress's Commerce Power 15

1. The Problem of Uncompensated Care Transcends State Boundaries 15

2. Decisions to Forego Insurance Have a Substantial Effect on Interstate Commerce 18

3. State-Level Reforms Cannot Fully Address the Problems Associated With Uncompensated Care 20

4. Federal Regulation to Address the Healthcare Crisis Serves a Critical Role in Aiding State Reform Efforts 24

II. THE MINIMUM-COVERAGE PROVISION IS AN INTEGRAL ELEMENT OF CONGRESS'S INTERSTATE SOLUTION TO THE HEALTHCARE CRISIS 26

III. THE AFFORDABLE CARE ACT, RATHER THAN DISPLACING STATE AUTHORITY, PRESERVES STATE POLICYMAKING DISCRETION IN THE IMPLEMENTATION OF HEALTHCARE REFORMS, BUILDING ON A SUCCESSFUL MODEL OF COOPERATIVE FEDERALISM 29

A. The Affordable Care Act Builds on a Long Tradition of Federal-State Cooperation 29

B. The Affordable Care Act Affords States Wide Latitude in Implementing Key Elements of the Act's Reforms 31

CONCLUSION 37

TABLE OF AUTHORITIES

Page

CASES

Alaska Dep't of Envtl. Conservation v. Environmental Prot. Agency, 540 U.S. 461 (2004) 36

Arkansas v. Oklahoma, 503 U.S. 91 (1992) 31

Carter v. Carter Coal Co., 298 U.S. 238 (1936) 19

Danforth v. Minnesota, 552 U.S. 264 (2008) 13

Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88 (1992) 31

Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824) 11, 13, 14

Gonzales v. Raich, 545 U.S. 1 (2005) 7, 10, 12, 19, 26

Harris v. McRae, 448 U.S. 297 (1980) 30

Helvering v. Davis, 301 U.S. 619 (1937) 3, 25, 30

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 11, 30, 36

Hughes v. Oklahoma, 441 U.S. 322 (1979) 11

King v. Smith, 392 U.S. 309 (1968) 31

New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1999) 29, 36

New York v. United States, 505 U.S. 144 (1992) 2, 6, 7, 8, 11, 12

Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 511 U.S. 93 (1994) 11

Printz v. United States, 521 U.S. 898 (1997) 36

Saenz v. Roe, 526 U.S. 489 (1989) 24

Schaeffer v. Weast, 546 U.S. 49 (2005) 31

Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011) 6, 19

Steward Machine Co. v. Davis, 301 U.S. 548 (1937) 25, 26, 30, 36

Thomas More Law Ctr. v. Obama, 651 F.3d 529 (6th Cir. 2011) 19, 20

United States v. Lopez, 514 U.S. 549 (1995) 27, 29

United States v. Darby, 312 U.S. 100 (1941) 11, 13, 14

United States v. Morrison, 529 U.S. 598 (2000) 2

United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) 15

Wickard v. Filburn, 317 U.S. 111 (1942)..... 12, 14

Wisconsin Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473 (2002)..... 30, 31

STATUTES

26 U.S.C. § 4980H 31

26 U.S.C. § 5000A i

29 U.S.C. § 1144(a)..... 29

42 U.S.C. § 300gg-94 34

42 U.S.C. § 1315a 34

42 U.S.C. § 1315a(b)(2)(B)(x) 34

42 U.S.C. § 1315a(b)(2)(B)(xi) 34

42 U.S.C. § 1395f(b) 17

42 U.S.C. § 1396a(a)(10)(A)(i)(VIII)..... 31

42 U.S.C. § 18031 31

42 U.S.C. § 18031(b)(1) 33

42 U.S.C. § 18031(d)(3)(B) 33

42 U.S.C. § 18031(d)(4)(A) 33

42 U.S.C. § 18031(e)(1)(B) 33

42 U.S.C. § 18051 34

42 U.S.C. § 18052 34

42 U.S.C. § 18091 21

42 U.S.C. § 18091(a)(2)(B) 16, 17

42 U.S.C. § 18091(a)(2)(F) 16

42 U.S.C. § 18091(a)(2)(G) 28

Md. Code Ann., Health-Gen. § 19-211 18

Md. Code Ann., Health-Gen. § 19-212 18

Md. Code Ann., Health-Gen. § 19-214 18

REGULATIONS

76 Fed. Reg. 41,891 (July 15, 2011) 33

OTHER AUTHORITIES

The Federalist No. 15 (A. Hamilton) (Clinton Rossiter ed., 1961) 12

The Federalist No. 16 (A. Hamilton) (Clinton Rossiter ed., 1961) 12

The Federalist No. 41 (J. Madison) (Clinton Rossiter ed., 1961) 10

James Madison, *Vices of the Political System of the United States,* The Papers of Madison 348 50 (Robert A. Rutland *et al.,* eds., 1975) 9

2009 Budget Analysis, Health Regulatory Commissions, Dept. of Health and Mental Hygiene 18 18

American Hospital Association, *Uncompensated Hospital Care Fact Sheet (Dec. 2010)* 17

Centers for Medicare & Medicaid Services, Historical National Health Expenditure Data Web Tables T. 1 (2011)..... 17

Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 Stan. L. Rev. 115 (2010)..... 10

Families USA, *Hidden Health Tax: Americans Pay a Premium* 2 (2009)..... 16

Bowen Garrett, *et al.*, *The Cost of Failure to Enact Health Reform* (2009) 16

Health Services Cost Review Commission 2010 Report 2-4 17

Adele M. Kirk, *Riding the Bull: Experience With Individual Market Reform in Washing, Kentucky, and Massachusetts*, 25 J. Health Politics, Policy & Law 152 (2000) 22

Len M. Nichols, *State Regulation: What Have We Learned So Far?* 25 J. Health Politics,

Policy & Law 175 (2000) 22

Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Individual Mandate*, 75 Law & Contemp. Probs. (forthcoming 2012) 28

Nancy C. Turnbull, *et al.*, *Insuring the Healthy or Insuring the Sick? The Dilemma of Regulating the Individual Health Insurance Market: Short Case Studies of Six States* (Feb. 2005) 23

U.S. Census Bureau, *Health Insurance, Health Insurance Historical Tables* 21

INTEREST OF AMICI STATES

Amici Curiae, the States of Maryland, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, New Mexico, New York, Oregon, and Vermont, the District of Columbia, and the Virgin Islands, have a strong interest in protecting and promoting the health, safety, and welfare of their citizens, an interest that the Affordable Care Act advances in vitally important ways.

The Amici States have each made determined efforts to address the extraordinary problems associated with the current system of healthcare delivery in the United States, including spiraling costs, limitations on the availability of insurance coverage, and restricted access to medical services. Although the Amici States have achieved modest successes, these state-by-state efforts cannot fully counteract the force of inexorable national trends driven by problems that are fundamentally interstate in nature. The experience of the Amici States demonstrates the need for action on the national level.

The Amici States also bring a unique perspective to the questions of federalism raised in this case. The Amici States, no less than the Respondent States, embrace our system of dual sovereignty and resist federal encroachment in areas properly reserved to the states. Still, principles of federalism must not be misapplied to block federal legislation that addresses truly national problems, leaving both states and the federal government unable to adequately address and resolve pressing national

concerns. The Amici States also have a compelling interest in ensuring that constitutional principles of cooperative federalism are validated when Congress seeks to address important national problems by enacting legislation that will be implemented through the joint participation of the federal government and the states, as Congress has done here.

INTRODUCTION

Though the respondents' challenge to the Affordable Care Act's minimum-coverage provision is rooted in supposed limits on federal power inherent in the Commerce Clause, their claim has little to do with the core concerns that have animated this Court's Commerce Clause jurisprudence: it does not raise "our oldest question of constitutional law[,] . . . discerning the proper division of authority between the Federal Government and the States," *New York v. United States*, 505 U.S. 144, 149 (1992), nor does it implicate the problem of drawing "distinction[s] between what is truly national and what is truly local," *United States v. Morrison*, 529 U.S. 598, 617 (2000).

There can be no serious contention that existing defects in the country's markets for health care and health insurance—markets that accounted for 17.6% of the entire national economy in 2009—are somehow local in origin, in scope, or in effect. Nor can one seriously contend that requiring most Americans to obtain a minimum level of health

insurance coverage—through their employers, through a state health benefit exchange, or through a state Medicaid program—unduly encroaches on state authority or state prerogatives.

As a result of the systemic problems in our healthcare system, a large and growing number of Americans—49 million in 2009—lack health insurance and reliable access to basic healthcare services; employers increasingly find it effectively impossible to provide healthcare benefits to their employees; and healthcare costs claim a massive and steadily expanding proportion of the budgets of American families, of state and federal expenditures, and of the national economy as a whole. Emergency rooms now double as primary-care clinics for millions of uninsured; hundreds of thousands of Americans have been driven into personal bankruptcy because of their inability to pay for health care; and state governments, in each budget cycle over the last generation, have had to grapple with increasingly painful choices about whether, and if so how, to pay for health care for their most vulnerable citizens.

The crisis in our healthcare system "is plainly national in area and dimensions"—much like the problem of elderly poverty that Congress comprehensively addressed in enacting the Social Security Act, *Helvering v. Davis*, 301 U.S. 619, 644 (1937). Though state governments and private actors have taken important and innovative steps to expand access to health care and to restrain the growth of health care costs, no remedy can be fully effective without action on a national level. The Commerce Clause empowers Congress to take such

action, and Congress properly employed that power in addressing the nation's healthcare crisis through the reforms enacted in the Affordable Care Act.

In enacting the Affordable Care Act, Congress chose not to establish a single-payer system or a national service for healthcare delivery. Instead, the reforms selected by Congress leave essentially undisturbed the predominantly private, market-based character of our healthcare economy. Just as importantly, Congress designed its reforms in a manner that respects the existing balance of responsibility between the federal government and the states. The Act does not displace state regulatory authority, but instead proceeds on the basis of cooperative federalism: two of the three principal channels through which the Act expands access to health insurance—Medicaid programs and health benefit exchanges—are intended to be established, developed, and operated by the states according to their own policy choices.

SUMMARY OF ARGUMENT

Rather than embrace the essential genius of the constitutional design and its allocation of regulatory authority between the states and the national government, the respondents seek to justify their attack on the minimum-coverage provision with a novel misconception of the commerce power, one that does not derive from any principled understanding of federalism. The Constitution restricts Congress's power to regulate commerce by limiting its object to interstate commerce: "Commerce . . . among the

several States." The Constitution imposes this limitation—not as an adjunct to the individual rights enshrined elsewhere in the Constitution—but as a protection against incursions on the regulatory authority of the states. The restrictions on Congress's commerce power thus reinforce our federalist system of dual sovereignty.

But the conception of the commerce power that underlies the respondents' attack on the minimum-coverage provision does not derive from any principled understanding of federalism. On the contrary, the respondents' theory reflects a misapprehension of this Court's teachings about the nature of the federal commerce power. It is not true, as the respondents appear to believe, that the Constitution "presupposes a lack of plenary federal authority" to regulate interstate commerce. State Respondents' Cert.-Stage Brief at 1. This Court has repeatedly affirmed that, within the domain of interstate commerce, Congress's authority is indeed "plenary," and does not differ in its reach from the authority that states possess with respect to intrastate commerce.

Moreover, despite the rhetoric that accompanies the challenge to the minimum-coverage provision, the constitutional limitations on the commerce power do not embrace a libertarian objection to Congress's exercise of regulatory authority over the conduct of individuals. Rather than marking a "departure from commerce power norms," Pet. App. 112a, the exercise of federal authority to regulate individual conduct is consistent with the design of the Framers, who "opted for a Constitution in which Congress would exercise its legislative authority

directly over individuals. . . ." *New York*, 505 U.S. at 165.

In invoking federalism limitations as the basis for their challenge to the Affordable Care Act, the respondents fail to appreciate that the federal commerce power exists precisely to allow Congress to address problems—like those that plague the nation's healthcare system—that do not respect state boundaries and that the states cannot fully and effectively address on their own.

The factual premise for the respondents' challenge to the minimum-coverage provision—based on an ostensible distinction between activity and inactivity—ignores reality by supposing that there are a meaningful number of citizens who will never obtain health care and who therefore will never affect the country's healthcare economy. To the contrary, as the D.C. Circuit recognized, the health insurance market is unique, "both because virtually everyone will enter or affect it, and because the uninsured inflict a disproportionate harm on the rest of the market as a result of their later consumption of health care services." *Seven-Sky v. Holder*, 661 F.3d 1, 18 (D.C. Cir. 2011). Congress acted within its authority in taking account of these unique features of the healthcare economy and in enacting the minimum-coverage provision, without which the Affordable Care Act's other vital reforms would not be fully effective.

The Affordable Care Act does not represent an incursion on state sovereignty. Rather, it is an indispensable aid to the states in their own efforts to tackle the healthcare problems their citizens face.

The framework established by the Affordable Care Act empowers the states, in partnership with the federal government, to create enduring solutions to the nation's healthcare crisis. Where, as here, Congress has exercised its commerce power to act in partnership with the states to confront problems with both interstate and intrastate dimensions, Congress honors, rather than transgresses, the structural limitations embodied in the Constitution.

ARGUMENT

I. THE HEALTHCARE REFORMS CONGRESS ADOPTED IN THE AFFORDABLE CARE ACT FALL SQUARELY WITHIN THE HISTORICAL UNDERSTANDING OF THE COMMERCE POWER AS A TOOL FOR ADDRESSING INTERSTATE PROBLEMS THAT STATES CANNOT EFFECTIVELY ADDRESS ALONE.

The Commerce Clause represents "the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation." *Gonzalez v. Raich*, 545 U.S. 1, 16 (2005). That absence of federal authority resulted not only in a national government effectively incapable of making national policy on matters of interstate and international commerce, but in the frustration of *state* efforts to make policy on the same matters. As the Court explained in *New York v. United States*, the Framers adopted the Commerce Clause to address this "central problem" by conferring plenary power on the federal government

to regulate interstate commerce. 505 U.S. at 163-66. This power by definition included the authority to regulate directly the conduct of individual citizens. *See id.* at 165 (the Framers "opted for a Constitution in which Congress would exercise its legislative authority directly over individuals").

The crisis in our country's healthcare system is a contemporary example of the type of intractable interstate problem for which the Framers adopted the Commerce Clause. It is a problem with national scope and one that the states, acting alone, cannot fully address. The remedy that Congress selected to address the problem, the Affordable Care Act, falls well within the power that the Commerce Clause confers.

A. The Commerce Clause Enables Congress to Regulate Interstate Commerce Comprehensively.

1. The Framers Empowered Congress to Act to Address Problems of National Scope.

The Commerce Clause's grant of broad power to Congress to "regulate Commerce . . . among the several States" reflected lessons learned from the failure of the Articles of Confederation. Under Article IX of the Articles of Confederation, the states themselves regulated commerce. Without a mechanism for the federal government to coordinate and facilitate interstate commerce, the states were hindered in their ability to confront problems with interstate dimensions. As James Madison observed,

a major "defect" in this arrangement was its inability to facilitate action in "concert in matters where common interest requires it," particularly with regard to "our commercial affairs." James Madison, *Vices of the Political System of the United States*, in 9 The Papers of Madison 348 50 (Robert A. Rutland *et al.*, eds., 1975). Without coordinated interstate action, a patchwork of state laws "restrict[ed] the commercial intercourse with other States"; this arrangement frustrated economic development and was "destructive of the general harmony." *Id.*

Alexander Hamilton adhered to the same view. He observed profound economic insecurity under the Articles of Confederation: "commerce . . . at the lowest point of declension," "a violent and unnatural decrease in the value of land," and the drying up of "private credit," with "borrowing and lending . . . reduced within the narrowest limits." Federalist No. 15. For Hamilton, this economic insecurity could "only be fully explained by that want of private and public confidence" in the efficacy of the national government. *Id.* Collective action problems, Hamilton further observed, hindered the states from effectively addressing these problems:

> The greater deficiencies of some States furnished the pretext of example and the temptation of interest to the complying, or at least to the delinquent States. Why should we do more in proportion than those who are embarked with us on the same political voyage? Why should we consent to bear more than our proper share of the common burden?

Id.

This structural defect led Madison and his fellow Framers to advocate for a new Constitution under which the national government would have the power to "[m]aintain[] . . . harmony and proper intercourse among the States." The Federalist No. 41 (J. Madison) (Clinton Rossiter ed., 1961).[1] Under their proposal, Congress would have the power "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." Though some contemporaries advocated stronger limitations on Congress's powers, the committee of the Constitutional Convention that drafted Article I, Section 8 adopted the approach that Madison and the Virginia delegation had proposed.

The powers enumerated in Article I, Section 8—including the power to "regulate Commerce . . . among the several States"—overcame shortcomings in the previous system by enabling the federal government to address problems that the states could not effectively resolve through uncoordinated, state-by-state action. *See Gonzales v. Raich*, 545 U.S. 1, 16 (2005) ("The Commerce Clause emerged as the Framers' response to the central problem giving

---

[1] *See also* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 Stan. L. Rev. 115, 121 (2010) ("The structure of governance established by the Articles of Confederation often prevented the states from acting collectively to pursue their common interests. Solving these problems of collective action was a central reason for calling the Constitutional Convention.").

rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation."); *see also Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 98-99 (1994) ("The Framers granted Congress plenary authority over interstate commerce in 'the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979))).

2. Congress Has the Power to Regulate Individual Conduct that Substantially Affects Interstate Commerce.

The federal commerce power, by deliberate design, includes the power to regulate individual conduct. This Court has repeatedly recognized that the grant of federal power under the Commerce Clause is "plenary" in nature. *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 ("[T]he Commerce Clause is a grant of plenary authority to Congress."); *United States v. Darby*, 312 U.S. 100, 114 (1941); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824) ("[T]he sovereignty of Congress, though limited to specified objects, is plenary as to those objects."). This plenary power necessarily includes the power to regulate individual conduct. As the Court explained in *New York v. United States*, "[u]nder the Articles of Confederation, Congress lacked the authority in most respects to govern the people directly. . . . The inadequacy of this governmental structure was responsible in part

for the Constitutional Convention." 505 U.S. at 163. Through the Commerce Clause and other counterpart provisions, the Framers determined to "'extend the authority of the Union to the persons of the citizens—the only proper objects of government.'" *Id.* (quoting Federalist No. 15). The Framers deliberately established a federal government able to "'carry its agency to *the persons of the citizens*,'" a "'government of the Union, like that of each State, . . able to address itself immediately to the hopes and fears of individuals.'" *Id.* (quoting Federalist No. 16) (emphasis added).

The Commerce Clause empowers Congress to regulate the conduct of individuals whose actions substantially affect interstate commerce. Indeed, as the Court's cases establish, Congress may regulate under the Commerce Clause the conduct of individual people whose decisions *not* to participate in interstate commerce nonetheless have a substantial effect on interstate commerce. It so concluded with respect to federal restrictions on the cultivation of wheat for home consumption in *Wickard v. Filburn*, and, more recently, with respect to federal proscription of the cultivation of marijuana for home consumption in *Gonzalez v. Raich*. As the Court explained in the latter case, "the regulation is squarely within Congress's commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity." 545 U.S. at 19 (discussing *Wickard v. Filburn*, 317 U.S. 111 (1942)).

In this regard, "[t]he authority of the federal government over interstate commerce does not differ in extent or nature from that retained by the states over intrastate commerce." *Darby*, 312 U.S. at 116. Just as states have plenary authority to regulate commerce within their boundaries, *see Danforth v. Minnesota*, 552 U.S. 264, 280 (2008), so too does Congress have plenary authority to regulate commerce that crosses state boundaries.

B. Longstanding Precedent Confirms the Understanding of the Commerce Power as a Means of Enabling Congress to Address Problems that Require Coordination and Cooperation Among the States.

From the time of Chief Justice Marshall, this Court has consistently interpreted Congress's commerce power as one intended to address problems that require coordination among states, where states, acting alone, can create problems affecting other states. In the seminal case of *Gibbons v. Ogden*, the Court recognized that the commerce power was necessary to prevent one state from stifling the development of both another state's commerce and interstate commerce in the United States generally. Commerce "among" the states, the Court explained, meant commerce of one state "intermingled" with that of others, which necessarily "cannot stop at the external boundary of each State." 22 U.S. at 194. Without federal power to coordinate this intermingled commerce, actions by one state could negatively affect commerce in another state or among states. Therefore, the Court held, the

Commerce Clause must be understood as granting Congress the power to regulate "that commerce which concerns more states than one." *Id.*

As the nation's economy evolved and became more interdependent, the Supreme Court recognized that even small intrastate transactions could affect interstate commerce. In *Wickard v. Filburn*, the Court upheld the application of federal price-stabilization laws to a single farmer's production of wheat for home consumption, finding that the effect of his contribution to the wheat market, when "taken together with that of many others similarly situated, is far from trivial." 317 U.S. at 128. The Court held that the commerce power "extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." 317 U.S. at 124 (citation omitted).

The Court has also recognized that a single state can put itself at a competitive disadvantage with other states if it expends resources to address a general societal ill while other states fail to take action. In *Darby*, the Court held that federal wage-and-hour regulations were necessary to prevent unfair competition between businesses in states with such laws and those in states without them, and that such nationwide regulations were within Congress's commerce power. *See* 312 U.S. at 115. A state-by-state approach to eradicating "the evils . . . of substandard labor conditions" would result in the "dislocation of the commerce itself caused by the impairment or destruction of local businesses" seeking to compete in a system of interstate

commerce. *Id.* at 122. Only Congress, exercising its commerce power, can legislate a solution while maintaining a level playing field among the states.

Thus, longstanding precedent has established that the federal commerce power supplies the basis for coordinated action to resolve problems that states, acting within their borders, cannot effectively address alone. As the Court explained in *United States v. South-Eastern Underwriters Association*, the federal commerce power encompasses "the power to legislate concerning . . . transactions which, reaching across state boundaries, affect the people of more states than one—to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing." 322 U.S. 533, 552 (1944). The nation's healthcare crisis is one that states are "not fully capable of governing" without federal regulation that addresses the interstate dimensions of the healthcare economy.

C. Our Nation's Healthcare Crisis Is an Interstate Problem that States Cannot Fully Address on Their Own, and Is Thus a Proper Subject for the Exercise of Congress's Commerce Power.

1. The Problem of Uncompensated Care Transcends State Boundaries.

The interstate nature of the market for health care is beyond serious dispute. The healthcare economy accounted for 17.6% of the nation's gross domestic product in 2009. Many hospital corporations operate in numerous states, and

medical supplies, drugs, and equipment—not to mention patients—routinely cross state lines. *See* 42 U.S.C. § 18091(a)(2)(B). Spending for health insurance exceeded $850 billion in 2009, and the majority of health insurance is sold by national or regional companies. *See id.* The value of healthcare services provided to those without insurance in 2008 was $116 billion. *See* Families USA, *Hidden Health Tax: Americans Pay a Premium* 2 (2009). Congress found that providers were not compensated for $43 billion of that total; that providers shift a substantial portion of those costs onto insurance companies and other payers; and that annual family health insurance premiums are, on average, more than $1,000 higher than they otherwise would be as a result of the further shifting of those costs. *See* 42 U.S.C. § 18091(a)(2)(F).

No state has fully insulated itself from the alarming trends in the number of people who lack insurance and in the overall cost of health care. In 2009, for example, 21.9% of Californians, 10.7% of Hawaiians, 11.8% of Iowans, 16.1% of Marylanders, 16.1% of New Yorkers, and 21.8% of Oregonians lacked health insurance; in the absence of the reforms Congress adopted in the Affordable Care Act, those figures were projected to rise by 2019 to 25.6%, 12.4%, 13.5%, 18.9%, 18.5%, and 26.1% respectively. *See* Bowen Garrett, *et al.*, *The Cost of Failure to Enact Health Reform* (2009), *available at* http://www.rwjf.org/files/research/49148.pdf.

The American Hospital Association estimates that the value of hospital-based uncompensated care has risen steadily over the last 30 years, from $3.9 billion in 1980 to $39.1 billion in 2009. *See*

American Hospital Association, *Uncompensated Hospital Care Fact Sheet* (Dec. 2010), *available at* http://www.aha.org/content/00-10/10uncompensatedcare.pdf. Total national healthcare expenditures have risen from $27.3 billion in 1960, or 5.2% of the gross domestic product in that year, to $2.5 trillion, or 17.6% of the gross domestic product, in 2009. Centers for Medicare & Medicaid Services, Historical National Health Expenditure Data Web Tables T.1 (2011), *available at* https://www.cms.gov/NationalHealthExpendData/downloads/tables.pdf. In enacting the Affordable Care Act, Congress projected that, without meaningful reform, total national health expenditures would rise to $4.7 trillion in 2019. *See* 42 U.S.C. § 18091(a)(2)(B).

In Maryland, where hospitals in 2009 provided $999 million in uncompensated care to the uninsured,[2] the State has established a healthcare compensation structure to regulate and rationalize the economic consequences of the "inactivity" that is the core subject of this case. As a result of this system, it is possible to trace more concretely the substantial effect on the healthcare economy of failing to maintain adequate health insurance. Under Maryland's all-payer system, for which it has received a waiver from the federal government under 42 U.S.C. § 1395f(b), the State's Health Services Cost Review Commission sets the rates for hospital in-patient services paid by all payers, including private insurers, the federal Medicare program, and

---

[2] *See* Health Services Cost Review Commission 2010 Report, at 2-4, *available at* http://www.hscrc.state.md.us/documents/HSCRC_PolicyDocumentsReports/AnnualReports/GovReport10_MD_HSCRC.pdf.

the State's Medicaid program. *See* Md. Code Ann., Health-Gen. §§ 19-211, 19-212. In establishing the Commission, the Maryland General Assembly expressly sought to address the market problems associated with uncompensated care, *see* Md. Code Ann., Health-Gen. § 19-214, and a key virtue of the all-payer rate-setting system is that it rationalizes the shifting of the costs of uncompensated care, avoiding a situation in which the bargaining power of each payer determines the extent to which the costs of uncompensated care will be shifted to it. Each year, after studying the level of uncompensated care, the Commission authorizes hospitals to impose a surcharge to reimburse them for costs associated with providing uncompensated care. In 2009, that surcharge was 6.91%. *See* 2009 Budget Analysis, Health Regulatory Commissions, Department of Health and Mental Hygiene, at 18, *available at* http://mlis.state.md.us/2009rs/budget_docs/all/operating/m00r_dhmh_health_regulatory_commissions.pdf. Thus, in Maryland, the "inactivity" that is the subject of this case—failing to maintain adequate health insurance—inflated the cost of in-patient hospital care to those who did maintain health insurance by nearly 7%.

2. Decisions to Forego Insurance Have a Substantial Effect on Interstate Commerce.

In the healthcare context, the respondents' proffered distinction between "activity" and "inactivity" utterly fails to generate principled rules for the exercise of regulatory authority. The proper allocation of constitutional authority does not turn on the "activity" or "inactivity" of healthcare

consumers, as the respondents contend, and this Court has refused to draw such artificial lines when reviewing Congress's exercise of the commerce power. *See Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 547 (6th Cir. 2011) (Martin, J.) ("[T]he text of the Commerce Clause does not acknowledge a constitutional distinction between activity and inactivity, and neither does the Supreme Court."); *id.* at 560 (Sutton, J., concurring) (Commerce Clause does not "contain an action/inaction dichotomy that limits congressional power"); *Seven-Sky*, 661 F.3d at 16 ("No Supreme Court case has ever held or implied that Congress's Commerce Clause authority is limited to individuals who are presently engaging in an activity involving, or substantially affecting, interstate commerce."); *see also Carter v see also Carter v. Carter Coal Co.*, 298 U.S. 238, 307-08 (1936) (Commerce Clause permits regulation of any "activity *or condition*" that substantially affects interstate commerce (emphasis added)).

The irrelevance of the supposed distinction between "activity" and "inactivity" is evidenced in *Wickard*, where the Court found that a decision to "forestall resort to the market" for wheat—like a decision to forestall resort to the health insurance market—could, in the aggregate, substantially affect a national market. 317 U.S. at 127-28. Similarly, in *Raich*, the Court found that growing or possessing marijuana for one's own use—without any consumption, trade, or other "activity" related to it—is subject to federal regulation, where Congress had a rational basis for believing that, when viewed in the aggregate, that conduct would affect price and market conditions. *See* 545 U.S. at 19; *see also Seven-Sky v. Holder*, 661 F.3d 1, 16-18 (D.C. Cir.

2011). So too with health care: there is little dispute that the uninsured will impose billions of dollars in costs on the national economy regardless of whether their lack of insurance is deemed "activity" or "inactivity."

In any event, forgoing health insurance is indeed an activity. As Judge Sutton has explained, "No one is inactive when deciding how to pay for health care, as self-insurance and private insurance are two forms of action for addressing the same risk. Each requires affirmative choices; one is no less active than the other; and both affect commerce." *Thomas More*, 651 F.3d at 561 (Sutton, J., concurring). "[F]ar from regulating inactivity, the minimum coverage provision regulates individuals who are, in the aggregate, active in the health care market." *Id.* at 548 (Martin, J.). If it is "inactivity" to forgo health insurance, when the United States expends more than $43 billion annually to cover the cost of care for those without insurance, then there's a whole lot of "inactivity" going on in the national healthcare market.

3. State-Level Reforms Cannot Fully Address the Problems Associated With Uncompensated Care.

Uncompensated care in one state creates effects for multiple states, and so represents a problem that is not fully susceptible to state-by-state solutions. The impediments are practical ones and are rooted in the interconnectedness of the American economy. Today, if a state adopts a policy to reverse the rising number of people lacking access to basic health care, or to control the spiraling costs of health care,

insurers who object to that policy can exit that state with relative ease, as could healthcare providers, individuals, and employers who wish to avoid the taxes, insurance expenses, or other burdens associated with the state's policy. At the same time, individuals and employers may easily enter a state if they wish to avail themselves of better healthcare policies, such as a state-imposed "guaranteed-issue" requirement that ensures the availability of coverage regardless of pre-existing conditions. Similarly, a state's decision to adopt more expansive standards for Medicaid eligibility may attract applicants from states that retain stricter standards. Conversely, relocating to another state may present an attractive alternative for individuals and employers who wish to avoid taxes, insurance expenses, or other burdens associated with the policies adopted in their home state.

There are, of course, numerous examples of effective state policymaking in the area of health care, many of which Congress drew upon in enacting the Affordable Care Act. Washington State's insurance program for people who have modest incomes but who are ineligible for Medicaid, for instance, served as the model for the option in the Act for states to create a "basic health program." 42 U.S.C. § 18091. And, most notably, Massachusetts, which enacted a set of minimum-coverage, guaranteed-issue, and community-rating requirements similar to those contained in the Act, has succeeded in reducing the percentage of its citizens lacking health insurance to 4.4%—by far the lowest in the country. *See* U.S. Census Bureau, Health Insurance, Health Insurance Historical Tables,

available at http://www.census.gov/hhes/www/hlthins/data/historical.

Nonetheless, experience shows that, in the health insurance field, as in the fields of unemployment and old-age insurance, the interconnectedness of state economies imposes practical restrictions on the range of policy choices open to any individual state, and also limits the efficacy of any solution chosen by a state that departs substantially from policies adopted by other states. In the 1990s, a number of states attempted to address an increasing lack of access to individual insurance for sicker residents by enacting reform packages including "guaranteed issue" requirements. *See* Len M. Nichols, *State Regulation: What Have We Learned So Far?*, 25 J. Health Politics, Policy & Law 175, 188 (2000).

Several of the states that attempted to institute these reforms saw insurance providers pick up stakes and cease participation in those states' insurance markets. In Kentucky, for example, 40 insurers departed the Commonwealth, leaving only two remaining providers to serve the statewide market, after the reforms were instituted in 1994; similarly, in Washington, all but one out-of-state commercial carrier stopped issuing new policies before the State's guaranteed-issue provision took effect. *See* Adele M. Kirk, *Riding the Bull: Experience With Individual Market Reform in Washington, Kentucky, and Massachusetts*, 25 J. Health Politics, Policy & Law 152 (2000). In Washington, the one remaining commercial insurer experienced significant losses because sicker individuals flocked to its product. *See id.* at 140. When national carriers have the ability to avoid

exposure to such losses by simply ceasing to participate in reformed markets, states are forced to abandon wanted policies, as Kentucky and Washington ultimately did. *See id.* at 133, 136-37, 152, 158; Nancy C. Turnbull, *et al.*, *Insuring the Healthy or Insuring the Sick? The Dilemma of Regulating the Individual Health Insurance Market: Short Case Studies of Six States* 7 (Feb. 2005); *see also* Pet. App. 230a-231a (Marcus, J., dissenting) (discussing experience of state-level healthcare reform that led to insurers exiting the market).

The experience of states attempting to go it alone reveals the serious risks of a purely state-by-state approach when neighbor states can offer a more congenial environment to insurance companies by forgoing healthcare reforms. This concern is particularly acute in states with few carriers in the market. In Alabama, for example, a single insurance carrier has a 96% share of the small-group market; in North Dakota, the corresponding figure is 91%.

Beyond the impediments to effective state policymaking that flow from the interconnectedness of each state's healthcare economy, many potential state solutions are foreclosed or preempted by federal law. As discussed below, federal regulation has displaced state authority to regulate large components of the healthcare sector. Self-funded employer health plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA"). Are largely beyond the reach of state regulators as a result of that statute's broad preemptive scope. In addition, the single largest source of healthcare expenditures, the Medicare program, is administered by the federal government without state

involvement. The states' regulatory authority is further limited by the Constitution itself, which prohibits a state from limiting its conferral of welfare benefits that are more generous than those provided by other states to people who lived in the State for the preceding year. *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489 (1999). Thus, for example, any state that wishes to establish eligibility criteria for its Medicaid program substantially broader than those of its neighbors must be prepared, by virtue of constitutional mandate, to shoulder the cost of extending those benefits to any new arrivals who move to the state to avail themselves of Medicaid eligibility.

4. Federal Regulation Serves a Critical Role in Aiding State Healthcare Reform Efforts.

The states should, and undoubtedly will, play a critical role in health care reform; as discussed below, the Affordable Care Act fully embraces state policymaking within a national framework of cooperative federalism. In the absence of such a national framework, however, state policymaking is just as likely to be driven (or paralyzed) by interstate competitive pressures as by a desire to function as "laboratories of democracy" in finding innovative solutions to these extraordinarily pressing problems.

This Court long ago recognized—well before health insurance could be purchased over the internet—that the growing interconnection of state economies poses an ever-greater challenge to effective state-by-state policymaking on matters of national economic concern. Problems "plainly

national in area and dimensions" often require national solutions, as the Court recognized in 1937 in separate decisions upholding, respectively, the system of unemployment insurance benefits and the system of old-age benefits established in the Social Security Act. *See Steward Machine*, 301 U.S. 548, 586-89 (1937); *Helvering*, 301 U.S. at 644.

With respect to Congress's decision to provide a measure of income security to older Americans, Justice Cardozo explained for the Court that the "laws of the separate states cannot deal with [the problem of income insecurity and poverty among the elderly] effectively." *Helvering*, 301 U.S. at 644. This is so because, "[a]part from the failure of resources, states and local governments are at times reluctant to increase so heavily the burden of taxation to be borne by their residents for fear of placing themselves in a position of economic disadvantage as compared with neighbors or competitors." *Id.* This fear is rational, and applies to single-state efforts to reduce the cost and improve the quality of healthcare services delivery, just as it applies to a "system of old age pensions," which, "if put in force in one state and rejected in another" creates "a bait to the needy and dependent elsewhere, encouraging them to migrate and seek a haven of repose." *Id.* For that reason, as this Court recognized, "[o]nly a power that is national can serve the interests of all" in reforming the interstate healthcare market. *Id.*

What is true of old-age pensions and healthcare reform was also true of the decision to establish a national system of federal-state cooperation for

providing unemployment insurance. There, too, as Justice Cardozo explained:

> [I]f states had been holding back before the passage of the federal law, inaction was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with their neighbors or competitors. . . .

Steward Machine, 301 U.S. at 588.

The states have long been active, creative shapers of healthcare policy in this country. In the Affordable Care Act, Congress ensured that they will continue to function in that capacity in the future. For a host of practical and legal reasons, however, the states, acting alone, cannot fully address the defects in our country's healthcare system.

II. THE MINIMUM-COVERAGE PROVISION IS AN INTEGRAL ELEMENT OF CONGRESS'S INTERSTATE SOLUTION TO THE HEALTHCARE CRISIS.

The minimum-coverage provision is squarely within Congress's Commerce Clause powers. Exercising this power, Congress may regulate economic activities that, in the aggregate, have a substantial effect on interstate commerce. *See Gonzalez v. Raich*, 545 U.S. 1, 17 (2005). In addition, Congress may regulate noneconomic activity so long as the regulation is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut

unless the intrastate activity were regulated." *United States v. Lopez*, 514 U.S. 549, 561 (1995). The minimum-coverage provision is a justifiable exercise of Congress's Commerce Clause authority because (1) the aggregate effect of maintaining a minimum level of insurance coverage has a substantial effect on commerce, and (2) the comprehensive solution to health insurance reform would be undercut without the minimum coverage provision.

The minimum-coverage provision is an essential and lawful part of the Affordable Care Act's attempt to provide healthcare access to individuals with preexisting conditions, a group that is among the hardest of the uninsured to cover. The provision is essential because it helps prevent individuals from free-riding on state and federal budgets and on those who responsibly obtain health insurance. It is also essential because, without it, the preexisting-condition prohibition would lead to much higher insurance premiums, causing more people to forgo health insurance, and thereby worsening the impact on state and federal budgets. This dynamic is borne out by the experience, discussed above, of states that saw higher premiums and reduced coverage following their adoption of guaranteed-issue requirements that were not accompanied by a requirement akin to that imposed by the minimum-coverage provision.

The increase in insurance premiums without a minimum-coverage requirement is due to the phenomenon of moral hazard: Under a system where health insurers cannot turn away people with preexisting conditions, many people will simply wait

to purchase insurance until they are facing a health emergency, secure in the knowledge that they will be able to obtain insurance for expensive treatments when the time comes. This manifestation of moral hazard, known as adverse selection, skews the insurance pool, since people will tend to opt into the pool only when they perceive their health risks to be great.

Two unique features of the healthcare market exacerbate the problem of adverse selection: the need for services is highly unpredictable, and the cost of those services can be ruinously expensive.[3] One's health condition, of course, is not static. There is no class of healthcare consumers who are forever impervious to illness and injury. Rather, presently healthy people ineluctably become unhealthy or injured in the future and then require more costly treatment, just as presently unhealthy people regain their health and then require less costly treatment. No insurance regime can survive if people can opt out when the risk insured against is only a risk, but opt in when the risk materializes. Congress enacted the minimum-coverage provision to prevent free riders from distorting market prices for insurance in this way.[4] The minimum-coverage provision is thus justified as "an essential part of a larger regulation"

---

[3] Congress found that "62 percent of all personal bankruptcies are caused in part by medical expenses." 42 U.S.C. § 18091(a)(2)(G).

[4] *See* Niel S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Individual Mandate*, 75 Law & Contemp. Probs. (2012), Working Paper at 25-27, *available at http://scholarship.law.duke.edu/faculty_scholarship/2386*.

of the health insurance industry. *Lopez*, 514 U.S. at 561.

III. THE AFFORDABLE CARE ACT, RATHER THAN DISPLACING STATE AUTHORITY, PRESERVES STATE POLICYMAKING DISCRETION IN THE IMPLEMENTATION OF HEALTHCARE REFORMS, BUILDING ON A SUCCESSFUL MODEL OF COOPERATIVE FEDERALISM.

A. The Affordable Care Act Builds on a Long Tradition of Federal-State Cooperation.

Today's healthcare economy is one in which there has already been substantial displacement of state regulatory authority. According to the U.S. Census Bureau, the federal Medicare program accounted for $502 billion in healthcare expenditures in 2009, representing—more than 20% of the national total. The Medicare program, unlike Medicaid, is administered exclusively by the federal government, without state involvement. Roughly half of the expenditures by private insurers are by self-funded employer health plans and largely beyond the reach of state regulatory authority by virtue of ERISA preemption. *See* 29 U.S.C. § 1144(a); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 658 (1999).

In the Affordable Care Act, rather than further displacing state regulatory authority, Congress chose to proceed on the basis of "cooperative federalism," a manner of legislating in which Congress "allows the States, within limits

established by federal minimum standards, to enact and administer their own regulatory program, structured to meet their own particular needs." *Hodel*, 452 U.S. at 289. Although it is undisputed that Congress could have displaced state authority and enacted a single-payer system, its choice to rely on the private marketplace, state-operated Medicaid, and state-run insurance exchanges shows a profound respect for the principles of federalism that underlie Congress's enumerated powers.[5]

The Medicaid program, which in 2009 accounted for $374 billion in healthcare expenditures (or about 15% of the national total), is perhaps the preeminent example of this type of legislation. *See Wisconsin Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 495-96 (2002). States choose whether to participate in the Medicaid program, and its "cornerstone" is "financial contribution by both the Federal Government and the participating State." *Harris v. McRae*, 448 U.S. 297, 308 (1980). In the development of policy for the program, Congress leaves "a range of permissible choices to the States," and allows each State "to 'strike its own balance' in the implementation of the Act." *Blumer*, 534 U.S. at

---

[5] It is a notable irony of the respondents' challenge to the minimum-coverage provision, a challenge animated by libertarian values, that the most salient difference between, on the one hand, the Affordable Care Act's system for extending protection to those who today lack access to basic health care and, on the other hand, the insurance systems established in the Social Security Act and upheld against similar challenges in *Helvering* and *Steward Machine*, is that, in the Affordable Care Act, Congress relied principally on the private market, not on public insurance programs, to achieve its objectives.

495, 497 (internal citation omitted). Other examples of cooperative federalism include Aid to Families with Dependent Children, *King v. Smith*, 392 U.S. 309, 316 (1968); the Individuals with Disabilities in Education Act, *Schaffer v. Weast*, 546 U.S. 49, 52 (2005); the Clean Water Act, *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992); and the Occupational Health and Safety Act of 1970, *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 97 (1992).

B. The Affordable Care Act Affords States Wide Latitude in Implementing Key Elements of the Act's Reforms.

The Affordable Care Act embraces the model of cooperative federalism. The millions of Americans who will gain access to affordable health insurance as a result of the Act's reforms will look primarily to one of three sources to obtain coverage: their employers, state Medicaid programs, and state health benefit exchanges. Currently-uninsured employees of large employers will gain access to employer-sponsored insurance by virtue of the Act's employer-responsibility provision. *See* 26 U.S.C. § 4980H. Many Americans will become newly eligible for Medicaid, which will be extended to cover those whose incomes do not exceed 133% of the federal poverty level. *See* 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII). Others who currently lack insurance may purchase it through a "health benefit exchange," a competitive insurance marketplace in each state. 42 U.S.C. § 18031. Congress has provided substantial federal funding for these exchanges, but has left to the states, in the first instance, the policy choices that determine how the

exchanges will be established and will operate. *See id.* Thus, of the three most significant channels through which previously-uninsured Americans will obtain insurance after full implementation of the ACA, one is the expansion of an existing private source of coverage (employer-sponsored insurance), and two are programs of cooperative federalism (state Medicaid programs and state-based health benefit exchanges).

With regard to the Act's expansion of Medicaid eligibility, it is sufficient for present purposes to emphasize what this Court has previously observed: the Medicaid program exemplifies "cooperative federalism," leaving "a range of permissible choices to the States" and allowing each State "to 'strike its own balance' in the implementation of the Act," *Blumer*, 534 U.S. at 495, 497. In expanding access to health care for the country's most vulnerable citizens, the Affordable Care Act does not create a giant new federal entitlement program. Instead, the Act expands a highly successful program that is jointly overseen by the federal government and the states and that is implemented entirely by the states.

With regard to health benefit exchanges, the Act provides in the first instance for the exchanges to be established and developed by the states themselves, subject to limited federal oversight and with the support of substantial federal funding. At least 13 states have enacted legislation concerning these exchanges, joining Massachusetts and Utah, both of which had previously established an exchange. The core functions of these state-based exchanges are (a) to certify "qualified health plans" for sale in the

state, (b) to facilitate the purchase of such plans by consumers seeking individual coverage, and (c) to assist small employers in enrolling their employees in such plans. 42 U.S.C. § 18031(b)(1), (d)(4)(A).

Significantly, a state has broad discretion to determine the basic package of benefits that a plan offered through its exchange must provide. *See* 42 U.S.C. § 18031(d)(3)(B). Moreover, under recent guidance from the Department of Health and Human Services, states have substantial latitude in defining "essential health benefits," based on conditions in each state's insurance market. *See* Center for Consumer Information and Insurance Oversight, "Essential Health Benefits Bulletin," December 16, 2011. The minimum-coverage provision requires individuals to maintain insurance that provides these "essential health benefits." Thus, the operation of the very provision at issue in this case will be influenced by decisions made at the state level. And, naturally, the states may exercise this policymaking authority differently, arriving at results that are tailored to the needs and preferences of its citizens, thereby fulfilling one of the promises of our federal system by acting as laboratories for policy experimentation.

The Act further authorizes each state to make the fundamental determination whether its exchange will offer for purchase any plan that meets minimum requirements, or if instead its exchange will adopt so-called "active purchasing" approaches to certification, such as competitive bidding processes or negotiations with insurance carriers of plan terms, cost, network breadth, and service quality. *See* 42 U.S.C. § 18031(e)(1)(B); 76 Fed. Reg.

41,891-92, 41,921 (July 15, 2011). All of these provisions, as well as numerous others, afford to each state the opportunity to decide not only what kinds of health plans its exchange will offer for purchase, but—even more fundamentally—what kind of exchange it will have.

Beyond the fact that two of the three principal channels through which the Affordable Care Act expands access to health insurance are intended to be developed and implemented by the states themselves, the Act exemplifies cooperative federalism in other highly significant ways. For example, the Act affords each state the option, along with substantial federal financial assistance, to establish a "basic health program" for individuals who are ineligible for Medicaid but whose family income is less than 200% of the federal poverty level. *See* 42 U.S.C. § 18051. The Act also establishes a process, to be implemented jointly by federal regulators and state insurance commissioners, that will subject annual increases in health insurance premiums to enhanced regulatory rate review. *See* 42 U.S.C. § 300gg-94.

The Act also encourages policy innovation by the states, allowing states to apply for waivers of the Act's requirements, *see* 42 U.S.C. § 18052, and to test other "innovative payment and delivery models," 42 U.S.C. § 1315a. These provisions offer new opportunities for a state to shape the manner in which the federal *Medicare* program—again, accounting for roughly 20% of total national health expenditures—pays for care to beneficiaries in that state. *See* 42 U.S.C. § 1315a(b)(2)(B)(x) & (xi).

These core features of the Act, which bolster, rather than usurp, state authority in the arena of healthcare regulation, refute the respondents' contention, accepted by the panel majority below, that the Affordable Care Act "supersedes a multitude of the states' policy choices in key areas of traditional state concern" and "obliterat[es] the boundaries inherent in the system of enumerated congressional powers." Pet. App. 143a, 187a. In virtually every respect, Congress decided to maintain the existing balance of responsibility between the federal government and the states. Rather than supplant state authority, Congress directed federal regulators to work in cooperation with state Medicaid programs, state health benefit exchanges, state insurance commissioners, and other state institutions in such endeavors as expanding access to health care, regulating market participants, and testing innovative strategies to control healthcare costs. At a minimum, a comparison of the cooperative federalism that characterizes the approach taken in the Affordable Care Act with, for example, ERISA's preemption provision, through which Congress overrode all state authority to regulate roughly 15% of the entire healthcare economy, reveals the hyperbole in the respondents' claim that the Affordable Care Act "supersedes" state policy choices and "obliterates" our federalist system.

Moreover, in keeping with the best values of cooperative federalism, the states remain accountable to their citizens for the policy decisions they make in implementing essential aspects of healthcare reform, because the broad discretion afforded to state officials under the Act allow the

states to "structure[]" the reforms "to meet their own particular needs." *Hodel*, 452 U.S. at 289; *cf. Printz v. United States*, 521 U.S. 898, 929-30 (1997); *New York v. United States*, 505 U.S. at 167-68. In the critical provisions of the Act discussed above, Congress did not "consign States to the ministerial tasks of information gathering and making initial recommendations, while reserving to [the federal government] the authority to make final judgments under the guise of surveillance and oversight." *Alaska Dep't of Envtl. Conservation v. Environmental Prot. Agency*, 540 U.S. 461, 518 (2004) (Kennedy, J., dissenting). Rather, while addressing a crisis in the health care system that is plainly national in scope and effect, the Affordable Care Act "allow[s] state governments to be accountable to the democratic process," *id.*, in making and implementing critical state-level policy choices, such as in deciding the operating model for its health benefit exchange and in deciding what benefits must be provided in plans offered for purchase through the exchange.

The healthcare reforms adopted in the Affordable Care Act do not represent an incursion on state sovereignty or an encroachment on state regulatory authority. On the contrary, like the system of federal-state cooperation established in the Social Security Act for providing insurance against unemployment, the Act's "operation is not constraint, but the creation of a larger freedom, the states and the nation joining in cooperative endeavor to avert a common evil." *Steward Machine*, 301 U.S. at 587.

CONCLUSION

The judgment of the court of appeals invalidating the minimum-coverage provision should be reversed.

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland

JOHN B. HOWARD, JR.
Deputy Attorney General

WILLIAM F. BROCKMAN
Acting Solicitor General
Counsel of Record

JOSHUA N. AUERBACH
STEPHEN M. RUCKMAN
SARAH W. RICE
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
wbrockman@oag.state.md.us
(410) 576-7055

Attorneys for Amici Curiae

January 13, 2012

AMICUS CURIAE BRIEF

No. 11-398

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE*, COMMONWEALTH OF MASSACHUSETTS

(SUPPORTING PETITIONERS AND ADDRESSING WHETHER ENACTING MINIMUM COVERAGE PROVISION OF ACA AUTHORIZED BY ARTICLE I)

MARTHA COAKLEY
ATTORNEY GENERAL OF MASSACHUSETTS
Counsel of Record
THOMAS M. O'BRIEN
DANIEL J. HAMMOND
EMILIANO MAZLEN
ASSISTANT ATTORNEYS GENERAL
ONE ASHBURTON PLACE
BOSTON, MA 02108
(617) 727-2200
Martha_AG.Coakley@state.ma.us
Counsel for Amicus Curiae

January 13, 2012

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Beginning in 2014, the minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, will require non-exempted individuals to maintain a minimum level of health insurance or pay a tax penalty. 26 U.S.C.A. 5000A. The question presented is:

Whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision?

TABLE OF CONTENTS

Page

Question Presented. i

Table of Authorities. iv

Interest of the Amicus Curiae. 1

Summary of Argument. 5

Argument. 7

I. THE ECONOMIC EFFECTS OF THE MASSACHUSETTS INDIVIDUAL MANDATE CONFIRM THAT CONGRESS HAD A RATIONAL BASIS TO DETERMINE THAT FREE-RIDING, TAKEN IN AGGREGATE, SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE. 7

II. THE EXPERIENCE IN MASSACHUSETTS ALSO DEMONSTRATES HOW ELIMINATING FREE-RIDERS IS RATIONALLY RELATED TO SUCCESSFUL IMPLEMENTATION OF OTHER COMPONENTS OF FEDERAL HEALTHCARE LAW; THUS, CONGRESS ALSO HAD AUTHORITY UNDER THE NECESSARY AND PROPER CLAUSE TO IMPOSE THE MINIMUM COVERAGE REQUIREMENT. 12

III. FEDERAL REFORM IS NECESSARY TO ADDRESS SIGNIFICANT INTERSTATE ASPECTS OF HEALTH CARE WHICH ARE BEYOND THE SCOPE OF INDIVIDUAL STATE AUTHORITY. 15

Conclusion. 18

TABLE OF AUTHORITIES

Page

CASES

Gonzales v. Raich,
545 U.S. 1 (2005). 7, 8, 9

McCulloch v. Maryland,
4 Wheat 316 (1819). 12

United States v. Comstock,
___ U.S. ___, 130 S.Ct. 1949 (2010). 12

United States v. Lopez,
514 U.S. 549 (1995). 8

United States v. Morrison,
529 U.S. 598 (2000). 8

United States v. South-Eastern
Underwriters Ass'n,
322 U.S. 533 (1944). 8

Wickard v. Filburn,
317 U.S. 111 (1942). 8

CONSTITUTIONAL PROVISIONS

U.S. Const., art. I § 8, cl. 3. . . . . 5, 6, 7, 8, 12, 13, 14

U.S. Const., art. I § 8, cl. 18. . . . . 6, 12, 13

STATUTORY PROVISIONS

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("ACA") . . . . . *passim*

29 U.S.C. § 1001 13

42 U.S.C. § 201 13

42 U.S.C. § 1395dd (2006) 9

House Bill 4279 . . . . . 2, 3

Pub. L. No. 93-406 . . . . . 4, 16

OTHER AUTHORITIES

Agency for Healthcare Research and Quality, Center for Financing, Access and Cost Trends, 2010 Medical Expenditure Panel Survey-Insurance Component, available at http://www.meps.ahrq.gov/mepsweb/data_stats/summ_tables/insr/state/series_2/2010/tiid1.pdf 10, 11

Blue Cross Blue Shield Found., Health Reform in Massachusetts: An Update as of Fall 2009 10 (June 2010), available at http://bluecrossfoundation.org/~/media/Files/Publications/Policy%20Publications/060810MHRS2009FINAL.pdf 10, 11

Division of Health Care Finance and Policy, Health Care in Massachusetts: Key Indicators, 4, 6 (Nov. 2010), available at http://www.mass.gov/Eeohhs2/docs/dhcfp/r/pubs/10/key_indicators_november_2010.pdf 16

Mass. Division of Health Care Finance and Policy, Health Insurance Coverage in Massachusetts: Results from the 2008-2010 Massachusetts Health Insurance Surveys 1 (Dec. 2010), available at http://www.mass.gov/eohhs/docs/dhcfp/r/pubs/10/mhis-report-12-2010.pdf 3, 9

Mass. Division of Health Care Finance and Policy, Health Safety Net 2010 Annual Report 4 (Dec. 2010). 3, 9

Mass. Division of Health Care Finance and Policy, Hospital Discharge Database (HDD) for fiscal year 2009. 15

Mass. Division of Health Care Finance and Policy, Uncompensated Care Pool PFY06 Annual Report 3 (July 2007). 3, 9

William Pierron & Paul Fronstin, ERISA Preemption: Implications for Health Reform and Coverage, 314 EBRI Issue Brief 11 (Feb. 2008), available at http://www.ebri.org/pdf/briefspdf/EBRI_IB_02a-20082.pdf. 16

Cathy Schoen, Ashley-Kay Fryer, Sara R. Collins, and David C. Radley, The Commonwealth Fund, State Trends in Premiums and Deductibles, 2003–2010: The Need for Action to Address Rising Costs (Nov. 2011), available at http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2011/Nov/State%20Trends/1561_Schoen_state_trends_premiums_deductibles_2003_2010.pdf. 10, 11

INTEREST OF THE AMICUS CURIAE[1]

In the spring of 2006, the Commonwealth of Massachusetts passed and implemented *An Act Providing Access to Affordable, Quality, Accountable Health Care*, Chapter 58 of the Acts of 2006 ("Chapter 58"), thereby becoming the first State in the Nation to enact healthcare reform that requires all non-exempt individuals to purchase some form of health insurance coverage. Chapter 58's core features include, among other things, a state-operated health insurance exchange, new subsidies for low- and moderate-income individuals, and a mandate that all individuals who can afford health insurance purchase coverage. Chapter 58 has been widely cited as a model used by Congress in fashioning what became the Patient Protection and Affordable Care Act (the "ACA").

With four years of empirical data collected since Chapter 58 went into effect, Massachusetts is uniquely situated to speak to the actual economic effects of comprehensive reform that includes an individual coverage requirement.

The experience of Massachusetts under Chapter 58 confirms a key Congressional assumption underlying the ACA: that by requiring individuals to be insured, and thereby preventing healthy people from foregoing

---

[1] Pursuant to Rule 37.4 of the Rules of this Court, the Commonwealth of Massachusetts, as a sovereign State, does not require leave to file this amicus curiae brief submitted by its Attorney General. This brief was not written in whole or in part by counsel for any party, and no person or entity other than the amicus curiae has made a monetary contribution to the preparation and submission of this brief.

health insurance until they are sick or injured (a practice often described as "free-riding"), a comprehensive reform program can spread risk, control costs, and reduce the financial burdens otherwise borne by health plans and free-care pools. Massachusetts submits this amicus brief in support of the ACA because its experience demonstrates that Congress had a rational basis for concluding that free-riding by individuals, taken in aggregate, has a substantial effect upon interstate commerce, and that reducing or eliminating free-riding has a salutary impact on the health insurance market as a whole.

In July of 2005, then Governor Mitt Romney filed House Bill 4279, and in his filing letter to the Massachusetts Legislature he stated:

> Today, we spend approximately $1 billion on the medical cost for the uninsured. Safety Net Care redirects this spending to achieve better health outcomes in a more cost-effective manner. With Safety Net Care in place, it is fair to ask all residents to purchase health insurance or have the means to pay for their own care. This personal responsibility principle means that individuals should not expect society to pay for their medical costs if they forego affordable health insurance options.[2]

---

[2] Letter from Governor Mitt Romney to the Massachusetts Legislature dated July 20, 2005, filing *An Act to Increase the Availability and Affordability of Private Health Insurance To Residents of the Commonwealth*. H.B. 4279, 184th Gen. Ct. (Mass. 2005).

Governor Romney's proposed legislation to enact "Safety Net Care" was the precursor to Chapter 58, which he signed on April 12, 2006.[3]

The Massachusetts healthcare reform law has yielded positive economic consequences. Since its enactment, Massachusetts has reduced the number of uninsured residents to less than two percent of the State's population, giving Massachusetts the lowest percentage of uninsured residents in the Nation.[4] The significant gains in the number of Massachusetts residents with health insurance helped spur a corresponding sharp decline in spending by the state's "free care" pool for the uninsured and under-insured. The dollar value of free care provided dropped from $709.5 million in fiscal year 2006 to $475 million in fiscal year 2010.[5]

Despite these successes under Chapter 58, Massachusetts, like any individual State, is unable to

---

[3] Under Governor Romney's proposed legislation, "Safety Net Care" was the term used for a proposed government- subsidized premium assistance offered to low-income individuals who were not eligible for Medicaid. H.B. 4279, 184th Gen. Ct. (Mass. 2005).

[4] See Mass. Division of Health Care Finance and Policy, Health Insurance Coverage in Massachusetts: Results from the 2008-2010 Massachusetts Health Insurance Surveys 1 (Dec. 2010), available at http://www.mass.gov/eohhs/docs/dhcfp/r/pubs/10/mhis-report-12-2010.pdf [hereinafter Mass. Health Insurance Survey Results].

[5] See Mass. Division of Health Care Finance and Policy, Health Safety Net 2010 Annual Report 4 (Dec. 2010); Mass. Division of Health Care Finance and Policy, Uncompensated Care Pool PFY06 Annual Report 3 (July 2007).

grapple effectively with the interstate (and international) economic implications of current healthcare trends. While Massachusetts plays the primary role in protecting the health and welfare of Massachusetts residents, the State shares responsibility for regulating healthcare and health insurance with the federal government. Through Medicare, Medicaid, and a variety of federal statutes, notably the Employee Retirement Income Security Act of 1974 ("ERISA"),[6] the federal government plays a substantial (and, in some areas, exclusive) role in shaping the nationwide healthcare marketplace. Given this overlay, some aspects of healthcare reform are beyond individual states' regulatory reach. For example, Massachusetts's ability to regulate the private group health plan market in Massachusetts is constrained by ERISA, which preempts state governments from enacting laws that regulate self-insured employer health benefit plans, the most common source of health coverage for American workers.

Accordingly, Massachusetts supports the ACA as an appropriate federal response to the urgent need for comprehensive, national healthcare reform. The ACA carefully balances federal economic interests with the States' interests in developing new ways to control costs while improving access to quality healthcare.

---

[6] Pub. L. No. 93-406, § 2.

SUMMARY OF ARGUMENT

Having enacted six years ago a prototype of the comprehensive healthcare reform package that Congress would later adopt in 2010, Massachusetts is in a unique position to assess the rationality of the assumptions that underlay both enactments.

Specifically, the Court has held that the Commerce Clause empowers Congress to regulate activities that substantially affect interstate commerce. Congress properly exercised that power in adopting a provision in the ACA that requires all non-exempt persons to purchase at least a minimum level of health insurance coverage. Through its legislative findings, Congress rationally concluded that those who fail to purchase health insurance despite their ability to pay for it ("free riders") not only drain finite State and federal free-care resources, but also negatively impact the availability of privately-issued health insurance policies and the prices at which such policies are sold. Congress further concluded that curtailing the practice of "free riding" would make private health insurance coverage easier for individuals both to procure and to afford.

Having examined data for four years following the adoption of its own individual mandate, Massachusetts can attest to the rationality of Congress's conclusions. Massachusetts now finds that its efforts to stop healthy people from opting out of purchasing health insurance have increased health-plan enrollment and helped decrease the rate of premium growth. These developments, in turn, prompted a significant reduction in governmental and private free-care expenditures. Because Massachusetts's empirical

experience demonstrates a strong link between eliminating "free riders" and improving access (and reducing costs), Congress acted rationally in drawing the same link as one basis for its regulation of activity affecting interstate commerce. (Pages 7 to 11.)

The Massachusetts experience further demonstrates that Congress was also empowered to enact an individual mandate under the Necessary and Proper Clause. That clause authorizes Congress to take the steps necessary to implement legislation that falls within a specifically enumerated power. Thus, even if an individual mandate did not fall within the ambit of the Commerce Clause, the broader machinery of the ACA -- provisions broadening access, controlling costs, and eliminating denials based on pre-existing conditions -- was constructed precisely to regulate the interstate features of the health insurance marketplace. That attacking the "free rider" problem is rationally related to achieving the ACA's interstate-commerce objectives likewise finds strong support in the Massachusetts data. (Pages 12 to 14.)

Finally, while Massachusetts has reaped many benefits as a pioneer in healthcare reform, its experience also demonstrates the limitations on a single State, acting alone. Many aspects of health insurance are the exclusive domain of federal regulators, while innovations by individual States have consequences beyond that State's borders. This demonstrates both the interstate character of the health insurance market and the need for a coherent federal approach to its regulation. (Pages 15 to 17.)

ARGUMENT

I. THE ECONOMIC EFFECTS OF THE MASSACHUSETTS INDIVIDUAL MANDATE CONFIRM THAT CONGRESS HAD A RATIONAL BASIS TO DETERMINE THAT FREE-RIDING, TAKEN IN AGGREGATE, SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE

The Commerce Clause provided Congress with authority to enact the ACA, including the minimum coverage requirement. The Constitution gives Congress the power to "regulate Commerce . . . among the several States." U.S. Const., art. I, § 8, cl. 3. Under this authority, Congress can "regulate activities that substantially affect interstate commerce." Gonzales v. Raich, 545 U.S. 1, 17 (2005).[7]

As "stressed" by this Court, "[i]n assessing the scope of Congress' authority under the Commerce Clause . . . the task before [the Court] is a modest one." Id. at 22. The Court "need not determine" itself whether the regulated "activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." Id.

There is a rational basis for concluding that, taken in the aggregate, individuals' refusal to obtain health

---

[7] Congress also has the authority to "regulate the channels of interstate commerce" and to "regulate and protect the instrumentalities of interstate commerce and persons or things in interstate commerce." Gonzales, 545 U.S. at 16-17.

insurance substantially affects interstate commerce. "[T]he business of insurance" is within "the regulatory power of Congress under the Commerce Clause." United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944). In the ACA, Congress found that:

> The cost of providing uncompensated care to the uninsured was $43,000,000,000 in 2008. To pay for this cost, health care providers pass on the cost to private insurers, which pass on the cost to families. This cost-shifting increases family premiums by on average over $1,000 a year. By significantly reducing the number of the uninsured, the requirement, together with the other provisions of this Act, will lower health insurance premiums.

ACA § 1501(a)(2)(F), as amended by § 10106.[8] "It is well established by decisions of the Court that the power to regulate commerce includes the power to regulate the "practices affecting" the "prices at which commodities in that commerce are dealt in. . . ." Wickard v. Filburn, 317 U.S. 111, 128 (1942). Because it directly impacts the prices at which health insurance policies will be sold, individuals' refusal to obtain health insurance is a practice properly subject to regulation by Congress under the Commerce Clause.[9]

---

[8] Such Congressional findings are to be considered in the analysis when available, although they are not necessary to sustain the exercise of Commerce Clause authority. Gonzales, 545 U.S. at 21.

[9] United States v. Lopez, 514 U.S. 549 (1995), and United States v. Morrison, 529 U.S. 598 (2000), have no application here as they

The experience in Massachusetts elevates the connection between eliminating free-riders and controlling costs from a rational belief to a demonstrable correlation. Governor Romney and the Massachusetts Legislature, like Congress, determined that an individual health insurance mandate, as part of a comprehensive reform package, would serve to increase access to healthcare while greatly decreasing the detrimental cost-shifting caused by people who chose to forego insurance and shift the cost of their current and future healthcare to others.[10] As discussed above, in the four years after Chapter 58's enactment, there was, indeed, a significant increase in the percentage of insured Massachusetts residents.[11] The significant gains in the number of Massachusetts residents with health insurance helped spur a corresponding sharp decline in the amount of spending on "free care" for the uninsured and under-insured: The amount of free care dropped 33 percent -- hundreds of millions of dollars -- from fiscal year 2006 to fiscal year 2010.[12]

---

relate to Congressional attempts to regulate non-economic behavior. See Gonzales, 545 U.S. at 25-26.

[10] Federal law, in fact, requires Medicare-participating hospitals with an emergency department to provide emergency services to stabilize patients with emergency medical conditions regardless of whether they are insured. See 42 U.S.C. § 1395dd (2006).

[11] See Mass. Health Insurance Survey Results, supra note 4.

[12] See Mass. Division of Health Care Finance and Policy, Health Safety Net 2010 Annual Report 4 (Dec. 2010); Mass. Division of Health Care Finance and Policy, Uncompensated Care Pool PFY06 Annual Report 3 (July 2007).

The Massachusetts reform program also has improved healthcare use. From the fall of 2006 to the fall of 2009, more adults (including lower-income adults, adults with chronic health conditions and minority adults) reported visits to doctors and fewer adults reported unmet need for care.[13]

Massachusetts achieved these gains in access to care while making gains in the affordability of care for its residents. In the fall of 2009, as compared with the fall of 2006, and notwithstanding the impacts of the economic recession, there were reductions in both the share of adults reporting high out-of-pocket healthcare spending relative to family income and the share of adults reporting unmet needs for care due to cost.[14] Moreover, according to the most recent information available from the Agency for Healthcare Research and Quality, Massachusetts has slowed the growth trend in health insurance premiums since enactment of healthcare reform in 2006.[15] The rate of premium

---

[13] See Blue Cross Blue Shield Found., Health Reform in Massachusetts: An Update as of Fall 2009 10 (June 2010), available at http://bluecrossfoundation.org/~/media/Files/Publications/Policy%20Publications/060810MHRS2009FINAL.pdf [hereinafter BCBS Found. Fall 2009 Update].

[14] Id.

[15] See Agency for Healthcare Research and Quality, Center for Financing, Access and Cost Trends, 2010 Medical Expenditure Panel Survey-Insurance Component, available at http://www.meps.ahrq.gov/mepsweb/data_stats/summ_tables/insr/state/series_2/2010/tiid1.pdf [hereinafter AHRQ MEPS 2010 Data]; see also Cathy Schoen, Ashley-Kay Fryer, Sara R. Collins, and David C. Radley, The Commonwealth Fund, State Trends in Premiums and Deductibles, 2003–2010: The Need for Action to

growth in Massachusetts since the State enacted health care reform compares favorably to that in many other States, and to the national average. The average cost of employer-sponsored family coverage in Massachusetts as of 2010 was less expensive than in Florida, Illinois, Connecticut, New Hampshire, New York, Rhode Island and Delaware, and within $100 of the annual premium rates in Texas, Wisconsin and Maine.[16]

As the experience with healthcare reform in Massachusetts shows, prohibiting people from opting out of the insurance market when they can afford coverage, and creating incentives for these "free-riders" to join their employer-sponsored health plan or to enroll in a publicly supported healthcare plan, has helped generate "increases in both public and private insurance coverage, and this increase in coverage has translated into increases in the access, use, affordability, and quality of care in the state."[17] Congress could rationally have determined that a similar requirement on the federal level would have the same impact on the interstate market for health insurance.

Address Rising Costs (Nov. 2011), available at http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2011/Nov/State%20Trends/1561_Schoen_state_trends_premiums_deductibles_2003_2010.pdf [hereinafter Commonwealth Fund Report].

[16] See AHRQ MEPS 2010 Data, supra note 15; see also Commonwealth Fund Report, supra note 15.

[17] BCBS Found. Fall 2009 Update, supra note 13, at 50.

II. THE EXPERIENCE IN MASSACHUSETTS ALSO DEMONSTRATES HOW ELIMINATING FREE-RIDERS IS RATIONALLY RELATED TO SUCCESSFUL IMPLEMENTATION OF OTHER COMPONENTS OF FEDERAL HEALTHCARE LAW; THUS, CONGRESS ALSO HAD AUTHORITY UNDER THE NECESSARY AND PROPER CLAUSE TO IMPOSE THE MINIMUM COVERAGE REQUIREMENT

The Necessary and Proper Clause provided Congress with additional authority to set the minimum coverage requirement as a means to effectuate the broader ends of the ACA. The Constitution gives Congress the power to "make all Laws which shall be necessary and proper in carrying into Execution" its powers, including those under the Commerce Clause. U.S. Const., art. I, § 8, cl. 18.

As with the analysis under the Commerce Clause, the standard for determining whether legislation is authorized under the Necessary and Proper Clause is a relaxed one. Enactment of a particular federal law is authorized by the Necessary and Proper Clause when "the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." United States v. Comstock, ___ U.S. ___, 130 S.Ct. 1949, 1956 (2010). In Comstock, the Court reiterated its nearly 200-year-old formulation of this authority, that the Necessary and Proper Clause is a "broad power to enact laws that are 'convenient, or useful' or 'conducive' to the . . . 'beneficial exercise'" of specifically granted powers. 130 S.Ct. at 1956 (quoting McCulloch v. Maryland, 4 Wheat 316, 413, 418 (1819)).

Thus, even if Congress lacked authority under the Commerce Clause to impose the minimum coverage requirement — which it did not; see Argument I, supra — it was authorized by the Necessary and Proper Clause to impose the requirement as a rational requisite of implementing other components of federal law that were unequivocally permitted by the Commerce Clause. Congress made particular findings that make clear the rational relationship between the minimum coverage requirement and Congress's exercise of its Commerce Clause powers in other related legislation. First, Congress found that:

> Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.), the Public Health Service Act (42 U.S.C. 201 et seq.), and [the ACA], the Federal Government has a significant role in regulating health insurance. The [minimum purchase] requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market.

ACA § 1501(a)(2)(H), as amended by § 10106.

Second, Congress, in § 1201 of the ACA, makes changes to the Public Health Service Act that ban pre-existing condition exclusions and discrimination in health insurance based on health status. Congress found that:

> Under sections 2704 and 2705 of the Public Health Service Act (as added by section 1201 of this Act), if there were no requirement, many individuals would wait to purchase health

> insurance until they needed care. By significantly increasing health insurance coverage, the [minimum coverage] requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums. The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of preexisting conditions can be sold.

ACA § 1501(a)(2)(I), as amended by § 10106.

Massachusetts's experience gives additional support to the conclusion that the minimum coverage requirement was, at a minimum, rationally related to the implementation of Congress's unquestioned authority under the Commerce Clause to alter other aspects of the federal healthcare regulatory landscape. Specifically, as discussed above, Massachusetts utilized just such a provision as a linchpin of its comprehensive reform and has reaped intrastate benefits through sharp reductions in spending on "free care" for uninsured residents and improved access to healthcare.

III. FEDERAL REFORM IS NECESSARY TO ADDRESS SIGNIFICANT INTERSTATE ASPECTS OF HEALTH CARE WHICH ARE BEYOND THE SCOPE OF INDIVIDUAL STATE AUTHORITY

There remains a limit to the structural changes Massachusetts -- or any other State attempting to "go it alone" -- can effect in the healthcare marketplace. A single State's freedom of action is necessarily constrained by jurisdictional limits and the pre-emptive overlay of federal law. Even successful healthcare innovations on the State level have impacts beyond State borders. During fiscal year 2009 alone, for example, Massachusetts hospitals provided inpatient care to more than 43,000 patients who were not residents of Massachusetts, at an estimated cost of $910,000,000.[18] Of these non-Massachusetts residents, approximately 1,200 did not have any health insurance.[19] The number of out-of-state patients without insurance coverage was even greater at Massachusetts emergency departments where more than 12,900 uninsured individuals received care during fiscal year 2009.[20] Massachusetts cannot regulate insurance coverage for non-Massachusetts residents, nor can it (or should it) restrict access to necessary and emergent care. This interstate flow of patients (including uninsured patients) is but one

---

[18] Mass. Division of Health Care Finance and Policy, Hospital Discharge Database (HDD) for fiscal year 2009 (October 1, 2008 through September 30, 2009).

[19] Id.

[20] Id.

illustration that individual states cannot effectively account for, let alone mitigate, the impact of healthcare trends felt on the national and interstate levels.

Congress has long recognized that employer health plans had "operational scope and economic impact" that was "increasingly interstate."[21] The federal government already exercises significant control over a large section of the private group health plan market. In Massachusetts, more than half of this market is made up of self-insured plans that, because of ERISA's preemptive effect, are beyond the direct reach of state regulators.[22]

Nationwide, the number of people enrolled in these self-insured employer plans has increased markedly since 1999. In 2007, 55 percent of the 132.8 million people in plans governed by ERISA were in self-insured plans, up from 44 percent in 1999.[23] The federal government has long exercised exclusive regulatory authority over these self-insured employer benefit plans. The continued growth of self-insured plans, coupled with the interstate nature of the

---

[21] ERISA, Pub. L. No. 93-406, § 2.

[22] The "private group market" includes large group, small group, and self-insured members. See Division of Health Care Finance and Policy, Health Care in Massachusetts: Key Indicators, 4, 6 (Nov. 2010), available at http://www.mass.gov/Eeohhs2/docs/dhcfp/r/pubs/10/key_indicators_november_2010.pdf.

[23] See William Pierron & Paul Fronstin, ERISA Pre-emption: Implications for Health Reform and Coverage, 314 EBRI Issue Brief 11 (Feb. 2008), available at http://www.ebri.org/pdf/briefspdf/EBRI_IB_02a-20082.pdf.

healthcare marketplace, demonstrates the need for the federal reforms contained in the ACA to establish minimum national standards for health coverage. Nothing in the ACA constrains individual States from further regulating intrastate aspects of the health insurance market – as Massachusetts has done in Chapter 58 -- if they so choose.

Massachusetts has already experienced the economic benefits of tackling the free-rider problem head-on, by enacting comprehensive reforms that include a requirement that individuals who can afford health insurance must purchase it. Massachusetts has substantially increased the numbers of insured and substantially decreased "free care" costs. The experience in Massachusetts shows that, when Congress included a similar minimum coverage requirement in the ACA, it acted pursuant to its enumerated powers under Article I to promote – for the Nation – more affordable and accessible healthcare.

CONCLUSION

For these reasons, Massachusetts urges the Court to hold that Article I conferred upon Congress the requisite authority to enact the Patient Protection and Affordable Care Act.

Respectfully Submitted,

MARTHA COAKLEY
Attorney General of Massachusetts
Counsel of Record
Thomas M. O'Brien
Daniel J. Hammond
Emiliano Mazlen
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
617.727.2200

Counsel for the Amicus Curiae,
Commonwealth of Massachusetts

January 13, 2012

AMICUS CURIAE BRIEF

No. 11-398

In The
Supreme Court of the United States

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, et al.,

Petitioners,

v.

STATE OF FLORIDA, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

BRIEF OF MEMBERS OF THE UNITED STATES SENATE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS ON THE MINIMUM COVERAGE PROVISION ISSUE

CARRIE SEVERINO
Counsel of Record
AMMON SIMON
JUDICIAL CRISIS NETWORK
1413 K St. NW, Suite 1000
Washington, DC 20533
(616) 915-8180
carrie@judicialnetwork.com
Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. The Individual Mandate Exceeds the Commerce Clause Power 6

A. The Commerce Clause Does Not Authorize Congress to Mandate the Purchase of a Particular Product, but Only Permits Regulation of Existing Activity That Substantially Affects Interstate Commerce 8

B. Lacking Precedent for the Constitutional Authority They Claim Justifies the Individual Mandate, Petitioners Attempt to Elide the Distinction Between Regulating Voluntary Activities and Mandating that Inactive Individuals Engage in Activity in the First Place 15

C. Petitioners' Recharacterization of the Decision Not To Purchase Insurance as a Regulable "Activity" Fails Because It Would Destroy All Limits on the Commerce Power 22

II. Petitioners' Arguments Would Impermissibly Convert the Commerce Power into a Federal Police Power, Eliminating the Distinction Between State and Federal Authority 26

TABLE OF CONTENTS – Continued

Page

A. This Court's Precedent has Foreclosed Conversion of the Commerce Power into a General Federal Police Power..... 26

B. The Individual Mandate is a Classic Exercise of a General Police Power 28

CONCLUSION 31

TABLE OF AUTHORITIES

Page

CASES

Atascadero State Hospital v. *Scanlon*, 473 U.S. 234 (1985) 27

Bond v. *United States*, 131 S. Ct. 2355 (2010) 28

Consolidated Edison Co. v. *NLRB*, 305 U.S. 197 (1938) 18

Federal Maritime Comm'n v. *South Carolina Ports Authority*, 535 U.S. 743 (2002) 6

Florida v. *United States HHS*, 648 F.3d 1235 (11th Cir. 2011) 14, 20

Fountas v. *Comm'r of Dep't of Revenue*, 2009 WL 3792468 (Mass. Super. Ct. Feb. 6, 2009) 29

Gibbons v. *Ogden*, 22 U.S. 1 (1824) 10, 16

Gonzales v. *Raich*, 545 U.S. 1 (2005) 13, 20

Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 7

Hodel v. *Indiana*, 452 U.S. 314 (1981) 21

Jacobson v. *Massachusetts*, 197 U.S. 11 (1905) 28

Kidd v. *Pearson*, 128 U.S. 1 (1888) 10

Maryland v. *Wirtz*, 392 U.S. 183 (1968) 9

McCulloch v. *Maryland*, 17 U.S. (4 Wheat) 316 (1819) 7

New York v. *United States*, 505 U.S. 144 (1992) 21, 22

NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) 10, 26

TABLE OF AUTHORITIES – Continued

Page

Printz v. *United States*, 521 U.S. 898 (1997) 15

Robinson v. *California*, 370 U.S. 660 (1962).....29

Selective Draft Law Cases, 245 U.S. 366 (1918).....29

Seven-Sky v. *Holder*, 661 F.3d 1 (D.C. Cir. 2011).....14, 20

State of Florida v. *U.S. Dept. of Health and Human Services*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011).....17

Thomas More Law Center v. *Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010).....14

Thomas More Law Center v. *Obama*, 651 F.3d 529 (6th Cir. 2011).....14

United States v. *Darby*, 312 U.S. 100 (1941) 21

United States v. *Lopez*, 514 U.S. 549 (1995).....*passim*

United States v. *Morrison*, 29 U.S. 598 (2000)....*passim*

Virginia v. *Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010).....14

Wickard v. *Filburn*, 317 U.S. 111 (1942).....*passim*

Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 29

STATUTES

Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010)

§ 1501(a).....9, 10

§ 1501(a)(2)(D).....29

§ 1501(b).....8

§ 1501(b)(1).....8

TABLE OF AUTHORITIES – Continued

Page

Mass. Gen. Laws ch. 111M, § 2 (2008) 29

U.S. CONST. amend. X 2

U.S. CONST. art. I, § 8 2

U.S. CONST. art. I, § 8, cl. 3 ..... 4, 7

U.S. CONST. art. I, § 8, cl. 12 29

OTHER AUTHORITIES

2 Samuel Johnson, *A Dictionary of the English Language* (1755) 17

Congressional Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* (Aug. 1994), *available at* http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf 11

Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* (Jul. 24, 2009), *available at* http://www.gwumc.edu/sphhs/departments/healthpolicy/healthreform/CRS%20Report_Constitutionality.pdf 12

Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* (Nov. 15, 2011), *available at* http://src.senate.gov/files/R40725.pdf 12

Merriam Webster's Collegiate Dictionary (10th ed. 1996) 17

THE FEDERALIST No. 45 (Madison) 6, 26

INTEREST OF *AMICI*[1]

Amici Curiae United States Senate Republican Leader Mitch McConnell, and Senators Orrin Hatch, Lamar Alexander, Kelly Ayotte, John Barrasso, Roy Blunt, John Boozman, Richard Burr, Saxby Chambliss, Daniel Coats, Tom Coburn, Thad Cochran, Susan Collins, Bob Corker, John Cornyn, Mike Crapo, Jim DeMint, Michael Enzi, Chuck Grassley, Dean Heller, John Hoeven, Kay Bailey Hutchison, James Inhofe, Johnny Isakson, Mike Johanns, Ron Johnson, Jon Kyl, Mike Lee, Richard Lugar, John McCain, Jerry Moran, Lisa Murkowski, Rand Paul, Rob Portman, James Risch, Pat Roberts, Marco Rubio, Richard Shelby, Olympia Snowe, John Thune, Patrick Toomey, David Vitter, and Roger Wicker are United States Senators serving in the One Hundred Twelfth Congress.

As United States Senators, *Amici* are acutely interested in the constitutional issues at stake in this litigation, independent of any opposition they may have voiced to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010) (hereinafter "PPACA" or "Act") on policy grounds. Members of Congress are required to swear an oath to uphold the Constitution of the United States. Therefore, they are

---

[1] No counsel for any party has authored this brief in whole or in part, and no person other than *Amici* or their counsel has made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

under an independent responsibility to uphold the Constitution of the United States by ensuring that the Legislative Branch does not exceed its constitutionally enumerated powers. *See United States* v. *Lopez*, 514 U.S. 549, 577-78 (1995) (Kennedy, J., concurring)

> ([I]t would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. . . . The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.).

Mindful of their duty to uphold the Constitution, Senators raised two constitutional points of order during the Senate's consideration of the PPACA. On December 23, 2009, Senator Ensign raised a point of order stating that the bill would violate the Constitution because the powers delegated to Congress by Article I, § 8, do not include the authority to require individuals to engage in a particular activity – in this case, buying qualifying medical insurance – on pain of a penalty.

Senator Hutchison raised another constitutional point of order on the same day, asserting that the bill would violate the Tenth Amendment, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

Amici have a particular interest in preserving the proper balance of power between the federal and state governments in order to safeguard our constitutional system of dual sovereignty, the Senate being the branch of Congress whose very structure was designed to ensure the representation of the States themselves within the federal legislature. To the extent that the Commerce Clause is expanded beyond its proper boundaries, Congress will undoubtedly introduce more legislation that is tangential to or outside of its actual constitutional mission, distracting from its central function as envisioned by the founders and intruding on the general police power reserved to the states.

Put simply, Congress acted without constitutional authority in enacting the Individual Mandate of the PPACA. In so doing, it has damaged Congress' institutional legitimacy and has triggered severe conflicts between state and federal governments that the Constitution was carefully designed to avert. *Amici's* interest, therefore, is in preventing the long-term damage to our form of government that will result from the *ultra vires* nature of the PPACA.

SUMMARY OF ARGUMENT

Our nation was distinguished in its founding by a government of dual sovereignty, which provided for states to retain their sovereignty subject to a federal government that exercises only enumerated powers.

The Framers of the Constitution judged this arrangement to be especially protective of individual liberty because it prevented any one government from amassing too much power. Petitioners' arguments in this case will undermine this carefully-balanced system of government by placing an effectively unlimited power in the hands of Congress.

The Commerce Clause allows the federal government to "regulate Commerce . . . among the several States,"[2] and has been interpreted broadly by this Court to allow regulation of things actually in interstate commerce, the channels of interstate commerce, and even intrastate activities that have a "substantial relation" to interstate commerce.[3] But the Individual Mandate in the PPACA goes even farther than this already-expansive understanding of the Commerce Clause to allow the federal government, for the first time in history, to compel its citizens to purchase a government-prescribed product and thereby force inactive individuals into the market for health insurance.

The step from regulating market participation to mandating participation in a market is novel and unprecedented. This has been acknowledged by the non-partisan Congressional Budget Office and Congressional Research Service as well as every court that has addressed the issue. The fact that Congress

---

[2] U.S. CONST. art. I, § 8, cl. 3.

[3] *See United States* v. *Lopez*, 514 U.S. 549, 558-59 (1995).

in 200 years has not attempted to regulate inactivity to force market participation also strongly suggests it never has had such authority.

Petitioners downplay the novelty of the Individual Mandate by attempting to blur the distinction between regulating activities voluntarily undertaken and mandating that individuals engage in activity in the first place. But historical usage of the term "regulate" has always presupposed an existing activity to be regulated. This Court's decision in *Wickard* v. *Filburn*, 317 U.S. 111 (1942) is no exception. The agricultural regulations at issue in that case did not apply to all Americans, but only to those who chose to grow wheat and who thereby engaged in activity that affected the wheat market. But if the decision *not* to engage in commerce is itself regulable – and all inaction naturally affects markets at some level – then the Commerce Clause contains no limit at all on governmental power, and the government has been unable to identify any limits on the power it proposes for itself. Such an expansion of federal power is foreclosed by the structure and purposes of our Constitution as well as this Court's precedents.

The Individual Mandate is a classic exercise of a general police power, which is constitutionally reserved to the States, not the federal government. States may compel activity; the only other example of a health insurance mandate to be upheld by a court was premised on the exercise of a *state's* general police power. This Court has repeatedly held that there is no federal police power, and warned that

creating one would result in a centralized government, undermining the fundamental American institution of dual sovereignty and in the process, individual liberty.

ARGUMENT

I. The Individual Mandate Exceeds the Commerce Clause Power

At the founding of our nation's system of dual sovereignty, while federal law became the supreme law of the land, the States nevertheless entered the Union "with their sovereignty intact." *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U.S. 743, 751 (2002). The Framers of the Constitution achieved these seemingly contradictory goals by clarifying that the States would retain the general police power while the federal government would be limited to exercising *only* those enumerated powers granted to it by the Constitution. *See generally* THE FEDERALIST No. 45 (Madison) ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined" while "[t]hose which are to remain in the State Governments are numerous and indefinite.").

This balance of power was conceived by the Framers to "ensure protection of our fundamental liberties" by "prevent[ing] the accumulation of excessive power," thus "reduc[ing] the risk of tyranny and abuse from either" state or federal government.

Gregory v. *Ashcroft*, 501 U.S. 452, 458 (1991). As Chief Justice Marshall observed:

> Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

McCulloch v. *Maryland*, 17 U.S. (4 Wheat) 316, 405 (1819) (*quoted in United States* v. *Lopez*, 514 U.S. 549, 566 (1995)). In modern times, debate has arisen particularly over the scope of the power granted to the federal government "[t]o regulate Commerce . . . among the several States. . . ." U.S. CONST. art. I, § 8, cl. 3.

While the past century has seen a general expansion of the subject matter committed to the federal government under the Commerce Clause, in recent years this Court has not tolerated attempts to stretch the Commerce Clause beyond all bounds for fear of eliminating the remaining meaningful limits on the federal government's power. *See United States* v. *Lopez*, 514 U.S. 549, 556-57 (1995); *United States* v. *Morrison*, 529 U.S. 598, 607-08 (2000). If accepted, Petitioners' arguments in this case will overwhelm the remaining limits on Commerce Clause power, thereby upsetting the Constitution's delicate balance by untethering the federal government from its

enumerated powers and invading the legitimate province of the States.

A. The Commerce Clause Does Not Authorize Congress to Mandate the Purchase of a Particular Product, but Only Permits Regulation of Existing Activity That Substantially Affects Interstate Commerce

The Individual Mandate requires that "an . . . individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual . . . is covered under minimum essential coverage for such month," subject only to a few very narrow exceptions. *See* PPACA § 1501(b). The federal government penalizes with a fine those who decline to purchase its prescribed type of health insurance. *See* PPACA § 1501(b)(1). This mandate and penalty are designed to compel inactive individuals to engage in a particular economic activity by requiring them to purchase health insurance even if they do not wish to do so. This law greatly exceeds the authority given to the federal government in the Commerce Clause, which has always been understood to allow regulation, not compulsion, of economic activity.

This Court noted in *United States* v. *Lopez* that Congress' power to "regulate Commerce . . . among the several States" has three permissible applications:

> First, Congress may regulate the use of the channels of interstate commerce. Second,

> Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate commerce. Finally, Congress' commerce authority includes the power to regulate *those activities* having a substantial relation to interstate commerce.

Lopez, 514 U.S. at 558-59 (emphasis added, internal citations omitted). Although the Commerce Clause specifically addresses interstate activity, this Court has allowed regulation of even local and intrastate activity if that "activity," in the aggregate, exerts a "substantial economic effect" on the interstate economy. *See Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942). But this "power to regulate commerce, though broad indeed, has limits" that the Court must enforce. *Maryland* v. *Wirtz*, 392 U.S. 183, 196 (1968). The existence of an "activity" first and foremost always has been a basic requirement for the assertion of federal power under the Commerce Clause and a precursor to determining whether the activity "substantially" affects interstate commerce.

In its findings accompanying the PPACA, Congress exclusively and explicitly invoked its power under the Commerce Clause as the purported constitutional authority for the Individual Mandate, making clear that it was relying on the third prong of *Lopez* in particular. *See* PPACA § 1501(a). These findings, however, misstate the *Lopez* test, and strongly suggest that Congress misunderstood the nature of

its authority when enacting the PPACA. *Compare* PPACA § 1501(a) (finding that "*[t]he individual responsibility requirement* provided for in this section . . . is commercial and economic in nature, and *substantially affects* interstate commerce") (emphasis added) *with Lopez* 514 U.S. at 558-59 ("Congress' commerce authority includes the power to regulate *those activities* having a substantial relation to interstate commerce") (emphasis added). Its confusion is evident in that Congress did not actually find that the failure to purchase health insurance was an activity, let alone one that substantially affects interstate commerce. Rather, it found that the PPACA *itself* would affect interstate commerce.

Although the scope of the Commerce Clause has been debated for over two centuries, this Court has never embraced such blatant bootstrapping. On the contrary, the landmark Commerce Clause cases have always addressed first whether a particular type of activity was commercial, only afterwards turning to the impact of the regulation on interstate commerce (where relevant). *See, e.g.*, *Gibbons* v. *Ogden*, 9 Wheat 1 (1824) (considering whether interstate navigation was "commerce"); *Kidd* v. *Pearson*, 128 U.S. 1 (1888) (whether manufacturing was "commerce"); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (whether labor relations could be regulated as "commerce"); *Wickard*, 317 U.S. 111 (whether economic activity was too "local" to be regulated under the Commerce Power); *Lopez*, 514 U.S. 549 (whether carrying a weapon in a "school zone" could be regulated on the

basis of its asserted effects on commerce); *Morrison*, 529 U.S. 598 (whether gender-motivated violence could be regulated under the Commerce Clause).

These cases represent a wide spectrum of Commerce Clause decisions with diverse fact patterns. But none even suggests that, under the Commerce Clause, Congress has the power to affirmatively obligate otherwise passive individuals to engage in a particular economic activity – to purchase a particular good or service – and to punish them if they choose not to do so. What the Petitioners urge, therefore, is frankly an unprecedented interpretation of the Commerce Clause – an interpretation that, if adopted, would result in a dramatic expansion of Congressional power without any realistic limitation on its reach. Because the Individual Mandate regulates a simple decision or choice not to purchase a particular product, it exceeds the proper scope of the Commerce Clause.

Indeed, Congress' own analyses have repeatedly recognized the complete lack of precedent for using the Commerce Clause to compel the purchase of a product. For example, Congress has charged the Congressional Budget Office (CBO) with providing it with objective and nonpartisan analyses of federal programs. *See* http://www.cbo.gov/aboutcbo/factsheet.cfm. The CBO has noted that Congress has "never required people to buy any good or service as a condition of lawful residence in the United States." *See* Congressional Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, at 1 (Aug. 1994), *available at* http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf.

Another non-partisan office within Congress, the Congressional Research Service (CRS) has reached much the same conclusion. Among its responsibilities, the CRS provides Congress with analyses of the constitutionality of proposed federal laws and has been called Congress' "think tank." It has questioned whether the Commerce Clause "would provide a solid constitutional foundation for legislation containing a requirement to have health insurance." Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, at 3 (Jul. 24, 2009), *available at* http://www.gwumc.edu/sphhs/departments/healthpolicy/healthreform/CRS%20Report_Constitutionality.pdf. In fact, the CRS has acknowledged that the idea that Congress may use the Commerce Clause to require an individual to purchase a good or service is "a novel issue." *Id.*; *see also* Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis*, at 9 (Nov. 15, 2011), *available at* http://src.senate.gov/files/R40725.pdf.

Since the enactment of the PPACA, the CRS has reiterated its uncertainty about the constitutionality of the Individual Mandate. The CRS has repeatedly noted the unprecedented nature of the Individual Mandate. *See most recently* Congressional Research Service, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis,* November 15, 2011, at 8-9. It has observed that, in "general, Congress has used its authority under the Commerce

Clause to regulate individuals, employers, and others who *voluntarily* take part in some type of *economic activity*." *Id.* at 11 (emphasis added). And it questioned whether, like in the PPACA, "regulating a *choice* to purchase health insurance is" such an activity at all. *Id.* (emphasis added). The CRS observed that the Individual Mandate in the PPACA is different in kind, not just in degree, from the type of power that Congress in the past has relied upon the Commerce Clause to exert.

> While in *Wickard* and *Raich*, the individuals were participating in their own home activities. . . . , they were acting on their own volition, and this activity was determined to be economic in nature and affected interstate commerce. However, [under the Individual Mandate] a requirement could be imposed on some individuals *who do not engage in any economic activity* relating to the health insurance market. This is a novel issue: whether Congress can use its Commerce Clause authority to require a person to buy a good or a service and whether this type of *required participation* can be considered economic activity.

Id. (emphasis added). The CRS went on to say that "it may seem like too much of a bootstrap to force individuals into the health insurance market and then use their participation in that market to say they are engaging in commerce." *Id.* at 11-12.

In accord with the analyses just discussed, the court below noted the novel character of the Individual Mandate.

> Economic mandates such as the one contained in the Act are so unprecedented, however, that the government has been unable, either in its briefs or at oral argument, to point this Court to Supreme Court precedent that addresses their constitutionality. Nor does our independent review reveal such a precedent.

Florida v. *United States HHS*, 648 F.3d 1235, 1288 (11th Cir. 2011). Every court of appeals to consider the issue has agreed that the Mandate is without precedent. *See Seven-Sky* v. *Holder*, 661 F.3d 1, 14-15 (D.C. Cir. 2011) ("The Government concedes the novelty of the mandate and the lack of any doctrinal limiting principles"); *Thomas More Law Center* v. *Obama*, 651 F.3d 529, 567 (6th Cir. 2011) ("The mandate is a novel exercise of Commerce Clause power. No prior exercise of that power has required individuals to purchase a good or service."). *See also Virginia* v. *Sebelius*, 728 F. Supp. 2d 768, 775 (E.D. Va. 2010) ("[T]he Minimum Essential Coverage Provision appears to forge new ground and extends the Commerce Clause powers beyond its current high water mark."); *Thomas More Law Center* v. *Obama*, 720 F. Supp. 2d 882, 893 (E.D. Mich. 2010) (noting that this is a case of first impression because "[t]he [Supreme] Court has never needed to address the activity/inactivity distinction advanced by plaintiffs because in every Commerce Clause case presented thus far, there has been some sort of activity").

As this Court has stated repeatedly, where there is an "utter lack" of statutes purporting to exercise the Commerce Power in a particular expansive manner for over 200 years, there is a strong presumption of the "*absence* of such power." *Printz* v. *United States*, 521 U.S. 898, 908 (1997) (emphasis in original); *id.* at 905 (if "earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist"); *id.* at 907-08 ("the utter lack of statutes imposing obligations [like the one in *Printz*] (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power") (emphasis in original); *id.* at 918 ("almost two centuries of apparent congressional avoidance of the practice [at issue in *Printz*] tends to negate the existence of the congressional power asserted here").

B. Lacking Precedent for the Constitutional Authority They Claim Justifies the Individual Mandate, Petitioners Attempt to Elide the Distinction Between Regulating Voluntary Activities and Mandating that Inactive Individuals Engage in Activity in the First Place

Petitioners argue that "[t]here is no textual support in the Commerce Clause for respondents' 'inactivity' limitation . . . [because] to regulate can mean to require action." *Petitioners' Br.*, p. 48 (internal citations omitted). From its earliest Commerce Clause jurisprudence, however, this Court has "acknowledged

that limitations on the commerce power are inherent in the very language of the Commerce Clause." *Lopez,* 514 U.S. at 553 (citing *Gibbons,* 9 Wheat at 194-95). For example, "'[c]omprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one.'" *Id.* (*quoting Gibbons,* 9 Wheat at 194). And "'enumeration presupposes something not enumerated.'" *Id.* (*quoting Gibbons,* 9 Wheat at 195).

Contrary to what the Petitioners assert, this Court has always understood the term "regulate" to presuppose the basic requirement of an *existing* commercial action or activity. In *Gibbons,* Chief Justice Marshall, writing for the Court, observed that "commerce" is something more than simply "traffic": "it is intercourse. . . . and is regulated by prescribing rules for carrying on that intercourse." 9 Wheat at 189-90; *accord Lopez,* 514 U.S. at 559 (emphasis added) ("Congress' commerce authority includes the power to regulate *those activities* having a substantial relation to interstate commerce"); *Wickard,* 317 U.S. at 120 (emphasis added) (the proper focus is on "the actual effects of the *activity* in question upon interstate commerce"). If Petitioners' view were to prevail, and there were no "'inactivity' limitation," then the "first principles" of the Constitution – enumerated and

defined federal power – would be eviscerated. *Lopez*, 514 U.S. at 552.[4]

Petitioners also argue that "the Court has recognized that it is not appropriate to 'draw content-based or subject-matter distinctions, thus defining by semantic categories those *activities* that [are] commerce and those that [are] not." *Petitioners' Br.*, p. 49 (citing *Lopez*, 514 U.S. at 569 (Kennedy, J., concurring) (emphasis added)). The issue here, however, is not one of semantics. It is whether the most basic limit on the scope of power afforded to the federal government under the Commerce Clause is going to remain. In their effort to remove that limit, Petitioners attempt to read Justice Kennedy's concurrence in *Lopez* to contradict the majority opinion itself, which Justice

---

[4] Indeed, as Judge Vinson explained below, at the time of the drafting of the Constitution, the contemporaneous understanding of "regulate" only allowed for the regulation, not compulsion, of economic activity. *See State of Florida* v. *U.S. Dept. of Health and Human Services*, 780 F. Supp. 2d 1256, 1286 n.17 (N.D. Fla. 2011). Eighteenth-century dictionaries, like those of today, define "to regulate" in terms that presuppose the existence of a previous activity. A regulator comes to an existing phenomenon and organizes, limits, or encourages it; he or she does not trigger the underlying phenomenon itself. *See* 2 Samuel Johnson, *A Dictionary of the English Language* (1755) (defining "regulate" as "(1) to adjust by rule or method. (2) to direct."). *See also Merriam Webster's Collegiate Dictionary* 985 (10th ed. 1996) (defining "regulate" variously as "to govern or direct according to rule," "to bring under the control of law or constituted authority," "to make regulations for or concerning," "to bring order, method, or uniformity to," "to fix or adjust the time, amount, degree, or rate of").

Kennedy himself joined. In particular, *Lopez* still affirms the enumerated nature of the federal government's powers, 514 U.S. at 552, and the need to preserve the distinctions between state and federal governments, *id.* at 557. Indeed, the concurrence itself is devoted to reinforcing the Court's "duty to recognize meaningful limits on the commerce power of Congress," particularly in the context of the Commerce Clause. 514 U.S. at 580 (Kennedy, J., concurring). Insofar as Petitioners' arguments would undermine those limits, they are in conflict with the Kennedy concurrence as well as *Lopez* itself.[5]

Finally, petitioners misread *Wickard* v. *Filburn* in their effort to equate inactivity and activity. Petitioners allege that, just as Congress could use the Commerce Clause to *"forestall resort to the market,"* *Wickard*, 317 U.S. at 127 (emphasis added), the Individual Mandate "regulates the way in which the uninsured finance what they will consume in the

---

[5] Petitioners state that "[u]nder the Court's practical approach, it 'ha[s] applied the well-settled principle that it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion.'" *Petitioners' Br.*, p. 49 (*quoting Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 222 (1938)). They fail to note that, two sentences later, the *Consolidated* Court clarifies that "whether or not particular *action* in the conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion *as to be subject to federal control*, is left to be determined as individual cases arise." *Id.* (emphasis added, citations omitted). Thus the *Consolidated Edison* Court itself implicitly acknowledged the basic and still-important requirement of an activity.

market for health care services (in which they participate), requiring that they 'resort to the market' for insurance rather than attempt to 'meet [their] own needs' through attempted self-insurance." *Petitioners' Br.*, p. 50 (*quoting Wickard*, 317 U.S. at 127). What we are talking about here, however, is not "forestalling resort" to the health insurance "market," but rather the government mandating that its citizens *enter* the health insurance market by purchasing a government-prescribed insurance product when those citizens have decided not to do so. This is not just a different way of affecting the market; it is the polar opposite of what the Court endorsed in *Wickard*.

Petitioners ignore that market forestalling is premised upon there being activity to regulate. Because *Wickard* involved wheat quotas, the case was premised on the *activity* of growing wheat. *Wickard*, 317 U.S. at 113. In *Wickard*, Congress did not require all Americans, or even all farmers, to grow a prescribed amount (a quota) of wheat, instead only requiring that farmers who were growing wheat follow the quota.

A regulation more analogous to the Individual Mandate would be a "Wheat Mandate" that forced every American to buy a government-prescribed amount of wheat or pay a penalty. This would be a more effective means of raising wheat prices than the regulation at issue in *Wickard*. It also would share the features Petitioners rely upon to justify the health insurance mandate: the vast majority of Americans participate in the wheat market in some form,

and the gains to farmers from raised prices could allow them to more easily absorb the cost of fulfilling a moral obligation to provide food for the hungry. While that goal would be a salutary one, this Court has never approved of such intrusive and seemingly unlimited power for the federal government. Yet that is the import of the scope of power that the federal government proposes for itself in this case. In sum, rather than explain how their proposed construct of the Commerce Clause would leave any meaningful limits on the power of the federal government, Petitioners instead label the Respondents' arguments "formalistic" and "semantic." Yet try as they might, Petitioners cannot escape the Court's consistent focus on "the actual effects of the *activity* in question upon interstate commerce." *Wickard*, 317 U.S. at 120 (emphasis added). And petitioners do not point to a single Supreme Court case suggesting that the effects of such *inactivity* should be analyzed under the Commerce Clause because there simply are none.[6]

---

[6] *See Seven-Sky* v. *Holder*, 661 F.3d 1, 14-15 (D.C. Cir. 2011) ("The Government concedes the novelty of the mandate and the lack of any doctrinal limiting principles; indeed, at oral argument, the Government could not identify any mandate to purchase a product or service in interstate commerce that would be unconstitutional, at least under the Commerce Clause."); *United States HHS*, 648 F.3d at 1288 (Economic mandates such as the one contained in the Act are so unprecedented, however, that the government has been unable, either in its briefs or at oral argument, to point this Court to Supreme Court precedent that addresses their constitutionality. Nor does our independent review reveal such a precedent.); *see also Gonzales* v. *Raich*, 545

(Continued on following page)

More fundamentally, without some "formalistic" – or in other words, *basic* – limitations upon the scope of the Commerce Clause, there would be no way to restrain the exercise of federal power. As this Court has explained in *New York* v. *United States*, formal limitations on federal power are essential to maintaining our Constitutional system of checks and balances and enumerated federal powers:

> Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case

---

U.S. 1, 37 (2005) (Congress "may regulate even noneconomic local *activity* if that regulation is a necessary part of a more general regulation of interstate commerce.") (emphasis added, citation omitted); *United States* v. *Lopez*, 514 U.S. 549, 558-59 (1995) (Congress may regulate "channels of interstate commerce . . . instrumentalities of interstate commerce, or persons or things in interstate commerce . . . [and] *those activities* having a substantial relation to interstate commerce.") (emphasis added, internal citations omitted); *Hodel* v. *Indiana*, 452 U.S. 314, 324 (1981) ("The pertinent inquiry therefore is not how much commerce is involved but whether Congress could rationally conclude that the regulated *activity* affects interstate commerce.") (emphasis added, citations omitted); *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942) (Allowing regulation of local and intrastate activity if that "activity," in the aggregate, exerts a "substantial economic effect" on the interstate economy); *United States* v. *Darby*, 312 U.S. 100, 119-20 (1941) (" . . . the power of Congress to regulate interstate commerce extends to the regulation through legislative action of *activities* intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it.") (emphasis added).

> to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day
>
> . . . [A] judiciary that licensed extra-constitutional government with each issue of comparable gravity would, in the long run, be far worse [than the crisis itself].

New York v. *United States*, 505 U.S. 144, 187-88 (1992).

In passing the PPACA, Congress fell prey to this temptation to concentrate power in the federal government – assuming the power to require the purchase of a particular product in a given market under the guise of regulating that market As will be shown, if this concentration of power is allowed to stand, there is no discernible area the federal government could not regulate.

C. Petitioners' Recharacterization of the Decision Not To Purchase Insurance as a Regulable "Activity" Fails Because It Would Destroy All Limits on the Commerce Power

Current Commerce Clause jurisprudence clearly states that a proper understanding of that power

must not vitiate the limited, enumerated powers granted the legislature by the Constitution or disregard the distinction between federal and state power. The *Lopez* Court indicated the lack of a limiting principle as a chief reason to reject the expansion of governmental power in that case:

> Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

514 U.S. at 564; *accord* 514 U.S. at 580 (Kennedy, J., concurring) (noting the Court's "duty to recognize meaningful limits on the commerce power of Congress"); *Morrison,* 529 U.S. at 613 (to allow regulation of non-economic activity at issue would enable the federal government to regulate almost any activity, including "family law and other areas of traditional state regulation."). But Petitioners' logic admits of no sustainable limits on the federal legislative power.

Petitioners' argument rests on blurring the lines between those who do and do not participate in the health insurance market. They argue not that the Individual Mandate affects only individuals who are active in the health insurance market – individuals who already are purchasing health insurance products – but that *most* affected individuals are somehow

"active" in the much broader, and undefined, market for health care. Petitioners make three points: (1) uninsured Americans *as a class* participate in the health care market, thus acknowledging that certain individuals within the class do not participate in the market; (2) individual Americans are *at risk of* needing health care, thus understanding that many individuals will not need health care; and (3) the *majority* of uninsured Americans are "not permanently out of the health care market," thus recognizing that many uninsured Americans are in fact permanently out of the health care market. *Petitioners' Br.*, 50-51. Throughout, Petitioners implicitly acknowledge that the Individual Mandate will inevitably regulate inactivity – the decision not to purchase an insurance product – even if it also regulates activity.

This analysis can easily be extended to almost any market, as (1) every market can be said to include in some sense those who do not formally "participate" in it, in that their inactivity in deciding not to purchase goods and services affects that market; (2) every individual can be said to be *at risk* of needing to purchase a particular product or service in a market; and (3) all markets could be said to include individuals who have not *permanently* left the market but have simply chosen at a given time not to purchase a product or service.

The *Lopez* Court clearly indicated that it would not extend Congress' considerable power under the Commerce Clause beyond its current reach, and that the distinction between general state police power

and enumerated federal power must be preserved. 514 U.S. at 567. Petitioners are nevertheless arguing for the most dramatic expansion of the Commerce Clause in history. If Congress may punish a decision to refrain from engaging in a private activity (namely, the purchase of health insurance) because the consequences of not engaging in it, in the aggregate, could substantially affect interstate commerce, then the Congress can require the purchase of virtually *anything*. For example, this same rationale would allow Congress to punish individuals for not purchasing a host of health-related products, such as vitamin supplements, the use of which could lower aggregate health costs. Indeed, it is hard to imagine any private decision not to purchase a particular good or service that does not have some economic impact when aggregated among millions of people. Under that rationale, the government could mandate any commercial activity.

The Court has warned of the risks that such an expanded Commerce Clause would pose to our system of dual sovereignty:

> the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is

> local and create a completely centralized government.'

Jones & Laughlin Steel, 301 U.S. 1 at 37 (*quoted in Lopez*, 514 U.S. at 557). Such an expansion would also produce a Commerce Clause jurisprudence unrecognizable to the Founders, and incompatible with their vision of a federal government of limited and enumerated powers. *See generally* THE FEDERALIST No. 45 (Madison) ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined" while "[t]hose which are to remain in the State Governments are numerous and indefinite.").

II. Petitioners' Arguments Would Impermissibly Convert the Commerce Power into a Federal Police Power, Eliminating the Distinction Between State and Federal Authority

A. This Court's Precedent has Foreclosed Conversion of the Commerce Power into a General Federal Police Power

As the *Lopez* Court repeatedly emphasized, the Commerce Clause must not be commandeered to create a federal police power. Indeed, creating a rampart against such an intrusion of federal power into the historic realm of state power was a major rationale of *Lopez*. *See, e.g.*, 514 U.S. at 566 ("The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation"), *id.* at 567 ("To uphold the Government's

contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."), *id.* at 580 (Kennedy, J., concurring) ("In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far. If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.").

The boundary between the federal Commerce Clause power and the states' police powers, in fact, has been described as crucial to our constitutional structure. *See Morrison,* 529 U.S. at 616, n.7 ("As we have repeatedly noted, the Framers crafted the federal system of Government so that the people's rights would be secured by the division of power."); *id.* at n.8 (The contrary "argument is belied by the entire structure of the Constitution. With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate."); *Atascadero State Hospital* v. *Scanlon,* 473 U.S. 234, 242 (1985) ("The 'constitutionality mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties'") (cited in *Morrison,* 529

U.S. 616, n.7). On "[t]he theory that two governments accord more liberty than one," the Constitution preserves "two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States". *See Lopez*, 514 U.S. at 576 (Kennedy, J., concurring). For that reason, the *Lopez* Court warned of extending the Commerce Clause so far as to "effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *See id.* at 557. *See also Morrison*, 529 U.S. at 617-19 (explaining that "[t]he Constitution . . . withholds from Congress a plenary police power") (internal citations omitted).

This distinction between federal and state authority is crucial to protect the rights of individuals. The Court has explained that: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake." *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2010).

B. The Individual Mandate is a Classic Exercise of a General Police Power

Affirmative legal obligations on citizens characteristically arise under the state police power. For example, compulsory vaccination, *Jacobson* v. *Massachusetts*, 197 U.S. 11, 12, 24-25 (1905); drug

rehabilitation, *Robinson* v. *California*, 370 U.S. 660, 665 (1962); and the education of children, *cf. Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972), have all been upheld on the basis of state police powers.

Besides the PPACA, the only other statutory mandate to purchase health insurance in America is also premised on state police power. Under Massachusetts law, most adult residents must obtain "creditable" health insurance coverage and are penalized for not doing so. *See* Mass. Gen. Laws ch. 111M, § 2 (2008). In designing the PPACA, Congress noted the "similar requirement" in Massachusetts and explicitly cited that measure as a model for PPACA's Individual Mandate. *See* PPACA § 1501(a)(2)(D) (finding that "[i]n Massachusetts, a similar requirement has strengthened private employer-based coverage: despite the economic downturn, the number of workers offered employer-based coverage has actually increased.").

But the federal government does not possess the state police power upon which Massachusetts claimed to base its requirement to purchase health insurance. *See Fountas* v. *Comm'r of Dep't of Revenue*, 2009 WL 3792468 (Mass. Super. Ct. Feb. 6, 2009) (dismissing suit), *aff'd*, 922 N.E.2d 862 (Mass. App. Ct. 2009), *review denied*, 925 N.E.2d 865 (Mass. 2010)). Congress, by contrast, may only impose affirmative obligations on passive individuals when it does so based on an enumerated power. For example, the draft is authorized by Congress' power "to raise and support Armies." *See* U.S. CONST. art. I, § 8, cl. 12; *Selective*

Draft Law Cases, 245 U.S. 366, 383, 390 (1918). The Individual Mandate represents the first time Congress has ever tried to use the Commerce Clause to impose an affirmative obligation to purchase a product or service, or to participate in any kind of activity.

If Petitioners' view of the Commerce Clause is adopted here, not only will any meaningful limit on Congress' power under the Commerce Clause disappear, but so will any meaningful separation between federal and state power. As this Court warned in *Lopez*, such a ruling would "obliterate the distinction between what is national and what is local." 514 U.S. at 557. Indeed, a new federal police power would not merely mirror state police power – because of the Supremacy Clause, it would actually take it over piece by piece. But since our constitutional system is premised on a federal, not a unitary, structure as the arrangement most conducive to liberty, the arguments advanced by the Petitioners, and their inevitable consequences if adopted, should be rejected.

CONCLUSION

The judgment of the Court of Appeals on the constitutionality of the individual mandate should be affirmed.

Respectfully submitted,

CARRIE SEVERINO
Counsel of Record
AMMON SIMON
JUDICIAL CRISIS NETWORK
1413 K St. NW, Suite 1000
Washington, DC 20533
(616) 915-8180
carrie@judicialnetwork.com

Counsel for Amicus Curiae

February 13, 2012

AMICUS CURIAE BRIEF

No. 11-398

IN THE

SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF THE MISSOURI ATTORNEY GENERAL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS REGARDING THE UNCONSTITUTIONALITY OF THE MINIMUM COVERAGE PROVISION

CHRIS KOSTER
Attorney General of Missouri
JEREMIAH J. MORGAN
Counsel of Record
Office of the Attorney General
P.O. Box 899
Jefferson City, MO 65102-0899
(573) 751-1800
jeremiah.morgan@ago.mo.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES 1

INTEREST OF AMICUS CURIAE 4

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

I. The Founding Fathers and this Court Have Uniformly Rejected a Generalized Federal Police Power..... 7

A. Although the Commerce Clause Broadly Reaches "Activities" That Substantially Affect Interstate Commerce, an Individual's Neglect or Refusal to Act is Not Such an Activity..... 10

1. The "most far reaching example of Commerce Clause authority," *Wickard v. Filburn*, involved only activities, not inactivity or doing nothing..... 11

2. The law at issue in *Gonzales v. Raich* also penalized only activities, not inactivity or doing nothing. 12

B. If Doing Nothing Constitutes "Activities" Subject to Regu lation Under the Commerce Clause, the Commerce Clause Becomes a Generalized Police Power. 13

1. The definitions of "commerce" and "activity" do not include the decision to do nothing. 13

2. Allowing Congress to penalize, under the Commerce Clause, a decision to do nothing is a dramatic and unsupported expansion of its authority. 16

C. The Power to Require Individual Citizens to Act to Protect Health is Quintessentially State Police Power. 18

D. Alternatives to Uphold the Individual Mandate..... 20

CONCLUSION..... 22

TABLE OF AUTHORITIES

CASES

Brown v. Maryland,
25 U.S. (12 Wheat.) 419 (1827) 7

Gibbons v. Ogden,
22 U.S. (9 Wheat.) 1 (1824) 8

Gonzales v. Raich,
545 U.S. 1 (2005) ..... *passim*

Hill v. Colorado,
530 U.S. 703 (2000) 18

Home Bldg. & Loan Ass'n v. Blaisdell,
290 U.S. 398 (1934) 17

Jacobson v. Massachusetts,
197 U.S. 11 (1905) 7, 8, 11, 19

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 7

Mead v. Holder,
No. 10-950, 2011 WL 611139 (D.D.C. Feb. 22, 2011)..... 15

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 18

Metropolitan Life Ins. Co. v. Massachusetts,
471 U.S. 724 (1985) 18

Prigg v. Pennsylvania,
41 U.S. (16 Pet.) 539 (1842) 7

Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) 15

Slaughter-House Cases,
83 U.S. (16 Wall.) 36 (1872) 18

United States v. Lopez,
514 U.S. 549 (1995) ..... *passim*

United States v. Morrison,
529 U.S. 598 (2000) ..... *passim*

Wickard v. Filburn,
317 U.S. 111 (1942) ..... *passim*

Woods v. Cloyd W. Miller Co.,
333 U.S. 138 (1948) 20

STATUTES

§ 1.330, Mo. Rev. Stat. 4

26 U.S.C. § 4980H 9

26 U.S.C. § 5000A 4, 6, 20

42 U.S.C. § 13981(a) 10

42 U.S.C. § 18091(a)(1) 10, 20

Art. I, § 8, cl. 1, U.S. Const. 20

Art. I, § 8, cl. 3, U.S. Const. 9

OTHER AUTHORITIES

16A C.J.S. *Constitutional Law* § 609 (2011) 8

The Federalist No. 32 7

The Federalist No. 39 7

The Federalist No. 45 7

The Original Meaning of the Commerce Clause,
68 U. Chi. L. Rev. 101, 112-125 (2001) 16

Webster's Third New International Dictionary..... 14

INTEREST OF AMICUS CURIAE

The Patient Protection and Affordable Care Act ("ACA") was signed into law on March 23, 2010. Among its numerous provisions, the ACA mandates that an applicable individual shall maintain "minimum essential [healthcare] coverage" or they must pay a penalty. 26 U.S.C. § 5000A. On August 3, 2010, the people of the state of Missouri overwhelmingly passed, by referendum, "Proposition C." Mo. Rev. Stat. § 1.330. Proposition C was passed in response to the ACA, and prohibits compelling "any person, employer, or health care provider to participate in any health care system." *Id.* § 1.330.1.

The ACA and Missouri's Proposition C are in conflict. Thus, the state of Missouri has an interest in the application of the ACA and in this Court's determination of the validity of its provisions under the United States Constitution. Because of the Supremacy Clause, the validity and impact of Missouri's Proposition C depends on the constitutionality of the ACA provisions with which Proposition C conflicts.

SUMMARY OF THE ARGUMENT

When Henry Thoreau set about to idly chronicle the summer of 1845 alongside Walden Pond, could the United States Congress assert that Thoreau's season of reflection was, in fact, an active decision not to fish Walden's waters, regulate his negative decision under the Commerce Clause, and thereafter penalize his failure to fish under the theory that everyone has to eat?

* * *

Could Congress assert, under a newly expanded *Wickard v. Filburn*, not only the authority to limit the acres of wheat a farmer in Northwest Missouri may plant, but also the power to penalize his decision to leave his land fallow, or not to plant, based on the federal theory that resting his acreage negatively impacts the price of food?

* * *

Can Congress employ an enhanced Commerce Clause authority to mandate that expectant mothers undergo amniocentesis testing in order to identify and treat individuals, yet unborn, whose extraordinary medical expenses may someday be cost-shifted onto the society-at-large?

* * *

To each of these questions, the state of Missouri answers "No." Such federal authority would require a generalized police power or a separately enumerated

power, but is not cognizable under the Commerce Clause.

Upholding the Patient Protection and Affordable Care Act's ("ACA") individual mandate (26 U.S.C. § 5000A) as a legitimate exercise of congressional power under the Commerce Clause would imbue Congress with police powers rejected by the Founding Fathers and never before permitted by this Court. Within the healthcare arena, the power to penalize one's decision not to purchase health insurance is indistinguishable from granting Congress the power to penalize individuals for not obtaining an annual physical or prostate exam, for not vaccinating one's children, or for not maintaining a specific body-mass. Outside the healthcare arena, granting Congress such new power would stand *Wickard v. Filburn* on its head, for it would allow Congress not only the authority to penalize a farmer's planting of wheat, but also grant Congress the power to penalize a farmer's decision *not* to plant wheat. 317 U.S. 111 (1942).

The Constitution does not tolerate reasoning that would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *United States v. Lopez*, 514 U.S. 549, 567 (1995). A decision to uphold the individual mandate as a permissible exercise of the Commerce Clause would grant Congress the power to penalize inactivity in a manner that can only rationally be described as the establishment of a federal police power.

ARGUMENT

I. The Founding Fathers and this Court Have Uniformly Rejected a Generalized Federal Police Power.

The Founding Fathers envisioned – and the people adopted – a federal government with limited, enumerated powers. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). Alexander Hamilton wrote that "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States." The Federalist No. 32 (emphasis in original). James Madison also declared that federal authority extends "to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." The Federalist No. 39; *see also* The Federalist No. 45 (James Madison) (reserving to the states power over "the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity").

This Court has long held that the federal government does not have a generalized police power. In 1827, Justice John Marshall declared that the police power "unquestionably remains, and ought to remain, with the States." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827). A few years later, in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 561 (1842), the Court again declared that "police power extends over all subjects within the territorial limits of the states, and has never been conceded to the United States."

By contrast, in *Jacobson v. Massachusetts*, 197 U.S. 11, 12 (1905), this Court endorsed the states' use of police power to compel action to protect public health. The Court considered a Massachusetts law permitting

a city to "require and enforce the vaccination and revaccination of all the inhabitants." *Id.* at 12. The law penalized individuals $5 for refusing or neglecting to comply with the requirement. *Id.* Speaking for the Court, Justice Harlan invoked "[t]he authority of the state to enact this statute [under] the police power,–a power which the state did not surrender when becoming a member of the Union under the Constitution." *Id.* at 24-25. The Court also "distinctly recognized the authority of a state to enact quarantine laws and 'health laws of every description.'" *Id.* (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

The modern Court has continued to reject a generalized federal police power. In *United States v. Morrison*, 529 U.S. 598, 618-19 (2000), this Court made clear that the Constitution " 'withhold[s] from Congress a plenary police power' " and reserves "a generalized police power to the States." *Id.* (quoting *Lopez*, 514 U.S. at 566). Indeed, Justice O'Connor warned against further expanding the Commerce Clause authority beyond existing precedent, stating that the Court had "already rejected the result that would follow–a federal police power." *Gonzales v. Raich*, 545 U.S. 1, 50 (2005) (O'Connor, J., dissenting).

II. The Commerce Clause is Not a Federal Police Power Permitting Congress to Force Individual Citizens to Act.

A generalized police power is "the sovereign right of a government to protect lives, promote public safety, health, morals, and the general welfare of society." 16A C.J.S. *Constitutional Law* § 609 (2011). This includes the power to "impose obligations and responsibilities otherwise nonexistent." *Id.* § 616.

The Commerce Clause is not a general power, but a limited, enumerated authority to "regulate commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause has been interpreted by the Supreme Court to empower Congress in three ways: (1) "Congress may regulate the use of the channels of interstate commerce"; (2) "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . *i.e.*, those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59.

The first two categories of Commerce Clause authority are not at issue here. Indeed, the second category provides authority for many of the ACA's provisions – including the requirement that certain employers provide health insurance to their employees. *See, e.g.*, 26 U.S.C. § 4980H. Thus, a company such as Walmart could not claim that the "employer mandate" violates the Commerce Clause, because Walmart is covered under the second category above – "persons or things in interstate commerce." The same is likely true of a local flower shop, or even a seller at the farmers' market. To the extent the ACA regulates "[2] . . . the instrumentalities of interstate commerce, or persons or things in interstate commerce," the regulation, even if it compels the action it then regulates, is within existing Commerce Clause authority and precedent. *Lopez*, 514 U.S. at 558.

The question here is whether the individual mandate – the mandate that reaches those who have

not entered the stream of commerce – regulates "[3] ... activities that substantially affect interstate commerce." *Id.* at 558-59.[1/] That question cannot be answered "yes" without erasing the line between Commerce Clause authority and "a plenary police power." *Morrison*, 529 U.S. at 617-19.

A. Although the Commerce Clause Broadly Reaches "Activities" That Substantially Affect Interstate Commerce, an Individual's Neglect or Refusal to Act is Not Such an Activity.

Respondents have challenged the ACA to the extent it reaches those who have not chosen to enter the stream of commerce. The question, then, is whether such individuals, when they neglect or refuse to purchase health insurance, are engaging in "activities having a substantial relation to interstate commerce" so as to bring them within the scope of congressional regulation. *Lopez*, 514 U.S. at 558-59.

Put another way, when Henry Thoreau set about to idly chronicle the summer of 1845 alongside Walden Pond, could Congress assert that Thoreau's season of reflection was, in fact, an active decision not to fish Walden's waters, regulate his negative decision under the Commerce Clause, and thereafter penalize his failure to fish under the theory that everybody has to

---

[1/] Congress invoked the third category of Commerce Clause authority in the ACA by finding that the individual mandate "substantially affects interstate commerce." 42 U.S.C. § 18091(a)(1). A Congressional finding, however, does not mean the act is within Congress' authority. After all, the Violence Against Women Act, declared unconstitutional in part in *United States v. Morrison*, 529 U.S. 598 (2000) , contained a similar provision. 42 U.S.C. § 13981(a).

eat? No. While the state of Massachusetts could have compelled Thoreau to either fish or pay a fine under the state's authority to regulate the health, safety, and welfare of its citizens (*i.e.* police power), *see Jacobson*, 197 U.S. at 24-25, the United States Congress, relying solely on the Commerce Clause, could not.

1. The "most far reaching example of Commerce Clause authority," *Wickard v. Filburn*, involved only activities, not inactivity or doing nothing.

The modern view of the Commerce Clause has its origins in *Wickard v. Filburn* – "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *Lopez*, 514 U.S. at 560. We accept the basic premise of *Wickard v. Filburn* as controlling law. That is, if activities, though apparently intrastate in nature, aggregate to "substantially affect" interstate commerce, then Congress has authority under the Commerce Clause to regulate those intrastate activities. *Wickard*, 317 U.S. at 129.

The practical consequences of this landmark expansion of congressional authority are that the garden in your back yard, the tomato plants on your porch, and the herbs on your window sill are all potentially subject to federal regulation under the Commerce Clause, even if the production is purely for one's own consumption. What is missing from *Wickard v. Filburn*, however, is any hint that Congress could penalize a farmer or a family for *failing or refusing* to raise wheat, a tomato plant, or herbs. Even after this most expansive of Commerce Clause decisions, farmers could still decide to leave their land

fallow without incurring a penalty imposed by the federal government.

2. The law at issue in *Gonzales v. Raich* also penalized only activities, not inactivity or doing nothing.

More than a half-century after *Wickard v. Filburn*, this Court took up a similar case. In *Gonzales v. Raich*, the activity was growing marijuana solely for personal consumption. Utilizing the same aggregating analysis it used to extend the Commerce Clause to production for personal use on the farm, the Court held that "leaving home-consumed marijuana outside federal control would similarly affect price and market conditions." *Gonzales*, 545 U.S. at 19.

Again, we do not quarrel with the decision in *Gonzales v. Raich*, nor that Congress may, by virtue of the Commerce Clause, reach the small-scale cultivation of plants in the home. *See id.* at 50 (O'Connor, J., dissenting). As with *Wickard v. Filburn*, we accept the basic premise of *Gonzales v. Raich*. That is, no matter how small (or illegal) the activity may be, it can be aggregated to show a "substantial affect" on interstate commerce. Yet, the Court in *Gonzales v. Raich* still made no mention of regulating *a failure or refusal to plant*. Thus, a family remained free to decide whether to plant a garden, a tomato plant, or herbs, and their decision to do nothing was beyond the reach of Congress to compel.

B. If Doing Nothing Constitutes "Activities" Subject to Regulation Under the Commerce Clause, the Commerce Clause Becomes a Generalized Police Power.

In *United States v. Morrison* and *United States v. Lopez*, this Court recognized a limit on Congress' Commerce Clause authority: it does not reach non-economic activities, *e.g.* violence against women and carrying guns in school zones. That limitation does not apply here; if the non-purchase of insurance (whether by decision or indecision) were an "activity," it would certainly be an economic one. But the third category of Commerce Clause authority reaches only "*activities* having a substantial relation to interstate commerce." *Lopez*, 514 U.S. at 558-59. No prior articulation of this Commerce Clause category has dared to reach the regulation of "thought" or "inactivity" or "doing nothing." Such a line bars Congress from compelling citizens to step into the stream of commerce when they have either neglected or chosen not to do so. And absent such a restriction on Commerce Clause authority, the Clause would become exactly what Justice O'Connor warned against – "a federal police power." *Gonzales*, 545 U.S. at 50 (O'Connor, J., dissenting).

1. The definitions of "commerce" and "activity" do not include the decision to do nothing.

The very notion that doing nothing is "interstate commerce" is contrary both to a common sense definition, and to the original meaning of "commerce" in the Constitution. The dictionary defines "commerce" as:

> **1a:** social intercourse : dealings between individuals or groups in society : interchange of ideas, opinions, or sentiments . . . **b:** dealings of any kind . . . : interrelationship, connection, or communication . . . **2a:** the exchange or buying and selling of commodities esp. on a large scale and involving transportation from place to place . . . .

Webster's Third New International Dictionary 456 ("Webster's") (1993). "Commerce" thus contemplates what this Court has always found to be regulated by Commerce Clause legislation: an "activity." The definition of "activity" is consistent with this same concept:

> **1:** the quality or state of being active . . . **2:** physical motion or exercise of force: as **a:** vigorous or energetic action . . . **b:** adroit or skillful physical action . . . **4a:** an actuating force . . . .

Webster's 22 (1993). Neither definition contemplates doing nothing or inactivity as a potential definition.

Yet, some courts considering the ACA have concluded that an activity substantially affecting interstate commerce includes doing nothing or deciding to do nothing. For example, the United States District Court for the District of Columbia held that "decisions, whether positive or negative, are clearly economic ones" and therefore "this case involves an economic activity: deciding whether or not to purchase health

insurance." *Mead v. Holder*, 766 F. Supp.2d 16, 33 (D.D.C. 2011).

There is no support for the leap of logic that equates decisions with actions. Even a decision to buy insurance is not an action, just a prelude to action. And an inchoate decision by an individual who is not a person in the stream of commerce has never been subject to regulation under the Commerce Clause. Every case in which congressional authority has been upheld under the Commerce Clause involves not commercial decisions but commercial actions. *See Lopez*, 514 U.S. at 580 (Kennedy, J., concurring) (noting that "like the earlier cases to come before the Court here neither the *actors* nor their *conduct* has a commercial character") (emphasis added). Indeed, the D.C. district court acknowledged that "previous Commerce Clause cases have all involved physical activity, as opposed to mental activity, i.e. decision-making." *Mead*, 766 F. Supp.2d at 36 (*affirmed in Seven-Sky v. Holder*, 661 F.3d 1, 20 (D.C. Cir. 2011) (acknowledging that "Congress has not used this authority before")). To include mental decision making – or perhaps even more important, failure to engage in mental decision making – within the scope of "activities" Congress can regulate under the Commerce Clause is beyond the pale of linguistic analysis and current precedents.

Nor is it supported by the original meaning of "commerce." The Commerce Clause's "text, structure, and history all indicate that, at the time of the founding, the term 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *Gonzales*, 545 U.S. at 58 (Thomas, J., dissenting) (citing *Lopez*, 514 U.S. at 585 (Thomas, J., concurring)). "Throughout founding-era dictionaries,

Madison's notes from the Constitutional Convention, The Federalist Papers, and the ratification debates, the term 'commerce' is consistently used to mean trade or exchange-not all economic or gainful activity that has some attenuated connection to trade or exchange." *Id.* (citing Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 112-125 (2001)).

And if the original meaning of "commerce" was limited to actual trade or exchange, then simply doing nothing is in no way consistent with the meaning of "commerce" – historical or modern.

2. Allowing Congress to penalize, under the Commerce Clause, a decision to do nothing is a dramatic and unsupported expansion of its authority.

To put these principles and definitions in perspective, it is worth looking again at *Wickard v. Filburn* and *Gonzales v. Raich*, but from a new perspective: the inverse.

Suppose that Congress decided to regulate not how many acres of wheat Mr. Filburn could plant, but how many acres of wheat he must plant. Although he may not wish to farm his land, Congress could – if inactivity or refusal to act were covered under the Commerce

Clause – force Mr. Filburn to grow wheat on pain of civil *or even criminal* penalties.[2/]

Now consider the inverse of *Gonzales v. Raich*. If Congress' authority under the Commerce Clause extended as far as the Justice Department suggests, then individuals or families could be required to grow tomatoes, herbs, or marijuana whether they wanted to or not. Family gardens and simple home production may be beneficial, and indeed it may be possible to mandate "victory gardens" under the war power. *See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) (noting that the war power "permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation"). But it is another matter to suggest that Congress has the power under the Commerce Clause to force such activity. Such an interpretation would mean that Congress has the power to create commerce in order to regulate it.

The consequences are more intrusive in the healthcare arena than in agriculture. If Congress can force activity under the Commerce Clause, then it could force individuals to receive vaccinations or annual check-ups, undergo mammogram or prostate exams, or maintain a specific body-mass. In the aggregate, the failure to obtain such medical care unquestionably has an impact on interstate commerce. But nothing in existing precedents presages, much less

---

[2/] The manner in which regulation is imposed under the Commerce Clause belongs exclusively to Congress, and includes both civil and criminal penalties. A newly expanded *Wickard v. Filburn* (or an upholding of the ACA) would authorize Congress to criminally penalize individuals for their decision not to enter the stream of commerce. Such a result is entirely unprecedented, if not disturbing.

justifies, congressional compulsion of an unbounded range of human activity.

C. The Power to Require Individual Citizens to Act to Protect Health is Quintessentially State Police Power.

What Congress seeks to regulate, or rather force, with the individual mandate provision of the ACA – the health and welfare of individual citizens – is a traditional area of state police power. *See Hill v. Colorado*, 530 U.S. 703, 715 (2000) ("It is a traditional exercise of the States' 'police powers to protect the health and safety of their citizens.' ") (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996)); *see also Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (citing *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1872)).

Whether Congress is stepping into traditional areas of state police power has been an important factor in this Court's Commerce Clause analysis. *See, e.g.*, *Morrison*, 529 U.S. at 615-16 (noting, with disapproval, that if Commerce Clause reached violent crime it could be applied equally to "other areas of traditional state regulation"). Indeed, this Court noted with dismay in *United States v. Lopez* that the government's efforts to regulate violent crime under the Commerce Clause would allow Congress to regulate "any activity that it found was related to economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example." 514 U.S. at 564. As a result, Congress would be permitted virtually unlimited power, including in "areas such as criminal law enforcement or education where States historically have been sovereign." *Id.*

Here, Congress chose to use a classic form of state police power – the same form considered in *Jacobson v. Massachusetts*. Just like those who refused vaccinations in *Jacobson v. Massachusetts*, the people who refuse healthcare insurance may eventually get sick, need care, and have an impact on the economy in the aggregate, if not individually. While forcing citizens to obtain healthcare insurance may be perfectly within a state's police power, it is not within the enumerated authority of Congress under the Commerce Clause. That is why Justice Harlan stated that the police power necessary to force individual citizens to be vaccinated is "a power which the state did not surrender when becoming a member of the Union under the Constitution." *Jacobson*, 197 U.S. at 25.

Permitting Congress the power to force individual citizens to act under the Commerce Clause would allow a host of heretofore unauthorized incursions into areas of traditional state authority. In addition to immunizations or vaccinations, Congress could force compulsory education or require individual citizens to obtain long-term care insurance. As to each, there is an undeniable aggregate effect on interstate commerce, even if, for example, an individual may never need long-term care. But an aggregate effect on interstate commerce is not enough to permit Congress a generalized police power to force individual citizens to act. The United States Congress was wrong: the individual mandate is unconstitutional and should be struck down.

D. Alternatives to Uphold the Individual Mandate.

As discussed above, Congress lacks the authority under current Commerce Clause precedent to compel economic activity by those who are not actors in interstate commerce and who have not chosen to enter the stream of commerce. Should this Court, nonetheless, choose to uphold the ACA's individual mandate, it must do so in a manner that preserves both state sovereignty and the continuity of case law from *Wickard v. Filburn* to *Gonzales v. Raich*. Although challenging, this might be accomplished in the following ways:

First, this Court could adopt the Justice Department's argument that the individual mandate is "independently authorized by Congress's taxing power." Petitioners' Br. p. 52 (citing U.S. Const. art. I, § 8, cl. 1). No court to date has concluded that the individual mandate was passed under the taxing power, and Congress unquestionably was at pains to avoid calling the individual mandate a tax. *See* 42 U.S.C. § 18091(a)(1); 26 U.S.C. § 5000A(b)(1). Nonetheless, inclusion of the individual mandate within the Internal Revenue Service Code may be construed by this Court as evidence enough of taxing power intent. "[T]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). While inconsistent with the language of the ACA, such a decision would preserve the limited, but important, boundaries on Commerce Clause authority that now exist.

Second, and despite undermining the historical continuity of Commerce Clause precedent, a bright-line exception could be constructed to aggressively limit this Court's decision solely to the healthcare arena. Such an exception might include the following limiting considerations: (a) the congressional regulation is in the area of healthcare in which nearly all individuals are certain to enter interstate commerce because of the need for medical treatment at some point in their life; (b) the regulation of healthcare is necessary because individuals are highly likely to "cost-shift," where the uninsured impose on others the burden of paying for their choices; and (c) the economic impact of the regulated choices affect a significant portion of the national gross domestic product and are beyond dispute.

We do not suggest, by these alternatives, that the individual mandate can be sustained under current Commerce Clause precedent. It cannot. And the above suggestions are, at the very least, problematic. The Constitution still "withholds from Congress a plenary police power," *Morrison*, 529 U.S. at 617-19; *see Lopez*, 514 U.S. at 567-68, and without an expansion of congressional authority under the Commerce Clause, or some alternative means of analysis such as suggested immediately above, the individual mandate must fail.

CONCLUSION

For the foregoing reasons, this Court should affirm the court of appeals on the unconstitutionality of the minimum coverage provision.

Respectfully submitted,

CHRIS KOSTER
Attorney General of Missouri
JEREMIAH J. MORGAN
Counsel of Record
Deputy Solicitor General
P.O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321
jeremiah.morgan@ago.mo.gov

February 2012

Counsel for Amicus Curiae the Missouri Attorney General

AMICUS CURIAE BRIEF

No. 11-398

In The
Supreme Court of the United States

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

BRIEF OF AMICUS CURIAE EGON MITTELMANN, ESQ. IN SUPPORT OF RESPONDENTS MARY BROWN AND KAJ AHLBURG ON THE MINIMUM COVERAGE PROVISION ISSUE, SUPPORTING THE TRIAL COURT AND COURT OF APPEALS DECISIONS

AMICUS BRIEF ON THE MINIMUM COVERAGE PROVISION ISSUE

EGON MITTELMANN, ESQ.*
California Bar No.: 42,093
1140 S. Swall Drive
Los Angeles, CA 90035
(310) 273-5860
egonlawyer@aol.com

**Counsel of Record*

JOSEPH R. EVANNS, ESQ.
California Bar No.: 43,333
8200 Wilshire Blvd.,
Suite 227
Beverly Hills, CA 90211
(310) 273-0938
jrevanns@yahoo.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF AMICUS INTERESTS 1

STATEMENT OF THE ISSUES 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

The Individual Mandate Often Referred To As The "Minimum Essential Coverage Provision" Of The Legislation At Issue Herein – Targeted At A Defined Class Of Individuals (Those Without Health Insurance Who Choose Not To Purchase Health Insurance) – Requiring Said Individuals To Purchase Health Insurance And Imposing A Penalty Without A Judicial Trial Is A Bill Of Attainder Barred By Article I, Section 9, Clause 3 Of The United States Constitution 4

CONCLUSION 13

TABLE OF AUTHORITIES

Page

SUPREME COURT CASES

Cummings v. Missouri, 71 U.S. 227 (1867) 4

United States v. Lovett, 328 U.S. 303 (1946) 5, 6

Ex Parte Garland, 71 U.S. 333 (1866) 6

CONSTITUTIONAL PROVISIONS

Article 1, Section 9, Clause 3 .....2, 3, 4

OTHER SOURCES

Affordable Care Act (Chapter 48) 2, 7

Affordable Care Act (Section 1501(g))....2, 3, 10, 12, 13

Internal Revenue Code (Chapter 68, Section 6671) 11, 12

STATEMENT OF AMICUS INTERESTS[1]

The Interests of the Amicus are threefold: (1) to provide a clear, simple and decisive basis for holding the compulsory purchase of health insurance – and the penalty therefor – unconstitutional; (2) to remove from obscurity and desuetude a powerful constitutional protection now largely forgotten; and (3) to encourage research into and application of classic Constitutional remedies, including the remedy which forms the subject matter of the instant brief, which remedy is now largely consigned to historic interest only.

For many years, Amicus has studied and written about the United States Constitution always with a view of researching and applying to current situations some of the classical but often forgotten Constitutional provisions.

One of the articles written by Amicus, entitled "A Tainted Censure" came to the attention of the late Congressman Henry Hyde, House Manager of the impeachment prosecution team (during the Clinton administration, when there was talk of a censure of

---

[1] The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

the President for his misconduct), and Amicus was informed by Mr. Hyde's staff that he read the article in its entirety to the Senate, putting to rest the idea that a censure would be appropriate, since the censure would constitute a bill of attainder.

Over the years, Amicus has published other articles in publications of general circulation on Constitutional issues.

STATEMENT OF THE ISSUES

1. Is the Minimum Essential Coverage Provision (The "Individual Mandate") set forth in Section 1501 of the Patient Protection and Affordable Care Act a penalty or a tax? ("ACA")

2. If the minimum essential coverage provision is a penalty, does Section 1501 constitute a bill of attainder aimed at a targeted, defined group, barred by Article I Section 9, Clause 3 of the Constitution of the United States?

3. If Section 1501 of the ACA constitutes a Bill of Attainder, is it valid or enforceable?

SUMMARY OF ARGUMENT

The Minimum Essential Coverage Provision of the Patient Protection and Affordable Care Act (the "Individual Mandate" to purchase health insurance) results in an exaction included with the taxpayer's annual return which is enforced without judicial intervention, and is a penalty, as opposed to a tax. This is established by the careful decision and opinion of the Trial Court below in its memorandum opinion filed October 14, 2010. This Amicus has nothing to add to the Judge's reasoning and conclusion in this regard, which was affirmed on appeal.

The Individual Mandate targets individual citizens without health insurance requiring them to purchase same under penalty of a $750.00 charge/ exaction in the individual's income tax return. This is legislatively imposed punishment/penalty without judicial intervention (Section 1501(g)), a classic example of a bill of attainder barred by Article I, Section 9, Clause 3 of the United States Constitution.

ARGUMENT

THE INDIVIDUAL MANDATE OFTEN REFERRED TO AS THE "MINIMUM ESSENTIAL COVERAGE PROVISION" OF THE LEGISLATION AT ISSUE HEREIN – TARGETED AT A DEFINED CLASS OF INDIVIDUALS (THOSE WITHOUT HEALTH INSURANCE WHO CHOOSE NOT TO PURCHASE HEALTH INSURANCE) – REQUIRING SAID INDIVIDUALS TO PURCHASE HEALTH INSURANCE AND IMPOSING A PENALTY WITHOUT A JUDICIAL TRIAL, IS A BILL OF ATTAINDER BARRED BY ARTICLE I, SECTION 9, CLAUSE 3 OF THE UNITED STATES CONSTITUTION.

> "No bill of attainder or ex post facto law shall be passed [by the congress]" United States Constitution, Article 1, Section 9, Clause 3.

The Individual Mandate is a penalty, not a tax. Memorandum Opinion of Judge Vinson in the Trial Court below, issued 10-14-2010.

> "A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." *Cummins v. Missouri*, 4 Wall at 71 U.S. 388.

> "Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial, are bills of attainder prohibited by the Constitution." *United States v. Lovett*, 328 U.S. 303, 315 (1946).

The *Lovett* case squarely applies to the case at bar. In *Lovett,* legislation known as the "Urgent Deficiency Appropriation Act of 1943" was passed, including Section 304, providing that after November 14, 1943, no salary or other compensation would be paid to certain employees of the government (specified by name) out of any monies then or thereafter appropriated, except for services as jurors or members of the armed forces, unless they are again appointed by the president with the advice and consent of the Senate prior to such date."

The respondents in *Lovett* (Lovett, Watson, and Dodd) had been for several years employees of the government with no complaints about their work. In spite of the congressional enactment and the failure of the president to re-appoint the respondents, their respective agencies kept them at work for varying periods after November 15, 1943 but discontinued their pay and respondents brought litigation against the government for their post-November 15 work.

The *Lovett* respondents previously were the subject of congressional investigators for possible "subversive" activities, and were singled out by the legislation on that basis.

Based on the Individual Mandate and penalty amount of $750.00 per year, raising by government estimates approximately $4 billion annually, it appears that the government anticipates in excess of 5 million violators per year of the Individual Mandate. That there is a substantial number of targeted individuals, does not prevent invalidation of a bill of attainder directed against them. In *Ex Parte Garland,* 4 Wall. 333, the targeted class was attorneys desirous of practicing in Federal Courts, such attorneys being required to swear an oath that they had not participated in the Civil War on the side of the Confederacy as a precondition for the attorneys to practice in federal court. This provision was held to constitute an unconstitutional bill of attainder.

There is no doubt under the well-reasoned holding of the Trial Court below that the "Exaction" (as the Trial Court referred to the penalty for refusal of the uninsured to purchase health insurance) is indeed a "penalty" as opposed to a "tax."

Accordingly, the imposition of the "exaction" as a fine on such individuals unquestionably places the "exaction" in the ambit of a bill of attainder, if the penalty is imposed without court intervention.

In *Lovett* the court observed:

> "Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons

> because the legislature thinks them guilty of conduct which deserves punishment."
>
> They intended to safeguard the people of this country from punishment without trial by duly constituted courts. [citing case . . .] When our Constitution and Bill Of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of freemen they envisioned. And so, they proscribed bills of attainder." *Id.* at 317, 318.

The instant litigation involves besides 26 States of the United States at least one trade association, and two individuals – Mary Brown and Kaj Ahlburg – both of whom are uninsured for health insurance, do not intend presently to obtain health insurance, and do not intend to purchase health insurance in the future.

It is these individual plaintiffs supported by this Amicus brief at whom the bill of attainder in the form of penalty implemented and enforced through the Internal Revenue Code, is aimed.

The ACA provides for the Individual Mandate, penalty, and enforcement, the latter being conducted in an extremely complex manner, precluding judicial intervention, as fully set forth hereinbelow.

The ACA lays down the requirement for maintaining minimum essential coverage as follows:

"Subtitle F: Shared Responsibility for Healthcare: Part I-Individual Responsibility . . . Section 1501 Requirement to Maintain Minimum Essential Coverage . . . (b) In General-Subtitle D of the Internal Revenue Code of 1986 is amended by adding at the end the following new chapter:

"Chapter 48-Maintenance of Minimum Essential Coverage. Section 5000A, Requirement to Maintain Minimum Essential Coverage.

"(a) REQUIREMENT TO MAINTAIN MINIMUM ESSENTIAL COVERAGE. – An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month.

"(b) SHARED RESPONSIBILITY PAYMENT. –

"(1) IN GENERAL. – If an applicable individual fails to meet the requirement of subsection (a) for one or more months during any calendar year beginning after 2013, then, except as provided in subsection (d), there is hereby imposed a penalty with respect to the individual in the amount determined under subsection (c).

"(2) INCLUSION WITH RETURN. – Any penalty imposed by this section with respect to any month shall be included with a

taxpayer's return under chapter 1 for the taxable year which includes such month.

"(3) PAYMENT OF PENALTY. – If an individual with respect to whom a penalty is imposed by this section for any month –

"(A) is a dependent (as defined in section 152) of another taxpayer for the other taxpayer's taxable year including such month, such other taxpayer shall be liable for such penalty, or

"(B) files a joint return for the taxable year including such month, such individual and the spouse of such individual shall be jointly liable for such penalty.

"(c) AMOUNT OF PENALTY. –

"(1) IN GENERAL. – The penalty determined under this subsection for any month with respect to any individual is an amount equal to 1/12 of the applicable dollar amount for the calendar year.

"(2) DOLLAR LIMITATION. – The amount of the penalty imposed by this section on any taxpayer for any taxable year with respect to all individuals for whom the taxpayer is liable under subsection (b)(3) shall not exceed an amount equal to 300 percent of the applicable dollar amount (determined without regard to paragraph (3)(C)) for the calendar year with or within which the taxable year ends.

"(3) APPLICABLE DOLLAR AMOUNT. – For purposes of paragraph (1) –

"(A) IN GENERAL. – Except as provided in subparagraphs (B) and (C), the applicable dollar amount is $750.

"(B) PHASE IN. – The applicable dollar amount is $95 for 2014 and $350 for 2015.

"(C) SPECIAL RULE FOR INDIVIDUALS UNDER AGE 18. – If an applicable individual has not attained the age of 18 as of the beginning of a month, the applicable dollar amount with respect to such individual for the month shall be equal to one-half of the applicable dollar amount for the calendar year in which the month occurs.

Enforcements/Sanctions are set forth commencing at Section 1501(g).

"(g) ADMINISTRATION AND PROCEDURE. – "(1) IN GENERAL. – The penalty provided by this section shall be paid upon notice and demand by the Secretary, and except as provided in paragraph (2), shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

"(2) SPECIAL RULES. – Notwithstanding any other provision of law –

"(A) WAIVER OF CRIMINAL PENALTIES. – In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any

criminal prosecution or penalty with respect to such failure.

"(B) LIMITATIONS ON LIENS AND LEVIES. – The Secretary shall not –

"(i) file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section, or

"(ii) levy on any such property with respect to such failure."

Per Chapter 68 of the Internal Revenue Code, Section 6671 – Rules for Application of Assessable Penalties provides as follows:

Sec. 6671. Rules for application of assessable penalties.

(a) Penalty assessed as tax. *The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes.* (Emphasis added). Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) Person defined.

The term "person," as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee,

> or member is under a duty to perform the act in respect of which the violation occurs.

Per Chapter 68 of the Internal Revenue Code, Section 6671, therefore, the assessment and collection of penalties and liabilities is required to be accomplished in "the same manner as taxes"; however, the common remedies for collecting taxes which all involve judicial intervention at some point in the proceedings – (1) Criminal Penalties; (2) Liens on taxpayer property; (3) Levy on taxpayer property, all involving judicial proceedings, e.g., to order liened property sold – are ruled out by Section 1501(g). Thus, as far as the statute is concerned, the penalty will remain on the record of the resistant taxpayer, to the probable detriment of the taxpayer's credit and reputation (e.g., "Mr. X is a tax evader."). This is truly punishment without judicial intervention.

Accordingly, the requirement for a bill of attainder for legislative punishment without judicial proceedings is fulfilled. (It appears that in effect, there is no procedure for enforcing/collecting the penalty for violating the Individual Mandate. This anomalous situation wherein a penalty for refusing to purchase government-mandated health insurance, supposedly enforceable through taxation, with all judicial enforcement options ruled out, may be a duty without a remedy – or judicial review – and as such may be a nullity. This in itself may be grounds to invalidate the ACA in view of the central importance to the Act of the Individual Mandate and its revenues.)

This Amicus concurs with the carefully reasoned opinion of Judge Vinson in the Trial Court below whereby the invalidation of the Individual Mandate and its penalty should serve to invalidate the entire Act.

CONCLUSION

In view of the foregoing, it is respectfully submitted that Section 1501 of the ACA, the Individual Mandate Minimum Coverage Provision, is invalid as unconstitutional and unenforceable as a bill of attainder directed against uninsured individuals.

Respectfully submitted,

EGON MITTELMANN, ESQ.*
California Bar No.: 42,093
1140 S. Swall Drive
Los Angeles, CA 90035

*Counsel of Record

JOSEPH R. EVANNS, ESQ.
California Bar No.: 43,333
8200 Wilshire Blvd.,
Suite 227
Beverly Hills, CA 90211

AMICUS CURIAE BRIEF

No. 11-398

In The Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF MONTANA SHOOTING SPORTS ASS'N AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS (Minimum Coverage)

Quentin M. Rhoades
Counsel of Record
Sullivan, Tabaracci & Rhoades, P.C.
1821 S. Ave. W., Third Floor
Missoula, Montana 59801
(406) 721-9700 - qmr@montanalawyer.com
Counsel for Amicus Curiae

February 13, 2012

QUESTIONS PRESENTED

1. This Court's Interstate Commerce Clause has jurisprudence misconstrued the Ninth and Tenth Amendments, which by being ratified and enacted after the previous texts in the Constitution, overturned, superseded and displaced portions of the pre-Bill-of-Rights Constitution which are in conflict with the Ninth and Tenth Amendments.

2. The mandates of the Affordable Care Act impermissibly intrude upon the rights of individuals within the several states to retain autonomy over their health care.

3. The individual insurance mandate of the Affordable Care Act is an impermissible modification of Montana's 1889 contract for statehood.

TABLE OF CONTENTS

Table of Authorities iii

Interest of Amicus Curiae 1

Summary of Argument 2

Argument 4

I. The Ninth and Tenth Amendments, as later enacted, amended the underlying Constitution, including the Commerce, Supremacy, and Necessary and Proper Clauses. 4

II. The Constitution does not authorize Congress, by means of the Affordable Care Act, to require individuals within the several states to engage in commerce regarding health care 9

III. The Affordable Care Act violates the federal government's compact with the State of Montana 12

Conclusion 20

TABLE OF AUTHORITIES

Page

CASES

Bond v. United States, 564 U.S. ___ (2011) 8, 11

Citizens United v. Federal Election Commission, 558 U.S. 08-205 (2010) 9

District of Columbia v. Heller, 554 U.S. 570 (2008) 4

Florida v. HHS 2

Green v. Biddle, 8 Wheat. 1, 92, 5 L, ed. 547 17

M'Ilvaine v. Coxe's Lessee, 8 U.S. (4 Cranch) 209 (1808) 12

MSSA v. Holder, Case No. 10-36094 (9th Cir.) 2

United States v. Tynen, 78 U.S. 88, 11 Wall. 88, 92 (1870) 4

Wickard v. Filburn, 317 U.S. 111 (1942) 9

STATUTES

Affordable Care Act ..... passim

MONT. CODE ANN. §§ 30-20-101 through 106 ..... 2, 15

U.S.Const., Art. I, § 8 ..... passim

OTHER AUTHORITIES

Herbert Broom, Maxims of Law (1854) 4

INTEREST OF AMICUS CURIAE[1]

The Montana Shooting Sports Association, Inc. ("MSSA") is a non-profit corporation organized under the laws of the State of Montana. The purpose of MSSA is to "support and promote firearm safety, the shooting sports, hunting, firearm collecting, and personal protection using firearms, to provide education to its members concerning shooting, firearms, safety, hunting and the right to keep and bear arms, own and/or manage one or more shooting facilities for the use of its members and/or others, and to conduct such other activities as serves the needs of its members." The aims of the MSSA have been continuously challenged by federal laws and their application, and the MSSA seeks for Montana to reassert a more constitutionally appropriate relationship with the federal government. This brief furthers MSSA's interest in asserting Montanans' opposition to the federal government's now-massive burden of laws and regulations based on Interstate Commerce Clause power, which have been imposed on Montana through political processes in distant Washington which give disproportionate political power to states and regions which do not share Montana's high regard for individual liberty.

The MSSA is the lead Plaintiff in *MSSA v.*

---

[1] No counsel for any party authored this brief in whole or in part, nor did any party, person or entity other than amicus make a monetary contribution to the preparation/submission of this brief. The parties have given blanket consent to the filing of *amicus* briefs.

Holder, Case No. 10-36094 (9th Cir.), wherein the MSSA seeks a declaration that Montana's Firearm Freedom Act, MONT. CODE ANN. §§ 30-20-101 through 106 properly exempts firearms made and retained in Montana from all federal authority. As a result, MSSA has developed unique expertise and perspective concerning proper application of the Interstate Commerce Clause. MSSA believes that MSSA's perspective on state/federal relations applies as well to Florida v. HHS; and that this perspective offers constructive insights to aid this Court's consideration of this case.

SUMMARY OF ARGUMENT

It is an axiom of statutory and constitutional interpretation that any law passed after an earlier law supersedes the previous law to the extent that the two are inconsistent. Indeed, it can be said that this principle is the basis for all law, without which no enacted law could be amended. The Ninth and Tenth Amendments, placed in the Constitution on December 15, 1791 after an extended multi-state debate regarding federal and state power, superseded any conflicting provisions of the Constitution, such as the Interstate Commerce Clause of Article 1, Section 8, the Necessary and Proper Clause, Article I, Section 8 and the Supremacy Clause, Article VI, Section 2 which were ratified and enacted on September 17, 1789. The Supreme Court's history of interpreting and construing the Interstate Commerce Clause, at least in the last 75 years, has largely ignored this basic principle of constitutional interpretation.

The general thesis of Respondents in this cases is that the mandates of the Affordable Care Act go impermissibly beyond what is allowed under the current state of Interstate Commerce Clause jurisprudence. The amici go much further and assert that the current state of Interstate Commerce Clause jurisprudence vastly understates the proper role of the Ninth and Tenth Amendments in our constitutional order. Accordingly, the amici assert that the mandates under the Affordable Care Act are impermissible because they purport to wield powers within the several states which Congress does not have and may not wield.

ARGUMENT

I. The Ninth and Tenth Amendments, as later enacted, amended the underlying Constitution, including the Commerce, Supremacy, and Necessary and Proper Clauses.

In District of Columbia v. Heller, 554 U.S. 570 (2008), Justice Scalia closed with a proclamation that "what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct." A similar sentiment should be expressed regarding the Ninth and Tenth Amendments. Like the Second Amendment, the Ninth and Tenth Amendments have been mostly ignored over the course of American history. Yet these Amendments are central to a proper understanding of the Constitution.

It is axiomatic that when a law is enacted after an earlier law, the earlier law is considered as repealed to the extent that the two enactments conflict. This maxim of constitutional and statutory construction is the bedrock beneath the rule of law: "Leges posteriores priores contrarias abrogant." Herbert Broom, Maxims of Law (1854). See also, United States v. Tynen, 78 U.S. 88, 92, 11 Wall. 88, 92 (1870) ("When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not

in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act"). Without this principle applied to the Constitution, it would have been impossible for the Eighteenth Amendment (Prohibition) to change the Constitution, and impossible for the Twenty-First amendment to repeal the Eighteenth Amendment.

Thus, the Ninth and Tenth Amendments actually amended and changed the meaning of the underlying Constitution, including the Commerce, Supremacy, and Necessary and Proper clauses. The Interstate Commerce Clause, U.S. Const. Article I, Section 8, Clause 3 was written in very broad terms: "[The Congress shall have power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Supremacy Clause, Article VI, Clause 2, boldly claims that federal law is supreme and that judges in every state shall be bound thereby." The Necessary and Proper Clause, Article I, Section 8, Clause 18 proclaims that "[The Congress shall have Power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . ."

For generations, this Court has construed provisions of the Constitution which grant powers to government expansively, while construing provisions which limit government power restrictively. Yet the history of the ratification debates illustrates that the

enactment of the Ninth and Tenth Amendments was intended to prevent such construction.

The original Constitution was hammered out at the Constitutional Convention in Philadelphia between May and September 1787. Its drafters met on the second floor of the Philadelphia Statehouse (now known as Independence Hall) with windows shut, sentries posted below, and delegates sworn to strict silence. The States had chosen seventy-four delegates, nineteen of whom refused to attend, leaving only fifty-five. Most were cosmopolitan and personally anxious for a stronger national government; the American countryside was grossly underrepresented. Before the end of the Convention, fourteen delegates left, leaving forty-one, three of whom refused to sign. Thus, nearly half refused to attend, left, or did not sign. See Roger Roots, The Approaching Death of the Collective Right Theory of the Second Amendment, 39 Duq. L. Rev. 71, 97 (2000).

The document that was circulated for ratification in the winter of 1787-1788 came largely with the onus that it was perceived as a Federalist statement (i.e., that it was being promoted by the advocates of a more centralized government). Opponents of this constitution cited a number of objectionable aspects. In particular, the document provided no express limitations on the powers of the national government. See id.

Those suspicious of centralized authority were relentless in their criticism. A sizeable percentage of

delegates to state ratification conventions indicated they would support ratification only if a declaration or bill of rights were amended into it. It soon became evident that the Constitution would not be ratified unless assurances were given that a bill of rights with agreeable terms would soon be attached upon the document's successful return to Philadelphia. The combined number of votes from all of the conventions indicates that 34 percent of state convention delegates approved of the Constitution just as it was and an additional 30 percent favored ratification with proposed amendments. See The Origin of the Second Amendment: A Documentary History of the Bill of Rights 1787-1792 (David E. Young ed., 2d ed. 1995), Appendix C. Only by combining were these two groups (totaling 64 percent) able to gain ratification. Id. The largest voting bloc (36 percent) was that of delegates who were against the Constitution unless it was amended prior to ratification. Id. According to these figures, a significant majority (66 percent) required amendments. See id. (providing statistics from the twelve state conventions which met in 1787 and 1788.

When the House Select Committee to draft the Bill of Rights met during the First Congress, it met with the intention of seriously carving back on the extravagant grants of power that had been enunciated in the original Constitution. Roger Sherman, who served with James Madison on the Committee, introduced an amendment beginning as follows: "The People have certain natural rights

which are retained by them when they enter into Society . . . ." Roger Sherman's Draft of the Bill of Rights, in The Rights Retained by the People: The History and Meaning of the Ninth Amendment 351, app. A (Randy E. Barnett ed., 1998). By "certain natural rights," Sherman was pronouncing a recognition that rights such as "Conscience in matters of religion; of acquiring property and of pursuing happiness & Safety; of Speaking, writing and publishing their Sentiments with decency and freedom; of peaceably assembling to consult their common good, and of applying to Government by petition or remonstrance for redress of grievances" were supreme over the limited powers of government. Id.

As Professor Randy Barnett articulates in Restoring the Lost Constitution (2003), the Ninth Amendments protects from government interference such trivial rights as the choice by a person to wear a hat, or not wear a hat. One significant purpose for the federalism secured by under Tenth Amendment, and voiced by Justice Kennedy in Bond v. United States, 564 U.S. __ (2011), is to enable a state to protect the individual rights of its citizens. "Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power."

Thus, the Ninth Amendment preserves the right of individuals to choose to buy or not buy health insurance, and the Tenth Amendment preserves the power of the states to interdict a congressional mandate that would strip state citizens of their rights under the Ninth Amendment.

II. The Constitution does not authorize Congress, by means of the Affordable Care Act, to require individuals within the several states to engage in commerce regarding health care.

As Chief Justice Roberts declared in Citizens United v. Federal Election Commission, 558 U.S. 08-205 (2010), this Court must revise precedent "when the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake." It is difficult to imagine a line of precedent more jury-rigged, held together with duct tape and baling wire, than the line of cases that have led Congress to believe it may compel citizens to purchase a federally selected consumer product. Not only should the individual mandate of the Affordable Care Act be rejected as impermissibly beyond congressional power, but the Court should seize this opportunity to correct the obvious and misleading "jury-rigging" that has occurred to expand the scope of the Interstate Interstate Commerce Clause in and since Wickard v. Filburn, 317 U.S. 111 (1942).

The Affordable Care Act purports to compel citizens to purchase products and services under the

auspices of the Interstate Commerce Clause, U.S.Const., Art. I, § 8. This assumption of power extends radically beyond our Founders' intent behind the Interstate Commerce Clause as well as the Ninth and Tenth Amendments. For those who believe Congress may assert any power under the Interstate Commerce Clause, this Court ought to clarify that contemporary views of Interstate Commerce Clause power have become "jury-rigged" beyond all reasonableness.

As noted repeatedly by Respondents and various amici, the Affordable Care Act amounts to a vast departure from historical lawmaking by Congress. For the first time ever, Congress presumes power to require individual citizens to shell out hard-earned money to purchase a type of private product selected by Congress. In essence, Congress attempts with the Affordable Care Act to avoid the politically embarrassing prospect of raising taxes to provide universal health care by requiring instead that all individuals must purchase his or her own health care insurance, at threat of penalty for any citizen who fails to comply.

Congress might as well demand that every homeless person buy a house in order to solve the twin problems of homelessness and the crisis of excessive homes sitting vacant and underutilized by owning lenders.

None of the powers granted to Congress in the Constitution authorize Congress to embark upon the new and radical course of requiring that individuals purchase private products, whether houses or health insurance. Moreover, because the Ninth and Tenth Amendments were enacted after the Interstate

Commerce Clause, they must be given deference in any conflict with the Interstate Commerce Clause and other empowering clauses of the underlying Constitution.

Most observers who admit that the Ninth Amendment actually exists and means anything understand that our Founders intent with the Ninth was to protect from government interference an endless array of choices that individuals might care to make, choices far too numerous to catalog in a Bill of Rights, or even to protect with carefully-drawn enumerated powers. One of those obvious choices is whether to purchase or not purchase private health insurance. Surely, this must be beyond need for any thorough explanation.

The conflict between the commerce-based individual mandate and the Tenth Amendment takes at least two forms. First, as Justice Kennedy explained in U.S. v. Bond, the first purpose of maintaining the sovereignty of states is so that the states are adequately empowered to protect the individual liberties of a state's people, liberties taken if the federal government may command people to buy private products. The Tenth Amendment preserves the ability of states to protect the individual liberties of its citizens.

Second, and perhaps for an overlapping reason, the states are admitted to have retained police powers in order to protect and serve their citizens. Imposition of the individual mandate upon citizens usurps and displaces police powers very deliberately left to the states, powers that are protected from such interference by the prohibition of the Tenth Amendment. As a result, Congress has no power to require individuals to engage in

interstate commerce, whether or not it believes requiring them to do so makes good policy sense.

III. The Affordable Care Act violates the federal government's compact with the State of Montana.

The Affordable Care Act extends into the realm of state jurisdiction and violates the liberties of individuals within the jurisdictions of the states. The original thirteen colonies of America were each separately established by charters from the English Crown. Outside of the common bond of each being a dependency and colony of the mother country, England, the colonies were not otherwise united. Each had its own governor, legislative assembly and courts, and each was governed separately and independently by the English Parliament.

Between October, 1775, and the August 1776, each of the colonies separately severed ties and relations with England, and several adopted their own constitutions. The legal effect of the Declaration of Independence was to make each new State a separate and independent sovereign over which there was no other government of superior power or jurisdiction. This was clearly shown in M'Ilvaine v. Coxe's Lessee, 8 U.S. (4 Cranch) 209, 212 (1808), where it was held:

> This opinion is predicated upon a principle which is believed to be undeniable, that the several states which composed this Union, so far at least as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states, and that

> they did not derive them from concessions made by the British king. The treaty of peace contains a recognition of their independence, not a grant of it. From hence it results, that the laws of the several state governments were the laws of sovereign states, and as such were obligatory upon the people of such state, from the time they were enacted.

The representatives who assembled in Philadelphia in May, 1787, to attend the Constitutional Convention, met for the primary purpose of improving the commercial relations among the States, although the product of the Convention produced more than this. But, no intention was demonstrated for the States to surrender in any degree the jurisdiction so possessed by the States at that time, and indeed the Constitution as finally drafted continued the same territorial jurisdiction of the States as existed under the Articles of Confederation. The essence of this retention of state jurisdiction was embodied in Art. I, Sec. 8, Cl. 17 of the U.S. Constitution, which read as follows:

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by

> the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

The reason for the inclusion of this clause in the Constitution was and is obvious. Under the Articles of Confederation, the States retained full and complete jurisdiction over lands and persons within their borders. The Congress under the Articles was merely a body which represented and acted as agents of the separate States for external affairs, and had no jurisdiction within the States. This defect in the Articles made the Confederation Congress totally dependent upon any given State for protection, and this dependency did in fact cause embarrassment for that Congress.

By the adoption of the Constitution in 1789, the States jointly surrendered some 17 specific and well defined powers to the federal Congress, which related strictly to external affairs of the States. Any single power, or even several powers combined, do not operate in a fashion as to invade or divest a State of its jurisdiction. As against a single State, the remainder of the States under the Constitution have no right to jurisdiction within the single State absent its consent.

Each state that has entered the union after 1789, like the original 13 colonies, surrendered only the very slender area of jurisdictional powers, while receiving guarantees from the Union that its own

sovereignty and police powers were retained within the powers of the state. Montana officially entered into statehood via the mechanism of a contract, known as The Compact with the United States (Montana Constitution, Article I). There is nothing in that contract which authorizes Congress to compel the citizens of Montana to purchase health insurance, or any other private product. Thus, the congressional mandate for individuals to purchase health insurance under the Affordable Care Act is a unilateral, and therefore impermissible, amendment to or modification of a significant contract.

This principle is preserved and asserted by the Montana Legislature in relation to the Montana Firearms Freedom Act at MONT. CODE ANN. § 30-20-102.

> Legislative declarations of authority. The legislature declares that the authority for this part is the following:
>
> (1) The 10th amendment to the United States constitution guarantees to the states and their people all powers not granted to the federal government elsewhere in the constitution and reserves to the state and people of Montana certain powers as they were understood at the time that Montana was admitted to statehood in 1889. The guaranty of those powers is a matter of contract between the state and people of Montana and the United States as of the time that the compact with the

> United States was agreed upon and adopted by Montana and the United States in 1889.
>
> (2) The ninth amendment to the United States constitution guarantees to the people rights not granted in the constitution and reserves to the people of Montana certain rights as they were understood at the time that Montana was admitted to statehood in 1889. The guaranty of those rights is a matter of contract between the state and people of Montana and the United States as of the time that the compact with the United States was agreed upon and adopted by Montana and the United States in 1889.

Montana entered into statehood in 1889. The contract for statehood to which Montana agreed was between the citizens of Montana, with the Montana Territorial Legislature acting on behalf of the citizens, and the several states already in the Union, with Congress and the President acting as the agent for those several states. This contract was affirmed and detailed by Ordinance 1 of the Montana Territorial Legislature, by the Enabling Act of Congress of 1889, the Organic Act of Congress of 1889, and the Proclamation of Montana Statehood by President Benjamin Harrison.

Montana's contract for statehood is memorialized as Article I of the Montana

Constitution, known as The Compact with the United States ("Compact"). Montana's Compact is a bilateral, written contract or agreement that binds the parties thereto as defined by: Bouvier's, 1839; Bouvier's, 1856; Webster's, 1884; and Black's, 1910. "The terms 'compact' and 'contract' are synonymous." Green v. Biddle, 8 Wheat. 1, 92, 5 L, ed. 547. The only difference between a compact and a contract in any reasonable usage of the terms as they apply here is that a compact is more generally an agreement between or among states. Montana's Compact shares many points in common with usual, bilateral contracts. It includes competent parties, subject matter, legal considerations, mutuality of agreement, and mutuality of obligation.

It is a bedrock principle of contract interpretation that contracts must be interpreted so as to give credence to the intent of the contracting parties. This principle is so well established as to need no elaboration here.

Further, before Montana was allowed statehood, and as a part of the contract, the Montana territorial legislature, on behalf of the people of Montana, was required to approve Ordinance 1. In its fifth paragraph, Ordinance 1 declared, "Fifth. That on behalf of the people of Montana, we in convention assembled, do adopt the constitution of the United States." This adoption was on February 22nd, 1889. Certainly, the Interstate Commerce Clause, in the exact same verbiage as it occurs today, was a part of the "constitution of the United States" that was adopted and accepted by Montana

in 1889 via Ordinance 1.

Thus, any interpretation of congressional power asserted under the Interstate Commerce Clause must be consistent with the general view at that time, which view must inform any observer of the intent of the parties then entering into the contract.

Certainly, there is nothing in the Compact, in the Enabling Act, in the Organic Act or in Ordinance 1 which offers power to Congress to require Montana citizens to purchase health insurance, or any other private product. There was no public or legal view at the time that congressional power under the Interstate Commerce Clause could be expanded to authorize any such federal requirement. Therefore, the Affordable Care Act effectively amends this bilateral contract, but unilaterally. And, the Compact declares on its face that it may only be amended with the consent of the parties, that it shall: "... continue in full force and effect until revoked by the consent of the United States and the people of Montana."

It is also significant that any modification of a contract must pass a more rigorous test than initiation of the underlying contract, so as to not defeat the intent of the contracting parties. In his amicus brief in this case, Professor James Blumstein provides a competent explanation of this principle when he informs:

The law of contract draws a critical

> distinction between contract formation and contract modification. Parties are subject to more restraints when they modify than when they form a contract. See Timothy J. Muris, Opportunistic Behavior and the Law of Contracts, 65 MINN. L. REV. 521 (1981); WILLISTON ON CONTRACTS (4th ed. 2008)(Richard A. Lord ed.), vol. 3 at 695-719. For example, there is a duty of fair and equitable treatment at contract modification that has no counterpart at contract formation. And the notion of "fair and equitable" goes beyond absence of coercion. Rest.2d Contracts, §89, comment b.

There is no cognizable or documented intention that Montana's contract for statehood, at the time it was entered into, could authorize Congress to require Montana citizens to purchase health insurance under its power to regulate interstate commerce; or could preempt Montana's reserved Tenth Amendment prerogative to protect its citizens from such exercise; or could modify how the reservations of choice were preserved to Montana citizens under the Ninth Amendment. Absent any such intention, the opposite is apparent. Therefore, the individual insurance mandate of the Affordable Care Act should be struck down as an impermissible unilateral amendment to the federal government's binding, bilateral statehood contract with Montana.

CONCLUSION

Accordingly, the decision by the Court of Appeals regarding Affordable Care Act's expanded Medicaid mandate should be affirmed.

Respectfully submitted,

Quentin M. Rhoades
Counsel of Record
Sullivan, Tabaracci & Rhoades, P.C
1821 S. Ave. W., Third Floor
Missoula, Montana 59801
Telephone: 406-721-9700
Facsimile: 406-721-5838
Email: qmr@montanalawyer.com

Counsel for Amicus Curiae
Montana Shooting Sports Association

February 9, 2012

AMICUS CURIAE BRIEF

No. 11-398

In The
Supreme Court of the United States

DEPARTMENT OF HEALTH
AND HUMAN SERVICES, et al.,

Petitioners,

v.

STATE OF FLORIDA, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

**AMICUS CURIAE BRIEF OF
MOUNTAIN STATES LEGAL FOUNDATION
IN SUPPORT OF RESPONDENTS
(MINIMUM COVERAGE PROVISION)**

JAMES M. MANLEY
JEFFREY W. MCCOY
STEVEN J. LECHNER*
**Counsel of Record*
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
jmanley@mountainstateslegal.com
jmccoy@mountainstateslegal.com
lechner@mountainstateslegal.com

Attorneys for Amicus Curiae

QUESTION PRESENTED

Beginning in 2014, the minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, will require non-exempted individuals to maintain a minimum level of health insurance or pay a tax penalty. 26 U.S.C. § 5000A. The question presented is:

Whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THE PRINCIPLE OF A LIMITED FEDERAL GOVERNMENT OF ENUMERATED POWERS IS DEEPLY ROOTED IN THE HISTORY OF THE UNITED STATES 6

A. The Principle Of A Limited Government Of Enumerated Powers Arose In The Pre-Revolutionary Period 6

B. The Principle Of A Limited Government Of Enumerated Powers Is Evident In The Declaration Of Independence 10

C. The Principle Of A Limited Government Of Enumerated Powers Is Explicitly Included In The Articles Of Confederation 13

D. The Principle Of A Limited Government Of Enumerated Powers Is Enshrined In The Constitution 15

1. The Constitutional Convention proposed a federal government of enumerated powers 15

2. The structure of the Constitution explicitly creates a federal government of enumerated powers 17

TABLE OF CONTENTS – Continued

Page

3. The doctrine of enumerated powers was embraced during the ratification debates 19

4. The Bill of Rights demonstrates the scope and historical depth of the doctrine of enumerated powers 23

5. This Court has consistently recognized that the federal government possesses only limited, enumerated powers 28

II. THE INDIVIDUAL MANDATE OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT IS UNCONSTITUTIONAL; OTHERWISE, THE FEDERAL GOVERNMENT WOULD CEASE TO BE A GOVERNMENT OF ENUMERATED POWERS 30

A. If The Individual Mandate Were A Valid Exercise Of The Commerce Power, The Commerce Clause Would Render The Other Enumerated Powers Superfluous 32

B. If The Individual Mandate Were A Valid Exercise Of The Commerce Power, The Principle Of A Limited Federal Government Of Enumerated Powers Would Be Eviscerated 37

CONCLUSION 40

TABLE OF AUTHORITIES

Page

CASES

American Civil Liberties Union of Kentucky v. McCreary County, Kentucky, 354 F.3d 438 (6th Cir. 2003) 11

C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) 14

City of Boerne v. Flores, 521 U.S. 507 (1997) 28

Dept. of Revenue of Kentucky v. Davis, 553 U.S. 328 (2008) 14

Florida ex rel. Atty. Gen. v. U.S. Dep't of Health and Human Services, 648 F.3d 1235 (11th Cir. 2011) 2, 5, 39

Florida ex rel. Bondi v. U.S. Dep't of Health and Human Services, 780 F. Supp. 2d 1256 (N.D. Fla. 2011) 4, 10, 31, 38

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 28

Goldwater v. Carter, 444 U.S. 996 (1979) 18

Gonzales v. Raich, 545 U.S. 1 (2005) 39

Griswold v. Connecticut, 381 U.S. 479 (1965) 27

Holmes v. Jennison, 39 U.S. 540 (1840) 33

Kansas v. Colorado, 206 U.S. 46 (1907) 28

Liberty University v. Geithner, 2011 WL 3962915 (4th Cir. 2011) 2

Linder v. United States, 268 U.S. 5 (1925) 19

Luther v. Borden, 48 U.S. (7 How.) 1 (1849) 8

TABLE OF AUTHORITIES – Continued

Page

M'Culloch v. Maryland, 17 U.S. 316 (1819).....28

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).....28

Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011).....2, 34

Thomas More Law Center v. Obama, 651 F.3d 529 (6th Cir. 2011).....2

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).....17

United States v. Comstock, ___ U.S. ___, 130 S. Ct. 1949 (2010).....5

United States v. Ho, 311 F.3d 589 (5th Cir. 2002).....17

United States v. Lopez, 514 U.S. 549 (1995).....19, 29, 33, 38

United States v. Morrison, 529 U.S. 598 (2000).....29, 30

United States v. Patton, 451 F.3d 615 (10th Cir. 2006).....39

United States v. Santos, 553 U.S. 507 (2008).....33

Virginia ex rel. Cuccinelli v. Sebelius, 656 F.3d 253 (4th Cir. 2011).....2

Virginia ex rel. Cuccinelli v. Sebelius, 702 F. Supp. 2d 598 (E.D. Va. 2010).....2, 31

West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994).....14

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I ..... *passim*

U.S. Const. art. II 17

U.S. Const. art. III 17

U.S. Const. amend. IX 26

U.S. Const. amend. X 26

STATUTES

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) 2

Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) 2

26 U.S.C. § 5000A i

42 U.S.C.A. § 18091(a) 14, 32

OTHER AUTHORITIES

Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987) 6, 7, 9

Annals of Congress (1789) 27

Annals of Congress (1791) 22

Annals of Congress (1792) 22

Annals of Congress (1794) 23

Articles of Confederation, art. II 13

Articles of Confederation, art. IX 13

TABLE OF AUTHORITIES – Continued

Page

Frederic Bastiat, *The Law* (1850) 12

Carl Becker, *The Declaration of Independence: A Study in the History of Ideas* (1922) 12

William Blackstone, *Commentaries on the Laws of England* (1765-69) 6

J. Blum, E. Morgan, et al., *The National Experience* (1973) 9

Congressional Budget Office, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance* (1994) 32

The Charter of Massachusetts Bay (1629) 7, 8

The Debate on the Constitution: Part One: September 1787 to February 1788 (Bernard Bailyn, ed. 1993) 23

The Debates in the Several State Conventions on the Adoption of the Federal Constitution (Jonathan Elliot ed., 1836) (1787-88) 19, 20, 25

Declaration of Independence (U.S. 1776) 10, 11, 12

The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States 438 (John P. Kaminski & Gaspare J. Saladino eds., 1988) 21

William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. Pa. J. Const. L. 901 (2008) 16

The Federalist No. 22 (Alexander Hamilton) (C. Rossiter ed., 1961) 14

TABLE OF AUTHORITIES – Continued

Page

The Federalist No. 32 (Alexander Hamilton) (C. Rossiter ed., Mentor 1999) 19

The Federalist No. 39 (James Madison) (C. Rossiter ed., Mentor 1999) 20

The Federalist No. 45 (James Madison) (C. Rossiter ed., Mentor 1999) 20

The Federalist No. 53 (James Madison) (C. Rossiter ed., Mentor 1999) 36

The Federalist No. 84 (Alexander Hamilton) (C. Rossiter ed., Mentor 1999) 26

Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan. L. Rev. 843 (1978) 9, 10

Samuel Johnson, *The Works of Samuel Johnson* (Pafraets & Company 1913) 9

Samuel Johnson, *A Dictionary of the English Language* (J.F. Rivington, et al., 6th ed. 1785) 30, 33, 34

Kurt T. Lash, *Leaving The Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 Wm. & Mary L. Rev. 1577 (2009) 6, 21

Letter from the Federal Farmer No. 16 (Jan. 20, 1788) 22, 26

John Locke, *Second Treatise of Civil Government* (1690) 12

TABLE OF AUTHORITIES – Continued

Page

Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. Cin. L. Rev. 49 (1992) 25

A. McLaughlin, *The Foundations of American Constitutionalism* (1961) 17

Roger Pilon, *The Purpose and Limits of Government, Cato's Letter #13* (1999) 11, 12

The Records of the Federal Convention of 1787 (Max Farrand ed., Yale University Press 1911) 15, 16, 17

Joseph Story, *Commentaries on the Constitution of the United States* (1833) 15, 34, 38

Harold C. Syrett, ed., 15 *The Papers of Alexander Hamilton* 33, 39 (Columbia 1969) 18

Melvin L. Urofsky & Paul Finkelman, *A March of Liberty* (2d ed. 2002) 14

James Wilson, *Speech of Dec. 4, 1787* 21

Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (University of North Carolina Press 1969) 24

John Yoo, *Unitary, Executive, or Both?*, 76 U. Chi. L. Rev. 1935 (2009) 18

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Respondents.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF's members include individuals who live and work in every State of the Nation. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system.

Central to the notion of a limited government is the constitutional principle of enumerated powers: those powers not explicitly delegated to the federal government are reserved to the States and the

[1] Pursuant to Supreme Court Rule 37.6, counsel for MSLF affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than MSLF, its members, or counsel, made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of amicus briefs.

people. These limited powers include Congress's power to make rules regulating interstate commerce, as conferred by the Commerce Clause. U.S. Const. art. I, § 8, cl. 3. Legislation that reaches beyond Congress's constitutional authority, like the Individual Mandate component of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010), ("Individual Mandate"), results in a federal government that is no longer limited and ethical, and further erodes individual liberty, the right to own and use property, and the free enterprise system. Therefore, MSLF was actively involved in all relevant litigation challenging the Individual Mandate and filed amicus curiae briefs in the following cases: *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011); *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011); *Liberty University v. Geithner*, 2011 WL 3962915 (4th Cir. 2011); *Florida ex rel. Atty. Gen. v. U.S. Dep't of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011); *Thomas More Law Center v. Obama*, 651 F.3d 529 (6th Cir. 2011); and *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598 (E.D. Va. 2010). Therefore, MSLF respectfully submits this amicus curiae brief in support of Respondents urging that this Court affirm the Eleventh Circuit's ruling that the Individual Mandate is unconstitutional.

SUMMARY OF THE ARGUMENT

The principle of enumerated powers is instrumental in maintaining the federal system of shared power established by the Constitution, because those powers not explicitly delegated to the federal government are reserved to the States and the people. That Congress is limited to its enumerated powers has been a foundational principle throughout the history of the United States. As demonstrated in Part I, the doctrine of enumerated powers can be traced to the colonial period, and is evident in the Declaration of Independence, the Articles of Confederation, the debate prior to ratification of the Constitution, and, as this Court has consistently held, in the text of the Constitution.

In contrast to the plenary authority of the British parliamentary system that many American colonists had left behind, colonial governments possessed limited authority. The colonists pointed to this notion of limited government in the Declaration of Independence, which explains that "Governments are instituted among Men, deriving their just powers from the consent of the governed" for the limited purpose of securing individual rights. The Articles of Confederation carried forward the notion that the federal government was to be one of limited powers. But the Articles of Confederation did not sufficiently limit the powers of State governments to enact protectionist legislation. To rectify this problem, the Articles were replaced with the Constitution, which granted Congress authority to regulate interstate commerce to

ensure free trade across state lines. U.S. Const. art. I, § 8, cl. 3.

The drafters of the Constitution adhered to the longstanding doctrine of enumerated powers; indeed, the ratification debates suggest that the Constitution might never have been ratified had the federal government not been limited to specifically enumerated powers. This Court has consistently acknowledged that the text of Article I and the Ninth and Tenth Amendments resolve definitively that the federal government is one of limited, enumerated powers. Yet, Congress often claims authority that exceeds constitutional limits, in an effort to justify legislation governing matters of purely intrastate concern, or matters outside commerce. The result of such overreaching is a federal government that cannot be regarded as limited and ethical, and further erosion of individual liberty, the right to own and use property, and the free enterprise system.

As demonstrated in Part II, the Individual Mandate compels all non-exempt Americans to affirmatively engage in interstate commerce by purchasing what Congress deems an acceptable level of health insurance coverage from private insurance firms. This mandate, passed purportedly pursuant to the Commerce Clause, "exceeds Congress' commerce power, as it is understood, defined, and applied in the existing Supreme Court case law." *Florida ex rel. Bondi v. U.S. Dep't of Health and Human Services*, 780 F. Supp. 2d 1256, 1295 (N.D. Fla. 2011).

Nonetheless, the federal government has argued that the Individual Mandate is "eminently reasonable." Petitioners' Brief on the Merits at 19. The federal government's arguments in support of the Individual Mandate merely pay lip-service to the doctrine of enumerated powers, and thereby seek to undermine that foundational principle of American government. Petitioners' Brief on the Merits at 22 (citing *United States v. Comstock*, ___ U.S. ___, 130 S. Ct. 1949, 1956 (2010)). Indeed, the Individual Mandate threatens to eviscerate the doctrine of enumerated powers upon which the federal government was established.

The constitutionality of the Individual Mandate depends upon an unbounded interpretation of the Commerce Clause, which would render the other enumerated powers superfluous, and thereby render the doctrine of enumerated powers a nullity. As the Eleventh Circuit correctly decided, if the Commerce Clause gives Congress the power to compel individuals to engage in interstate commerce, it would consequently give Congress power to mandate any and all individual decisions. *Florida ex rel. Atty. Gen.*, 648 F.3d at 1295-98.

Such an unlimited interpretation of the Commerce Clause would be in direct conflict with the clear intent of the Founders, as expressed in the Declaration of Independence, the Articles of Confederation, in the debates surrounding the drafting and ratification of the Constitution, and in the text of the Constitution itself. Thus, by purporting to derive its power to enact the Individual Mandate from the

Commerce Clause, Congress engaged in an unprecedented power grab that threatens to extinguish the principle of enumerated powers upon which the federal government was established.

ARGUMENT

I. THE PRINCIPLE OF A LIMITED FEDERAL GOVERNMENT OF ENUMERATED POWERS IS DEEPLY ROOTED IN THE HISTORY OF THE UNITED STATES.

A. The Principle Of A Limited Government Of Enumerated Powers Arose In The Pre-Revolutionary Period.

In 18th-century Britain, power was concentrated entirely in the "King-in-Parliament" (i.e., the King, Lords, and Commons). Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1431 (1987). Britons understood this power as being absolute. *Id.*; *see also* William Blackstone, *Of the Nature of Laws in General, in Commentaries on the Laws of England* § 2 (1765-69) (In all governments, there is "a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii* or the rights of sovereignty, reside.") *available at* http://www.lonang.com/exlibris/blackstone/bla-002.htm. Many American colonists, however, due in part to their experiences with the British Parliament, had developed a profoundly different view of government – one in which all power was derived from the people themselves. Kurt T. Lash, *Leaving*

the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction, 50 Wm. & Mary L. Rev. 1577, 1593-94 (2009).

The structure of the colonial governments reinforced the colonists' understanding that a just government is one of limited authority. Typically, each colony was governed by a corporate charter. Amar, *supra*, at 1432-33. These charters, such as the Massachusetts Bay Company Charter, established a governor and other governmental agents, much like corporate agents, with clearly defined authority:

> That from henceforth for ever, there shalbe one Governor, one Deputy Governor, and eighteene Assistants of the same Company, to be from tyme to tyme constituted, elected and chosen out of the Freemen of the saide Company . . . which said Officers shall applie themselves to take Care for the best disposeing and ordering of the generall buysines and Affaires of, for, and concerning the said Landes and Premisses hereby mencoed, to be graunted, and the Plantacion thereof, and the Government of the People there.

The Charter of Massachusetts Bay (1629), *available at* http://avalon.law.yale.edu/17th_century/mass03.asp. Like corporate agents, the colonial governmental officials possessed only those powers specifically enumerated; government actions beyond the scope of the charter had no legal authority. Amar, *supra*, at 1433-35 (citing A. McLaughlin, *The Foundations of American Constitutionalism* 38-65, 104-28 (1961)). For example,

the Massachusetts Bay government had the power "to make Lawes and Ordinnces for the Good and Welfare of the saide Company," of "nameing and setting of all sorts of Officers," of "disposing and ordering of the Eleccons of such of the said Officers as shalbe annuall," and "to incounter, expulse, repell, and resist by Force of Armes . . . all such Person and Persons, as shall at any Tyme hereafter, attempt or enterprise the Destruccon, Invasion, Detriment, or Annoyaunce to the said Plantation or Inhabitants." The Charter of Massachusetts Bay, *supra*.

The colonial charters were thus a precursor to the American notion of limited, constitutional government. Indeed, Rhode Island's colonial charter served as the basis for government there until Dorr's Rebellion in 1841. *See Luther v. Borden*, 48 U.S. (7 How.) 1, 1 (1849). Unlike Rhode Island, most of the colonies adopted constitutions following the Revolution, which carried forward the concept of constitutionally limited government. *See id.* Thus, even prior to the Revolution, colonial governments stood in stark contrast to the British system of government that many of the colonists had fled, wherein the government's authority was absolute and the actions of Parliament were unassailable. The British notion of sovereignty permitted none of the limitations that have come to define the American form of government:

> In sovereignty there are no gradations. There may be limited royalty, there may be limited consulship; but there can be no limited government. There must, in every

> society, be some power or other, from which there is no appeal, which admits no restrictions, which pervades the whole mass of the community, regulates and adjusts all subordination, enacts laws or repeals them, erects or annuls judicatures, extends or contracts privileges, exempt itself from question or control, and bounded only by physical necessity.

Samuel Johnson, *Taxation No Tyranny: An Answer to the Resolutions and Address of the American Congress* (1775), *reprinted in* 14 *The Works of Samuel Johnson* 93 (Pafraets & Company 1913), *available at* http://www.samueljohnson.com/tnt.html.

As a result, some colonists objected not only to Parliament's actual policies, but also to the principle that the power of Parliament was unlimited. *See* Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan. L. Rev. 843, 876 (1978) ("The view that the Stamp Act was unconstitutional (in the full sense of "illegal") provided the organizing principle for a new and vigorous movement of popular protest against the tax."). The Boston Tea Party, for example, was a protest against both a tax on tea and the notion that Parliament had the power to tax tea. Amar, *supra*, at 1430 n.21 (citing J. Blum, E. Morgan, et al., *The National Experience* 94 (1973)). Indeed, the Tea Party took place after Parliament had *reduced* a tax on tea in an attempt to acclimate colonists to the

principle of plenary parliamentary taxation powers.[2] *Id.* The revolutionary idea that government power is limited by specific grants of authority was thus inherent in the structure of the colonies; it is an idea that would be integral to the new governments that were formed by the colonists in the wake of the American Revolution.

B. The Principle Of A Limited Government Of Enumerated Powers Is Evident In The Declaration Of Independence.

In 1776, the Founders' primary justification for independence from England was Parliament's abandonment of the principle of a limited government of enumerated powers in its governance of the colonies. The Declaration of Independence famously justifies the concept of limited government by observing that individuals are "endowed by their Creator with certain unalienable Rights." Declaration of Independence para. 2 (U.S. 1776). In other words, rights exist by virtue of an individual's nature as a human being. The Declaration explains this proposition by exposing the illogic of grounding rights in government:

---

[2] In holding the Individual Mandate unconstitutional, the District Court for the Northern District of Florida recognized: "It is difficult to imagine that a nation which began, at least in part, as a result of opposition to a British mandate giving the East India Company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place." *Florida ex rel. Bondi*, 780 F. Supp. 2d at 1286.

> [The Declaration] speaks simply to the question of whether rights come from government by posing, in effect, the question of where government would get its rights if not from the people – it being clear that people create and hence come before government. In both logic and time, then, people come first, government second. That was the central point the Founders sought to pin down.

Roger Pilon, *The Purpose and Limits of Government, Cato's Letter #13* 6 (1999).

The unalienable rights possessed by the people are far too numerous to be listed specifically; the Founders acknowledged the broad nature of individual rights by providing that "among these [rights] are Life, Liberty and the pursuit of Happiness." Declaration of Independence para. 2 (U.S. 1776). They contrasted these individual rights with the unlimited authority claimed by King George III's Parliament, calling his reign a "History of repeated Injuries and Usurpations, all having in direct Object the Establishment of an absolute Tyranny over these States." *Id.*

Corollary to the unalienable rights identified by the Declaration, the Founders also acknowledged the Lockean idea that individuals possess the authority to empower a government to protect those rights.[3]

---

[3] As has been documented frequently, John Locke was the primary philosophical influence for Thomas Jefferson, the principal author of the Declaration of Independence. *See, e.g.*, *American Civil Liberties Union of Kentucky v. McCreary County*,

(Continued on following page)

Locke described this authority to consent to governance as an "Executive Power," i.e., the right to secure an individual's unalienable rights. Pilon, *supra*, at 15 (citing John Locke, *Second Treatise of Civil Government* § 13 (1690)). Accordingly, the Declaration famously explains that governments are "instituted" for the limited purpose of "secur[ing] these rights" of the people, and the authority of the government to secure these rights is "derive[ed] . . . from the consent of the governed." Declaration of Independence para. 2 (U.S. 1776).

Consequently, the federal government's power exists solely because the people have conferred upon it their right to secure their unalienable rights. Naturally, then, for the federal government to have the power to secure a purported right, individuals must first have possessed that power, and then, through the consent of the governed, must have delegated that power to the federal government. *See* Frederic Bastiat, *The Law* 68-69 (Dean Russell, trans., Foundation for Economic Education 1998) (1850) ("It is not true that the legislator has absolute power over our persons and property. The existence of persons and property preceded the existence of the legislator, and his

---

Kentucky, 354 F.3d 438, 453 n.7 (6th Cir. 2003) (noting that "with respect to 'the political philosophy of Nature and natural rights' referenced in the Declaration that the 'lineage is direct: Jefferson copied Locke' ") (quoting Carl Becker, *The Declaration of Independence: A Study in the History of Ideas* 79 (1922)), *aff'd*, 545 U.S. 844 (2005).

function is only to guarantee their safety."). This provides the philosophical premise behind the principle of enumerated powers.

C. The Principle Of A Limited Government Of Enumerated Powers Is Explicitly Included In The Articles Of Confederation.

In the years following the Revolution, the principle of a limited government of enumerated powers continued to be foundational to the American form of government. The Articles of Confederation provided that, "Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." Articles of Confederation, art. II. With that firm endorsement of the concept of enumerated powers as its guiding principle, the Articles proceed to list the enumerated powers delegated to the federal government. *See* Articles of Confederation, art. IX. Thus, the Founders, keenly aware of the dangers that resulted from a tyrannical English government, were careful to create a limited government possessing only a few enumerated powers.

The Articles of Confederation, however, were inadequate because, *inter alia*, they did not sufficiently limit the power of *state* governments. States had become engaged in the practice of enacting protectionist legislation to benefit local industries and businesses.

See, e.g., *Dept. of Revenue of Kentucky v. Davis*, 553 U.S. 328, 363-64 (2008) (Kennedy, J., dissenting). An attempt was made, unsuccessfully, in 1784 to amend the Articles to create a uniform rule of navigation among the States, in order to prevent the parochialism that had thus far pervaded interstate commerce. Melvin L. Urofsky & Paul Finkelman, *A March of Liberty* 85 (2d ed. 2002). Ultimately, commerce was made regular among the several States by the insertion of the Commerce Clause in the Constitution. *See, e.g.*, *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (citing *The Federalist No. 22*, at 143-145 (Alexander Hamilton) (C. Rossiter ed., 1961)). The Commerce Clause fulfilled the Founders' desire to ensure free trade amongst the States, unrestrained by governmental biases, prejudices, or regulations. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994) ("The 'negative' aspect of the Commerce Clause was considered the more important by the 'father of the Constitution,' James Madison."). It is upon that clause that the federal government purports to rest the Individual Mandate, 42 U.S.C.A. § 18091(a), but even the mighty Commerce Clause cannot carry the burden that the federal government would have it shoulder.

D. The Principle Of A Limited Government Of Enumerated Powers Is Enshrined In The Constitution.

1. The Constitutional Convention proposed a federal government of enumerated powers.

"The constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers. This is apparent . . . from the history of the proceedings of the convention, which framed it. . . ." Joseph Story, 2 *Commentaries on the Constitution of the United States* § 906 (1833) (hereinafter "*Commentaries*") *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_1s28.html. At the outset of the Constitutional Convention, James Madison expressed his desire for a national government of explicitly enumerated powers, though he was uncertain whether such an enumeration could be accomplished. 1 *The Records of the Federal Convention of 1787* 53 (Max Farrand ed., Yale University Press (1911)) (hereinafter "*Convention Records*"), *available at* http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1785. Other delegates to the Convention, though not all, similarly expressed support for an enumeration of powers. *Id.*

After a month of debate on a wide range of issues, the delegates to the Convention appointed a committee "for the purpose of reporting a Constitution conformably to the Proceedings aforesaid" so that, going forward, the delegates would have one tangible

document on which to debate. 2 *Convention Records* 85. This Committee of Detail began its work with a broad, general sketch of the legislative branch provided to it by the Convention:

> Resolved[.] That the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation; and moreover to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.

1 *Convention Records* 53.

After nearly two weeks of work, the Committee of Detail presented its final document to the Convention as a whole. William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. Pa. J. Const. L. 901, 993 (2008). The document that emerged reflected the predominate desire, expressed by Madison, for a specific enumeration of powers. *Id.* at 986-93. Importantly, once the Committee of Detail's final draft was presented to the Convention, none of the delegates questioned the *principle* that the national government should be limited and comprised solely of defined, enumerated powers. *Id.* at 994. Eighteen specifically enumerated powers were proposed for the national legislature by the Committee of Detail, including the authority "To regulate commerce (both foreign & domestic)." 2 *Convention Records* 143. Ultimately, most of the proposed enumerated powers were accepted

and the commerce power was limited: "To regulate commerce with foreign nations, and among the several States; and with the Indian tribes." *Id.* at 569; U.S. Const. art. I, § 8, cl. 3.

2. The structure of the Constitution explicitly creates a federal government of enumerated powers.

This principle of a limited federal government comprised of defined, enumerated powers is express in the structure of the Constitution. Unlike Article II of the Constitution, which begins, "The executive Power shall be vested in a President of the United States of America," and unlike Article III of the Constitution, which begins, "The judicial Power of the United States, shall be vested in one supreme Court . . . ," Article I of the Constitution begins, "All legislative Powers *herein granted* shall be vested in a Congress." U.S. Const. art. I-III (emphasis added). In so doing, the Founders expressly limited Congress's power to only those powers "herein granted" and enumerated in the Constitution. *See United States v. Ho*, 311 F.3d 589, 596 (5th Cir. 2002) ("The Constitution creates a federal government of limited and enumerated powers, and in particular a Congress of limited and enumerated powers. The Article I Vesting Clause confirms this proposition, vesting in Congress '[a]ll legislative powers herein granted.'" (citations omitted)); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 n.9 (1995) (explaining that the Founders of the Constitution were keenly aware of the

doctrine of *expressio unius est exclusio alterius* (i.e., the enumeration of some excludes all others)).

The contrast between the plenary powers of the President to enforce the laws and the limited powers of Congress to enact the laws is perhaps most stark. The Constitution takes two diametrically opposite approaches for each branch: While the President has plenary executive authority that is limited by the Constitution, the Congress has only those specific powers granted by the Constitution. John Yoo, *Unitary, Executive, or Both?*, 76 U. Chi. L. Rev. 1935, 1938 (2009) ("Article II, §1's Vesting Clause grants all of the federal executive power to the president alone, subject only to narrow, explicit exceptions in the text itself."). Indeed, the President's near-exclusive authority over foreign policy decisions is a stark example of the breadth of this inherent executive power. Even though the President's power to conduct foreign affairs is textually limited to submitting treaties to the Senate for its approval, "an implicit executive authority to set and conduct foreign policy on behalf of the nation" has been recognized since the founding. *Id.* at 1938 n.11 (citing Alexander Hamilton, *Pacificus No 1* (June 29, 1793), *in* Harold C. Syrett, ed., 15 *The Papers of Alexander Hamilton* 33, 39 (Columbia 1969)). Congress has no such "implicit" authority. Even the Judiciary is incapable of interceding in the President's foreign policy decisions. *See Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring). The only Congressional power that begins to approach the plenary executive authority of the

President is the Necessary and Proper Clause, but even this broad grant of power is constrained by the enumerated powers contained in Article I, section 8. *See, e.g.*, *Linder v. United States*, 268 U.S. 5, 18 (1925) ("Obviously, direct control of medical practice in the states is beyond the power of the federal government. Incidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate and unnecessary to reasonable enforcement of a revenue measure.").

3. The doctrine of enumerated powers was embraced during the ratification debates.

Following the Constitutional Convention, even federalists promoting the ratification of the Constitution, such as Alexander Hamilton, suggested that the Constitution should be rejected "if it would enable the Federal Government to ' . . . penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals.'" *United States v. Lopez*, 514 U.S. 549, 592 (1995) (Thomas, J., concurring) (quoting 2 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 267-68 (J. Elliot ed. 1836) (A. Hamilton at New York Convention)). But Hamilton dismissed this concern because "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States." *The Federalist No. 32*, *supra*, at 166 (Alexander Hamilton) (emphasis in original). As James

Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined." *The Federalist No. 45*, *supra*, at 260 (James Madison). Madison further insisted that "the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." *The Federalist No. 39*, *supra*, at 213 (James Madison) (emphasis in original).

Echoing Hamilton and Madison, Oliver Ellsworth, at the Connecticut Convention, explained that, "If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges . . . will declare it to be void." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 196 (Jonathan Elliot ed., 1836) (1787) (hereinafter "*Convention Debates*"), *available at* http://memory.loc.gov/ammem/amlaw/lwed.html. Likewise, in the North Carolina Convention, Archibald Maclain explained that "'[t]he powers of Congress are limited and enumerated. . . . It is as plain a thing as possibly can be, that Congress can have no power but what we expressly give them.'" 4 *Convention Debates* 140-41. James Wilson succinctly expressed the principle of enumerated powers when, at the Pennsylvania ratifying convention, he explained that "the supreme power . . . resides in the PEOPLE, as the fountain of government. . . . They can delegate it in such proportions, to such bodies, on such terms, and under such

limitations, as they think proper." James Wilson, *Speech of Dec. 4, 1787, available at* http://press-pubs.uchicago.edu/founders/documents/v1ch2s14.html. Likewise, a Virginia newspaper supporting ratification declared that "'should Congress attempt to exercise any powers which are not expressly delegated to them, their acts would be considered as void, and disregarded.'" Lash, *supra*, at 1595 (quoting Alexander White, *To the Citizens of Virginia*, Winchester Va. Gazette, Feb. 29, 1788, *reprinted in* 8 *The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States* 438 (John P. Kaminski & Gaspare J. Saladino eds., 1988)).

Even the anti-federalist "Federal Farmer," who was skeptical of a consolidation of power in a federal government, acknowledged in 1788 that one of the proposed Constitution's virtues was its creation of a federal government that would possess only specific, enumerated powers.

> The supreme power is undoubtedly in the people, and it is a principle well established in my mind, that they reserve all powers not expressly delegated by them to those who govern; this is as true in forming a state as in forming a federal government. . . . [W]e might advantageously enumerate the powers given, and then in general words, according to the mode adopted in the 2d art. of the confederation, declare all powers, rights and privileges, are reserved, which are not explicitly and expressly given up.

Letter from the Federal Farmer No. 16 (Jan. 20, 1788) *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch14s32.html.

After the ratification debate ended, Madison continued to champion the constitutional principle of enumerated powers. For example, in 1791, Madison clarified that "'[n]o power . . . not enumerated could be inferred from the general nature of Government. Had the power of making treaties, for example, been omitted, however necessary it might have been, the defect could only have been lamented or supplied by an amendment to the Constitution.'" 2 *Annals of Congress* 1950 (1791) (Joseph Gales ed., 1834), *available at* http://memory.loc.gov/ammem/amlaw/lwaclink.html) (hereinafter "*Annals of Congress*"). In 1792, during the Second Congress, Madison observed that the original meaning of the Constitution was uniformly understood to definitively limit the federal government's powers:

> I, sir, have always conceived – I believe those who proposed the Constitution conceived – it is still more fully known, and more material to observe, that those who ratified the Constitution conceived – that this is not an indefinite government, deriving its powers from the general terms prefixed to the specified powers – but a limited government, tied down to the specified powers, which explain and define the general terms.

3 *Annals of Congress* 386 (1792). Likewise, in 1794, Madison reaffirmed the connection between personal

sovereignty and limited government: "When the people have formed a Constitution, they retain those rights which they have not expressly delegated." 4 *Annals of Congress* 934 (1794). Thus, the doctrine of enumerated powers was embraced before, during, and after ratification of the proposed Constitution.

4. The Bill of Rights demonstrates the scope and historical depth of the doctrine of enumerated powers.

So widely accepted was the principle of enumerated powers amongst the Founders that the idea of a Bill of Rights had "never struck the mind of any member of the late convention till . . . within three days of the dissolution of that body, and even then, of so little account was the idea, that it passed off in a short conversation, without introducing a formal debate, or assuming the shape of a motion." James Wilson and John Smilie, *James Wilson and John Smilie Debate the Need for a Bill of Rights* (Nov. 28, 1787) *in The Debate on the Constitution: Part One: September 1787 to February 1788* 807 (Bernard Bailyn ed., 1993). The initial rejection of a Bill of Rights was not a repudiation of individual rights in favor of a national government of plenary powers. Instead, many delegates opposed the Bill of Rights

because of its potentially negative implication for the enumerated powers doctrine.[4]

James Wilson, one of the five members of the Committee of Detail at the Constitutional Convention, captured this concern during the Pennsylvania ratifying convention by pointing out that inherent government authority could be implied from an enumeration of individual rights:

> [I]n a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent. In all societies, there are many powers and rights, which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated

---

[4] This was distinctly different from what existed in England:

> Bills of rights had possessed a relevance in England where there is a king and a House of Lords, quite distinct with respect to power and interest from the rest of the people. Since the English kings had claimed all power and jurisdiction, bills of rights like the Magna Carta had been considered by them as grants to the people. A bill of rights was used in England to limit the king's prerogative; he could trample on the liberties of the people in every case which was not within the restraint of the bill of rights.

Gordon S. Wood, *The Creation of the American Republic, 1776-1787* 539 (University of North Carolina Press 1969) (internal quotations omitted).

> is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete.

2 *Convention Debates* 436. At the North Carolina ratifying convention, James Iredell, who would later become one of the original justices of this Court, echoed Wilson's concerns:

> [I]t would not only be useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one. Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.

4 *Convention Debates* 167; *see also* Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. Cin. L. Rev. 49, 85-86 (1992) ("[S]ince the new central government was a government of limited and enumerated powers, any attempt to enumerate rights which were immune from the exercise of those powers carried with it an unwanted implication. . . ."). Hamilton took a similarly dim view of an enumeration of rights as unnecessary to a government of enumerated powers: "a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is

merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns." *The Federalist No. 84*, *supra*, at 481 (Alexander Hamilton).

The anti-federalist Federal Farmer opposed both the Constitution and a bill of rights, on the basis that either would represent an affront to the authority of States and the rights of the people:

> When we particularly enumerate the powers given, we ought either carefully to enumerate the rights reserved, or be totally silent about them; we must either particularly enumerate both, or else suppose the particular enumeration of the powers given adequately draws the line between them and the rights reserved, particularly to enumerate the former and not the latter, I think most advisable: however, as men appear generally to have their doubts about these silent reservations, we might advantageously enumerate the powers given, and then in general words, according to the mode adopted in the 2d art. of the confederation, declare all powers, rights and privileges, are reserved, which are not explicitly and expressly given up.

Letter from the Federal Farmer No. 16, *supra*. The anti-federalists' wish for a general reservation of authority was ultimately embodied in the Ninth and Tenth Amendments. U.S. Const. amend. IX, X. These provisions were included in the Bill of Rights

specifically to address the concerns expressed by those quoted above, and others, that the doctrine of enumerated powers might be eroded by a Bill of Rights. *See Griswold v. Connecticut*, 381 U.S. 479, 488-92 (1965) (Goldberg, J., concurring). In presenting the proposed Bill of Rights, Madison called the Congress's attention to the salutary affect of the Ninth Amendment on the doctrine of enumerated powers:

> It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [the Ninth Amendment].

1 *Annals of Congress* 456 (1789); *see also Griswold*, 381 U.S. at 488-90 (Goldberg, J., concurring). The documentary evidence therefore demonstrates that the change to the Constitution wrought by the Bill of Rights did nothing to diminish the doctrine of enumerated powers. Indeed, even the advocates of the Bill of Rights, such as Madison and the Federal Farmer, were careful to protect and defend the notion

that the federal government would continue to be one of only limited enumerated powers.

5. This Court has consistently recognized that the federal government possesses only limited, enumerated powers.

This Court's precedents have established conclusively that the Constitution creates a federal government of limited, enumerated powers. First, in the seminal case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803), Chief Justice Marshall explained: "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." Later, in 1819, this Court again stated that "[t]his government is acknowledged by all, to be one of enumerated powers." *M'Culloch v. Maryland*, 17 U.S. 316, 405 (1819). Five years later, this Court again explained that the Constitution "contains an enumeration of powers expressly granted by the people to their government." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187 (1824). Indeed, "the constant declaration of this court from the beginning is that this government is one of enumerated powers." *Kansas v. Colorado*, 206 U.S. 46, 87 (1907).

More recent decisions reach the same conclusion. In *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997), this Court acknowledged, "Under our Constitution, the Federal Government is one of enumerated powers."

Likewise, in *United States v. Lopez*, 514 U.S. 549, 552 (1995), this Court reaffirmed that:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. *See* Art. I, § 8. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *The Federalist No. 45*, pp. 292-293 (C. Rossiter ed., 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Ibid.*

Again, in 2000, this Court explained that, "[w]ith its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate." *United States v. Morrison*, 529 U.S. 598, 619 n.8 (2000). Therefore, this Court held that "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." *Id.* at 607.

Ultimately, the principle that the federal government is one of limited, enumerated powers is so well documented in the history of the Colonies, so thoroughly and painstakingly set forth in the Articles of Confederation, the Constitution, and the Bill of Rights, and so thoughtfully protected by this Court, that one cannot seriously argue that it is not a bedrock principle – perhaps the single most important principle – enshrined in the Constitution.

II. THE INDIVIDUAL MANDATE OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT IS UNCONSTITUTIONAL; OTHERWISE, THE FEDERAL GOVERNMENT WOULD CEASE TO BE A GOVERNMENT OF ENUMERATED POWERS.

The plain language of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, even with help from the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, does not empower Congress to regulate any and all forms of human activity – *or inactivity*. *Morrison*, 529 U.S. at 607-08 ("[E]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits."). The power "[t]o regulate commerce," is the power to direct how commercial exchanges take place, not the power to mandate that certain commercial exchanges happen. U.S. Const. art. I, § 8, cl. 3; *see* Samuel Johnson, 2 *A Dictionary of the English Language* (J.F. Rivington, et al., 6th ed. 1785) (Defining "to regulate" as "1. To adjust by rule or method. . . .

2. To direct."). Therefore, while Congress may regulate certain economic *activities* under the Commerce Clause, "a decision not to purchase a product, such as health insurance, is not an economic activity. It is a virtual state of repose – or idleness – the converse of activity." *Virginia ex rel. Cuccinelli*, 702 F. Supp. 2d at 610. In fact, as the District Court in this case correctly explained, the Individual Mandate marks the first time in history that Congress has regulated economic *inactivity* under the Commerce Clause: "Never before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive and residing in the United States." *Florida ex rel. Bondi*, 780 F. Supp. 2d at 1284. "It would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause." *Id.* at 1286. The nonpartisan Congressional Budget Office ("CBO") has likewise opined that such federal action is unprecedented:

> A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States. An Individual Mandate would have two features that, in combination, would make it unique. First, it would impose a duty on individuals as members of society. Second, it would require people to purchase a specific service that would be heavily regulated by the federal government.

CBO, The Budgetary Treatment of an Individual Mandate to Buy Health Insurance, 1 (1994), *available at* http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf. Yet, Congress justified the Individual Mandate by reference to the Commerce Clause. 42 U.S.C.A. § 18091(a). Under this interpretation of the Commerce Clause, the federal government would no longer be limited to its enumerated powers; the centuries-old doctrine upon which the federal government is based would be eviscerated.

A. If The Individual Mandate Were A Valid Exercise Of The Commerce Power, The Commerce Clause Would Render The Other Enumerated Powers Superfluous.

Congress's interpretation of the Commerce Clause, as reflected in the Individual Mandate, effectively swallows up all the other enumerated powers in the Constitution, resulting in one comprehensive governmental power. Indeed, if the Commerce Clause empowers Congress to mandate that citizens enter into a specific commercial transaction, many of Congress's other enumerated powers under Article I, section 8, would be wholly superfluous:

> [T]here is no need for the Constitution to specify that Congress may enact bankruptcy laws, cl. 4, or coin money and fix the standard of weights and measures, cl. 5, or punish counterfeiters of United States coin and securities, cl. 6. Likewise, Congress would not need the separate authority to establish post

> offices and post roads, cl. 7, or to grant patents and copyrights, cl. 8, or to "punish Piracies and Felonies committed on the high Seas," cl. 10. It might not even need the power to raise and support an Army and Navy, cls. 12 and 13, for fewer people would engage in commercial shipping if they thought that a foreign power could expropriate their property with ease. . . . An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct.

Lopez, 514 U.S. at 588-89 (Thomas, J., concurring); *cf. United States v. Santos*, 553 U.S. 507, 519 n.6 (2008) (discussing the often-cited canon of statutory construction that statutory text should be interpreted such that no provision is rendered superfluous).

"In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. 540, 571 (1840). The power "to regulate commerce" in the Commerce Clause has a specific meaning, tailored to the limited role of the federal government envisioned by the Founders. It does not include the power to mandate that commerce occur.

When the Constitution was written, "to regulate" was defined by Samuel Johnson's authoritative *A Dictionary of the English Language* as "To adjust by rule or method" or, secondarily, "To direct." Johnson, *supra*, vol. 2. This was a common understanding of the

phrase, even years after the Constitution was written. Writing about the original meaning of the Commerce Clause in 1833, Justice Story commented that "[t]he power is to regulate; that is, to prescribe the rule, by which commerce is to be governed." Story, 3 *Commentaries* § 1057.

The Federal government argues that "there is no textual support in the Commerce Clause for [an] 'inactivity' limitation," emphasizing Johnson's secondary definition of "to regulate," i.e., "to direct." Petitioners' Brief on the Merits at 48; *but see* Respondents' Brief on the Merits at 20. The D.C. Circuit accepted this argument blindly. *Seven-Sky*, 661 F.3d at 16. Yet, that second definition, "To direct," is itself defined as "3. To regulate; to adjust. . . . 4. To prescribe certain measure; to mark out a certain course . . . 5. To order; to command." Johnson, *supra*, vol. 1. Although the last definition of "To direct" superficially supports the constitutional authority for the Individual Mandate, Johnson specifically notes that "to *direct* is a softer term than to *command*." *Id.* (emphasis in original). Thus, any link between the power encompassed in the grant of authority "to regulate commerce" in the Commerce Clause and the Individual Mandate to engage in economic activity is tenuous, at best. Any link between the Individual Mandate and the original meaning of the Constitution relies on stretching the definition of the term "to regulate" past its breaking point.

The purported link between the Individual Mandate and the Constitution disappears altogether when

the Commerce Clause is taken in context. *See* Respondents' Brief on the Merits at 19-20. The Constitution uses the phrase "regulate" or "regulation," two other times in Article I, section 8.

The Constitution gives Congress the power "To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures" and "To make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 5 & 14. The text of the Constitution draws a specific distinction between the power to regulate the value of money and the power to coin money. Similarly, the power to make rules for the regulation of the land and naval forces is different from the power "To raise and support Armies" and "To provide and maintain a Navy." U.S. Const. art. I, § 8, cl. 12-13. If the meaning of "to regulate commerce" actually supported the Individual Mandate to engage in commerce, the Constitution would not have drawn these distinctions. Instead, the power to regulate the value of money would necessarily include the power to coin money and the power to make rules for the regulation of the land and naval forces would inherently include the power to raise an army and navy.

Because the Constitution draws a distinction between Congress's authority to call something into existence and its authority to regulate those things already existing, the power to regulate only applies to something that is already in existence. The power to create or mandate something from nothing is an

entirely different power; e.g., the power to "coin," "raise," or "provide."

Indeed, James Madison highlighted the fact that Congress's regulatory authority over commerce would require knowledge of commerce already underway:

> How can foreign trade be properly regulated by uniform laws, without some acquaintance with the commerce, the ports, the usages, and the regulations of the different States? How can the trade between the different States be duly regulated, without some knowledge of their relative situations in these and other respects? How can taxes be judiciously imposed and effectually collected, if they be not accommodated to the different laws and local circumstances relating to these objects in the different States? How can uniform regulations for the militia be duly provided, without a similar knowledge of many internal circumstances by which the States are distinguished from each other?

The Federalist No. 53, *supra*, at 301 (James Madison). Throughout this passage, Madison referred consistently to regulating something that is already in existence, never about using regulation to mandate that citizens undertake a certain activity. This is consistent with the 18th-century dictionary definition of "to regulate," Justice Story's understanding of "to regulate," and the other uses of the term in Article I, section 8.

As a result, economic activity must already be underway before Congress can exercise its power under the Commerce Clause to regulate it. It is impossible to prescribe rules for or to regulate inactivity. Therefore, the Congress's reliance on the Commerce Clause for the authority to mandate the purchase of health insurance products is paradoxical and unconstitutional.

B. If The Individual Mandate Were A Valid Exercise Of The Commerce Power, The Principle Of A Limited Federal Government Of Enumerated Powers Would Be Eviscerated.

Neither the Commerce Clause standing alone, nor in conjunction with the Necessary and Proper Clause, can be interpreted to justify the Individual Mandate and still remain consistent with the doctrine of enumerated powers. As Justice Story noted, the Necessary and Proper Clause cannot make an unconstitutional law constitutional simply because it is convenient or expedient:

> What, then, is the true constitutional sense of the words "necessary and proper" in this clause? It has been insisted by the advocates of a rigid interpretation, that the word "necessary" is here used in its close and most intense meaning; so that it is equivalent to *absolutely and indispensably necessary*. It has been said, that the constitution allows only the means, which are *necessary*; not those,

> which are merely *convenient* for effecting the enumerated powers. If such a latitude of construction be given to this phrase, as to give any non-enumerated power, it will go far to give every one; for there is no one, which ingenuity might not torture into a convenience in some way or other to some one of so long a list of enumerated powers. It would swallow up all the delegated powers, and reduce the whole to one phrase. Therefore it is, that the constitution has restrained them to the *necessary* means; that is to say, to those means, *without which the grant of the power would be nugatory*. A little difference in the degree of convenience cannot constitute the necessity, which the constitution refers to.

Story, 3 *Commentaries* § 1239.

As the Eleventh Circuit, the U.S. District Court for the Northern District of Florida, and the U.S. District Court for the Eastern District of Virginia have correctly held, if the individual mandate were to be upheld as a lawful exercise of the Commerce Clause and the Necessary and Proper Clause, the limited federal government of enumerated powers would be transformed into an omnipotent government of plenary powers: "If Congress can penalize a passive individual for failing to engage in commerce, the enumeration of powers in the Constitution would have been in vain for it would be 'difficult to perceive any limitation on federal power' . . . and we would have a Constitution in name only." *Florida ex rel. Bondi*, 780 F. Supp. 2d at 1286 (quoting *Lopez*, 514 U.S. at 564);

Florida ex rel. Atty. Gen., 648 F.3d at 1311-12; *Virginia ex rel. Cuccinelli*, 728 F. Supp. 2d at 782; *see also United States v. Patton*, 451 F.3d 615 622-23 (10th Cir. 2006) ("If we entertain too expansive an understanding of effects, the Constitution's enumeration of powers becomes meaningless and federal power becomes effectively limitless."). Indeed, if Congress is empowered to regulate all spheres of activity – or inactivity – in an individual's life, except those explicitly protected in the Bill of Rights, the doctrine of enumerated powers, upon which the United States was founded, would cease to exist. Under such a scheme, the Founder's vision of a republic flourishing under the consent of the governed, constrained in its authority to those means specifically granted by those sovereign individuals, as the Declaration of Independence and the Constitution provide, would cease to exist. Instead, the doctrine of enumerated powers would be turned on its head, and the inalienable rights of life, liberty, and the pursuit of happiness would exist solely as revocable licenses from the federal government. *Gonzales v. Raich*, 545 U.S. 1, 47 (2005) (O'Connor, J., dissenting) ("[I]f the Court always defers to Congress . . . , little may be left to the notion of enumerated powers."). If the Individual Mandate were constitutional, the centuries old doctrine of enumerated powers, the very foundation of the Nation, would be destroyed.

CONCLUSION

For the foregoing reasons, this Court should affirm the Eleventh Circuit's ruling that the Individual Mandate is unconstitutional.

Respectfully submitted:

JAMES M. MANLEY
JEFFREY W. MCCOY
STEVEN J. LECHNER*
*Counsel of Record
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
jmanley@mountainstateslegal.com
jmccoy@mountainstateslegal.com
lechner@mountainstateslegal.com

Attorneys for Amicus Curiae

February 10, 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

FILED
JAN 11 2012
OFFICE OF THE CLERK

No. 11-398

IN THE
Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners,

v.

STATE OF FLORIDA, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AMERICAN CIVIL LIBERTIES UNION, AND THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS IN SUPPORT OF PETITIONERS (Minimum Coverage Provision)

JOHN PAYTON
Director-Counsel
DEBO P. ADEGBILE
ELISE C. BODDIE
Counsel of Record
RENIKA C. MOORE
RIA A. TABACCO
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
99 Hudson Street, 16th Floor
New York, NY 10013
(212) 965-2200
eboddie@naacpldf.org

JOSHUA CIVIN
NAACP LEGAL DEFENSE
& EDUCATIONAL FUND, INC.
1444 I Street, NW, 10th Floor
Washington, DC 20005

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

LISA M. BORNSTEIN
LEADERSHIP CONFERENCE
ON CIVIL AND HUMAN RIGHTS
1629 K Street, NW
Washington, DC 20006

Library of Congress

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTERESTS OF AMICI 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. The minimum coverage provision enhances the ability of individuals to participate in the economic, social, and civic life of our nation, thereby advancing equal opportunity and personal liberty 5

A. The uninsured are more likely to experience conditions that inhibit the quality of life. 6

B. The minimum coverage provision promotes equal opportunity. 9

C. The ability to self-insure is not analogous to any liberty interests recognized by this Court 12

1. The provision imposes minimal burdens on liberty 14

2. Under the Court's Commerce Clause jurisprudence, individuals must sometimes yield economic liberty to advance the collective good. 16

II. The Necessary and Proper Clause further supports the constitutionality of the minimum coverage provision 21

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Bond v. United States, 131 S. Ct. 2355 (2011) 13

Bryan v. Koch, 627 F.2d 612 (2d Cir. 1980) 1

Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990) 14-15

Delaware v. Prouse, 440 U.S. 648 (1979) 15-16

Employment Division v. Smith, 494 U.S. 872 (1990) 20

Garcia v. Vanguard Car Rental USA, Inc., 540 F.3d 1242 (11th Cir. 2008) 16

Gonzales v. Raich, 545 U.S. 1 (2005)..... 18-19, 22

Griswold v. Connecticut, 381 U.S. 479 (1965)..... 15

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 11

Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, No. 10-553, 556 U.S. ___ (2012) 20

Jacobson v. Massachusetts, 197 U.S. 11 (1905) 15

Katzenbach v. McClung, 379 U.S. 294 (1964) 11

Lawrence v. Texas, 539 U.S. 558 (2003)..... 11, 15

Linton v. Commissioner of Health & Environment, 65 F.3d 508 (6th Cir. 1995)..... 1

Lochner v. New York, 198 U.S. 45 (1905)..... 13

McCulloch v. Maryland, 4 Wheat. 316 (1819) 21

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 15

Mussington v. St. Luke's-Roosevelt Hospital Center, 824 F. Supp. 427 (S.D.N.Y. 1993) 1

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 14, 19

Ophthalmic Mutual Insurance Co. v. Musser, 143 F.3d 1062 (7th Cir. 1998) 16

Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007) 11

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)..... 15

Rackley v. Board of Trustees of Orangeburg Regional Hospital, 238 F. Supp. 512 (E.D.S.C. 1965) 1

Rochin v. California, 342 U.S. 165 (1952)..... 15

Sabri v. United States, 541 U.S. 600 (2004)..... 23

Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011)..... 22

Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963) 1

Thomas More Law Center v. Obama, 651 F.3d 529 (6th Cir. 2011)..... 16, 18

United States v. Comstock, 130 S. Ct. 1949 (2010) 21, 23-24

United States v. Darby, 312 U.S. 100 (1941)..... 19

United States v. Lee, 455 U.S. 252 (1982) 19-20

United States v. Lopez, 514 U.S. 549 (1995) 23

United States v. Wrightwood Dairy Co., 315

U.S. 110 (1942) 23

Washington v. Glucksberg, 521 U.S. 702 (1997) 14-15

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) 13-14

Wickard v. Filburn, 317 U.S. 111 (1942)..... 16-19

Federal Statutes

Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) 3

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010)..... 3

26 U.S.C. § 5000A 4

26 U.S.C. § 5000A(f)(1) 14

42 U.S.C. § 300gg 21

42 U.S.C. § 300gg-1 9

42 U.S.C. § 300gg-1(a)..... 21

42 U.S.C. § 300gg-3(a)..... 21

42 U.S.C. § 18091(a)(2)(A) 4

42 U.S.C. § 18091(a)(2)(E) 8

42 U.S.C. § 18091(a)(2)(F) 8-9, 22

42 U.S.C. § 18091(a)(2)(G) 7

42 U.S.C. § 18091(a)(2)(I) 9, 22

Court Filings

Consent Decree, *Terry v. Methodist Hospital of Gary*, Nos. H-76-373, H-77-154 (N.D. Ind. June 8, 1979) 1

Other Authorities

James A. Baker III Institute for Public Policy of Rice University, *The Economic Impact of Uninsured Children on America* (Houston, Tex.), June 2009. 7-8

Robin A. Cohen et al., *Health Insurance Coverage: Early Release of Estimates from the National Health Interview Survey, 2010* (National Center for Health Statistics), June 2011 7

Jack Hadley, *Sicker and Poorer: The Consequences of Being Uninsured* (Kaiser Family Foundation, Wash., D.C.), May 10, 2002 7

Catherine Hoffman & Julia Paradise, *Health Insurance and Access to Health in the United States*, 1136 Annals N.Y. Acad. Sci. 149 (2008) 8

Institute of Medicine, Committee on the Consequences of Uninsurance, *Coverage Matters: Insurance and Health Care* (2001) 10-11

Institute of Medicine, Committee on the Consequences of Uninsurance, *Health Insurance Is a Family Matter* (2002) 6-8

Kaiser Commission on Medicaid and the Uninsured, *The Uninsured: A Primer, Key Facts About Americans Without Health In-*

surance (Kaiser Family Foundation, Wash., D.C.), Oct. 2007 ..... 6-7, 10

Neil S. Siegel, *Four Constitutional Limits that the Minimum Coverage Provision Respects*, 27 Const. Comment. 591 (2011) 4

Kristen Suthers, *Evaluating the Economic Causes and Consequences of Racial and Ethnic Health Disparities* (American Public Health Association, Wash., D.C.), Nov. 2008 ..... 8, 10

U.N. Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding Observations of the Committee on the Elimination of Racial Discrimination, United States of America (May 2, 2008), *available at* http://www.state.gov/documents/organization/107361.pdf (last visited Jan. 10, 2012) 10

INTERESTS OF AMICI[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is a non-profit legal organization that for more than seven decades has helped African Americans secure their civil and constitutional rights. Throughout its history, LDF has worked to support and provide equal treatment and high-quality medical services, care, and opportunities to African Americans. *E.g.*, *Linton v. Comm'r of Health & Env't*, 65 F.3d 508 (6th Cir. 1995) (preservation of Medicaid-certified hospital and nursing home beds to prevent eviction of patients in favor of admitting more remunerative private-pay individuals); *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980) (challenge to closure of municipal hospital serving inner-city residents); *Simkins v. Moses H. Cone Mem'l Hosp.*, 323 F.2d 959 (4th Cir. 1963) (admission of African-American physician to hospital staff); *Mussington v. St. Luke's-Roosevelt Hosp. Ctr.*, 824 F. Supp. 427 (S.D.N.Y. 1993) (relocation of services from inner-city branch of merged hospital entity); *Rackley v. Bd. of Trs. of Orangeburg Reg'l Hosp.*, 238 F. Supp. 512 (E.D.S.C. 1965) (desegregation of hospital wards); Consent Decree, *Terry v. Methodist Hosp. of Gary*, Nos. H-76-373, H-77-154 (N.D. Ind. June 8, 1979) (planned relocation of urban hospital services from inner-city community). LDF has a substantial inter-

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

est in this case because of its continuing commitment to promoting opportunity for African Americans, including access to affordable health insurance and health care.

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan, nonprofit organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since it was founded in 1920, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as amicus curiae. The ACLU has a substantial interest in the proper resolution of this case because of its potential impact on the ability of millions of uninsured Americans to participate more fully in the economic, political, and social life of the Nation.

The Leadership Conference on Civil and Human Rights is a diverse coalition of more than 200 national organizations charged with promoting and protecting the rights of all persons in the United States. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. The Leadership Conference works to build an America that is as good as its ideals, and toward this end, supports the authority of Congress to enact legislation, such as the Patient Protection and Affordable Care Act, which provides for the general welfare of the nation. Access to quality health care is a fundamental civil and human right, but the current system of health care in the United States denies this right to the

most vulnerable segments of society, including low-income families, people of color, women, seniors, and people with disabilities. By addressing the huge disparities in both access to and quality of care, the Patient Protection and Affordable Care Act takes a momentous step toward ensuring that all Americans can benefit from affordable, high-quality health care.

SUMMARY OF THE ARGUMENT

In our modern, integrated, and dynamic health care system, personal choices have consequences that extend far beyond the individual. The economic decision to forego health insurance, therefore, is not neutral. Rather, such a decision, when aggregated across our national population, both limits the personal liberty of others to choose health insurance and has the effect of reinforcing harsh economic and social disparities that threaten our country's democratic foundation and the cohesion of our society.

The minimum essential coverage provision of the Patient Protection and Affordable Care Act ("ACA" or "the Affordable Care Act"), Pub. L. No. 111-148, 124 Stat. 119 (2010),[2] promotes opportunity for millions of uninsured persons to participate in the life of our nation. It achieves this objective by making health insurance and, ultimately, health care itself more affordable. This, in turn, alleviates the severe financial burdens that fall on the uninsured, which have a disproportionate negative impact on disadvantaged populations. By reducing the exclusionary, harmful effects of the current system, the minimum

---

[2] As amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

coverage provision, 26 U.S.C. § 5000A – the cornerstone of ACA – enables covered persons to lead healthier, freer, and more productive lives, thereby advancing the twin goals of liberty and equal opportunity. Respondents, therefore, go too far in suggesting that the provision trenches on individual liberty in ways that require this Court to curtail federal power.

Amici support the position of the United States that the Eleventh Circuit erred in its analysis of Congress's power to enact the minimum coverage provision under both the Commerce and Necessary and Proper Clauses. Pet. Br. 17-20. Congress acted well within its constitutional authority in seeking to regulate "'economic and financial decisions about how and when health care is paid for, and when health insurance is purchased"[3] in order to prevent the severe economic and social upheaval that occurs when significant portions of the national population are uninsured.[4] *See* 42 U.S.C. § 18091(a)(2)(A).

Amici write separately to address the Eleventh Circuit's mischaracterization of the liberty interests that are at stake in this case and to emphasize the positive role the minimum coverage provision plays in advancing equal opportunity. Amici additionally demonstrate that the Necessary and Proper Clause

---

[3] *See* Neil S. Siegel, *Four Constitutional Limits that the Minimum Coverage Provision Respects*, 27 Const. Comment. 591, 596-99 (2011) (describing economic nature of decision to self-insure).

[4] In 2009, the number of uninsured persons totaled approximately 50 million. Pet. Br. 7.

supports Congress's authority to enact the minimum coverage provision.

ARGUMENT

I. The minimum coverage provision enhances the ability of individuals to participate in the economic, social, and civic life of our nation, thereby advancing equal opportunity and personal liberty.

Across our country, uninsured persons experience significant hardship that has a profound cumulative impact on our nation. Because they are less likely to obtain adequate, stable health care, the uninsured suffer many lost opportunities, which depresses both the quality and the longevity of their lives. These burdens are disproportionately borne by racial and ethnic minorities, lower-income persons, and other disadvantaged persons. For many individuals, being uninsured is not a choice, but rather is a *consequence* that is imposed on them due to circumstances largely beyond their control. *See* Pet. Br. 6 ("The coverage gaps [the uninsured] experience result for the most part from the high cost of insurance and employment changes – not a belief that coverage is unnecessary.").

Yet, although they lack steady access to health care, uninsured persons are not completely precluded from using medical services. *Id.* at 7. Unforeseen crises can lead to costly emergency room visits and hospitalizations that, while not covered by the uninsured, are still paid for by the health care system as a whole, eventually leading to higher insurance premiums for everyone. *Id.* at 7-8. By requiring non-exempt individuals to bear some of the

cost of their otherwise uncompensated[5] care, the minimum coverage provision has the effect of lowering the cost of health insurance and making health care more affordable and accessible. It is an essential component of the Affordable Care Act's comprehensive regulatory framework, *id.* at 24-32, that ultimately helps to protect and to improve the lives of uninsured persons and to reduce the severe inequities of our current system.

A. The uninsured are more likely to experience conditions that inhibit the quality of life.

From cradle to grave, lack of insurance can (and often does) result in life-inhibiting and personally catastrophic conditions that threaten the very core of a person's ability to function. Because of the high cost of health care under our current system, the uninsured must often choose between paying directly for health care services and other, basic life necessities. Kaiser Comm'n on Medicaid and the Uninsured, *The Uninsured: A Primer, Key Facts About Americans Without Health Insurance* (hereinafter *Primer on Uninsured*) (Kaiser Family Found., Wash., D.C.), Oct. 2007, at 9. Faced with these difficult tradeoffs, the uninsured are far more likely to accumulate significant debt and to experience the life-altering effects of severe financial hardship. *See* Inst. of Med., Comm. on the Consequences of Uninsurance, *Health Insurance Is a Family Matter* (hereinafter *Family Matter*) 77 (2002). Those who cannot

---

[5] "Uncompensated care" refers to "care received by uninsured patients but not paid for by them or by a third party on their behalf." Pet. Br. 8.

endure the financial burdens of non-covered health care services may simply decide to forego them.

It is unsurprising, therefore, that the uninsured have higher rates of illness, *see Primer on Uninsured* at 7-8, and suffer the effects of lost educational, employment, and other social and civic opportunities. Over time, this lost human capital degrades their lives and isolates them from the rest of the population. As multiple studies show, those without insurance often lead chaotic lives. They are less likely to receive preventative care for treatable illnesses, resulting in serious and even life-threatening conditions. *See Family Matter* at 87-88; Jack Hadley, *Sicker and Poorer: The Consequences of Being Uninsured* (hereinafter *Sicker and Poorer*) (Kaiser Family Found., Wash., D.C.), May 10, 2002, at 5-9. Children with untreated health problems are less likely to attend and to perform well in school. *Family Matter* at 122-24; *Sicker and Poorer* at 15. Being uninsured also correlates with other poor educational outcomes, such as failing to graduate from high school or to enroll in college. *See* Robin A. Cohen et al., *Health Insurance Coverage: Early Release of Estimates from the National Health Interview Survey, 2010* (hereinafter *Health Insurance Coverage*) (Nat'l Ctr. for Health Statistics), June 2011, at 4; *Primer on Uninsured* at 5. The uninsured often amass significant debt as a result of unforeseen medical expenses, leading to a downward, destabilizing financial spiral, including poor credit, *Primer on Uninsured* at 9; bankruptcy, 42 U.S.C. § 18091(a)(2)(G); lost wages; lower annual earnings, *Sicker and Poorer* at 13-14; and unemployment, James A. Baker III Inst. for Public Policy of Rice Univ., *The Economic Impact of*

Uninsured Children on America (Houston, Tex.), June 2009, at 5-6. These consequences are often cumulative and self-perpetuating and can create a vicious cycle of poor health and reduced opportunity that further diminishes the quality of life. *See Family Matter* at 76; *see also* 42 U.S.C. § 18091(a)(2)(E); Catherine Hoffman & Julia Paradise, *Health Insurance and Access to Health in the United States*, 1136 Annals N.Y. Acad. Sci. 149, 150-51 (2008); Kristen Suthers, *Evaluating the Economic Causes and Consequences of Racial and Ethnic Health Disparities* (hereinafter *Racial and Ethnic Disparities*) (Am. Pub. Health Ass'n, Wash., D.C.), Nov. 2008, at 2.

Congress reasonably concluded that lowering the cost of health insurance was vital to the strength and stability of our nation. Pet. App. 216a (Marcus, J., dissenting) ("Congress has wide regulatory latitude to address the extent of financial risk-taking in the health care services market, which in its view is a threat to a national market." (citations and internal quotation marks omitted)). The minimum coverage provision is the cornerstone of Congress's efforts to reduce health insurance costs. It accomplishes this objective by regulating "how health care consumption is financed," Pet. Br. 17, in order to disrupt the cost-shifting that occurs when uninsured individuals use uncompensated care. As noted above, because many uninsured are unable to pay in full for the services they receive, medical providers shift the cost of their uncompensated services – totaling $43 billion in 2008 – to insurers in the form of higher charges. Pet. App. 11a. Insurers then shift these costs to insured persons in the form of higher premiums. *Id.* at 11a-12a; *see also* 42 U.S.C.

§ 18091(a)(2)(F) (congressional finding that average premium increases for insured families by more than $1000 annually). By requiring individuals to purchase insurance (or risk incurring a financial penalty), the minimum coverage provision eliminates this cost-shifting problem, thereby lowering insurance premiums for all. Pet. App. 11a-12a (citing 42 U.S.C. § 18091(a)(2)(F)).

The minimum coverage provision also helps to effectuate the guaranteed issue provision of the Act, 42 U.S.C. § 300gg-1, which requires insurers to enroll all applicants. In the absence of a minimum coverage requirement, the guaranteed issue provision would reinforce the incentive for healthy people to wait until they were sick to obtain health insurance. This would increase the underwriting and administrative costs that have historically contributed to high premiums. Congress rationally concluded that such a result would frustrate its reform effort and included the minimum coverage provision to help ensure that insurance would be affordable. *See id.* § 18091(a)(2)(I). It did so based on the recognition that steady access to health care enables individuals to lead ordered, stable, and productive lives – the effects of which benefit our entire country. The provision enhances individual liberty to participate in and contribute to the life of our nation, alongside those who already have insurance.

B. The minimum coverage provision promotes equal opportunity.

The burdens of costly health care are not distributed evenly. Rather, they fall disproportionately on disadvantaged populations which are more likely to

experience higher rates of unemployment, to have jobs that do not offer health insurance, and to have lower incomes that put higher insurance premiums out of their financial reach. *See Primer on Uninsured* at 4-5.

Although more than half of all uninsured persons are non-Hispanic whites, Inst. of Med., Comm. on the Consequences of Uninsurance, *Coverage Matters: Insurance and Health Care* (hereinafter *Coverage Matters*) 12 (2001), racial minorities are "much more likely to be uninsured than whites."[6] *Primer on Uninsured* at 5. Latinos are the most likely to be uninsured, followed by African Americans. *Coverage Matters* at 12. These racial and ethnic disparities predictably lead to higher mortality rates compared to the insured population. *See Racial and Ethnic Disparities* at 2. Other associated effects of being uninsured – including the prolonged duration of otherwise treatable illnesses, depressed educational outcomes, and fewer employment opportunities – are more likely to affect racial minorities. *Id.* at 2-4.[7]

---

[6] In a recent periodic review, the United Nations Committee on the Elimination of Racial Discrimination noted its concern "that a large number of persons belonging to racial, ethnic and national minorities still remain without health insurance and face numerous obstacles to access to adequate health care and services." U.N. Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Art. 9 of the Convention, Concluding Observations of the Comm. on the Elimination of Racial Discrimination, United States of America ¶ 32 (May 2, 2008), *available at* http://www.state.gov/documents/organization/107361.pdf (last visited Jan. 10, 2012).

[7] Gender is also correlated with less stable forms of insurance. Although men in general are more likely to be uninsured,

By facilitating affordable health care, the minimum coverage provision integrates the uninsured more fully into the life of our nation and helps them to participate on a more equal footing with the rest of society. The provision therefore promotes equal opportunity, in addition to personal liberty. *See Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (observing that equal protection and "substantive guarantee of liberty are linked in important respects"). Congress's desire to promote equal opportunity, of course, is not dispositive of the question presented in this case. But in exercising its Commerce Clause powers, Congress certainly may consider the impact such legislation will have on those who are otherwise disadvantaged by market distortions beyond their control. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787-88 (2007) (Kennedy, J., concurring in part and concurring in judgment) (noting "the legitimate interest government has in ensuring all people have equal opportunity regardless of their race"); *Katzenbach v. McClung*, 379 U.S. 294, 299-300 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964).

"women are more likely to obtain coverage through individual policies and public programs" and, therefore, are more likely to experience gaps in coverage. *Coverage Matters* at 12. For a fuller discussion of the difficulties women have in obtaining and maintaining health insurance, see Amici Br. of National Women's Law Center et al.

C. The ability to self-insure is not analogous to any liberty interests recognized by this Court.

In rejecting Congress's authority to enact the minimum coverage provision, the court of appeals suggested that individual preferences to self-insure should override Congress's decision to require near-universal[8] insurance coverage. The Eleventh Circuit emphasized the liberty of individuals to forego health insurance. But it disregarded the countervailing liberty interests of individuals whose access to health insurance will be constrained in the absence of such a provision due to cost-shifting from the uninsured to the insured. This dynamic has the effect of placing affordable, stable health care out of financial reach for many people. Pet. App. 11a (describing inability of some uninsured to purchase coverage "because of higher premiums").

Respondents abandoned their substantive due process claim on appeal below. *Id.* at 112a n.93. Therefore, the question whether the minimum coverage provision unconstitutionally infringes their liberty interests was not squarely before the court of appeals. *See id.* Nonetheless, the Eleventh Circuit's concerns about the provision's effects on liberty

---

[8] The statute contains several exemptions to the minimum coverage provision. These include exemptions on the basis of religion; for persons not lawfully present in the country; for incarcerated persons; for those who fail to meet certain threshold income requirements; for those who have short-term gaps in their coverage; for "hardship" cases, as determined by the Department of Health and Human Services; and for members of Native American tribes. Pet. App. 43a.

plainly animated its conclusion that Congress "depart[ed] from commerce power norms." *Id.* at 112a. The court of appeals objected that the provision leaves persons "no choice" but "to purchase insurance," which "strikes at the heart of whether Congress has acted within its enumerated power." *Id.* It further concluded that Congress may only regulate individuals once they "actually enter the stream of commerce and consume health care." *Id.* at 118a.

As this Court has recognized, structural limitations on Congress's authority can serve the important function of protecting individuals against abuse of government power. *See Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) ("[F]ederalism protects the liberty of the individual from arbitrary power."). The Eleventh Circuit, however, misconceived the liberty interests at stake in this case. While it is true that those who do not purchase insurance are subject to a tax penalty beginning in 2014, Pet. Br. 11, this Court long ago repudiated the notion that private economic decisions are beyond government regulations designed to serve the larger good.

At bottom, the challenge to the minimum coverage provision echoes arguments made during the *Lochner* era about laws that purported to interfere with the right to contract. *See Lochner v. New York*, 198 U.S. 45 (1905) (striking down state labor law establishing maximum number of hours for bakers). The Court has long since abandoned such a notion. In *West Coast Hotel Co. v. Parrish*, for example, the Court rejected a challenge to a state minimum wage law on substantive due process grounds. 300 U.S. 379, 392-93 (1937) (collecting cases). The Court

observed the now familiar principle that the government may reasonably regulate private economic decisions to advance the public interest. *Id.* at 392; *see also Washington v. Glucksberg*, 521 U.S. 702, 761 (1997) (Souter, J., concurring) (describing repudiated economic due process cases); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937) (upholding federal law, enacted under Congress's Commerce power, that prohibited discharging employees based on union membership).

1. *The provision imposes minimal burdens on liberty.*

Although the minimum coverage provision is commonly described as a "mandate," it is worth clarifying first that the provision does *not* require individuals to purchase any particular insurance product or service. *See* Pet. App. 25a-26a (citing 26 U.S.C. § 5000A(f)(1)). Instead, covered persons may elect to pay a financial penalty that is enforced by an "offset [of] any tax refund owed the uninsured taxpayer." *Id.* at 45a. Thus, the practical compulsory effect on an individual's personal choice whether to buy insurance is minimal. For these reasons, the ability to self-insure is not analogous to any liberty interests that the Court has determined are constitutionally cognizable.

A few examples illustrate this point. *Cf. Glucksberg*, 521 U.S. at 722 (observing utility of "concrete examples" for determining outlines of protected liberty interests). The provision does not infringe on bodily integrity; as already mentioned, it does not require individuals to undergo any form of treatment or to use any form of health care. *See Cruzan v. Dir.*,

Mo. Dep't of Health, 497 U.S. 261, 269-79 (1990) (discussing right of competent individual to refuse unwanted medical treatment); *see also Rochin v. California*, 342 U.S. 165 (1952).[9] Nor does the provision intrude on "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," *Lawrence*, 539 U.S. at 574; involve the regulation of intimate, private relationships inside the home, *id.* at 567; affect marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); or implicate the right to decide whether to carry a pregnancy to term, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

Finally, the provision comfortably falls within the ambit of other kinds of regulations imposed by States that require persons, under penalty of law, to purchase insurance. Therefore, the provision does not implicate the kind of liberty interest that is "objectively, 'deeply rooted in this Nation's history and tradition.'" *Glucksberg*, 521 U.S. at 720-21 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)). Most States, for example, require individuals to purchase car insurance as a condition of vehicle registration (presumably even if they never drive their car). *See, e.g.*, *Delaware v.*

---

[9] Notably, in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Court repudiated the assertion that a compulsory smallpox vaccination was "hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best." *Id.* at 26. Observing "the fundamental principle that persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state," *id.* (internal quotation marks omitted), the Court upheld the law on the grounds that it promoted public health and safety, *id.* at 31.

Prouse, 440 U.S. 648, 658-59 (1979); *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1247-48 (11th Cir. 2008). Similarly, States may condition a professional license on obtaining malpractice insurance. *See, e.g.*, *Ophthalmic Mut. Ins. Co. v. Musser*, 143 F.3d 1062 (7th Cir. 1998). Thus, as Judge Sutton observed in his opinion in *Thomas More Law Center v. Obama*, the provision does little more than is required by States in analogous contexts. *See* 651 F.3d 529, 565 (6th Cir. 2011) (Sutton, J., concurring) (describing State laws that require individuals to buy medical insurance and car insurance).

2. *Under the Court's Commerce Clause jurisprudence, individuals must sometimes yield economic liberty to advance the collective good.*

The Court's Commerce Clause cases acknowledge that government's economic regulation may limit individual liberty to serve the common good. *Wickard v. Filburn*, 317 U.S. 111 (1942), is a clear example. Contrary to the conclusion of the Eleventh Circuit, *Wickard* supports the authority of Congress to enact the minimum coverage provision under its Commerce Clause power. In light of the court of appeals's extensive treatment of *Wickard*, Pet. App. 65a-68a, 111a-115a, and its close relationship to the liberty interest suggested in this case, it deserves close scrutiny.

In *Wickard*, this Court considered the constitutionality of a penalty imposed on a small commercial farmer who produced wheat in excess of his allotted acreage under the federal Agricultural Adjustment Act. The purpose of the law was to regulate the sup-

ply and demand for wheat in order to prevent price fluctuations and to stabilize the interstate market. 317 U.S. at 115. *Wickard* is significant because the farmer (Filburn) grew more than his quota not for the purpose of selling it on the interstate market, but for his own private consumption at home. *Id.* at 114. This fact did not matter under the law, however. Any wheat grown in excess of the prescribed allotment was subject to penalty and did "not depend upon whether any part of the wheat either within or without the quota [was] sold or intended to be sold." *Id.* at 119.

The court of appeals distinguished the liberty interests implicated by Congress's wheat regulation in *Wickard* on two grounds. First, Filburn was a commercial farmer and, therefore, had already chosen to place himself "in commerce" as opposed to individuals here who are – under Respondents' view – "compel[led]" to enter commerce to purchase individual health insurance. Pet. App. 98a. Second, the court observed that the Agricultural Adjustment Act "did not require him to purchase more wheat." *Id.* at 111a. Rather, Filburn retained a number of other options: "He could have decided to make do with the amount of wheat he was allowed to grow. He could have redirected his efforts to agricultural endeavors that required less wheat. He could have even ceased part of his farming operations." *Id.* at 111a-112a. In other words, Filburn was still free to exercise some choice, an option that the court of appeals concluded is lost as a result of the minimum coverage provision. *Id.* at 112a.

The Eleventh Circuit's analysis overstates the significance of Filburn's farming operation and rests

on a false characterization of the nature of the choice that was at issue in *Wickard*. Although Filburn technically was a commercial farmer, this Court did not treat the activity in question – "cultivation of wheat for home consumption" – "as part of his commercial farming operation." *Gonzales v. Raich*, 545 U.S. 1, 20 (2005). More important, there is no question that Filburn could not choose to grow wheat – even for his own private consumption – beyond the amount allotted to him under the Agricultural Adjustment Act. If he wanted to sell all of his prescribed share, he would be required to *purchase* any additional wheat for his personal use. As with individuals who prefer to self-insure, Filburn preferred to grow more wheat precisely so that he could avoid having to buy it. Yet, as the Court expressly acknowledged, the law "forc[ed] some farmers into the market to buy what they could provide for themselves." *Wickard*, 317 U.S. at 129. Filburn, in other words, was "compelled" to enter the stream of commerce to purchase a product that he would have otherwise chosen to cultivate himself. *See Thomas More Law Ctr.*, 651 F.3d at 560-61 (Sutton, J., concurring).

To meet its objective of stabilizing the wheat market, Congress needed to regulate Filburn, just as it now needs to regulate the willfully uninsured to stabilize the market for health insurance and health care. As the *Wickard* Court noted, it is simply the nature of regulation "that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others." 317 U.S. at 129.[10] This is a common theme of the

---

[10] The Court further observed that these legislative choices "are wisely left under our system to resolution by the Congress

Court's commerce cases. *See United States v. Darby*, 312 U.S. 100, 114-15 (1941); *Jones & Laughlin Steel*, 301 U.S. at 31-32; *see also Raich*, 545 U.S. 1 (concluding that application of federal law that criminalized possession and use of marijuana for medical purposes to intrastate growers and users did not violate Commerce Clause).

Like the law challenged in *Wickard*, and as with other federal programs that depend on individual participation to be viable, the minimum coverage provision requires nearly all persons, subject to important exceptions,[11] to make a financial contribution. In *United States v. Lee*, 455 U.S. 252 (1982), the Court upheld a similar financial "mandate" in the context of social security after factoring in the size and importance of the government program. The Court rejected an as-applied challenge to the constitutionality of a social security tax[12] under the Free Exercise Clause. A member of the Old Order Amish challenged the mandate on the grounds that both contributions to the social security system and receipt of any benefits constitutionally infringed his religious beliefs. *Id.* at 255. Accepting the contentions that "both payment and receipt of social security benefits is forbidden by the Amish faith" and that "compulsory participation in the social security

---

under its more flexible and responsible legislative process," particularly where such flexibility is needed to adapt legislation to the changing practical realities of our modern, integrated economy. 317 U.S. at 129.

[11] *See supra* note 8.

[12] Amici do not take any position on whether the minimum coverage provision's financial penalty is a "tax."

system interfere[d] with their free exercise rights," *id.* at 257, the Court nonetheless concluded that the government's interest "in assuring mandatory and continuous participation in and contribution to the social security system [was] very high." *Id.* at 258-59.[13] While not a case about the scope of Congress's Commerce power, *Lee* raises analogous concerns about the balance between individual liberty and government regulations designed to advance the common good. This Court rested its *Lee* decision in part on the role that social security played in "serv[ing] the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees." *Id.* at 258. As with the provision challenged here, which is an essential part of ACA's regulatory framework, Congress directed individuals to contribute financial resources on the ground that "mandatory participation is indispensable to the fiscal vitality of the . . . system." *Id.*

These cases demonstrate that the Court need not privilege the economic choice of a subset of individuals to self-insure, while disregarding the effect such decisions have on the ability of persons who *want* insurance to choose it. The minimum coverage pro-

---

[13] The Court reached this conclusion in *Lee* even though it applied heightened scrutiny. 455 U.S. at 257-60. The Court subsequently ruled, in *Employment Division v. Smith*, 494 U.S. 872 (1990), that heightened scrutiny does not apply to claims of religious exemption from a neutral and generally applicable law. *Cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, No. 10-553, 556 U.S. ___ (2012), slip op. at 15 (Jan. 11, 2012) (discussing *Smith*).

vision's limitations on individual liberty are fully consistent with the Constitution.

II. The Necessary and Proper Clause further supports the constitutionality of the minimum coverage provision.

The principle that Congress may enact laws "necessary and proper" to the execution of its enumerated powers has been firmly established for nearly 200 years, *McCulloch v. Maryland*, 4 Wheat. 316 (1819), and repeatedly reaffirmed by this Court as an essential ingredient of our constitutional system, including most recently in *United States v. Comstock*, 130 S. Ct. 1949 (2010). The minimum coverage provision easily satisfies the constitutional standards set forth in this Court's cases interpreting the Necessary and Proper Clause and should be upheld for that reason, as well.

The minimum coverage provision does not exist in legislative isolation. It is part of a comprehensive legislative scheme and its validity under the Necessary and Proper Clause must be evaluated in light of that scheme. In particular, the minimum coverage provision is closely tied to two other provisions of the health care law: one prohibits insurance companies from denying health care coverage to individuals based on pre-existing conditions or medical history, 42 U.S.C. §§ 300gg-1(a), 300gg-3(a), the other prohibits insurance companies from charging such individuals a higher premium, *id.* § 300gg. Together, these provisions are designed to address a free rider problem that currently distorts the national health care market, increasing the cost of insurance and decreasing the numbers insured.

The authority of Congress to enact the latter two provisions under the Commerce Clause has not been seriously questioned, *see Seven-Sky v. Holder*, 661 F.3d 1, 14 (D.C. Cir. 2011), and for good reason. Insurance companies are indisputably engaged in economic activity and that economic activity undeniably has a substantial effect on interstate commerce. As the legislative findings that were incorporated in ACA specifically note:

> The cost of providing uncompensated care to the uninsured was $43,000,000,000 in 2008. To pay for this cost, health care providers pass on the cost to private insurers, which pass on the cost to families. This cost-shifting increases family premiums by on average over $1,000 a year.

42 U.S.C. § 18091(a)(2)(F).

Congress further found that the minimum coverage provision was "essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold." *Id.* § 18091(a)(2)(I). The provision "broaden[s] the health insurance risk pool to include healthy individuals" who might otherwise choose to remain uninsured or defer insurance coverage. *Id.* This expanded pool, in turn, enables insurance companies to provide insurance coverage to everyone at lower premiums. *Id.* § 18091(a)(2)(F).

"[W]here Congress has the authority to enact a regulation of interstate commerce, 'it possesses every power needed to make the regulation effective.'" *Raich*, 545 U.S. at 36 (Scalia, J., dissenting) (quoting

United States v. Wrightwood Dairy Co., 315 U.S. 110, 118-19 (1942)). That is precisely what the minimum coverage provision does in this case. Moreover, Congress is generally granted broad discretion in determining what legislation is necessary and proper to effectuate its enumerated powers. *See Sabri v. United States*, 541 U.S. 600, 605 (2004).

To be sure, the Necessary and Proper Clause is not an unlimited license for Congress to enact any legislation it chooses. In *Comstock*, Justice Kennedy and the majority debated about whether the link to an enumerated power must be one that is rationally conceivable or empirically rooted. But that debate has no relevance here. Even accepting Justice Kennedy's view that "[t]he rational basis referred to in the Commerce Clause context is a demonstrated link in fact," 130 S. Ct. at 1967 (Kennedy J., concurring), that "link in fact" is amply "demonstrated" by the legislative findings supporting enactment of the Affordable Care Act.

Nor does it matter for purposes of the Necessary and Proper Clause whether the minimum coverage provision is independently supported by the Commerce Clause, although amici believe that it is for the reasons stated above. *See supra* Part I. It is enough, as this Court has noted, that the provision is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the . . . activity [at issue] were regulated." *United States v. Lopez*, 514 U.S. 549, 561 (1995).

Finally, in exercising its powers under the Necessary and Proper Clause, Congress cannot abridge

fundamental rights any more than it may in the exercise of its enumerated powers. *See Comstock*, 130 S. Ct. at 1957. As noted, *supra* Part I.C, however, the economic liberty interests suggested here in opposition to the minimum coverage provision do not rise to that level.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Eleventh Circuit striking down the minimum coverage provision.

Respectfully submitted,

JOHN PAYTON
Director-Counsel
DEBO P. ADEGBILE
ELISE C. BODDIE
Counsel of Record
RENIKA C. MOORE
RIA A. TABACCO
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson St., 16th Floor
New York, NY 10013
(212) 965-2200
eboddie@naacpldf.org

JOSHUA CIVIN
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
1444 I St., NW, 10th Floor
Washington, DC 20005

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

LISA M. BORNSTEIN
LEADERSHIP CONFERENCE
ON CIVIL AND HUMAN
RIGHTS
1629 K Street, NW
Washington, DC 20006

Counsel for Amici Curiae

January 13, 2012

AMICUS CURIAE BRIEF

NO. 11-398

IN THE SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Petitioners

v.

STATE OF FLORIDA, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER ON THE MINIMUM COVERAGE PROVISION

Marcia D. Greenberger
Emily J. Martin
Judith G. Waxman
National Women's Law Center
11 Dupont Circle, NW #800
Washington, D.C. 20036
202-588-5180

Melissa Hart
Counsel of Record
University of Colorado Law School
UCB 401
Boulder, CO 80309
303-735-6344
melissa.hart@colorado.edu

Attorneys for *Amici Curiae*

[Additional *Amici* Listed on Inside Cover]

9TO5-NATIONAL ASSOCIATION OF WORKING WOMEN, ALLIANCE FOR EARLY CARE & EDUCATION, INC., AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, AMERICAN COLLEGE OF NURSE-MIDWIVES, ASIAN AMERICAN JUSTICE CENTER, ASIAN PACIFIC AMERICAN LEGAL CENTER, BLACK WOMEN'S HEALTH IMPERATIVE, CAMPAIGN FOR BETTER HEALTH CARE, CENTER FOR REPRODUCTIVE RIGHTS, CENTRAL CONFERENCE OF AMERICAN RABBIS, CHICAGO ABORTION FUND, CHILDBIRTH CONNECTION, COALITION OF LABOR UNION WOMEN, COMMUNITY ACTION PROJECT OF TULSA COUNTY, CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, FEMINIST MAJORITY FOUNDATION, FLORIDA CHAIN, GENDER IMPACTS POLICY, GUTTMACHER INSTITUTE, HADASSAH- THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC., HEALTH CARE FOR AMERICA NOW, IBIS REPRODUCTIVE HEALTH, INSTITUTE FOR SCIENCE AND HUMAN VALUES , LEGAL VOICE, MARYLAND WOMEN'S COALITION FOR HEALTH CARE REFORM, MATERNITY CARE COALITION, MONTANA WOMEN VOTE, NARAL PRO-CHOICE AMERICA, NATIONAL ADVOCATES FOR PREGNANT WOMEN, NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM, NATIONAL ASSOCIATION OF NURSE PRACTITIONERS IN WOMEN'S HEALTH, NATIONAL ASSOCIATION OF SOCIAL WORKERS, NATIONAL COALITION FOR LGBT HEALTH, NATIONAL COUNCIL OF JEWISH WOMEN, NATIONAL COUNCIL OF WOMEN'S ORGANIZATIONS, NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, NATIONAL GAY AND LESBIAN TASK FORCE ACTION FUND, NATIONAL HEALTH CARE FOR THE HOMELESS COUNCIL, NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH, NATIONAL ORGANIZATION FOR WOMEN FOUNDATION,

National Partnership for Women & Families, North Dakota Women's Network, Northwest Health Law Advocates, Older Women's League, People For the American Way Foundation, PHI–Quality Care through Quality Jobs, Physicians for Reproductive Choice and Health, Planned Parenthood Federation of America, Raising Women's Voices for the Health Care We Need, Sargent Shriver National Center on Poverty Law, Sexuality Information and Education Council of the United States, South Dakota Advocacy Network for Women, Southwest Women's Law Center, Take Action Minnesota, Union for Reform Judaism, Wider Opportunities for Women, Wisconsin Alliance for Women's Health, Women of Reform Judaism, Women's Law Project, WOMEN'S WAY

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. A major purpose of the Affordable Care Act is improving women's access to health care and health insurance and eliminating practices that discriminate against and disadvantage women ... 4

A. *Women's Stake in the Ban on Pre-Existing Condition Exclusions and the Guaranteed Issue Requirement* 7

B. *The ACA's Comprehensive Approach to Women's Health* 13

1. Ending gender rating 13
2. Making maternity coverage available to all 15
3. Prohibiting sex discrimination in health care and health insurance 17
4. Expanding Medicaid eligibility 18
5. Supporting nursing mothers 19
6. Providing Pap tests, mammograms, and family planning without copayments .. 20
7. Making private health insurance more affordable 22

II. As legislation intended to promote women's health and end GENDER discrimination, the ACA follows in a long tradition of civil rights laws firmly within Congress's Commerce Clause power 22

III. As a reasonable component of a comprehensive plan responding to a national crisis in the health insurance market and to Women's coverage needs, the individual responsibility provision falls well within Commerce Clause authority 29

CONCLUSION 35

APPENDIX

AMICI STATEMENTS OF INTEREST A-1

TABLE OF AUTHORITIES

Federal Cases

Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995).....28

EEOC v. Wyoming, 460 U.S. 226 (1983).....28

Gonzales v. Raich, 545 U.S. 1 (2005).....33, 35

Groome Res. Ltd. v. Parish of Jefferson, 234 F.3d 192 (5th Cir. 2000).....27, 29, 31

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).....*passim*

Katzenbach v. McClung, 379 U.S. 294 (1964).....*passim*

Liberty Univ. v. Geithner, 753 F. Supp. 2d 611 (W.D. Va. 2010).....32

Mead v. Holder, 766 F. Supp. 2d 16 (D.D.C. 2011).....32

Morgan v. Sec'y of Hous. & Urban Dev., 985 F.2d 1451 (10th Cir. 1993).....28

Nesbit v. Gears Unlimited, Inc., 347 F.3d 72 (3d Cir. 2003).....31

Newport News Shipbuilding Co. v. EEOC, 462 U.S. 669 (1983).....25

Oxford House-C v. City of St. Louis, 77 F.3d 249 (8th Cir.1996).....28

Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).....25

Seniors Civil Liberties Ass'n v. Kemp, 965 F.2d 1030 (11th Cir.1992).....28

Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011).....30, 31

Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996).....28

Thomas More Law Ctr. v. Obama, 651 F.3d 529 (6th Cir. 2011).....32

United States v. Allen, 341 F.3d 870 (9th Cir. 2003).....27

United States v. Comstock, 130 S. Ct. 1949 (2010).....33

United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996).....28

United States v. Gregg, 226 F.3d 253 (3d Cir. 2000).....28

United States v. Gregory, 818 F.2d 1114 (4th Cir. 1987).....30

United States v. Lopez, 514 U.S. 549, 558 (1995).....34, 35

United States v. Miss. Dep't of Pub. Safety, 321 F.3d 495 (5th Cir. 2003).....28

United States v. Soderna, 82 F.3d 1370 (7th Cir. 1996).....28

United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).....29

United States v. Virginia, 518 U.S. 515 (1996).....25

Statutes and Legislative Materials

26 U.S.C § 5000A.....12

26 U.S.C. § 18091.....13, 27, 33, 35

29 U.S.C. § 207.....20

42 U.S.C. § 300gg.....11, 20

42 U.S.C. §§ 2000a -2000a-6.....31

42 U.S.C. §§ 3601-3614(a).....31

42 U.S.C. § 18116.....13, 18

29 C.F.R. § 2590.715–2713.....20

155 Cong. Rec. (2009).....*passim*

156 Cong. Rec. (2010).....*passim*

Chairman Henry A. Waxman and Bart Stupak, *Maternity Coverage in the Individual Health Insurance Market*, 111th Cong., Memorandum to Members of the Committee on Energy and Commerce (October 12, 2010).....10, 17

H.R. Rep. 111-299.....15, 21, 26

S. Res. 6, 111th Cong. (2009).....23

Comprehensive Health Care Reform: An Essential Prescription for Women, 2009 Joint Economic Report, H.R. Rep. 111-388 (October 8, 2009)....*passim*

What Women Want: Equal Benefits for Equal Premiums, Hearing before the Sen. Comm. On Health, Education, Labor and Pensions, 111th Congress (October 15, 2009).....8, 9, 14

Making HealthCare Work for American Families, Hearing Before the H. Comm. on Energy &Commerce, Subcomm. on Health, 111th Cong. (Mar. 17, 2009).....12

Patient Protection and Affordable Care Act, Pub L. No. 111-148, 124 Stat. 119 (2010).....1, 15, 17

Other Materials

Steven Asch *et al.*, *Who is At Greatest Risk for Receiving Poor-Quality Health Care?*, 354 New Eng. J. Med. 1147 (2006).....20, 27

Amy Bernstein, Alpha Center, *Insurance Status and Use of Health Services by Pregnant Women* (1999).....17, 27

Lisa Codispoti *et al.*, National Women's Law Center, *Nowhere to Turn: How the Individual Health Insurance Market Fails Women* (2008).....14, 16

Sarah Collins *et al.*, *Realizing Health Reform's Potential: Women and the Affordable Care Act of 2010* (Commonwealth Fund, pub. 1429, vol. 93, 2010).....19

Cong. Budget Office, *Key Issues in Analyzing Major Health Proposals* (2008).....34

Bridget Courtot *et al.*, National Women's Law Center, *Still Nowhere to Turn: Insurance Companies Treat Women Like a Pre-Existing Condition* (2009).....14, 15, 16

Susan Egerter *et al.*, *Timing of Insurance Coverage and Use of Prenatal Care Among Low-Income Women*, 92 Am. J. Pub. Health 423 (2002).....17, 26

Jenny Gold, *Domestic Abuse Victims Struggle with Another Blow: Difficulty Getting Health Insurance*, Kaiser Health News (October 7, 2009).....9

Jenny Gold, *Fight Erupts Over Health Insurance Rates for Businesses with More Women*, Kaiser Health News (October 25, 2009.....14

Stanley Ip *et al.*, *Breastfeeding and Maternal and Infant Health Outcomes in Developed Countries* (U.S. Dep't of Health and Human Servs., Agency for Healthcare Research and Quality Evidence Report/Technology Assessment No. 153, 2007).....19

Health Resources and Services Administration, Women's Preventive Services: Required Health Plan Guidelines (August 2011).....20, 21

Danielle Ivory, *Rape Victim's Choice: Risk AIDS or Health Insurance?*, Huffington Post (March 18, 2010).....10

Kaiser Family Foundation, *Women's Health Insurance Coverage* (2011).....18

Faye Menacker & Brady Hamilton, *NCHS Data Brief No. 35, Recent Trends in Cesarean Delivery in the United States* (2010).....9

Elizabeth M. Patchias & Judy Waxman, *Issue Brief: Women and Health Coverage: The Affordability Gap*, (Commonwealth Fund, pub. 1020, vol. 25, 2007).....22

Sheila D. Rustgi *et al.*, *Women at Risk: Why Many Women Are Forgoing Needed Health Care* (Commonwealth Fund, pub. 1262, vol. 52, 2009).....7, 21

Elizabeth Warren *et al.*, *Medical Problems and Bankruptcy Filings*, Norton's Bankruptcy Adviser (May 2000).....27

U.S. Census Bureau Current Population Survey's (CPS) *2011 Annual Social and Economic (ASEC) Supplements*.....18

U.S Census Bureau, *2009 American Community Survey*.....6

INTEREST OF AMICI CURIAE

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights since its founding in 1972. Women have long faced great difficulty obtaining comprehensive, affordable health coverage due to harmful and discriminatory health insurance industry practices. NWLC is profoundly concerned about the impact that the Court's decision may have on women's access to health insurance.

Statements of interest of 60 additional *amici* organizations committed to removing discriminatory barriers to access to health insurance and health care are set out in the Appendix.[1]

SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124

---

[1]Pursuant to Rule 37.3, letters of consent to the filing of this brief have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and none of the parties or their counsel, nor any other person or entity other than *amici*, their members or counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Stat. 1029 (2010) (hereinafter collectively referred to as the "the Affordable Care Act" or "the ACA"), makes important advances in women's health care, addressing a crisis of discrimination and obstacles to access truly national in scope. Indeed, a major purpose and concern of Congress in passing the ACA was improving women's health and ameliorating the disadvantages and discrimination women have faced in obtaining health care and health insurance. Like the civil rights laws of the past 50 years, the ACA aims at "a moral and social wrong" that itself has profound economic consequences. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 257 (1964).

The law's approach to achieving near-universal health insurance coverage, lowering insurance premiums, and eliminating or reforming an array of widespread practices in the health care market that deny or limit coverage has, and was intended to have, a particularly important effect on women. By requiring insurers to provide coverage to all who seek it, regardless of health status, it remedies long-standing insurer practices of refusing to sell insurance to women with "pre-existing conditions" such as pregnancy, a previous Caesarean section, or a history of having survived domestic abuse. Moreover, the Act explicitly targets practices that discriminate against or disadvantage women, such as charging women more for insurance coverage based solely on their sex and refusing to cover or overcharging women for essential services such as maternity care.

Through its many provisions protecting against discrimination and removing obstacles that

women and other disadvantaged groups face in obtaining health insurance and care, the ACA is a significant piece of civil rights litigation. The Act seeks to address the economic impacts of the disadvantage and discrimination that women face, remove barriers to women's participation in the health insurance market, and advance women's health. Like the many federal civil rights laws that preceded it, the ACA is a law targeting a fundamental issue of national concern for which a national solution is both appropriate and needed.

The authority of the federal legislature both to regulate markets to address the impact of discrimination, and to regulate health insurance and the national market for health care services, is well settled. An individual responsibility provision, requiring individuals to obtain insurance, has proven important for effective implementation of the requirement that insurance companies make insurance available to all who seek it and cover pre-existing conditions, and thus essential to advancing the ACA's goals of removing barriers to women's participation in the health insurance market. The ACA thus requires that all Americans, unless otherwise exempt, carry some minimum level of insurance as part of its comprehensive regulatory scheme. Like other federal laws, including particularly laws prohibiting discrimination, the Act generally prohibits "opting out" because Congress's legitimate regulatory goals are best served by full participation, given the aggregate economic and social impact of the regulated behavior.

As a component of Congress's comprehensive regulatory scheme for addressing failures in the health insurance market and barriers to individuals' participation in that market, the individual responsibility provision is a valid exercise of Commerce Clause power. Like other major civil rights statutes, the ACA is a valid exercise of Commerce Clause authority in pursuit of a fundamental moral principle with broad economic and practice effects, whose recognition must be national in scope.

ARGUMENT

I. A MAJOR PURPOSE OF THE AFFORDABLE CARE ACT IS IMPROVING WOMEN'S ACCESS TO HEALTH CARE AND HEALTH INSURANCE AND ELIMINATING PRACTICES THAT DISCRIMINATE AGAINST AND DISADVANTAGE WOMEN

The ACA is a comprehensive system of regulation designed to lower health care costs throughout the United States, provide minimum standards of coverage for health insurance and end some of the most significant barriers to inclusive health care access. Many of the ACA's most important provisions were enacted with the express purpose of addressing the myriad ways in which the existing insurance market has discriminated against and failed to meet the basic needs of women. As Congresswoman Barbara Lee explained days before the law's passage:

> While health care reform is essential for everyone, women are in particularly dire need for major changes to our health care system. Too many women are locked out of the health care system because they face discriminatory insurance practices and cannot afford the necessary care for themselves and for their children.

156 Cong. Rec. H1632-04 (daily ed. March 18, 2010).[2] As the Speaker stated on the night the House approved the legislation, "It's personal for women. After we pass this bill, being a woman will no longer be a preexisting medical condition." 156 Cong. Rec. H1891-01 (daily ed. March 21, 2010) (Statement of Rep. Pelosi).

The nationwide consequences of the insurance market's failure to meet women's needs are significant. In 2009, immediately prior to the ACA's passage, nearly one in five women ages 18-64 was

---

[2] *See also, e.g.*, *infra* n. 4; 155 Cong. Rec. S12026 (daily ed. Oct. 8, 2009) (statements of Sen. Mikulski) ("[H]ealth care is a women's issue, health care reform is a must-do women's issue, and health insurance reform is a must-change women's issue because . . . when it comes to health insurance, we women pay more and get less."); 155 Cong. Rec. S10262-01 (daily ed. Oct. 8, 2009) (statement of Sen. Boxer) ("Women have even more at stake. Why? Because they are discriminated against by insurance companies, and that must stop, and it will stop when we pass insurance reform."); 156 Cong. Rec. H1854-02 (daily ed. March 21, 2010) (statement of Rep. Maloney) ("Finally, these reforms will do more for women's health . . . than any other legislation in my career.").

uninsured. National Women's Law Center analysis based on U.S Census Bureau, *2009 American Community Survey*, http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml. The situation was even worse for women of color: 37.6% of Hispanic women, 23.4% of Black women, 29.9% of American Indian/Alaskan Native women, and 20.0% of Asian/Pacific Islander women were uninsured (compared to 13.9% of white women). *Id.*

That same year, over two million fewer women had job-based insurance than had the year before. *Id.* More than half of all women reported forgoing needed health care for financial reasons. Sheila D. Rustgi *et al.*, *Women at Risk: Why Many Women Are Forgoing Needed Health Care* 1 (Commonwealth Fund, pub. 1262, vol. 52, 2009), *available at* http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2009/May/Women%20at%20Risk/PDF_1262_Rustgi_women_at_risk_issue_brief_Final.pdf; *see also* 155 Cong. Rec. S13674 (daily ed. Dec. 21, 2009) (statement of Sen. Boxer) (describing women's difficulties in accessing medical care); *see also* 155 Cong. Rec. S13674 (daily ed. Dec. 21, 2009) (statement of Sen. Boxer) (same); *Comprehensive Health Care Reform: An Essential Prescription for Women*, 2009 Joint Economic Report, H.R. Rep. 111-388 at 77-81 (2009) (same). "Compared with men, women require more health care services during their reproductive years (ages 18 to 45), have higher out-of-pocket medical costs, and have lower average incomes." Rustgi, *supra*, at 1. In enacting the ACA, Congress recognized the need for uniform national legislation to address the barriers

and discrimination that women face in obtaining health insurance and medical care.

A. *Women's Stake in the Ban on Pre-Existing Condition Exclusions and the Guaranteed Issue Requirement*

As Congress recognized in passing the ACA, women have been sharply affected by insurers refusing to sell health coverage in the individual market to those with a pre-existing condition.[3] First, women are especially affected by preexisting condition denials because they are more likely than men to suffer from chronic conditions requiring

---

[3]For a few examples of numerous such references in the Congressional debates, see, e.g., 156 Cong. Rec. H1873 (daily ed. March 21, 2010) (statement of Rep. Woolsey) ("I wonder how many of my colleagues realize that essentially being a woman is a preexisting condition."); 156 Cong. Rec. H1638 (daily ed. March 18, 2010) (statement of Rep. Moore) ("Health care reform here will provide women the care that they need [and] . . . ban the insurance practice of rejecting women with a preexisting condition."); 155 Cong. Rec. S12051 (daily ed. Dec. 1, 2009) (statement of Sen. Franken) ("In many States, it is legal to charge women higher premiums, or deny them coverage at all, if they have had a C-section. It is a preexisting condition. . . . [I]n many States in this country an insurance company can deny a woman coverage because she has been the victim of domestic violence, because it is a preexisting condition. That is wrong."); 155 Cong. Rec. H12368 (daily ed. Nov. 5, 2009) (statement of Rep. Hirono) ("Nine States allow private plans to refuse coverage for domestic violence survivors. . . . In many policies, a previous C-section and being pregnant are considered preexisting conditions."); 155 Cong. Rec. S10265 (daily ed. Oct. 8, 2009) (statement of Sen. Murray) ("Our health care system is broken . . . for women we have heard about who have been denied coverage or charged more for preexisting conditions such as pregnancy or C sections or, tragically, domestic violence.")

ongoing treatment, like asthma or diabetes. H.R. Rep. 111-388 at 70 (2009). Second, several pre-existing conditions excluded by insurers exclusively or primarily affect women.

For example, women have been charged significantly more for coverage because they had previously given birth by Caesarean section. *See, e.g.*, *What Women Want: Equal Benefits for Equal Premiums*, Hearing before the Senate Comm. on Health, Education, Labor and Pensions, 111th Congress (October 15, 2009) (testimony of Marcia D. Greenberger, President, National Women's Law Center), *available at* http://help.senate.gov/imo/media/doc/Greenberger.pdf Other women have been denied coverage altogether unless they have been sterilized or are no longer of child-bearing age, or have been subject to an exclusionary period during which the insurer will not cover costs related to Caesarean sections or pregnancy. *See, e.g.*, 155 Cong. Rec. S10264 (daily ed. Oct. 8, 2009) (statement of Sen. Shaheen); 155 Cong. Rec. S11930 (daily ed. Nov. 21, 2009) (statement of Sen. Franken). For instance, as she recounted in 2009, in testimony before the Senate Committee on Health, Education, Labor, and Pensions, Peggy Robertson was denied insurance coverage, based on her previous Caesarean section; the insurer told her that she could only obtain coverage if she were sterilized. *What Women Want: Equal Benefits for Equal Premiums*, *supra* (testimony of Peggy Robertson), *available at* http://help.senate.gov/imo/media/doc/Robertson.pdf. These exclusions have a broad impact, as nearly one-third of births in the United States are by Caesarean

section. Faye Menacker & Brady Hamilton, *NCHS Data Brief No. 35, Recent Trends in Cesarean Delivery in the United States* 1 (2010), *available at* http://www.cdc.gov/nchs/data/databriefs/db35.pdf.

Some insurers deny coverage to women who have survived domestic violence. *See* Jenny Gold, *Domestic Abuse Victims Struggle with Another Blow: Difficulty Getting Health Insurance*, Kaiser Health News (October 7, 2009), http://www.kaiserhealthnews.org/Stories/2009/October/07/Domestic-Abuse.aspx. As Congresswoman Betty McCollum recounted in the days before the passage of the ACA:

> In 2006, attorney Jody Neal-Post tried to get health insurance but was rejected. Why? Because of treatment she received after a domestic abuse incident. Her insurer told her that her medical history made her a higher risk, more likely to end up in an emergency room and need care. 1.3 million American women are victims of physical assault by an intimate partner each year, and 85 percent of domestic violence victims are women. We can help the one out of every four women who are victims of domestic violence by stopping them from being victimized again by their insurance companies.

156 Cong. Rec. H1660 (daily ed. March 19, 2010); *see also, e.g.*, 156 Cong. Rec. H1873 (daily ed. March 21, 2010) (statement of Rep. Woolsey), 155 Cong. Rec. S10264 (daily ed. Oct. 8, 2009) (statement of Sen.

Shaheen); 155 Cong. Rec. S12462 (daily ed. Dec. 5, 2009) (statement of Sen. Harkin).

Some women have been denied health insurance coverage because they have previously received treatment for sexual assault. For instance, insurance agent Chris Turner received anti-HIV preventative medication after she was sexually assaulted in 2002. As a result, she could not obtain health insurance for three years; insurers refused to extend coverage based on the anti-HIV medication, even though she tested negative for HIV. Danielle Ivory, *Rape Victim's Choice: Risk AIDS or Health Insurance?*, Huffington Post (March 18, 2010), http://www.huffingtonpost.com/2009/10/21/insurance-companies-rape-n_328708.html. Other women report being denied insurance coverage because of a diagnosis of post-traumatic stress disorder stemming from a previous assault. *Id.*

Women also have been routinely denied health insurance in the private market on the basis of pregnancy. In 2010, the House Committee on Energy and Commerce investigated pre-existing condition denials by the four largest private for-profit health insurers in the country and found that all four identified pregnancy as a health condition requiring automatic denial of coverage. Chairman Henry A. Waxman and Rep. Bart Stupak, *Maternity Coverage in the Individual Health Insurance Market*, Memorandum to House Committee on Energy and Commerce, 111th Cong., 3-4 (October 12, 2010), *available at* http://democrats.energycommerce.house.gov/Press_111/20101012/Memo.Maternity.Coverage.Individual.Market.2010.10.12.pdf. These findings are

consistent with the letter written by "Kelly," from Columbus, Ohio, which Senator Brown read on the Senate floor during the ACA debates: Kelly had purchased a family policy on the individual market, learned that she was pregnant, and inquired about the maternity coverage she had added to her family's policy despite the high cost: "'I was shocked to learn there was a nine-month waiting period before the coverage took effect—and that the pregnancy and birth would not be covered because it's a pre-existing condition. That is $15,000 to $20,000 that would not be covered. My husband and I talked about that if I needed critical medical care, could we end up bankrupt? Could we lose our home?'" 155 Cong. Rec. S12462 (daily ed. Dec. 5, 2009) (statement of Sen. Brown); *see also, e.g.*, 156 Cong. Rec. H1719 (daily ed. March 19, 2010) (statement of Rep. Woolsey) (decrying treatment of pregnancy as pre-existing condition); 155 Cong. Rec. S10262, S10263 (daily ed. Oct. 8, 2009) (statements of Sen. Klobuchar, Sen. Stabenow) (same); 155 Cong. Rec. S11934, S11947, S11957 (daily ed. Nov. 21, 2009) (statements of Sen. Levin, Sen. Kaufman, Sen. Menendez) (same).

The ACA makes this discriminatory conduct a thing of the past by prohibiting insurance companies from denying coverage based on pre-existing conditions. *See* 42 U.S.C. §§ 300gg, 300gg-1. In addition, the law adopts "guaranteed issue," requiring that insurers sell policies to any person or employer who wishes to purchase a policy. *Id.* These provisions are made possible by the individual responsibility provision challenged in this case. As explained by the United States, empirical evidence shows that the ACA's ban on pre-existing conditions

and guaranteed issue requirement will not work effectively without the full participation that the individual responsibility provision works to ensure. Petitioners' Brief at 26-30. In states that have tried to enact the former without the latter, costs of insurance have skyrocketed. Under such a regulatory regime, people who are healthy may forgo insurance until they are sick and purchase insurance just at the moment when the insurer will have to spend most on their care, without having previously paid premiums that would cover some portion of these costs. In order to make up for these losses, insurance companies must substantially increase premium rates for everyone. When premiums increase, there is even greater incentive for healthy individuals not to purchase insurance, leaving only the truly sick in the insurance pool. This is referred to as a "death spiral." *Making Health Care Work for American Families*, Hearing Before the H. Comm. on Energy & Commerce, Subcomm. on Health, 111th Cong. (Mar. 17, 2009) (testimony of Princeton University Professor Uwe Reinhardt), *available at* http://democrats.energycommerce.house.gov/Press_111/20090317/testimony_reinhardt.pdf.

To avoid that spiral, the ACA included its individual responsibility provision. *See* 26 U.S.C. § 5000A. If all people have minimum coverage, regardless of their health at a particular moment, then when they do need care, they will have been paying into the system. The balanced and relatively predictable income into the system makes it possible for insurers to cover all comers, including people with pre-existing conditions. *See* 42 U.S.C. § 18091(a)(2) (congressional findings on need for

individual responsibility provision). Thus, one of the centerpieces of the regulatory system envisioned in the ACA, and a key measure for ending gender inequities in health access and outcomes, turns on the full participation that the individual responsibility provision seeks to achieve.

B. The ACA's Comprehensive Approach to Women's Health

The ban on pre-existing condition exclusions and the guaranteed issue requirement will significantly improve women's access to health insurance and care. In addition, the ACA includes a range of other provisions designed to end discrimination against women in health insurance. The Respondents ask this Court to strike down all of these policies in their entirety.

1. Ending gender rating

The widespread insurer practice of "gender-rating"—charging women higher premiums than men of the same age—has long made insurance prohibitively costly for women in the individual market and for small businesses that employ significant numbers of women. When Congress considered the ACA, the overwhelming majority of states still permitted this discriminatory practice; in these states, 95 percent of surveyed best-selling plans charged a 40-year-old woman more than a 40-year-old man for identical coverage. *What Women Want: Equal Benefits for Equal Premiums*, *supra*;

Bridget Courtot *et al.*, National Women's Law Center, *Still Nowhere to Turn: Insurance Companies Treat Women Like a Pre-Existing Condition* 5-6 (2009), http://www.nwlc.org/sites/default/files/pdfs/stillnowheretoturn.pdf. Almost none of these plans included maternity coverage (as discussed below), and thus costs associated with pregnancy and childbirth did not explain this difference. *Id.* Rather, the differences in premiums were arbitrary and highly variable. In Arkansas, premiums among the ten best-selling plans ranged from 13 to 63 percent more for women. Lisa Codispoti *et al.*, National Women's Law Center, *Nowhere to Turn: How the Individual Health Insurance Market Fails Women* 10 (2008), http://www.nwlc.org/sites/default/files/pdfs/NWLCReport-NowhereToTurn-81309w.pdf (appended to Greenberger testimony, *supra*). An insurer in Missouri charged 40-year-old women 140 percent more than men of the same age. *Id.* One small employer with a predominantly female workforce estimated that she paid $2,000 more per employee for health coverage due to her company's gender makeup. Jenny Gold, *Fight Erupts Over Health Insurance Rates for Businesses with More Women*, Kaiser Health News (October 25, 2009), http://www.kaiserhealthnews.org/Stories/2009/October/23/gender-discrimination-health-insurance.aspx.

As Representative Jackie Speier queried on the floor of the House of Representatives:

> Is a woman worth as much as a man? One would think so, unless, of course, one was considering our current health care system, a system where women pay

> higher health care costs than men. Now, believe it or not, in 60 percent of the most popular health care plans in this country, a 40-year-old woman who has never smoked will pay more for health insurance than a 40-year-old man who has smoked.

156 Cong. Rec. H1637 (daily ed. March 18, 2010); *see also* Courtot *et al.*, *supra*, at 6. Ending gender rating was an important purpose of the ACA,[4] which makes gender-rating illegal in every state in both the individual markets and the small group markets. *See* Pub. L. No. 111-148, § 1201.

2. Making maternity coverage available to all

Approximately 85 percent of women in the United States have given birth by age 44, and maternity care is one of the most common types of medical care that women of reproductive age receive. But the vast majority of individual market insurance plans in 2009 did not offer any maternity coverage; others required women to pay high supplemental fees to obtain even limited coverage. A 2009 study of 3600 individual market plans around the United

---

[4] *See, e.g.*, H.R. Rep. No. 111-299(III), at 92 (2009) (describing ending discrimination by insurance companies, including charging different premiums on the basis of gender, a "key element to health reform"); 156 Cong. Rec. H1894, H1898, H1909 (daily ed. March 21, 2010) (statements of Reps. DeLauro, Sanchez, and Velazquez); 155 Cong. Rec. S9524 (daily ed. Sept. 17, 2009) (statement of Sen. Casey); 155 Cong. Rec. S12870 (daily ed. Dec. 10, 2009) (statement of Sen. Baucus); 155 Cong. Rec. S13595 (daily ed. Dec. 21, 2009) (statement of Sen. Harkin).

States found that only 13 percent included any coverage for maternity care. *See* Courtot *et al.*, *supra*, at 6; *see also, e.g.*, H.R. Rep. 111-299(III) at 104 ("The Committee recognizes that historically, insurers have not covered medical services addressing a range of women's health needs, resulting in high out-of-pocket costs for medical services, such as maternity care and preventive screenings."); 155 Cong. Rec. S10265 (daily ed. Oct. 8, 2009) (statement of Sen. Mikulski) ("I think people would find it shocking, good men would find it shocking that maternity care is often denied as a basic coverage. . ."); 155 Cong. Rec. S12027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand) ("Some of the most essential services required by women are currently not covered by many insurance plans, such as childbearing . . . ."). In some instances, women in the individual market had an option to purchase supplemental maternity benefits for an additional premium (known as a rider), but coverage was often expensive and limited in scope. *See* Courtot *et al.*, *supra*, at 11; *What Women Want: Equal Benefits for Equal Premiums*, *supra* (testimony of Amanda Buchanan), *available at* http://help.senate.gov/imo/media/doc/Buchanan.pdf. For instance, maternity riders in Kansas and New Hampshire cost over $1,100 *per month* in 2008. Codispoti *et al.*, *supra*, at 11. Other maternity riders limited total maximum benefits to $3,000 to $5,000 in 2008, when the average cost for an uncomplicated hospital-based vaginal birth was $7,488 in 2006, not including prenatal or postpartum care. *Id.* Moreover, an investigation by the House Energy and Commerce Committee found that insurers intended specifically

to reduce or eliminate coverage of maternity expenses in order to reduce costs; for example, company executives for one insurer noted the "risk" that "by offering a maternity rider we would be attractive to potential members who are likely to have children." Waxman & Stupak, *supra*, at 6-8. Uninsured pregnant women are considerably less likely to receive proper prenatal care and are thus at risk of complications that could be prevented or managed given appropriate care. *See* Amy Bernstein, Alpha Center, *Insurance Status and Use of Health Services by Pregnant Women* (1999), http://www.marchofdime.com/chapterassets/files/bernstein_paper.pdf; Susan Egerter *et al.*, *Timing of Insurance Coverage and Use of Prenatal Care Among Low-Income Women*, 92 Am. J. Pub. Health 423, 423-27 (2002).

The ACA addresses this problem. Beginning in 2014, new health plans in the individual and small-group markets must cover maternity and newborn care as "essential health benefits." Pub. L. No. 11-148, § 1302(b)(D). Moreover, health plans will no longer be permitted to require prior approval for women seeking obstetric or gynecological care. *Id.* at§2719(A)(d). This will ensure greater access to the prenatal care that is essential to healthy pregnancy and birth.

3. Prohibiting sex discrimination in health care and health insurance

The ACA prohibits discrimination on the basis of sex, race, national origin, disability, or age in health programs or activities receiving federal

financial assistance, as well as discrimination by programs administered by executive agencies or any entity established under Title I of the ACA (such as the Health Insurance Exchanges, the "insurance marketplaces" where individuals and small employers will be able to compare and purchase health plans). *See* 42 U.S.C. § 18116. This groundbreaking nondiscrimination provision (which in design mirrors Title IX, the federal law prohibiting sex discrimination in education) is the first time federal law has ever broadly prohibited sex discrimination in health care and health insurance. It provides a legal remedy to individual women who experience discrimination at the hands of health insurers, hospitals and other health care institutions, or other health programs and activities.

4. *Expanding Medicaid eligibility*

Medicaid, the national health insurance program for low-income people, plays a critical role in providing health coverage for women. Women comprise about three-quarters of the program's non-elderly adult beneficiaries, more than one in ten women receives coverage through Medicaid, Kaiser Family Foundation, *Women's Health Insurance Coverage* 1 (2011), http://www.kff.org/womenshealth/upload/6000-091.pdf, including 21 percent of black Women and 16 percent of Hispanic women, National Women's Law Center analysis of 2010 health insurance data from the U.S. Census Bureau Current Population Survey's (CPS) *2011 Annual Social and Economic (ASEC) Supplements*, *available at*

http://www.census.gov/hhes/www/cpstc/cps_table_creator.html.

Nevertheless, even women living in extreme poverty are currently unlikely to qualify for Medicaid unless they are also pregnant, parenting, or disabled. *Id.* Under the ACA, Medicaid will cover up to an additional 8.4 million women by 2014, because eligibility will be expanded to those earning up to 133 percent of the poverty level, or roughly $30,000 a year for a family of four. Sarah Collins *et al.*, *Realizing Health Reform's Potential: Women and the Affordable Care Act of 2010* 9 (Commonwealth Fund, pub. 1429, vol. 93, 2010), http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2010/Jul/1429_Collins_Women_ACA_brief.pdf. *See also* H.R. Rep. 111-388, at 91 (2009) ("Medicaid expansions will disproportionately benefit women, who are more likely to be poor").

5. *Supporting nursing mothers*

Breastfeeding provides important health benefits to both mother and child, including reduced risks of type 2 diabetes, breast cancer, ovarian cancer and postpartum depression for mothers, and of ear infections, diarrhea, lower respiratory infections, asthma, diabetes, obesity, childhood leukemia, and other conditions in children. Stanley Ip *et al.*, *Breastfeeding and Maternal and Infant Health Outcomes in Developed Countries* (U.S. Dep't of Health and Human Servs., Agency for Healthcare Research and Quality Evidence Report/Technology Assessment No. 153, 2007),

http://www.ahrq.gov/downloads/pub/evidence/pdf/brfout/brfout.pdf. The ACA seeks to make these benefits more widely available by making it easier for working mothers to continue to breastfeed. Under the ACA, employers with more than 50 employees must provide employees break times and a private location other than a bathroom for expressing breast milk. 29 U.S.C. § 207(r)(1). In addition, insurers must cover lactation support and counseling, and rental of lactation equipment, such as hospital-grade breast pumps, without cost to the individual. 29 C.F.R. § 2590.715–2713(a)(1)(iv) (2012); Health Resources and Services Administration, Women's Preventive Services: Required Health Plan Guidelines (August 2011), http://www.hrsa.gov/womensguidelines/

6. Providing Pap tests, mammograms, and family planning without copayments

Women need more preventive care on average than men, but are more likely than men to forgo essential preventive services, such as cancer screenings, because of their cost. *See, e.g.*, H.R. Rep. 111-388 at 79-81 (2009); Steven Asch *et al.*, *Who Is at Greatest Risk for Receiving Poor-Quality Health Care?*, 354 New Eng. J. Med. 1147, 1151 (2006). In 2007, more than half of women reported difficulty in obtaining needed medical services because of the cost of such basic care. Rustgi, *supra*, at 3. The ACA requires that new plans cover recommended preventive services and screenings at no cost to the individual. 42 U.S.C. § 300gg-13; *see also* 29 C.F.R. § 2590.715–2713(a)(1)(iv) (2012); Health Resources and Services Administration, Women's Preventive

Services: Required Health Plan Guidelines (August 2011), http://www.hrsa.gov/womensguidelines/. Many women who otherwise would not be able to get basic screening like Pap tests and mammograms have access to this potentially life-saving medical care as a consequence of the new law. *See* H.R. Rep. 111-299(III) at 104 (2009) (describing intent to require basic benefits package "include the full range of medical services for women's unique health needs, at all stages of life, including . . . preventive screenings such as mammograms, annual gynecological exams, diagnostic, routine care, and recommended treatments."); 155 Cong. Rec. S11987 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski) (explaining need to remove barriers to preventive care for women); 155 Cong. Rec. S12025-S12030 (daily ed. Dec. 1, 2009) (same). As a result of the ACA, women will also have access to prescription contraceptives and family planning services without cost, as well as other important preventive care. *See, e.g.*, 155 Cong. Rec. S12027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand) ("With Senator Mikulski's amendment, even more preventive screening will be covered, including for post-partum depression, domestic violence, and family planning.") 155 Cong. Rec. S12274 (daily ed. Dec. 2, 2009) (statement of Sen. Murray) ("Women will have improved access to well-women visits—important for all women; family planning services; mammograms . . . to make sure they maintain their health.").

7. *Making private health insurance more affordable*

Under the ACA, beginning in 2014, subsidies will be available to help an additional 11 million low- and middle-income women pay for health insurance in the individual market and out-of-pocket health care costs. Because women are poorer on average than men, are more likely to hold low-wage or part-time jobs that do not offer employer-sponsored health benefits, and struggle more with medical debt, *see* H.R. Rep. 111-388, at 68-86 (2009); Elizabeth M. Patchias & Judy Waxman, *Issue Brief: Women and Health Coverage: The Affordability Gap* 5 (Commonwealth Fund, pub. 1020, vol. 25, 2007), http://www.nwlc.org/sites/default/files/pdfs/Section%204%20Making%20Health%20Care%20Affordable.pdf, these reforms are essential for addressing continuing gender health disparities and insurance coverage disparities in the United States.

II. AS LEGISLATION INTENDED TO PROMOTE WOMEN'S HEALTH AND END GENDER DISCRIMINATION, THE ACA FOLLOWS IN A LONG TRADITION OF CIVIL RIGHTS LAWS FIRMLY WITHIN CONGRESS'S COMMERCE CLAUSE POWER.

Given the ACA's purposes and importance for removing obstacles to women's equal treatment in the insurance market and making health care available to women, it is appropriately understood as

following in the tradition of our nation's civil rights laws, protecting the right to fair treatment and equal access to services fulfilling basic needs.

Throughout the congressional debate over the ACA, the law's significant impact on women was of paramount concern. The Congressional Record is rich with statements recognizing that "[h]ealth care reform here will provide women the care that they need; the economic security they need; prohibit plans from charging women more than men; ban the insurance practice of rejecting women with a preexisting condition; and include maternity services." 156 Cong. Rec. H1637 (daily ed. March 18, 2010) (statement of Rep. Moore).[5]

As Congresswoman Jackie Speier explained in casting her vote for the Act:

---

[5]*See also, e.g.*, 155 Cong. Rec. H12368 (daily ed. Nov. 5, 2009) (statement of Rep. Hirono) ("Fifty-two percent of women reported postponing or foregoing medical care because of cost. Only 39 percent of men report having had those experiences. Nine States allow private plans to refuse coverage for domestic violence survivors. Eighty-eight percent of private insurance plans do not cover comprehensive maternity care."); S. Res. 6, 111th Cong. (2009) (enacted) (women pay 68 percent more than men for out-of-pocket medical costs; 13 percent of all pregnant women are uninsured, making them less likely to seek prenatal care in the first trimester, less likely to receive the optimal number of prenatal health care visits, and 31 percent more likely to experience an adverse health outcome after giving birth; heart disease is leading cause of death for women and men, but women are less likely to receive lifestyle counseling, diagnostic and therapeutic procedures, and cardiac rehabilitation and are more likely to die or have a second heart attack).

> The fact is that women's health care premiums cost, on average, more than 145 percent of the price of a similar man's policy. Even then, women are more likely to be denied coverage for a pre-existing condition, including for things as common as getting pregnant (or the inability to get pregnant), having a C-section, even being a survivor of domestic violence. With the passage of this health care reform bill, these practices will be tossed on the ash-heap of history atop corsets, chastity belts, and other limitations on women's rights and equality. In fact, with this bill, America's mothers, wives and sisters will finally enjoy the same health care coverage that their fathers, sons and brothers have.

155 Cong. Rec. H12623-03 (daily ed. Nov. 7, 2009).

Because of this focus and impact, the ACA should be recognized as falling within the category of federal antidiscrimination legislation removing barriers to full economic participation by disadvantaged groups. The Commerce Clause has been consistently understood to provide the congressional authority to address the impact on interstate commerce that arises from these discriminatory exclusions and simultaneously to forward goals of equality and inclusion.

In enacting a broad range of federal civil rights laws over the past 50 years, Congress has determined that the problem of discrimination

against and exclusion of disfavored groups is one that cannot be left to local solutions, given its national scope and impact. Like civil rights laws such as the Civil Rights Act of 1964, the Equal Pay Act, and the Family and Medical Leave Act, the ACA recognizes that inequality and sex discrimination have a significant economic impact and that addressing these economic consequences requires confronting inequality and discrimination. Thus, by regulating commerce in health insurance and health care, the ACA also takes an important step to ensuring equality of access to health care—forwarding fundamental civil rights principles of equal treatment and equal opportunity.[6] The ACA's focus on addressing the economic harm of discrimination places it squarely within Congress's Commerce Clause power.

In the landmark cases upholding the constitutionality of the Civil Rights Act of 1964, *Heart of Atlanta* and *Katzenbach v. McClung*, the Supreme Court acknowledged "the overwhelming

---

[6] *See generally, e.g.*, *United States v. Virginia*, 518 U.S. 515, 532 (1996) (noting fundamental principle that is violated when "women, simply because they are women" are denied the "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984) (noting "the changing nature of the American economy and the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women"); *see also Newport News Shipbuilding Co. v. EEOC*, 462 U.S. 669, 676 (1983) (denying pregnancy coverage to female health insurance beneficiaries discriminates on the basis of sex).

evidence of the disruptive effect that racial discrimination has had on commercial intercourse." *Heart of Atlanta*, 379 U.S. at 257; *see also Katzenbach*, 379 U.S. at 303-304. The far-reaching gender inequities that have pervaded the market for health insurance and health care have been similarly disruptive to interstate commerce, as Congress has recognized.

Specifically, women who have been unable to obtain adequate insurance coverage because of preexisting condition exclusions, gender rating, denial of maternity coverage, or cost barriers have faced obstacles to securing access to needed health care goods and services, including those moving in interstate commerce. *See, e.g.*, H.R. Rep. 111-388 at 78 (2009) (68 percent of underinsured women, compared to 49 percent of underinsured men, have difficulty obtaining needed health care); Bernstein, *supra* (describing uninsured pregnant women's lower likelihood of obtaining prenatal care); Egerter, *supra* (same); Asch, *supra*, at 1147-56 (describing women's greater propensity to forego preventative care because of cost). When women cannot purchase insurance, or when the insurance available does not cover basic costs such as maternity expenses or imposes high out-of-pocket costs for preventive care, their health care expenses will be significant, thus restricting their ability to purchase other goods and services in interstate commerce. *See, e.g.*, H.R. Rep 111-299(III) at 92 ("Discrimination based on health, gender and other factors has severe economic consequences for those have been unable to find affordable health coverage and for those who have coverage, but are under-insured."); H.R. Rep. 111-388

at 84 (37 percent of women, compared to 29 percent of men, report problems paying medical bills); *id.* at 70 (over half of medical bankruptcies impact a woman); Elizabeth Warren *et al.*, *Medical Problems and Bankruptcy Filings*, Norton's Bankruptcy Adviser, 10 (May 2000), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=224581 (noting that "the number of women filing alone who identify a medical reason for their bankruptcies is nearly double that of men filing alone"). Finally, when uninsured or underinsured women are unable to pay for the health care they require, those costs are passed onto third parties through increased health care and health insurance costs, including increased costs for goods and services moving in interstate commerce. *See generally* 42 U.S.C. § 18091(a)(2)(F) (finding that the American public has paid tens of millions of dollars to cover the costs of health care for uninsured Americans).

Because of the economic impact of discrimination and the need for national solutions to the problems it poses, in cases upholding a range of federal civil rights legislation, courts have recognized that, far from being an impediment to the exercise of Commerce Clause authority, "civil rights ... are traditionally of federal concern." *United States v. Allen*, 341 F.3d 870, 881 (9th Cir. 2003) (upholding federal hate crimes legislation under Commerce Clause). So, for example, in *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000), the Fifth Circuit, upholding the Fair Housing Amendments Act (FHAA), "emphasize[d] that in the context of the strong tradition of civil rights enforced through the Commerce Clause . . . we have long

recognized the broadly defined 'economic' aspect of discrimination."

Recognizing the significant federal responsibility for addressing persistent discrimination and inequality, this Court and many lower courts have upheld a wide range of federal civil rights laws as appropriately enacted under the Commerce Clause. *See, e.g.*, *EEOC v. Wyoming*, 460 U.S. 226, 234, 243 (1982) (finding the Age Discrimination in Employment Act an appropriate exercise of Congress's Commerce Clause authority); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 242 (1964) (Title II); *Katzenbach v. McClung*, 379 U.S. 294, 295 (1964) (same); *Terry v. Reno*, 101 F.3d 1412, 1413 (D.C. Cir. 1996) (Freedom of Access to Clinic Entrances Act); *United States v. Miss. Dep't of Pub. Safety*, 321 F.3d 495, 500 (5th Cir. 2003) (Americans with Disabilities Act); *United States v. Gregg*, 226 F.3d 253, 262 (3d Cir. 2000) (Freedom of Access to Clinic Entrances Act); *United States v. Dinwiddie*, 76 F.3d 913, 921 (8th Cir. 1996) (same); *United States v. Soderna*, 82 F.3d 1370, 1374 (7th Cir. 1996) (same); *Cheffer v. Reno*, 55 F.3d 1517, 1520-21 (11th Cir. 1995) (same); *Oxford House-C v. City of St. Louis*, 77 F.3d 249, 251 (8th Cir. 1996) (FHAAA); *Morgan v. Sec'y of Hous.& Urban Dev.*, 985 F.2d 1451, 1455 (10th Cir. 1993) (same); *Seniors Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1034 (11th Cir. 1992) (same).

The ACA, like these other statutes, is an appropriate exercise of federal Commerce Clause authority. It is unquestionably a law that regulates commerce—the health insurance and health care

markets make up 17.5 percent of our nation's gross domestic product. In particular, the ACA corrects fundamental gender inequities in the health insurance and health care markets and bars discrimination against women in multiple forms, thus alleviating the severe economic consequences of such inequities and discrimination. In taking this legislative action, Congress was continuing "the strong tradition of civil rights enforced through the Commerce Clause." *Groome*, 234 F.3d at 209.

III. AS A REASONABLE COMPONENT OF A COMPREHENSIVE PLAN RESPONDING TO A NATIONAL CRISIS IN THE HEALTH INSURANCE MARKET AND TO WOMEN'S COVERAGE NEEDS, THE INDIVIDUAL RESPONSIBILITY PROVISION FALLS WELL WITHIN COMMERCE CLAUSE AUTHORITY

Through the ACA, Congress adopted a comprehensive regulatory plan designed to address a national economic crisis in health care, with a particular focus on the disadvantage and discrimination that women and others have faced in the insurance market. Addressing this crisis is well within Congress's power, given the settled authority that the Commerce Clause permits regulation of both the insurance industry and health care services. *See, e.g.*, *United States v. South-Eastern Underwriters' Ass'n*, 322 U.S. 533, 539 (1944).

The Eleventh Circuit's conclusion that the individual responsibility provision is beyond

Congress's Commerce Clause authority was wrong. On numerous previous occasions, exercising its Commerce Clause power in efforts to address behavior with broad consequences for the national economy and remove barriers to full economic participation by women and other disadvantaged groups, Congress has required individuals to engage in private commercial activity in instances where those individuals preferred to remain "inactive." For example, Title II of the Civil Rights Act of 1964 required hotel and restaurant owners to serve customers they did not want to serve and thus engage in commercial activities that they wished to avoid. *See* 42 U.S.C. §§ 2000a -2000a-6. As Judge Silberman, writing for the D.C. Circuit, recently recognized in upholding the constitutionality of the individual responsibility provision, the obligation to obtain minimum coverage is no more and no less an encroachment on individual liberty "than a command that restaurants or hotels are obliged to serve all customers regardless of race." *Seven-Sky v. Holder*, 661 F.3d 1, 20 (D.C. Cir. 2011). In upholding that law, this Court rejected the argument that a local motel owner should be able to deny service to African-American customers because that local decision was unrelated to interstate commerce. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964).

The same analysis underlies Congress's power to prohibit employers from refusing to employ an individual on the basis of her sex or race, thus requiring employers to enter into unwanted economic relationships in certain circumstances. *See, e.g.*, *U.S. v. Gregory*, 818 F.2d 1114, 1119 (4th Cir. 1987)

(noting that Title VII was enacted under the Commerce Clause); *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 81 (3d Cir. 2003) (same). Similarly, the Fair Housing Act, 42 U.S.C. §§ 3601-3614(a), passed pursuant to Congress's Commerce Clause power, prohibits refusing to rent or sell housing to an individual on the basis of her sex, familial status, race, or disability, and thus compels owners of real estate to engage in commercial activities they would otherwise have avoided. *See, e.g.*, *Groome*, 234 F.3dat 209. As the D.C. Circuit explained, "The right to be free from federal regulation is not absolute, and yields to the imperative that Congress be free to forge national solutions to national problems, no matter how local—or seemingly passive—their individual origins." *Seven-Sky*, 661 F.3d at 20 (citing *Heart of Atlanta Motel*, 379 U.S. at 258-59).

Congress realized in passing these laws and others like them, from the Equal Credit Opportunity Act to the Family and Medical Leave Act, that a national crisis of discrimination could only be solved through legislation reaching individual refusals to transact. Similarly, Congress understood in 2010 that legislation addressing a national crisis in the health insurance market would only work with near-universal participation and thus must reach individual refusals. As Congress is regulating within an area of its authority—and the health insurance and health care markets are unquestionably areas of appropriate national authority—there is no prohibition against the federal government requiring individuals to participate in economic transactions they might otherwise avoid.

As multiple courts have now recognized, the choice to purchase health insurance or pay for health care some other way is commercial activity. "The activity of foregoing health insurance and attempting to cover the cost of health care needs by self-insuring is no less economic than the activity of purchasing an insurance plan." *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 544 (6th Cir. 2011); *see also id.* at 561 (Sutton, J., concurring) ("No one is inactive when deciding how to pay for health care, as self-insurance and private insurance are two forms of action for addressing the same risk."); *Mead v. Holder*, 766 F. Supp. 2d 16, 33 (D.D.C. 2011); *Liberty Univ. v. Geithner*, 753 F. Supp. 2d 611, 633 (W.D. Va. 2010) ("Far from 'inactivity,' by choosing to forgo insurance, Plaintiffs are making an economic decision to try to pay for health care services later, out of pocket, rather than now, through the purchase of insurance."). Just as a hotel's decision not to rent rooms to African-Americans is not a decision that removes the hotel from the market for lodging, but rather is a decision about when and how to engage in that market, the choice not to purchase health insurance is not a decision that avoids participation in the health care market, but is simply a decision about when and how to pay for the costs of health care.

Like decisions to discriminate, the cumulative impact of decisions to eschew health insurance has significant consequences for the larger health care market and other participants in it. *Cf. Katzenbach*, 379 U.S. at 299-301. In 2005 alone, 48 million uninsured Americans incurred $43 billion in medical costs that they could not pay, which were in turn

passed to the broader public. *See* 42 U.S.C. §§ 18091(a)(2). Refusing to obtain health insurance is an economic choice, with economic consequences, under even a limited definition of "commercial" or "economic," just as a decision to refuse to provide lodging to an individual because of her race is an economic choice, with economic consequences.[7] *See Katzenbach*, 379 U.S. at 303-4 ("[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.").

Moreover, even if the decision to defer medical costs until after they are incurred, and the concurrent decision to shift the risk of inability to pay these costs to the broader market, were somehow construed not to be an economic activity, the individual responsibility provision would still be within congressional authority to enact as a "necessary and proper" part of a complex regulatory scheme. *See Gonzales v. Raich*, 545 U.S. 1, 22 (2005). Congress has the authority to use any "means that is rationally related to the implementation of a constitutionally enumerated power" that is not otherwise prohibited by the Constitution. *United States v. Comstock*, 130 S.Ct. 1949, 1956-57 (2010).

---

[7]Given the direct economic impact of these decisions in the aggregate, they easily come within Congress's Commerce Clause power to regulate, in contrast to the far more attenuated and speculative link that would be presented were Congress to regulate, for example, personal nutritional decisions. *Cf. Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (Scalia, J., concurring) (Commerce Clause does not reach noneconomic activity based on "remote chain of inferences" regarding impact on commerce).

This Court has repeatedly reaffirmed that "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *United States v. Lopez*, 514 U.S. 549, 558 (1995). Supreme Court precedent thus "firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce." *Raich*, 545 U.S. at 17 (*citing Perez v. United States*, 402 U.S. 146, 151 (1971) and *Wickard v. Filburn*, 317 U.S. 111 (1942)). Moreover, Congress can regulate entirely intrastate conduct "that is not itself 'commercial,' . . . if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market..." *Id.* at 18.

Congress certainly had a rational basis for its conclusion that the individual responsibility provision was necessary to effective implementation of important elements of the ACA, including Congress's purpose in addressing health insurer practices that excluded women from coverage. *See* 42 U.S.C. §§18091(a) (findings on need for individual responsibility provision). Uninsured individuals shift billions of dollars of costs onto third parties. Congressional Budget Office, *Key Issues in Analyzing Major Health Proposals* 114 (2008), *available at* http://www.cbo.gov/ftpdocs/99xx/doc9924/12-18-KeyIssues.pdf. The individual responsibility provision addresses this cost-shifting and forms a key part of the ACA's reforms. It is a reasonable provision permitting the ban on pre-existing condition exclusions, including insurers'

exclusion of women from insurance coverage because of pregnancy, past Caesarean-sections, cervical or breast cancer, or past domestic or sexual abuse.

CONCLUSION

As demonstrated by key civil rights precedent, including women's rights precedent, the ACA individual responsibility provision addresses the economic impact of insurance market failures and discrimination in a manner consistent with the Constitution. This Court should reverse the decision of the Eleventh Circuit Court of Appeals and uphold the provision as a valid exercise of Congress's Commerce Clause authority.

Dated: January 13, 2012

Respectfully Submitted,

Marcia D. Greenberger
Emily J. Martin
Judith G. Waxman

National Women's Law Center
11 Dupont Circle, NW #800
Washington, D.C. 20036
202-588-5180

Melissa Hart
Counsel of Record
University of Colorado
Law School
UCB 401
Boulder, CO 80309
303-735-6344
melissa.hart@colorado.edu

Attorneys for Amici Curiae

APPENDIX A

AMICI STATEMENTS OF INTEREST

9to5, National Association of Working Women
9to5, National Association of Working Women is a national membership-based organization of low-wage women working to achieve economic justice and end discrimination. 9to5's members and constituents are directly affected by lack of access to health care and health insurance, by discriminatory health insurance industry practices, and by the long-term negative effects of lack of access and discriminatory practices on their and their families' economic well-being. Our toll-free Job Survival Helpline fields thousands of phone calls annually from women facing these and related problems. The issues of this case are directly related to 9to5's work to end discrimination and our work to promote policies that aid women in their efforts to achieve economic security. The outcome of this case will directly affect our members' and constituents' access to health care and their long-term economic well-being and that of their families.

Alliance for Early Care & Education, Inc.
The Alliance for Early Care & Education, Inc. is a nonprofit organization dedicated to ensuring that all children benefit from an enriching early childhood experience. As such, we understand that it is impossible for children to learn and become self-reliant adults without a variety of supports, including access to comprehensive healthcare for themselves and their families. We feel that

healthcare is a fundamental human right which precedes the right of any corporation to generate a profit. Therefore, on behalf of our 1,378 members we urge you to uphold the constitutionality of the individual responsibility provision of the Affordable Care Act.

American Association of University Women (AAUW)
For 130 years, the American Association of University Women (AAUW), an organization of over 100,000 members and donors, has been a catalyst for the advancement of women and their transformations of American society. In more than 1000 branches across the country, AAUW members work to break through barriers for women and girls. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues, and chief among them is increased access to quality affordable health care. Therefore, AAUW supports efforts to ensure patient protection, equitable treatment of all consumers, coverage of preventive care, and other initiatives to improve the collective health of the American people.

American College of Nurse-Midwives
The American College of Nurse-Midwives (ACNM) is the national trade association representing the interests of over 11,000 Certified Nurse-Midwives (CNM®) and Certified Midwives (CM®) in the United States. ACNM is a non-profit organization whose mission is to promote the health and well-being of women and infants within their families and communities through the development and support of the profession of midwifery as practiced by CNMs

and CMs. The philosophy inherent in the profession affirms that every individual has the right to safe, satisfying health care with respect for human dignity and cultural variations. The Patient Protection and Affordable Care Act (ACA) instituted many far-reaching, necessary policy reforms including requiring coverage for pregnancy-related care, disallowing coverage denials for preexisting conditions, eliminating cost-sharing for women's health preventative services, recognition of free-standing birth centers, and the extension by 2014 of health insurance coverage to some 30 million Americans currently without coverage. ACNM believes the ACA should be upheld in its entirety.

Asian American Justice Center

The Asian American Justice Center (AAJC), member of the Asian American Center for Advancing Justice, is a national nonprofit, nonpartisan organization whose mission is to advance the civil and human rights of Asian Americans and to promote a fair and equitable society for all. Founded in 1991, AAJC engages in litigation, public policy, advocacy, and community education and outreach on a range of civil rights issues, including access to health care. AAJC's longstanding interest in health care matters that impact Asian Americans and others from underserved communities has resulted in the organization's participation in amicus briefs in both state and federal courts.

Asian Pacific American Legal Center

The Asian Pacific American Legal Center (APALC), a member of the Asian American Center for Advancing

Justice, is a nonprofit legal services and civil rights organization based in Southern California. APALC has worked on health issues for more than 14 years, including access for immigrants and limited English speakers to health and other government programs.

Black Women's Health Imperative

The Black Women's Health Imperative ("Imperative") is a non-profit advocacy organization with a 29 year history of dedication to promoting optimum health for Black women across the life span. Women have long faced great difficulty obtaining comprehensive, affordable health coverage due to harmful and discriminatory health insurance industry practices. The Imperative is profoundly concerned about the impact that the Court's decision may have on women's access to health insurance.

Campaign for Better Health Care

The Campaign for Better Health Care (Illinois) is a non-profit legal advocacy organization that that has been working since 1989 for affordable, accessible and quality health care for ALL. Far too long too tens of millions of residents of the United States have long faced great difficulty obtaining comprehensive, affordable health coverage due to harmful and discriminatory health insurance industry practices. CBHC and our 300+ members throughout the state of Illinois is profoundly concerned about the impact that the Court's decision may have on access to health insurance for tens of millions of Americans.

Center for Reproductive Rights

The Center for Reproductive Rights ("the Center") is a national, nonprofit, public interest law firm dedicated to the advancement of reproductive rights under the U.S. Constitution and as fundamental human rights, both in the United States and throughout the world. The Center's domestic and international programs engage in litigation, policy analysis, legal research, and public education seeking to achieve women's equality in society and ensure that all women have access to appropriate and freely chosen reproductive health services. The Center specializes in litigating reproductive rights cases throughout the United States and is currently lead or co-counsel in a majority of the reproductive rights litigation in the nation. The Center actively supports efforts to expand insurance coverage of the full range of reproductive health services throughout the United States.

Central Conference of American Rabbis

The Central Conference of American Rabbis (CCAR), whose membership includes more than 1,800 Reform rabbis, comes to this issue rooted in two central ideas that underlie the abiding Jewish commitment to provide health care to all of God's children: The first is Judaism's teaching that an individual human life is of infinite value and that the preservation of life supersedes almost all other considerations. The second is the belief that God has endowed us with the understanding and ability to become partners with God in making a better world. For these reasons, we believe that when members of a society at large are ill, our responsibility — not only of the

medical profession but of all of us — expands to ensure that medical resources are available at an affordable cost to those who need them.

Chicago Abortion Fund

The Chicago Abortion Fund (CAF) is an abortion fund in the Midwest that is working from a reproductive justice framework has worked for 26 years to provide the most marginalized and disadvantaged women with financial assistance for their second trimester abortion procedures. Through a two prong process we directly fund procedures then engage those same women in grassroots advocacy and mobilization. CAF believes that without access there is no choice.

Childbirth Connection

Childbirth Connection is a 94-year-old national not-for-profit organization that works to improve the quality and value of maternity care through consumer engagement and health system transformation. Women's access to comprehensive, affordable health coverage is essential in helping to ensure optimal birth outcomes for both women and newborns. Discriminatory practices by health insurers have created barriers to affordable, accessible maternity care for far too many childbearing women. Childbirth Connection is deeply concerned about the impact that the Court's decision may have on women's access to health insurance and birth outcomes.

Coalition of Labor Union Women

The Coalition of Labor Union Women (CLUW) is America's only national membership organization for all union women based in Washington, DC with chapters throughout the country. Founded in 1974 its focus is to empower women in the workplace, advance women in their unions, encourage political and legislative involvement, organize women workers into unions and promote policies that support women and working families. CLUW focuses on public policy issues such as equality in employment and educational opportunities, affirmative action, pay equity, national health care, labor law reform, family and medical leave, reproductive freedom, and increased participation of women in unions and in politics. Through its 45 chapters throughout the United States, CLUW members work to end discriminatory laws and policies and practices adversely affecting women through a broad range of educational, political and advocacy activities. Promoting quality, affordable health care for women and families has long been a priority of the Coalition of Labor Union Women. We support the National Women Law Center's amicus brief to uphold the Affordable Care Act.

Community Action Project of Tulsa County

Community Action Project of Tulsa County, Inc. ("CAPTC") is a non-profit anti-poverty organization that that has been working since 1997 to help young children from low-income families grow up to be able to achieve economic success as adults. These children and families face significant health risks merely by living in Oklahoma, which ranks 48th

among states in health outcomes. Many of the families CAPTC serves lack comprehensive, affordable health coverage; the Affordable Care Act finally offers an opportunity for these families to access health insurance. CAPTC is profoundly concerned about the impact that the Court's decision may have on low-income families' access to health insurance.

Connecticut Women's Education and Legal Fund

The Connecticut Women's Education and Legal Fund (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. Since its founding in 1973, CWEALF has provided legal education and advocacy and conducted research and public policy work to advance women's rights.

Feminist Majority Foundation

The Feminist Majority Foundation, a 501(c)(3) non-profit organization founded in 1987, is dedicated to the pursuit of women's equality, utilizing research and action to empower women economically, socially, and politically. FMF advocates for full enforcement of laws ending discrimination and advancing equality for women, including the Affordable Care Act, which ends discrimination in health insurance rates, reduces barriers to coverage, and expands the number of U. S. women who will be able to obtain health care.

Florida CHAIN

Florida CHAIN is a statewide consumer healthcare advocacy organization whose mission is to improve the health of all Floridians by promoting sustainable access to affordable, effective health care. A non-profit, 501 c3 organization, Florida CHAIN represents the uninsured and low-income healthcare consumers both directly and indirectly through its activities. Its function is to create an infrastructure that meets the need for coordination and organizing among community based health and human service providers, healthcare consumers and advocates. This infrastructure facilitates and provides for education, communication, policy analysis and advocacy. Priorities of Florida CHAIN include ensuring that Medicaid beneficiaries are protected against budget cuts and barriers to access, access is expanded to children and coverage is expanded for Florida's estimated 4.1 million uninsured.

Gender Impacts Policy

Gender Impacts Policy is a project of the Center of Southwest Culture, a non-profit economic development and education organization founded in 1991. Sex/gender, socio-economic status and education have long been social determinants of women's health, and women face great difficulty obtaining comprehensive, affordable health coverage due to harmful and discriminatory health insurance industry practices. Gender Impacts Policy is concerned with the impact that the Court's decision may have on women's access to health insurance.

Guttmacher Institute

The Guttmacher Institute is a non-profit nonpartisan organization committed to advancing sexual and reproductive health and rights through an interrelated program of research, policy analysis and public education designed to generate new ideas, encourage enlightened public debate and promote sound policy and program development. The Institute's overarching goal is to ensure the highest standard of sexual and reproductive health for all people. Given the critical importance of health insurance towards advancing this goal, the Institute is profoundly concerned about the implications of the Court's decision for access to coverage.

Hadassah, The Women's Zionist Organization of America, Inc.

Hadassah, The Women's Zionist Organization of America, Inc., founded in 1912, is the largest women's and the largest Jewish membership organization in the United States, with over 300,000 Members, Associates and supporters. While traditionally known for its role in initiating and supporting pace-setting health care and other initiatives in Israel, Hadassah also has had a longstanding commitment to strengthening the health care system in the United States, particularly with regard to the health care needs of women and children. Consistent with that commitment, Hadassah believes that all Americans should have access to affordable, quality health care. The Affordable Health Care Act represents a significant step towards achieving that goal.

Health Care for America Now (HCAN)
Health Care for America Now (HCAN) is a non-profit grassroots health care coalition that was created to win, implement and defend health care reform. Health insurance companies have long discriminated against women and the sick by denying coverage based on health status and pre-existing conditions. HCAN is deeply concerned about the impact of the Court's decision on women and other people that have been denied access to basic health care.

Ibis Reproductive Health
Ibis Reproductive Health is a nonprofit research and advocacy organization that aims to improve women's reproductive autonomy, choices, and health worldwide. Ibis has a portfolio of work on the impact of Massachusetts health care reform on women's access to reproductive health services, which has shown that low-income women and young women have largely benefitted from reform in the Commonwealth. The Affordable Care Act is a huge step forward to improve women's access to health care in the United States, and Ibis supports the arguments made by the National Women's Law Center in this brief.

Institute for Science and Human Values
The Institute for Science and Human Values (ISHV) is a non-profit educational organization committed to the enhancement of human values and scientific inquiry. It focuses on the principles of personal integrity: individual freedom and responsibility. It includes a commitment to social justice, planetary ethics, and developing shared values for the human

family. Women have continually faced great barriers to accessing comprehensive, affordable health coverage due to harmful and discriminatory health insurance industry practices. ISHV is deeply worried about the powerful effect that the Court's decision may have on women's right to and access to health insurance.

Legal Voice

Legal Voice is a regional non-profit public interest organization that works to advance the legal rights of all women in the Northwest (including Washington, Idaho, Alaska, Montana, and Oregon) through litigation, legislation, education and the provision of legal information and referral services. Since its founding in 1978, Legal Voice has been involved in both litigation and legislation to ensure women's equitable access to health care and non-discrimination in provision of health care services. Toward that end, Legal Voice has participated as counsel and as amicus curiae in cases throughout the Northwest and the country when women's health is at stake. Legal Voice has a strong interest in this case to secure comprehensive, affordable health care coverage for all women.

Maryland Women's Coalition for Health Care Reform

The Maryland Women's Coalition for Health Care Reform supports the Amicus Brief submitted by the National Women's Law Center. As a statewide coalition that includes 58 women's organizations, including all of the state's County Commissions for Women and hundreds of individuals, we are committed to ensuring that every Marylander has

access to all of the health care services they need and deserve. We fully support the provisions of the ACA that support this goal. In light of that we endorse the arguments made in this Brief.

Maternity Care Coalition

Maternity Care Coalition is a non-profit in Pennsylvania that serves over 5,000 families directly through our MOMobile, Early Head Start, and Cribs for Kids programs. We work to ensure that all families have access to quality prenatal, postpartum, and well-baby care. From these experiences and from our consistent monitoring of access to insurance for low-income women, we have experienced firsthand the harmful effects of discriminatory practices such as gender rating that prevent women from obtaining the quality, affordable health care they need. We are profoundly concerned about the impact of the Court's decision on access to health care for both mothers and babies.

Montana Women Vote

Montana Women Vote (MWV) is a statewide non-profit organization that works to register and engage low-income Montana women in the democratic process. MWV also works year-round on policy issues that affect women and families in Montana. While Montana has historically protected women from discrimination because of our long-standing state non-gender insurance laws, many women still lack access to affordable comprehensive health care and are edged out of the health insurance market because of industry practices. Access to health insurance for women and the scope of coverage would

be greatly improved under the Patient Protection and Affordable Care Act and that expanded coverage is potentially impacted by the Court's decision.

NARAL Pro-Choice America

NARAL Pro-Choice America is a non-profit organization dedicated to developing and sustaining a constituency that uses the political process to guarantee every woman the right to make personal decisions regarding the full range of reproductive choices, including preventing unintended pregnancy, bearing healthy children, and choosing legal abortion. The Affordable Care Act presents an historic opportunity to advance America's health-care system and promises to improve greatly women's access to reproductive-health services. NARAL Pro-Choice America is concerned about the impact that the Court's decision may have on women's access to affordable insurance coverage, particularly to coverage of reproductive- and preventive-health services.

National Advocates for Pregnant Women

National Advocates for Pregnant Women ("NAPW") is a non-profit organization that works to ensure the human rights, health, and dignity of all pregnant and parenting women, especially the most vulnerable including low income and women of color. NAPW advocates for reproductive justice, including the right to an abortion, the right to decide whether, when, and how to carry a pregnancy to term, access to culturally-appropriate and evidence-based medical care, and the right to parent the children one bears without unnecessary state intrusion and family

disruption. NAPW joins this case as amicus to explain to the court the importance of affordable healthcare in assuring the best health outcomes for women, the infants they give birth to, and the children they care for.

National Asian Pacific American Women's Forum

The National Asian Pacific American Women's Forum (NAPAWF) is the only national, multi-issue Asian and Pacific Islander (API) women's organization in the country. NAPAWF's mission is to build a movement to advance social justice and human rights, which includes access to quality, affordable, culturally competent, and comprehensive health care, for API women and girls. NAPAWF supports the Affordable Care Act for the advances it has provided on behalf of underserved API and immigrant women and urges the Supreme Court to uphold this important law.

National Association of Nurse Practitioners in Women's Health

The National Association of Nurse Practitioners in Women's Health (NPWH) was founded in 1980 as a non-profit nurse practitioner organization. Our mission is to assure the provision of quality healthcare to women of all ages, that they have access to nurse practitioners as their healthcare providers and that they have affordable healthcare which includes a wide range of coverage from clinical to pharmaceutical to devices, with a goal of improving health outcomes. NPWH is also very concerned about the impact the Court's decision

could have on women's access to healthcare insurance.

National Association of Social Workers

Established in 1955, the National Association of Social Workers (NASW) is the largest association of professional social workers in the world with nearly 145,000 members and 56 chapters throughout the United States and internationally. With the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the NASW Code of Ethics, conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession. NASW's statement, Health Care Policy, supports "efforts to increase health care coverage to uninsured and underinsured people until universal health and mental health coverage is achieved" and "efforts to eliminate racial, ethnic, and economic disparities in health service access, provision, utilization, and outcomes." (NASW, SOCIAL WORK SPEAKS, 167, 169, 8th ed., 2009). NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's members, but also to society in general. NASW has long been committed to working toward the elimination of all forms of discrimination against women. The NASW Code of Ethics directs social workers to "engage in social and political action that seeks to ensure that all people have equal access to the resources,

employment, services, and opportunities they require to meet their basic human needs and to develop fully." NASW's policies support "access to adequate health and mental health services regardless of financial status, race and ethnicity, age, or employment status, which would require universal health care coverage..." NATIONAL ASSOCIATION OF SOCIAL WORKERS, Women's Issues, SOCIAL WORK SPEAKS, 367, 371 (8th ed., 2009). Accordingly, given NASW's policies and the work of its members, NASW has expertise that will assist the Court in reaching a proper resolution of the questions presented in this case.

National Coalition for LGBT Health

The National Coalition for LGBT Health ("the Coalition") is a nationwide coalition of more than 75 organizations committed to improving the health and well-being of the lesbian, gay, bisexual, and transgender (LGBT) community through federal health policy advocacy. Because LGBT people and their families are regularly discriminated against in employment, relationship recognition, and insurance coverage, the LGBT population faces significant disparities in health status and insurance coverage. The Affordable Care Act is a key component of health system reform that seeks to eliminate these disparities, and the Coalition is deeply concerned about the negative effect that the Court's decision may have on the health and well-being of millions of women, including lesbians, bisexual women and their families.

National Council of Jewish Women

The National Council of Jewish Women (NCJW) is a grassroots organization of 90,000 volunteers, advocates, and supporters who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that the organization endorses and resolves to work to for "quality, comprehensive, confidential, nondiscriminatory health-care coverage and services, including metal health, that are affordable and accessible for all." Consistent with our Resolutions, NCJW joins this brief.

National Council of Women's Organizations

The National Council of Women's Organizations is a non-profit, non-partisan coalition of more than 240 prominent women's groups that advocates for the 12 million women they represent. While these groups are diverse and their membership varied, all work for equal participation in the economic, social, and political life of their country and their world. The Council addresses critical issues that impact women and their families: from workplace and economic equity to international development; from affirmative action and Social Security to the women's vote; from the portrayal of women in the media to enhancing girls' self-image; and from Title IX and other education rights to affordable access to health care.

National Family Planning & Reproductive Health Association

The National Family Planning & Reproductive Health Association (NFPRHA) represents the broad spectrum of family planning administrators and clinicians serving the nation's low-income and uninsured. NFPRHA's more than 400 institutional members operate or fund a network of more than 3,700 health centers and service sites in 48 states and the District of Columbia, providing family planning and other preventive health services to millions of low-income and uninsured individuals each year.

National Gay and Lesbian Task Force Action Fund

The National Gay and Lesbian Task Force ("The Task Force") is the oldest national organization advocating for the rights of lesbian, gay, bisexual and transgender people, particularly economical disadvantaged individuals and families. Research suggests that lesbians and bisexual women have higher rates of obesity, smoking, and stress, thereby increasing their risk of developing certain chronic diseases. As a longtime supporter of women's health and reproductive freedom, The Task Force is concerned about the impact the Court's decision may have on women's access to health insurance.

National Health Care for the Homeless Council

The National Health Care for the Homeless Council (NHCHC) is a non-profit membership organization representing Health Care for the Homeless (HCH) projects, their staff, and the patients they serve. HCH projects provide primary medical care,

behavioral health services, and other support services to individuals and families experiencing homelessness, 70% of whom are uninsured. For over 25 years, HCH projects have seen first-hand the inequities in access to health care services, health outcomes, and quality of life caused by a lack of health insurance. The Patient Protection and Affordable Care Act seeks to remedy some of these inequities by expanding health coverage. NHCHC is very concerned that the Court's decision will undermine the efforts to improve health and well-being for those experiencing homelessness and retain the current inequities in our health care system.

National Latina Institute for Reproductive Health
National Latina Institute for Reproductive Health (NLIRH) is the only national non-profit organization working to promote reproductive health and justice for a growing and diverse population of Latinas. The communities we represent face numerous barriers in accessing necessary healthcare: cost, language access, cultural competency, discrimination, and immigration status have all perpetuated health disparities between Latinas and the population at-large. Because the Affordable Care Act stands to improve access to care and coverage for many Latinas, especially those who are U.S. citizens, NLIRH is deeply concerned about the potential impact of the Court's decision.

National Organization for Women Foundation
The National Organization for Women Foundation is a 501(c)(3) organization devoted to furthering women's rights through education and litigation.

Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest grassroots feminist organization in the United States, with hundreds of thousands of contributing members in hundreds of chapters in all 50 states and the District of Columbia. Since its inception, one of NOW Foundation's goals has been to improve access for all women to quality health care which is affordable and free of sex-based discrimination.

National Partnership for Women & Families
The National Partnership for Women & Families is a nonprofit, nonpartisan organization that uses public education and advocacy to promote equal rights and quality health care for all. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership advocated for the critical reforms established by the Patient Protection and Affordable Care Act, which address discriminatory practices in the insurance industry and stand to make affordable, quality health care a reality for women and their families.

North Dakota Women's Network (NDWN)
The North Dakota Women's Network (NDWN) is a statewide women's advocacy organization whose mission is to improve the lives of women through communication, legislation and increased public activism. Because the health and well-being of women and girls is vital to improving women's lives, access to comprehensive and affordable health insurance is an imperative.

Northwest Health Law Advocates

Northwest Health Law Advocates ("NoHLA") is a non-profit legal and policy advocacy organization founded in 1999 to promote increased access to health care on behalf of low- and moderate-income Washington State residents. NoHLA represents low-income clients in cases seeking improved access to health care, provides training and consultation to many community-based legal assistance organizations and private attorneys, and provides advocacy to improve health care access in public forums such as rulemaking comments and legislative analysis. As a small organization, NoHLA often works with other groups to achieve common objectives to improve affordability and access to care for low-income individuals.

Older Women's League (OWL)

OWL is a national grassroots membership organization that focuses solely on improving the status and quality of life for midlife and older women. For the past thirty years, OWL has worked toward the goal of comprehensive, accessible healthcare that is publicly administered and financed. OWL has consistently advocated for a single-payer health care system. As the momentum for health care reform legislation gathered speed, OWL worked with a diverse set of organizations to foster change that addressed persistent problems including millions of Americans without insurance, ever-rising costs, lack of affordable long-term care coverage and inequities in the health insurance industry. OWL took a strong leadership position on gender and age rating of health insurance premiums

and moved the dialogue forward on this topic despite strong opposition. As a result, the Patient Protection and Affordable Care Act (PPACA) essentially eliminated gender rating, and insurers are restricted to a 3 to 1 age ratio (rather than a 5 to 1 ratio). Maintaining these important provisions in the PPACA are key to the quality of life for midlife and older women and compels OWL to support this brief.

People For the American Way Foundation

People For the American Way Foundation (PFAWF) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1981 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members nationwide. PFAWF regularly participates in litigation to defend constitutional principles, including those embodied in the Commerce Clause, and joins this brief in support of greater access to affordable healthcare and health insurance.

PHI – Quality Care through Quality Jobs

PHI (formerly the Paraprofessional Healthcare Institute) works to improve the lives of people who need home or residential care—by improving the lives of the workers who provide that care. Our goal is to ensure caring, stable relationships between consumers and workers, so that both may live with dignity, respect and independence. This workforce is overwhelmingly female, low-income, and twice as likely as the general population to lack health insurance coverage. The impact of the Court's

decision on access to affordable quality health coverage for our nation's paid caregivers is a major concern to PHI.

Physicians for Reproductive Choice and Health

PRCH is a doctor-led national advocacy organization. We use evidence-based medicine to promote sound reproductive health policies. As physicians, we believe every American deserves unfettered access to all reproductive health care. The health of our country depends on it. The Affordable Care Act is a valid use of congressional authority and means that millions of Americans will finally have the health coverage they need.

Planned Parenthood Federation of America

Planned Parenthood Federation of America (PPFA) is the nation's largest and most trusted voluntary reproductive health care organization. PPFA's 84 affiliates operate 815 healthcare centers nationwide. In addition to providing reproductive health care, PPFA and its affiliates are among the nation's most active and widely recognized advocates for increased access to comprehensive reproductive health services and education. PPFA is committed to promoting and preserving full reproductive choice for all people, and to providing access to high quality, confidential, reproductive health services.

Raising Women's Voices for the Health Care We Need

Raising Women's Voices for the Health Care We Need (RWV) is a national initiative working to make sure women's voices are heard in the health reform

debate and women's concerns are addressed by policymakers developing national and state health reform plans. RWV has a special focus on engaging women of color, low-income women, immigrant women, young women, women with disabilities and members of the lesbian, gay, bisexual and transgender community. In addition to bringing the concerns of these constituencies to federal advocacy forums, RWV has 22 regional coordinators in 20 states who do community organizing, advocacy and public education with women at the state and local levels.// RWV and the women it represents recognize that the Affordable Care Act (ACA) makes a real and significant difference in the lives of millions of our families, neighbors and communities. By prohibiting insurance companies from denying coverage to people with pre-existing conditions, like breast cancer or having a c-section delivery, and from charging women more than men for the same policies, it has increased our health security. Women will also gain from the availability of affordable health insurance for millions more families, from the guarantee that maternity care will be covered and from the availability of screening and preventive services without any cost-sharing barriers. With the promise of access to quality, affordable health care that meets the needs of women and our families the ACA has the potential to bring equity and fairness for women to the health care arena where it has been lacking for too long.

Sargent Shriver National Center on Poverty Law

The Sargent Shriver National Center on Poverty Law (Shriver Center) provides national leadership to

promote justice and improve the lives and opportunities of people with low income. The improved access to affordable comprehensive health coverage and health care provided by the Affordable Care Act is vital to the well-being and upward mobility of people with low income. The Shriver Center's Women's Law and Policy Project is particularly interested in justice for women and girls, including with respect to fair and adequate treatment by the nation's health care system. The Affordable Care Act contains important provisions to improve the system for women and girls that are at stake in the case before the Court.

Sexuality Information and Education Council of the United States (SIECUS)

The Sexuality Information and Education Council of the United States (SIECUS) is a 48-year-old national non-profit that advocates for the right of all people to accurate information, comprehensive education about sexuality, and sexual health services. SIECUS works to create a world that ensures social justice and sexual rights. Achieving sexual health should not be precluded by the barrier of access to comprehensive, affordable health coverage for sexual health services based on discriminatory health insurance industry practices. SIECUS is profoundly concerned with the impact that the Court's decision may have on the ability on women's access to health insurance for sexual health services.

South Dakota Advocacy Network for Women

The South Dakota Advocacy Network for Women ("SDANW") is a non-profit advocacy organization

that has been working since 1984 to advance and protect the rights of women in the South Dakota legislature. SDANW is a network composed of more than twenty women's organizations and dozens of individuals across the state of South Dakota. SDANW believes that women have a right to access comprehensive, affordable healthcare coverage, and that discriminatory practices on the part of health insurers have impeded such access in the past. SDANW is concerned the Court's decision could have a profound impact on the lives of women in our state and across the country.

Southwest Women's Law Center

The Southwest Women's Law Center is a nonprofit public interest organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by: (i) eliminating gender bias, discrimination and harassment; (ii) lifting women and their families out of poverty; and (iii) ensuring that women have full control over their reproductive lives through access to comprehensive reproductive health services and information. Access to health care is an important economic and social justice tool for improving the lives of women. As a result, the Southwest Women's Law Center has worked to ensure that New Mexico fully implements the Affordable Care Act.

TakeAction Minnesota

TakeAction Minnesota works for social, racial and economic justice for all in Minnesota. We are committed to expanding access to health care to all

Minnesotans and building healthy communities throughout our state. TakeAction Minnesota is deeply concerned about the impact the Court's decision may have on the expanded access to health care that the Affordable Care Act is designed to achieve.

Union for Reform Judaism

The Union for Reform Judaism, whose 900 congregations across North America includes 1.5 million Reform, comes to this issue rooted in two central ideas that underlie the abiding Jewish commitment to provide health care to all of God's children: The first is Judaism's teaching that an individual human life is of infinite value and that the preservation of life supersedes almost all other considerations. The second is the belief that God has endowed us with the understanding and ability to become partners with God in making a better world. For these reasons, we believe that when members of a society at large are ill, our responsibility — not only of the medical profession but of all of us — expands to ensure that medical resources are available at an affordable cost to those who need them.

Wider Opportunities for Women

Wider Opportunities for Women (WOW) works nationally and in its home community of Washington, DC, to help women achieve economic security and equality of opportunity for themselves and their families at all stages of life. Through our Family Economic Security and Elder Economic Security Initiatives, WOW has developed indexes of

income needed to cover basic needs, including out-of-pocket health care costs. Access to affordable health insurance is essential for women's economic security.

Wisconsin Alliance for Women's Health

The Wisconsin Alliance for Women's Health (WAWH) is the Wisconsin women's health policy leader. Our broad and diverse support base includes over four dozen organizations, 1,000 individuals, including policy makers, health care providers and community members, and 182 health care professionals in our state. The vision of WAWH is to create an environment in which all Wisconsin women at every stage of life can thrive through realizing their optimal health, safety, well-being, and economic security. For this reason, we are deeply committed to the Patient Protection and Affordable Care Act, and the impact the Supreme Court decision will have on Wisconsin Women's ability to realize the full potential of the Act's benefits.

Women of Reform Judaism

Women of Reform Judaism (WRJ), an affiliate of the Union for Reform Judaism, is the collective voice and presence of women in congregational life. Established in 1913, WRJ now represents more than 65,000 women in nearly 500 women's groups in North America and around the world. Deeply committed to the social justice mission of Reform Judaism, WRJ first took action on a health issue in 1935 and in 1991 adopted a resolution calling for universal access to health care. Initiating a focus on women's health care in 1991, WRJ wrote "Women are short-changed in all aspects of health care, from

research through prevention programs to delivery of services. The need to address these inequities is fundamental to women's rights in general." WRJ and its local affiliates have continued to advocate comprehensive, affordable health coverage for women to provide for their well-being.

Women's Law Project

The Women's Law Project (WLP) is a nonprofit legal advocacy organization dedicated to creating a more just and equitable society by advancing the rights and status of all women throughout their lives. To this end, we engage in high impact litigation, advocacy, and education. The WLP has a long and effective track record working to improve access to comprehensive, quality, and affordable health care for women. Since 1994, the Women's Law Project (WLP) has engaged in extensive advocacy on the federal and state levels to eliminate insurance practices that deny insurance coverage to victims of domestic violence. We advocated for adoption of the Affordable Care Act to reduce the significant barriers to health care that confront women in the existing insurance market and have a strong interest in full implementation of the ACA.

WOMEN'S WAY

WOMEN'S WAY is the country's oldest and largest women's funding federation and was founded in Philadelphia in 1977. Our mission is to raise money and public awareness to fight for and achieve women's equality, safety, self-sufficiency, and reproductive freedom through women-centered funding, advocacy, and public education. The passage

of the Affordable Care Act was paramount to the well-being of Pennsylvania's women and families who desperately need access to quality, affordable health care. Our organization is concerned that women's health will be negatively impacted if the Affordable Care Act is not upheld.

AMICUS CURIAE BRIEF

No. 11-398

Supreme Court, U.S.
FILED
FEB 9 - 2012
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DEPARTMENT OF HEALTH
AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

STATE OF FLORIDA, *et al.*,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

**BRIEF OF THE STATE OF OKLAHOMA AS
AMICUS CURIAE IN SUPPORT OF RESPONDENTS
(Addressing Minimum-Coverage Provision)**

E. SCOTT PRUITT
Attorney General of Oklahoma

PATRICK R. WYRICK
Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
313 NE 21st Street
Oklahoma City, Oklahoma 73105
patrick.wyrick@oag.ok.gov
405.521.3921
405.522.0669 FAX
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Page

STATEMENT OF THE IDENTITY, INTEREST, AND AUTHORITY OF *AMICUS* TO FILE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENTS AND AUTHORITIES 3

I.

Using the commerce power to regulate those who are not actively engaged in interstate commerce reduces an individual's liberty more so than using it to regulate those who wittingly engage in interstate commerce 5

II.

Commerce regulations that *mandate* conduct reduce an individual's liberty more so than regulations that *prohibit* conduct 6

III.

If Congress wishes to reduce an individual's liberty by enacting laws like the ACA's individual mandate, it should be required to do so through its taxing power – rather than the commerce power – as the taxing power is more checked by the political process and thus less susceptible to uses that infringe upon individual liberty 8

TABLE OF CONTENTS – Continued

Page

IV.

Infringements on individual liberty are best left to the states, as the state-level political process is more responsive and sensitive to the will of the people 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bond v. United States, 131 S.Ct. 2355 (2011).....3, 5, 10

Gonzales v. Raich, 545 U.S. 1 (2005).....4

United States v. Kahriger, 345 U.S. 22 (1953).....8

STATE STATUTES

Okla. Const. Art. 2, § 37.....1

OTHER AUTHORITIES

U.S. Const. art. I, § 8, cl. 3, Commerce Clause.....4

Kirk J. Stark, *The Right to Vote on Taxes*, 96 Nw. U. L. Rev. 191 (2001).....9

Ronald J. Krotoszynski, Jr., *Reconsidering the Non-Delegation Doctrine: Universal Service, The Power to Tax, and the Ratification Doctrine*, 80 Ind. L.J. 239 (2005).....8

The Federalist No. 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961).....9

The Federalist No. 45 (James Madison) (Clinton Rossiter ed., 1961).....4, 10

BRIEF OF THE STATE OF OKLAHOMA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS (Addressing Minimum-Coverage Provision)

STATEMENT OF THE IDENTITY, INTEREST, AND AUTHORITY OF *AMICUS* TO FILE

The State of Oklahoma as *amicus* has an interest in the decisions in *U.S. Dept. of Health and Human Services v. Fla.*, No. 11-398 because Oklahomans have a state constitutional right to be free from any law or rule that would compel them to participate in any health care system. *See* Okla. Const. Art. 2, § 37. The Affordable Care Act's individual mandate directly conflicts with Oklahoma's Constitution, and if found to be valid, would preempt Oklahoma's law.[1]

SUMMARY OF THE ARGUMENT

The Court should affirm the decision below. The Affordable Care Act's ("ACA") individual mandate exceeds Congress's commerce power by curtailing individual liberty in a way that cannot be reconciled with the commerce power's purpose and textual limitations.

[1] Pursuant to Rule 37.4 of the Rules of this Court, the State of Oklahoma, as a sovereign State, does not require leave nor the consent of the parties to file this *amicus curiae* brief submitted by its Attorney General. This brief was not written in whole or in part by counsel for any party, and no person or entity other than the *amicus curiae* has made a monetary contribution to the preparation and submission of this brief.

The primary purpose of the commerce power is to prevent state laws that discriminate against interstate commerce – not to allow Congress the virtually unfettered ability to regulate the lives of Americans. That would be a federal police power, and this Court has always insisted that the commerce power is no such thing.

If that is true, and there is no such federal police power, then there must be some limiting principle placed on the commerce power that prevents it from being abused. This case proves that the existing limits are inadequate. The Court should articulate clear limits that prevent improper curtailments of individual liberty – limits that take into account the following four factors:

1. Commerce regulations that apply to all citizens, regardless of whether they have voluntarily placed themselves in any interstate market, are inherently more restrictive of individual liberty than are more traditional commerce regulations, which place conditions only on those who wittingly engage in interstate commerce.

2. Commerce regulations that mandate conduct reduce individual liberty more so than regulations that prohibit conduct.

3. Because the commerce power does not have the political check that limits the use of the taxing power, it has a greater

potential to be used in a way that excessively infringes on individual liberty.

4. Infringements on individual liberty are best left to the States, as the state-level political process is more responsive and sensitive to the will of the people.

If these four factors are considered, the Court will arrive at a limiting principle that protects individual liberty, and the individual mandate will be found to be outside those limits.

ARGUMENTS AND AUTHORITIES

> Federalism . . . protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake. *Bond v. United States*, 131 S.Ct. 2355, 2364 (2011) (internal citation omitted).

The ACA, with its mandate that as a condition of residence all citizens buy a product that many do not want, has infringed upon the individual liberty of Oklahoma's citizens.

In effect, Congress has deemed a 20-year-old woman in Norman, Oklahoma engaged in no commerce at all, to be the regulatory equivalent of an eighteen-wheel truck transporting goods on interstate highways. That is, both are equally subject to regulation by Congress under the Commerce Clause.

The commerce power was never intended to create such odd parallels. It was conceived as the Founder's "response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation . . . the primary use of the Clause was to preclude the kind of discriminatory state legislation that had once been permissible." *Gonzales v. Raich*, 545 U.S. 1, 16 (2005). The Founders thought the commerce power, with its seemingly clear textual limits, hardly susceptible to abuse. *Cf.* The Federalist No. 45, at 293 (James Madison) (Clinton Rossiter ed., 1961) ("The regulation of commerce . . . seems to be an addition which few oppose, and from which no apprehensions are entertained."). Little thought was given to additional protections in the Bill of Rights to protect against abuse of the power, and additional words of limitation in the text of the clause were deemed unnecessary.

With the individual mandate, Congress has proven the Founders wrong. Congress incorrectly assumed that the commerce power gives the federal government virtually "complete jurisdiction over all concerns of public life." Oklahoma submits that in a federal system of limited, enumerated powers, the

individual mandate *must* be found to exceed Congress's commerce power because it infringes on individual liberty in a way that was never contemplated by the Founders.

I.

Using the commerce power to regulate those who are not actively engaged in interstate commerce reduces an individual's liberty more so than using it to regulate those who wittingly engage in interstate commerce.

Whatever limiting principle the Court decides to place on the commerce power – and there must be one lest the power be transformed into a federal police power – must take into account the power's effect on individual liberty. That is, the commerce power cannot be allowed to excessively infringe upon individual liberties protected by the federal constitution.[2]

Here is why: it is one thing to regulate those who voluntarily choose to engage in interstate commerce. But it is quite another to characterize "engagement in

---

[2] The federal constitution not only protects individual liberty through explicit guarantees, but also through the system of federalism it establishes. *Bond*, 131 S.Ct. at 2364 ("By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power."). This redundancy of safety measures illustrates just how much value the Founders placed on protecting individual liberty, and underscores the importance of structural federalism.

interstate commerce" in such a way that *every* citizen is subject to regulation – even the unwitting. Indeed, Americans are quite accepting of the notion that conditions might be imposed upon them when they choose to engage in interstate commerce – that is the most basic of American bargains. But Americans are much less accepting of the notion that a remote central government can place conditions on them when they choose to do nothing but *live*. That notion is antithetical to fundamental American views on individual autonomy.

The Court should thus at the outset acknowledge that commerce regulations that reach *every* citizen, regardless of their status, are inherently more coercive, and inherently more restrictive of individual liberty than those that reach only citizens who have wittingly injected themselves into an interstate market.

II.

Commerce regulations that *mandate* conduct reduce an individual's liberty more so than regulations that *prohibit* conduct.

The individual mandate represents Congress's single-most coercive exercise of the commerce power – that much seems clear. Some suggest that the novelty of the mandate indicates that past Congresses believed they lacked the commerce power to enact such a law. But it might also be the case that Congress never passed such a mandate because such a law is

vastly more restrictive than more common regulations that prohibit certain conduct.

Think about it this way: an individual with $1 to spend has a virtually infinite number of ways to spend that dollar. If Congress exercises its commerce power like it usually does, and passes rules prohibiting the individual from spending that dollar on certain things, like illegal drugs or weapons, the ways the individual can choose to spend his $1 decrease from infinite, to infinite minus only the prohibited expenditures. Conversely, when Congress passes a regulation mandating the way the individual spends their $1, the ways the individual can choose to spend their $1 are decreased from infinite to only one. A mandate thus tramples on individual choice and freedom much more so than a more typical regulatory prohibition. *That* is likely a better answer to the questions of why mandates are rare, and that is why in close cases involving mandates, the Court should view the exercise of the commerce power with extreme skepticism.

The Court should thus also acknowledge that, regardless of who or what is being regulated, a mandate reduces individual freedom more than does a prohibition. And in a case where the question of whether the conduct is subject to commerce regulation is a very close one, this acknowledgment should tip the scales in favor of striking down the mandate.

III.

If Congress wishes to reduce an individual's liberty by enacting laws like the ACA's individual mandate, it should be required to do so through its taxing power – rather than the commerce power – as the taxing power is more checked by the political process and thus less susceptible to uses that infringe upon individual liberty.

Congress could have elected to utilize the taxing power to accomplish the ends of the individual mandate. But it did not because it could not, at least not in the political climate that existed at the time.

And therein lies the rub of the taxing power. When then-presidential candidate George H.W. Bush declared, "Read my lips: no new taxes," he described an American hostility towards taxes that has festered since the Boston Tea Party. That hostility towards exercises of the taxing power makes it a power that Congress uses at its own risk. Ronald J. Krotoszynski, Jr., *Reconsidering the Non-Delegation Doctrine: Universal Service, The Power to Tax, and the Ratification Doctrine*, 80 Ind. L.J. 239, 240 (2005) ("[F]ew things inspire greater dread in most politicians than the prospect of raising taxes.").

The Founders recognized as much. As a result, they did not feel the need to place textual limits on the power, nor did they place protections against its use in the Bill of Rights. *United States v. Kahriger*, 345 U.S. 22, 28 (1953) ("It is axiomatic that the power

of Congress to tax is extensive and sometimes falls with crushing effect. . . . As is well known, the constitutional restraints on taxing are few."). With the Boston Tea Party still in their recent memory, the Founders knew that political pressures exerted by the will of the people were more than enough of a check:

> One cannot study American history for long before noticing the conspicuous role of tax revolts. Time and again Americans have turned mutinous against taxes – the Boston Tea Party, the Whiskey Rebellion, the Depression-era tax strikes. "Tax revolts," as one commentator put it, "are as American as 1776." Kirk J. Stark, *The Right to Vote on Taxes*, 96 Nw. U. L. Rev. 191, 191 (2001) (quoting Joseph D. Reid, Jr., *Tax Revolts in Historical Perspective*, 32 Nat'l Tax J. 67, 69 (1979)) (footnotes omitted).

So when proponents of the individual mandate argue that because Congress *could have* enacted it with its taxing power, "what's the harm in letting them enact it with the commerce power?," they miss the constitutional point. The Federalist No. 33, at 203-04 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded."). The taxing power and commerce power cannot be coextensive precisely because Congress wields the commerce power without the stigma that accompanies the taxing power. If the commerce power is expanded so that it is coextensive

with the taxing power, it will be far too susceptible to abuse.

IV.

Infringements on individual liberty are best left to the states, as the state-level political process is more responsive and sensitive to the will of the people.

Were it not for its constitutional amendment, the State of Oklahoma, through its general police power, *could* require its citizens to purchase health insurance. This is so because the Founders intended that most infringements of individual liberty be left to the States, because the individuals affected by such laws could more easily use their political will to affect legal change at the local, rather than national, level.

> Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. *Bond,* 131 S.Ct. at 2364; *see also* The Federalist No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people.").

This core principle of federalism cannot be ignored nor eroded, but it will be if the commerce power is transformed into a federal police power. Indeed, the fact that 28 of the 50 States have sued seeking to invalidate the individual mandate proves the disconnect that too often exists between the federal government and the States it was formed to serve. That disconnect will be exacerbated so long as the commerce power is the functional equivalent of a federal police power. The commerce power must therefore be limited in a way that acknowledges the federal government's proper place in our republican form of government.

CONCLUSION

For these reasons, the decision below should be affirmed, and the individual mandate should be declared unconstitutional and its enforcement should be permanently enjoined.

Respectfully submitted,

E. SCOTT PRUITT
Attorney General of Oklahoma

PATRICK R. WYRICK
Counsel of Record
Solicitor General

OFFICE OF THE ATTORNEY GENERAL
313 NE 21st Street
Oklahoma City, Oklahoma 73105
patrick.wyrick@oag.ok.gov
405.521.3921
405.522.0669 FAX
Attorneys for Respondent

February 9, 2012

AMICUS CURIAE BRIEF

No. 11-398

IN THE
Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF 104 HEALTH LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

(Minimum Coverage Provision)

GREGORY G. RAPAWY
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

CHARLES FRIED
Counsel of Record
1563 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636
(fried@law.harvard.edu)

ABBE R. GLUCK
435 West 116th Street
New York, NY 10027
(212) 854-0679

January 13, 2012

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY 2

ARGUMENT 5

I. THE NATIONAL MARKET FOR HEALTH CARE IS IMMENSE, INTERDEPENDENT, AND UNIQUE 5

A. Almost Everyone in the United States Uses Health Care Throughout Their Lives 5

B. Health Care Costs for Individuals Are Expensive, Unpredictable, and Difficult To Control 7

C. Individuals Often Receive Health Care Even When They Cannot Pay 11

D. No Other Part of the Economy Shares the Key Characteristics of the Health Care Market 14

II. LACK OF HEALTH INSURANCE COVERAGE DRAMATICALLY AFFECTS THE NATIONAL HEALTH CARE MARKET 16

A. Private and Public Insurance Pay for Most Personal Health Care Expenditures 16

B. Many Americans Spend Time Without Insurance 18

C. Lack of Health Insurance Coverage Leads to Worse Outcomes and Unpaid Bills 21

III. REQUIRING INDIVIDUALS TO BE INSURED STABILIZES THE NATIONAL HEALTH CARE MARKET 24

A. The Individual Mandate Advances PPACA's Purpose of Guaranteeing Access 24

B. PPACA Provides Nationwide and Individual Benefits to All Americans Participating in the Market for Health Care 26

CONCLUSION 28

APPENDIX

TABLE OF AUTHORITIES

Page

CASES

California Dental Ass'n v. FTC, 526 U.S. 756 (1999) 10

Guerrero v. Copper Queen Hosp., 537 P.2d 1329 (Ariz. 1975) 13

Wilmington Gen. Hosp. v. Manlove, 174 A.2d 135 (Del. 1961) 13

STATUTES AND RULES

Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd 13

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 ..... *passim*

26 U.S.C. § 5000A(f) 24

Cal. Health & Safety Code § 1317 13

Fla. Stat. Ann. § 401.45 13

210 Ill. Comp. Stat. Ann. 70/1 13

Sup. Ct. R. 37.6 1

LEGISLATIVE MATERIALS

Statement of Mark A. Hall Before the U.S. Senate Committee on Finance, Hearing on "47 Million and Counting: Why the Health Care Marketplace is Broken" (June 10, 2008), *available at* http://finance.senate.gov/imo/media/doc/061008MHTest.pdf 7

ADMINISTRATIVE MATERIALS

Centers for Medicare & Medicaid Services, U.S. Dep't of Health & Human Services:

National Health Expenditures Accounts: Definitions, Sources, and Methods, 2009, available at http://www.cms.gov/nationalhealthexpenddata/downloads/dsm-09.pdf 17

National Health Expenditures by Type of Service and Source of Funds, CY1960-2009, available at http://www.cms.gov/nationalhealthexpenddata/02_nationalhealthaccountshistorical.asp 17

Congressional Budget Office, *Selected CBO Publications Related to Health Care Legislation, 2009-2010* (Dec. 2010), *available at* http://www.cbo.gov/ftpdocs/120xx/doc12033/12-23-SelectedHealthcarePublications.pdf 26

HealthCare.gov, *At Risk: Pre-Existing Conditions Could Affect 1 in 2 Americans, at* http://www.healthcare.gov/law/resources/reports/preexisting.html (last visited Jan. 9, 2012) 27

National Ctr. for Health Statistics, U.S. Dep't of Health & Human Services:

Health, United States, 2010 (Feb. 2011), *available at* http://www.cdc.gov/nchs/data/hus/hus10.pdf 6

National Hospital Ambulatory Medical Care Survey: 2008 Emergency Department Summary Tables (Jan. 2011), *available at* http://www.cdc.gov/nchs/data/ahcd/nhamcs_emergency/nhamcsed2008.pdf 11

Summary Health Statistics for the U.S. Population: National Health Interview Survey, 2009, Vital & Health Stat., Series 10, Number 248 (Dec. 2010), *available at* http://www.cdc.gov/nchs/data/series/sr_10/sr10_248.pdf 20

Summary Health Statistics for the U.S. Population: National Health Interview Survey, 2010, Vital & Health Stat., Series 10, Number 251 (Dec. 2011), *available at* http://www.cdc.gov/nchs/data/series/sr_10/sr10_251.pdf 19

Summary Health Statistics for U.S. Adults: National Health Interview Survey, 2009, Vital & Health Stat., Series 10, Number 249 (Dec. 2010), *available at* http://www.cdc.gov/nchs/data/series/sr_10/sr10_249.pdf 6

Summary Health Statistics for U.S. Children: National Health Interview Survey, 2009, Vital & Health Stat., Series 10, Number 247 (Dec. 2010), *available at* http://www.cdc.gov/nchs/data/series/sr_10/sr10_247.pdf 6-7

National Weather Service, *United States Flood Loss Report – Water Year 2010, available at* http://www.nws.noaa.gov/hic/flood_stats/Summaries/WY2010.pdf 15

Office of Consumer Information & Insurance Oversight, Interim Final Rule for Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements under the Patient Protection and Affordable Care Act, Regulatory Impact Analysis Technical Appendix (Nov. 2010), *available at* http://cciio.cms.gov/resources/files/mlr_20101122_technical_appendix.pdf 17

Office of the Ass't Secretary for Planning and Evaluation, U.S. Dep't of Health & Human Services, *The Value of Health Insurance: Few of the Uninsured Have Adequate Resources To Pay Potential Hospital Bills* (May 2011), *available at* http://aspe.hhs.gov/health/reports/2011/valueofinsurance/rb.pdf.....7, 8, 9, 23

U.S. Census Bureau:

Income, Poverty, and Health Insurance Coverage in the United States: 2010 (Sept. 2011), *available at* http://www.census.gov/prod/2011pubs/p60-239.pdf..... 9

Statistical Abstract of the United States (2012), *available at* http://www.census.gov/compendia/statab/2012edition.html 15

OTHER MATERIALS

Eli Y. Adashi et al., *Health Care Reform and Primary Care – The Growing Importance of the Community Health Center*, 362 New Eng. J. Med. 2047 (June 3, 2010), *available at* http://www.nejm.org/doi/pdf/10.1056/NEJMp1003729..... 11

Berhanu Alemayehu & Kenneth E. Warner, *The Lifetime Distribution of Health Care Costs*, 39 Health Serv. Res. 627 (June 2004) 5, 6

America's Health Insurance Plans, *The Value of Provider Networks and the Role of Out-of-Network Charges in Rising Health Care Costs: A Survey of Charges Billed by Out-of-Network Physicians* (Aug. 2009), *available at* http://www.ahipresearch.org/PDFs/ValueSurvey/AllStatesReport.pdf 8-9

American Hospital Ass'n, *Uncompensated Hospital Care Cost Fact Sheet* (Nov. 2008), *available at* http://www.aha.org/content/00-10/08-uncompensated-care.pdf 14

American Medical Ass'n:

AMA Council on Ethical and Judicial Affairs, Opinion 8.11 – *Neglect of Patient* (June 1996), *available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion811.page? 11

Competition in Health Insurance: A Comprehensive Study of U.S. Markets – 2010 Update (2010) 16

Matthew Buettgens et al., Urban Institute, *America Under the Affordable Care Act* (Dec. 1, 2010), *available at* http://www.urban.org/UploadedPDF/412267-america-under-aca.pdf ... 26

GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES (1978) 12

Peter J. Cunningham, Center for Studying Health System Change, *Who Are the Uninsured Eligible for Premium Subsidies in the Health Insurance Exchanges?* (Dec. 2010), *available at* http://www.rwjf.org/files/research/71572.pdf 21

Stan Dorn, Urban Institute, *Uninsured and Dying Because of It: Updating the Institute of Medicine Analysis on the Impact of Uninsurance on Mortality* (Jan. 2008), *available at* http://www.urban.org/uploadedPDF/411588_uninsured_dying.pdf 22

Families USA:

Americans At Risk: One in Three Uninsured (Mar. 2009), *available at* http://www.familiesusa.org/assets/pdfs/americans-at-risk.pdf 19

Paying a Premium: The Added Cost of Care for the Uninsured (June 2005), *available at* http://www.familiesusa.org/assets/pdfs/Paying_a_Premium_rev_July_13731e.pdf 22

Elliott Fischer et al., *The Implications of Regional Variations in Medicare Spending – Part 2: Health Outcomes and Satisfaction with Care*, 138 Annals of Internal Med. 288 (Feb. 18, 2003), *available at* http://www.annals.org/content/138/4/288.full.pdf+html 10

CHARLES FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE (Harvard Univ. Press 1970) 12

Paul Fronstin, *Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2011 Current Population Survey*, EBRI Issue Brief No. 362 (Sept. 2011), *available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_09-2011_No362_Uninsured1.pdf 18

Thomas A. Gionis et al., *The Intentional Tort of Patient Dumping: A New State Cause of Action To Address the Shortcomings of the Federal Emergency Medical Treatment and Active Labor Act (EMTALA)*, 52 Am. U. L. Rev. 173 (2002) 13

Carole Roan Gresenz & José J. Escarce, *Spill-over Effects of Community Uninsurance on Working-age Adults and Seniors: An Instrumental Variables Analysis*, 49 Med. Care e14 (Sept. 2011), *available at* http://www.rwjf.org/files/research/72828fullmedicalcarespillovereffects20110920.pdf 22

Jack Hadley et al., *Covering The Uninsured In 2008: Current Costs, Sources Of Payment, And Incremental Costs*, 27 Health Aff. 399 (Aug. 2008), *available at* http://content.healthaffairs.org/content/27/5/w399.full.pdf+html ...22, 23

David C. Hadorn, *Setting Health Care Priorities in Oregon: Cost-Effectiveness Meets the Rule of Rescue*, 265 J. Am. Med. Ass'n 2218 (1991) 11-12

MARK A. HALL, MAKING MEDICAL SPENDING DECISIONS: THE LAW, ETHICS, AND ECONOMICS OF RATIONING MECHANISMS (Oxford Univ. Press 1997) 11

Mark A. Hall & Carl E. Schneider, *Patients as Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 Mich. L. Rev. 643 (2008) 8, 10

Bradley Herring & Mark V. Pauly, *Incentive-Compatible Guaranteed Renewable Health Insurance Premiums*, 25 J. Health Econ. 395 (2006) 28

David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 Am. J. Med. 741 (Aug. 2009), *available at* http://download.journals.elsevierhealth.com/pdfs/journals/0002-9343/PIIS0002934309004045.pdf 14

INSTITUTE OF MEDICINE:

AMERICA'S UNINSURED CRISIS: CONSEQUENCES FOR HEALTH AND HEALTH CARE (2009), *available at* http://www.nap.edu/catalog.php?record_id=12511 ..... 17, 24

INSURING AMERICA'S HEALTH: PRINCIPLES AND RECOMMENDATIONS (2004), *available at* http://www.nap.edu/catalog.php?record_id=10874 ... 23, 24

Ken Jacobs et al., *Maximizing Health Care Enrollment through Seamless Coverage for Families in Transition: Current Trends and Policy Implications* (Univ. of Calif., Berkeley, Ctr. for Labor Research & Educ., Mar. 2011), *available at* http://laborcenter.berkeley.edu/healthcare/seamless_coverage11.pdf 19, 20

Karen E. Jenni & George Loewenstein, *Explaining the "Identifiable Victim Effect,"* 14 J. Risk & Uncertainty 235 (1997), *available at* http://www.andrew.cmu.edu/user/gl20/GeorgeLoewenstein/Papers_files/pdf/identifiable-victim.pdf 12

James B. Kirby & Toshiko Kaneda, *Unhealthy and Uninsured: Exploring Racial Differences in Health and Health Insurance Coverage Using a Life Table Approach*, 47 Demography 1035 (Nov. 2010) 18-19

Norman G. Levinsky, *The Doctor's Master*, 311 New Eng. J. Med. 1573 (Dec. 13, 1984) 10

Wendy K. Mariner:

Health Reform: What's Insurance Got to Do With It? Recognizing Health Insurance as a Separate Species of Insurance, 36 Am. J. L. & Med. 436 (2010) 18

Standards of Care and Standard Form Contracts: Distinguishing Patient Rights and Consumer Rights in Managed Care, 15 J. Contemp. Health L. & Pol'y 1 (1998) 10

Angela B. Mariotto et al., *Projections of the Cost of Cancer Care in the United States: 2010-2020*, 103 J. Nat'l Cancer Inst. 117 (Jan. 19, 2011) 8

Anne B. Martin et al., *Growth In US Health Spending Remained Slow In 2010; Health Share Of Gross Domestic Product Was Unchanged From 2009*, 31 Health Aff. 208 (Jan. 2012) 5

Milliman, *2011 U.S. Organ and Tissue Transplant Cost Estimates and Discussion* (Apr. 2011), *available at* http://www.publications.milliman.com/research/health-rr/pdfs/2011-us-organ-tissue.pdf 8

Joseph P. Newhouse, Melinda Beeuwkes Buntin & John D. Chapman, *Risk Adjustment And Medicare: Taking A Closer Look*, 16 Health Aff. 26 (Sept./Oct. 1997), *available at* http://content.healthaffairs.org/content/16/5/26.full.pdf+html 9

Uwe E. Reinhardt, *The Economist's Model of Physician Behavior*, 281 J. Am. Med. Ass'n 462 (1999) 10

James C. Robinson, *Consolidation And The Transformation Of Competition In Health Insurance*, 23 Health Aff. 11 (Nov./Dec. 2004), *available at* http://content.healthaffairs.org/content/23/6/11.full.pdf+html 16

Thomas C. Schelling, *The Life You Save May Be Your Own*, *in* PROBLEMS IN PUBLIC EXPENDITURE ANALYSIS 127 (Samuel B. Chase, Jr. ed., 1968) 12

Pamela Farley Short & Deborah R. Graefe, *Battery-Powered Health Insurance? Stability In Coverage Of The Uninsured*, 22 Health Aff. 244 (Nov./Dec. 2003), *available at* http://content.healthaffairs.org/content/22/6/244.full.pdf+html 19

PAUL SLOVIC, THE FEELING OF RISK: NEW PERSPECTIVES ON RISK PERCEPTION (2010) 12

Benjamin D. Sommers & Sara Rosenbaum, *Issues In Health Reform: How Changes In Eligibility May Move Millions Back And Forth Between Medicaid And Insurance Exchanges*, 30 Health Aff. 228 (Feb. 2011) 19

Yungie Song et al., *Regional Variations in Diagnostic Practices*, 363 New Eng. J. Med. 45 (July 1, 2010), *available at* http://tdi.dartmouth.edu/documents/publications/Song%20Y%20Regional%20Variations.pdf 10-11

Anita Soni & Marc Roemer, *Characteristics of Those Without Any Ambulatory Care Visits in 2008: Estimates for the U.S. Civilian Non-institutionalized Adult Population*, Agency for Healthcare Research & Quality Statistical Brief #334 (July 2011), *available at* http://www.meps.ahrq.gov/mepsweb/data_files/publications/st334/stat334.pdf 21

The Lewin Group, *Patient Protection and Affordable Care Act (PPACA): Long Term Costs for Governments, Employers, Families and Providers*, Staff Working Paper #11 (June 2010), *available at* http://www.lewin.com/content/publications/LewinGroupAnalysis-PatientProtectionandAffordableCareAct2010.pdf 21

Zhenxiang Zhao & Melissa Winget, *Economic Burden of Illness of Acute Coronary Syndromes: Medical and Productivity Costs*, 11 BMC Health Servs. Res. 35 (Feb. 2011), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3042911/pdf/1472-6963-11-35.pdf 8

INTEREST OF *AMICI CURIAE*[1]

Amici are 104 professors of law who teach in schools of law, medicine, public health, and management.[2] They specialize in the field of health law and are familiar with the organization, financing, and delivery of health care. They are a diverse group and include some who generally favor market-based and some who generally favor government solutions to health policy issues. The Patient Protection and Affordable Care Act ("PPACA") is a major development in the field of health law; *amici* have spent much of their careers analyzing the health care field and the policy problems addressed by PPACA. *Amici* have a professional interest in the Court's disposition of the challenges to PPACA presented in this case – and, in particular, feel strongly that the Court should reach its conclusion based on accurate information about the market for health care and the role that health insurance plays in that market.

Amici are not generally professors of constitutional law, although some also study and teach constitutional issues. The purpose of this brief is therefore not to add to the many pages of doctrinal argument before this Court. Instead, it is to document facts about health care that should inform the Court's

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that, in consultation with *amici*, they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties have consented to the filing of this brief. Counsel for petitioners and respondents have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs.

[2] A full list of *amici*, including their institutional affiliations, is set forth in the Appendix to this brief.

deliberation. *Amici* believe that their perspective supports the position of the Solicitor General that, "[b]ecause of human susceptibility to disease and accident, we are all potentially never more than an instant from the 'point of consumption' of health care (Pet. App. 118a), yet it is impossible to predict which of us will need it during any period of time." U.S. Br. 43 (No. 11-398). *Amici* have therefore filed this brief in support of the United States and the constitutionality of PPACA.

INTRODUCTION AND SUMMARY

I. The market for health care in the United States operates on a national level. It is a very large part of the economy – in 2010, 17.9% of national gross domestic product ("GDP"). Almost everyone in the United States uses health care on a regular or semi-regular basis throughout their lives. Only 3.1% of Americans go longer than 5 years without seeing a health professional, and only 1% never see one in their lives. In any given year, however, the majority of health care costs go towards treating a minority of the population – those who become seriously ill or gravely injured. It is not possible to predict in advance who will fall into that category in any given year, and, when injury or illness does strike, it is very difficult for the affected individuals to estimate or control the costs of their care. The average bill for a hospitalization of an uninsured patient has recently been estimated at $22,200. That far exceeds the savings of the typical uninsured patient or family.

Nevertheless, the fact that uninsured individuals can rarely pay for urgently needed care seldom prevents them from receiving it. On the contrary, medical ethics, federal law, state law, and simple human nature all push (and sometimes require)

hospitals and physicians to provide lifesaving care without regard to ability to pay. American health policy therefore takes as a starting point that people in need *will* receive care – which is to say, they will participate in the market for health services. The hard question is how best to pay the resulting, unavoidable costs.

No other part of the national economy, and certainly none remotely as large, has features that resemble the market for health care. Virtually every person in society during a given period will enter one or more segments of that market – for hospital care, outpatient care, prescription drugs, or medical devices. Not only are urgent medical costs unpredictable and uncontrollable, but patients also are not ordinary consumers. Because their lives and well-being are at stake, patients are much less sensitive to price than are other consumers, and they rarely make decisions contrary to medical advice. The result has been a set of complex regulatory challenges particular to the health care market – especially the longstanding problem of dealing with the costs that individual patients incur, but cannot and do not pay.

II. Insurance, public and private, is the principal way that the costs of health care are financed in the United States. Health insurance performs a function that is very different from that of other types of insurance. Ordinary insurance protects assets acquired with other funds. In contrast, health insurance is a financing mechanism to pay for the original purchase of services that almost everyone consumes regularly. About 86% of total personal health expenditures are paid directly by either public or private health insurance.

Many Americans, however, spend at least some part of their lives without health insurance. Usually, this is not a voluntary choice; it is more typically a result of being unable to qualify for coverage or to afford coverage on an individual basis, combined with job loss or some other reason for lack of employer coverage.

Those who do not have insurance generally receive less health care than they need. This makes the uninsured prone to avoidable illness and premature death. The care that uninsured individuals and families receive also tends to be poorly timed. For example, illnesses such as asthma or diabetes that might have been treated in more effective and less costly ways instead result in hospitalization.

III. PPACA is a comprehensive regulatory effort to improve the functioning of the national market for health care in the United States by providing all Americans with the means of access to essential care. Its requirement that individuals obtain and maintain minimum coverage is one means that PPACA employs to ensure that the health care costs that practically everyone will incur (but in unpredictable amounts) are financed in advance. Many of PPACA's other provisions are designed to serve the same goal of improving access to care and ensuring that health care costs are financed in advance. These provisions include expansions of the two major public programs – Medicaid and Medicare – that finance health care for about a third of the population and new regulations of insurers and employers who provide health insurance to their employees.

By increasing insurance coverage and providing other means to secure financing of care in advance, PPACA will improve health outcomes nationwide.

By subsidizing coverage and requiring insurers to sell it at average community rates, PPACA also will make coverage more affordable and care more accessible. It also will protect individuals by eliminating the possibility that bad luck will render them "uninsurable" – that is, unable to obtain coverage at any reasonable price. Underlying all these provisions is an understanding that health insurance is both a means of protecting individuals by spreading the risk of unpredictable illness and injury and an important structural mechanism that ensures stable and reliable payment for services that virtually all Americans use.

ARGUMENT

I. THE NATIONAL MARKET FOR HEALTH CARE IS IMMENSE, INTERDEPENDENT, AND UNIQUE

A. Almost Everyone in the United States Uses Health Care Throughout Their Lives

Health care accounts for nearly a fifth of the national economy. In 2010, national spending on health care was approximately $2.6 trillion, which is 17.9% of national GDP.[3] A 2004 study estimated that the average American incurs more than $300,000 in costs for health care services over a lifetime.[4] These costs are spread over all phases of the average individual's life: 7.8% before the age of 20, 12.5% from ages 20 to 39, 31.0% from ages 40 to

---

[3] *See* Anne B. Martin et al., *Growth In US Health Spending Remained Slow In 2010; Health Share Of Gross Domestic Product Was Unchanged From 2009*, 31 Health Aff. 208, 208-09 & exh. 1 (Jan. 2012).

[4] *See* Berhanu Alemayehu & Kenneth E. Warner, *The Lifetime Distribution of Health Care Costs*, 39 Health Serv. Res. 627, 635 (June 2004).

64, 36.5% from ages 65 to 84, and 12.1% after the age of 85.[5]

All but a very few Americans use health care on a regular or recurring basis, and only a miniscule number do not use it at all. A 2010 survey by the National Center for Health Statistics ("NCHS") found that 82.5% of adults in the United States had visited a health care professional within the last year, and 95.9% had done so within the past five years.[6] Only 1% of all adults had never visited a doctor or other health care professional.[7] In addition, about half of non-elderly adults use at least one prescription drug every month.[8] Children use health care even more regularly: NCHS found that three-quarters of all children had visited a health care professional within the last six months.[9]

---

[5] *See id.* at 637.

[6] *See* National Ctr. for Health Statistics, U.S. Dep't of Health & Human Services, *Summary Health Statistics for U.S. Adults: National Health Interview Survey, 2009*, Vital & Health Stat., Series 10, Number 249, at 124 tbl. 37 (Dec. 2010), *available at* http://www.cdc.gov/nchs/data/series/sr_10/sr10_249.pdf.

[7] *See id.* Only 0.4% to 0.7% of insured adults ages 18 to 65 had never visited a health care professional; 2.9% of uninsured adults had not. *See id.* at 125 tbl. 37. That percentage diminishes by age, confirming that virtually everyone uses health services at some point. Of all adults under age 45, 1.3% reported never using health services; of those aged 65-74, only 0.4%. *See id.* at 124 tbl. 37.

[8] *See* National Ctr. for Health Statistics, U.S. Dep't of Health & Human Services, *Health, United States, 2010*, at 318 tbl. 94 (Feb. 2011), *available at* http://www.cdc.gov/nchs/data/hus/hus10.pdf.

[9] *See* National Ctr. for Health Statistics, U.S. Dep't of Health & Human Services, *Summary Health Statistics for U.S. Children: National Health Interview Survey, 2009*, Vital & Health

B. Health Care Costs for Individuals Are Expensive, Unpredictable, and Difficult To Control

1. Though it is practically certain that everyone in the United States will incur a substantial amount of health care costs distributed over the course of a lifetime, it is not at all certain whether a particular individual will incur major costs in a particular year. The distribution of health care costs in any given year is highly concentrated. It follows a rough "80-20 rule": 80% of costs each year fall upon 20% of the population, and the remaining 20% of costs are spread over the remaining 80% of the population.[10] Costs are even more concentrated at the very top of the distribution. In 2005, 22.7% of health care costs fell upon only 1% of the population, each of whom incurred more than $43,000 in costs.[11]

This concentration occurs because care other than routine preventive visits is often extremely expensive. The average bill for a hospital visit by an uninsured patient is more than $22,000.[12] For the most

---

Stat., Series 10, Number 247, at 6 (Dec. 2010), *available at* http://www.cdc.gov/nchs/data/series/sr_10/sr10_247.pdf.

[10] *See* Statement of Mark A. Hall Before the U.S. Senate Committee on Finance, Hearing on "47 Million and Counting: Why the Health Care Marketplace is Broken," at 3 (June 10, 2008) (citing Kaiser Family Foundation's calculations), *available at* http://finance.senate.gov/imo/media/doc/061008MHTest.pdf.

[11] *See id.* at 3-4.

[12] *See* Office of the Ass't Secretary for Planning and Evaluation, U.S. Dep't of Health & Human Services, *The Value of Health Insurance: Few of the Uninsured Have Adequate Resources To Pay Potential Hospital Bills* 8 (May 2011), *available at* http://aspe.hhs.gov/health/reports/2011/valueofinsurance/rb.pdf. This figure does not count "physician fees, ambulance fees, post-

common types of cancer, treatment for the first year after diagnosis costs Medicare an average of $27,693 (breast cancer) and $23,652 (prostate cancer).[13] The cost of an organ transplant ranges from a quarter-million to more than a million dollars.[14] A recent private study using data from 2004 and 2005 calculated average private insurance payments for coronary artery bypass graft surgery in 2005 at $86,914.[15]

These figures, high as they are, reflect payments by private insurers or Medicare. An uninsured patient would likely be billed a substantially greater amount for one of these procedures, because uninsured patients do not receive the benefit of negotiated discounts that average roughly 50% for hospital and specialist care.[16] Most American families

---

acute care expenses, or the possibility of multiple hospitalizations." *Id.*

[13] *See* Angela B. Mariotto et al., *Projections of the Cost of Cancer Care in the United States: 2010-2020*, 103 J. Nat'l Cancer Inst. 117, 125 tbl. 4 (Jan. 19, 2011) (cost of care); *see also id.* at 124 & tbl. 3 (cancer prevalence). The figures are estimates for 2010.

[14] *See* Milliman, *2011 U.S. Organ and Tissue Transplant Cost Estimates and Discussion* 3 tbl. 1 (Apr. 2011) ($262,900 for a kidney; $577,100 for a liver; $997,700 for a heart; more for multiple organs), *available at* http://www.publications.milliman.com/research/health-rr/pdfs/2011-us-organ-tissue.pdf.

[15] *See* Zhenxiang Zhao & Melissa Winget, *Economic Burden of Illness of Acute Coronary Syndromes: Medical and Productivity Costs*, 11 BMC Health Servs. Res. 35, 35 (Feb. 2011), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3042911/pdf/1472-6963-11-35.pdf.

[16] *See* Mark A. Hall & Carl E. Schneider, *Patients as Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 Mich. L. Rev. 643, 662-63 (2008); *see also* America's Health Insurance Plans, *The Value of Provider Networks and the Role of Out-of-Network Charges in Rising Health Care Costs:*

without health insurance confront these costs without any substantial savings.[17] Indeed, most Americans would not have the ability to pay out of pocket for an expensive medical episode even by selling everything they owned.[18] As a result, the costs of a significant injury or illness that is not covered by insurance can simply be impossible to pay.

2. Individuals routinely need regular preventive care, but their use of other types of care is highly unpredictable. Even with expert analysis, only about one-quarter of the variation in annual health care spending per person is predictable from one year to the next.[19]

The costs of health care also are difficult for individuals to predict or control even once an injury or illness has occurred, for several reasons. For one

---

A Survey of Charges Billed by Out-of-Network Physicians (Aug. 2009) (documenting list prices many times greater than those paid by Medicare), *available at* http://www.ahipresearch.org/PDFs/ValueSurvey/AllStatesReport.pdf.

[17] A recent study calculated that, using 2006-2007 data, median financial assets for an uninsured family were $20. *See Value of Health Insurance, supra* note 12, at 4 tbl. 2. Even the wealthiest segment of the uninsured population within that study – those with incomes above 400% of the federal poverty line, which were only 11% of the population – had median financial assets of only $4,100, completely inadequate to pay a $22,200 hospital bill.

[18] Median net worth for all Americans (including the insured and the uninsured) in 2010 was nearly $120,000. *See* U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2010*, at 6 tbl. 1 (Sept. 2011), *available at* http://www.census.gov/prod/2011pubs/p60-239.pdf.

[19] *See* Joseph P. Newhouse, Melinda Beeuwkes Buntin & John D. Chapman, *Risk Adjustment And Medicare: Taking A Closer Look*, 16 Health Aff. 26, 32-33 (Sept./Oct. 1997), *available at* http://content.healthaffairs.org/content/16/5/26.full.pdf+html.

thing, once "individuals . . . or their loved ones are sick," they are likely to seek any possible care that might help.[20] For another, as this Court has noted, the health care market is "characterized by striking disparities between the information available to the professional and the patient." *California Dental Ass'n v. FTC*, 526 U.S. 756, 771 (1999). Patients rely heavily on doctors and other health care professionals in determining what care they need. They rarely reject doctors' recommendations.[21] Doctors, for their part, generally put patients' health over costs,[22] and there is considerable evidence that doctors are unaware of or tend to minimize issues of cost or ability to pay in recommending treatments.[23]

---

[20] Wendy K. Mariner, *Standards of Care and Standard Form Contracts: Distinguishing Patient Rights and Consumer Rights in Managed Care*, 15 J. Contemp. Health L. & Pol'y 1, 32 n.107 (1998); *see id.* (discussing the "wealth of literature debating the causes of, and possible solutions to, increasing demand for medical care").

[21] *See* Hall & Schneider, 106 Mich. L. Rev. at 652.

[22] *See, e.g.*, Norman G. Levinsky, *The Doctor's Master*, 311 New Eng. J. Med. 1573, 1573 (Dec. 13, 1984) (arguing that the proper role of doctors is "to do everything that they believe may benefit each patient without regard to costs or other societal considerations").

[23] *See* Uwe E. Reinhardt, *The Economist's Model of Physician Behavior*, 281 J. Am. Med. Ass'n 462, 464 (1999) (finding "tentative support" for the hypothesis that, rather than maximizing revenue from each patient, "the typical physician will have settled on a preferred practice style that is applied to all patients, regardless of their insurance status"); Elliott Fischer et al., *The Implications of Regional Variations in Medicare Spending – Part 2: Health Outcomes and Satisfaction with Care*, 138 Annals of Internal Med. 288 (Feb. 18, 2003), *available at* http://www.annals.org/content/138/4/288.full.pdf+html; Yungie Song et al., *Regional Variations in Diagnostic Practices*, 363 New Eng. J. Med. 45 (July 1, 2010), *available at* http://tdi.dartmouth.edu/

C. Individuals Often Receive Health Care Even When They Cannot Pay

Individuals who desperately need health care often receive it even if they cannot afford to pay. In 2008, uninsured patients in the United States used emergency rooms more than 19 million times.[24] Beyond emergency care, our country has more than 8,000 community health centers that provide a wide range of basic health services to all patients in need, regardless of their ability to pay.[25]

Indeed, the medical profession has long considered it ethically improper to refuse emergency treatment for any reason, including inability to pay.[26] This professional "rescue ethic"[27] tracks a broader social

---

documents/publications/Song%20Y%20Regional%20Variations.pdf.

[24] *See* National Ctr. for Health Statistics, U.S. Dep't of Health & Human Services, *National Hospital Ambulatory Medical Care Survey: 2008 Emergency Department Summary Tables* tbl. 6 (Jan. 2011), *available at* http://www.cdc.gov/nchs/data/ahcd/nhamcs_emergency/nhamcsed2008.pdf.

[25] *See* Eli Y. Adashi et al., *Health Care Reform and Primary Care – The Growing Importance of the Community Health Center*, 362 New Eng. J. Med. 2047, 2047 (June 3, 2010), *available at* http://www.nejm.org/doi/pdf/10.1056/NEJMp1003729.

[26] *See* AMA Council on Ethical and Judicial Affairs, Opinion 8.11 – *Neglect of Patient* (June 1996) ("The physician should . . . respond to the best of his or her ability in cases of emergency where first aid treatment is essential. Once having undertaken a case, the physician should not neglect the patient."), *available at* http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion811.page?

[27] MARK A. HALL, MAKING MEDICAL SPENDING DECISIONS: THE LAW, ETHICS, AND ECONOMICS OF RATIONING MECHANISMS 32 (Oxford Univ. Press 1997); *see id.* ("[O]ur society will care for people in serious and obvious distress regardless of whether they can pay."); David C. Hadorn, *Setting Health Care Priorities*

norm: we "value in a different way, not just quantitatively but qualitatively," the "worth of saving an *identified* individual's life" as compared to the "statistical lives" that are lost or saved as "the incidence of death among a mass of unknown human beings" rises or falls.[28] Researchers have labeled this sociological phenomenon the "identifiable victim effect": people are consistently unwilling to let a named or visible person die for lack of money, even though they might not act to save a larger group of anonymous people under otherwise similar circumstances.[29]

Hospitals also have legal obligations to provide emergency care without regard to ability to pay. The

---

in Oregon: Cost-Effectiveness Meets the Rule of Rescue, 265 J. Am. Med. Ass'n 2218, 2219 (1991) (arguing that "any plan to distribute health care services must take human nature into account if the plan is to be acceptable to society," including the inability of people to "stand idly by when an identified person's life is visibly threatened if effective rescue measures are available").

[28] Thomas C. Schelling, *The Life You Save May Be Your Own*, *in* PROBLEMS IN PUBLIC EXPENDITURE ANALYSIS 127, 129-30 (Samuel B. Chase, Jr. ed., 1968); *see also* GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 21 (1978) (discussing the problem of "why, for instance, the United States will spend a million dollars to rescue a single, downed balloonist but will not appropriate a similar sum to provide shore patrols"); CHARLES FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE 207-10 (Harvard Univ. Press 1970) (analyzing "the apparent anomaly" between preferences for saving identifiable as opposed to statistical lives).

[29] *See generally* PAUL SLOVIC, THE FEELING OF RISK: NEW PERSPECTIVES ON RISK PERCEPTION 73 (2010); Karen E. Jenni & George Loewenstein, *Explaining the "Identifiable Victim Effect,"* 14 J. Risk & Uncertainty 235 (1997), *available at* http://www.andrew.cmu.edu/user/gl20/GeorgeLoewenstein/Papers_files/pdf/identifiable-victim.pdf.

federal Emergency Medical Treatment and Active Labor Act ("EMTALA") is perhaps the best-known example: it prohibits denial of certain emergency care and transfers on the basis of inability to pay and mandates screening and other procedures to ensure that such denials do not occur. *See* 42 U.S.C. § 1395dd. Moreover, EMTALA is neither innovative nor unique. Similar obligations existed before it was enacted, and continue to exist today, under state statutes[30] or judicial decisions.[31]

As a result of these ethical and legal commitments, our emergency departments and clinics take in a steady stream of patients who lack the means to pay (through insurance or otherwise) but who will suffer grave harm if denied urgent or essential care. The phenomenon of unpaid care creates several problems. From the patient's perspective, health care delivered on an emergency basis is often not as effective or as cost-efficient. Uninsured care also commonly forces patients into bankruptcy: a 2009 study by Harvard researchers estimated that "[i]llness or medical bills

---

[30] *See, e.g.*, Cal. Health & Safety Code § 1317; Fla. Stat. Ann. § 401.45; 210 Ill. Comp. Stat. Ann. 70/1; *see generally* Thomas A. Gionis et al., *The Intentional Tort of Patient Dumping: A New State Cause of Action To Address the Shortcomings of the Federal Emergency Medical Treatment and Active Labor Act (EMTALA)*, 52 Am. U. L. Rev. 173, 187-88 nn.72-74 (2002) (collecting statutes).

[31] *See, e.g.*, *Wilmington Gen. Hosp. v. Manlove*, 174 A.2d 135, 140 (Del. 1961) (recognizing "liability on the part of a hospital . . . predicated on the refusal of service to a patient in case of an unmistakable emergency, if the patient has relied upon a well-established custom of the hospital to render aid in such a case"); *Guerrero v. Copper Queen Hosp.*, 537 P.2d 1329, 1331 (Ariz. 1975) (deriving from a state hospital licensing statute a "public policy" under which a licensed "hospital may not deny emergency care to any patient without cause").

contributed to 62.1% of all bankruptcies in 2007."[32] From the providers' perspective, these bankruptcies and other failures to pay medical bills cause substantial financial losses. Hospitals nationwide report tens of billions of dollars in bad debt each year.[33]

In sum, as a society we devote substantial resources to make urgent and essential medical care available to practically everyone, whether or not they have made provisions through insurance coverage to pay for the required costs. The real question is not whether people will receive care: it is who will pay the cost of that care, and how.

D. No Other Part of the Economy Shares the Key Characteristics of the Health Care Market

No other economic activity in which Americans engage shares the characteristics of health care – its size, its ubiquity in touching every American, its unpredictable imposition of immense costs on individuals, and its intertwinement with moral and psychological imperatives about our responsibilities to each other. Other industries or economic activities have some of these characteristics, but not all. For example, Americans spent about $1.19 trillion (8.4% of GDP) on food and food services in 2009, and about

---

[32] David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 Am. J. Med. 741, 743 (Aug. 2009), *available at* http://download.journals.elsevierhealth.com/pdfs/journals/0002-9343/PIIS0002934309004045.pdf.

[33] *See* American Hospital Ass'n, *Uncompensated Hospital Care Cost Fact Sheet* (Nov. 2008), *available at* http://www.aha.org/content/00-10/08-uncompensated-care.pdf.

$1.58 trillion (11.2% of GDP) on housing in 2009.[34] Those industries touch every American, and serve basic human needs, but the costs of both food and shelter are much more predictable, stable, and evenly spread compared to health care.

The Eleventh Circuit used the example of catastrophic flooding as an area in which Congress confronted problems somewhat analogous to those that affect the health care market: the "unpredictability of flooding, the inevitability that floods will strike flood plains, and the cost shifting inherent in uninsured property owners seeking disaster relief funds." Pet. App. 108a (No. 11-398). But the comparison simply does not work; instead, the obvious contrasts illustrate just how distinctive health care really is.

The scale of the flood insurance problem is much smaller. Only a small portion of the population needs flood insurance, and floods affect only a tiny portion of those people every year[35] – compared to the entire population of the country that uses health care. The character of the problem also is fundamentally different. Large floods are major disasters that imperil life as well as property, but flood insurance (unlike health insurance) ultimately provides funds to rebuild homes and businesses after the fact.

---

[34] *See* U.S. Census Bureau, *Statistical Abstract of the United States* 442 tbl. 677 (2012), *available at* http://www.census.gov/compendia/statab/2012edition.html.

[35] Total flood losses in the United States averaged $7.56 billion annually from 1980 to 2009 – about 0.3% of the $2.6 trillion Americans spent in 2010 on health care. *See* National Weather Service, *United States Flood Loss Report – Water Year 2010*, *available at* http://www.nws.noaa.gov/hic/flood_stats/Summaries/WY2010.pdf; *see also supra* p. 5 & note 3 (providing figures and sources for total health care spending).

Human life is not directly in the balance when society makes the decision whether to pay for that rebuilding.

In addition, as we explain in more detail in Part II, health insurance plays a very different role from other types of insurance, flood insurance included. Other types of insurance pay for losses to existing property that a buyer has purchased with separate funds. Health insurance pays for the original purchase of health care services at the outset, not for losses to independently acquired assets. Moreover, while health insurance does protect individuals against the cost of care after catastrophic health events, unlike other forms of insurance, it also finances the direct provision of ongoing necessary health care that – to varying degrees – virtually everyone receives.

II. LACK OF HEALTH INSURANCE COVERAGE DRAMATICALLY AFFECTS THE NATIONAL HEALTH CARE MARKET

A. Private and Public Insurance Pay for Most Personal Health Care Expenditures

Over time – and, in particular, as technological advances have made health care more expensive – various forms of private and public health insurance have become the dominant means of payment for care in the national economy.[36] Public and private

---

[36] The market for private health insurance is, moreover, dominated by multi-state and national firms. *See* James C. Robinson, *Consolidation And The Transformation Of Competition In Health Insurance*, 23 Health Aff. 11 (Nov./Dec. 2004), *available at* http://content.healthaffairs.org/content/23/6/11.full.pdf+html; American Medical Ass'n, *Competition in Health Insurance: A Comprehensive Study of U.S. Markets – 2010 Update* (2010). Eighty percent of the 442 health insurers active in each state in

insurance paid for 85.7% of personal health care expenditures in 2009.[37] Only 14.3% – including retail sales of over-the-counter medications, as well as deductibles and co-payments – was paid out of pocket.[38]

As the Institute of Medicine concluded in a 2009 report, "health insurance coverage is integral to health care access and health."[39] It is not surprising that insurance has come to play this role, because insurance mechanisms are necessary to address the risk that an individual or family member will need expensive, unforeseen care. With regard to catastrophic care in particular, any method of financing health care is, at least in part, a means of spreading risk over the population, a traditional function of insurance. In addition, health insurance also serves

---

2009 were part of larger companies, and on average each insurer was active in 4.5 states. *See* Office of Consumer Information & Insurance Oversight, Interim Final Rule for Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements under the Patient Protection and Affordable Care Act, Regulatory Impact Analysis Technical Appendix 20 tbl. 12 (Nov. 2010), *available at* http://cciio.cms.gov/resources/files/mlr_20101122_technical_appendix.pdf.

[37] *See* Centers for Medicare & Medicaid Services, U.S. Dep't of Health & Human Services, *National Health Expenditures by Type of Service and Source of Funds, CY1960-2009, available at* http://www.cms.gov/nationalhealthexpenddata/02_nationalhealthaccountshistorical.asp.

[38] *See id.*; *see also* Centers for Medicare & Medicaid Services, U.S. Dep't of Health & Human Services, *National Health Expenditures Accounts: Definitions, Sources, and Methods, 2009, available at* http://www.cms.gov/nationalhealthexpenddata/downloads/dsm-09.pdf.

[39] INSTITUTE OF MEDICINE, AMERICA'S UNINSURED CRISIS: CONSEQUENCES FOR HEALTH AND HEALTH CARE 49 (2009), *available at* http://www.nap.edu/catalog.php?record_id=12511.

to finance the costs of health care generally – including, for some medical conditions such as cancer or diabetes, treatment that may remain unaffordable even after the condition is known and the costs are predictable.[40]

In 2010, 58.7% of non-elderly Americans had health insurance coverage through an employer; 7.1% purchased coverage individually; and 21.6% were covered by non-employment-based federal programs, including Medicare (which covers certain disabled non-elderly beneficiaries), Medicaid, and the Department of Veterans Affairs.[41] The uninsured made up 18.5% of the total non-elderly population; 21.9% of non-elderly adults; and 9.8% of children.[42]

B. Many Americans Spend Time Without Insurance

On average, Americans spend about 12 years of their life without health insurance and report at least some health problems during 40% of those uninsured years.[43] It is common for people to "cycle

---

[40] *See* Wendy K. Mariner, *Health Reform: What's Insurance Got to Do With It? Recognizing Health Insurance as a Separate Species of Insurance*, 36 Am. J. L. & Med. 436, 444 (2010) ("[H]ealth plans . . . perform two distinct financial functions: risk spreading for unanticipated health problems; and paying for routine or regular health services.").

[41] *See* Paul Fronstin, *Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2011 Current Population Survey*, EBRI Issue Brief No. 362, at 5 fig. 1 (Sept. 2011), *available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_09-2011_No362_Uninsured1.pdf. Percentages sum to more than 100 because some people have two sources of coverage.

[42] *See id.* at 5 fig. 1, 7 figs. 2-3.

[43] *See* James B. Kirby & Toshiko Kaneda, *Unhealthy and Uninsured: Exploring Racial Differences in Health and Health*

in and out of coverage over a short period of time."[44] A third of Americans were uninsured for at least part of the two-year period 2007-2008.[45] Only 20.6% of the non-elderly uninsured have never had insurance, while 25.9% have been uninsured less than a year, and an additional 22.6% have been uninsured from 1 to 3 years.[46] People also shift between private and Medicaid coverage as their incomes and job status change.[47]

Insurance Coverage Using a Life Table Approach, 47 Demography 1035, 1047 (Nov. 2010).

[44] Ken Jacobs et al., *Maximizing Health Care Enrollment through Seamless Coverage for Families in Transition: Current Trends and Policy Implications* 2 (Univ. of Calif., Berkeley, Ctr. for Labor Research & Educ., Mar. 2011), *available at* http://laborcenter.berkeley.edu/healthcare/seamless_coverage11.pdf.

[45] *See* Families USA, *Americans At Risk: One in Three Uninsured* 1 (Mar. 2009) (Lewin Group analysis of Census Bureau survey data), *available at* http://www.familiesusa.org/assets/pdfs/americans-at-risk.pdf.

[46] *See* National Ctr. for Health Statistics, U.S. Dep't of Health & Human Services, *Summary Health Statistics for the U.S. Population: National Health Interview Survey, 2010*, Vital & Health Stat., Series 10, Number 251, at 69 tbl. 23 (Dec. 2011), *available at* http://www.cdc.gov/nchs/data/series/sr_10/sr10_251.pdf; *see also* Pamela Farley Short & Deborah R. Graefe, *Battery-Powered Health Insurance? Stability In Coverage Of The Uninsured*, 22 Health Aff. 244, 248 (Nov./Dec. 2003) (finding that, in a four-year study period, 24% of the non-elderly uninsured were uninsured for 1 to 4 months; 22%, for 5 to 12 months; 19%, for 13 to 24 months; and 35%, for longer), *available at* http://content.healthaffairs.org/content/22/6/244.full.pdf+html.

[47] *See* Benjamin D. Sommers & Sara Rosenbaum, *Issues In Health Reform: How Changes In Eligibility May Move Millions Back And Forth Between Medicaid And Insurance Exchanges*, 30 Health Aff. 228 (Feb. 2011).

When Americans go without insurance, it is usually not a voluntary choice. A 2010 NCHS survey of the non-elderly uninsured found that the high cost of premiums was the most commonly cited reason for lack of coverage (by 48.1% of respondents), followed by loss of one's job (27.6%), lack of employer coverage or refusal by an insurance company (12.4%), and loss of Medicaid coverage (12.1%).[48] "[D]id not want or need coverage" was listed in a footnote as not receiving enough responses to warrant its own category.[49] As one recent analysis put it:

- "most uninsured people – more than 60 percent – disagreed with the view that they do not need health insurance coverage, with more than 40 percent strongly disagreeing";
- "even among groups with relatively low need, such as younger people or those without chronic conditions or access problems, most believe they need health insurance";
- "cost and affordability influence the decision not to purchase coverage for most uninsured people rather than perceptions that health insurance coverage isn't necessary";
- "the perception among some that most uninsured people do not value coverage and

---

[48] *See* National Ctr. for Health Statistics, U.S. Dep't of Health & Human Services, *Summary Health Statistics for the U.S. Population: National Health Interview Survey, 2009*, Vital & Health Stat., Series 10, Number 248, at 71 tbl. 25 (Dec. 2010), *available at* http://www.cdc.gov/nchs/data/series/sr_10/sr10_248.pdf.

[49] *Id.* at 72 n.2; *see also* Jacobs, *supra* note 44, at 2-3 ("[F]or many individuals uninsurance is a condition precipitated by a work or life change such as loss of job, reduction in work hours, job change, divorce, early retirement, or graduation.").

are willing to risk incurring catastrophic costs is overstated."[50]

In addition, about 10 million of the non-elderly uninsured have one or more preexisting conditions that typically result in denial of wanted coverage or higher premiums that make coverage unaffordable.[51]

C. Lack of Health Insurance Coverage Leads to Worse Outcomes and Unpaid Bills

Lack of health insurance coverage has well-established negative effects on health care. Those without insurance on average receive less health care relative to their needs than those with insurance.[52] A higher number of people who lack insurance in a particular community "result[s] in a lower probability of having a usual source of care, having an office-based visit, having any medical expenditures, and reporting being satisfied with the quality of care provided by the usual source of care" and "a higher

---

[50] Peter J. Cunningham, Center for Studying Health System Change, *Who Are the Uninsured Eligible for Premium Subsidies in the Health Insurance Exchanges?* 5-6 (Dec. 2010), *available at* http://www.rwjf.org/files/research/71572.pdf.

[51] *See* The Lewin Group, *Patient Protection and Affordable Care Act (PPACA): Long Term Costs for Governments, Employers, Families and Providers*, Staff Working Paper #11, at 6 (June 2010) (based on national Medical Expenditures Panel Survey), *available at* http://www.lewin.com/content/publications/LewinGroupAnalysis-PatientProtectionandAffordableCareAct2010.pdf.

[52] *See* Anita Soni & Marc Roemer, *Characteristics of Those Without Any Ambulatory Care Visits in 2008: Estimates for the U.S. Civilian Noninstitutionalized Adult Population*, Agency for Healthcare Research & Quality Statistical Brief #334, at 1 (July 2011) (finding that the most important variable in determining individuals' number of ambulatory care visits was insurance coverage), *available at* http://www.meps.ahrq.gov/mepsweb/data_files/publications/st334/stat334.pdf.

probability of reporting difficulty obtaining needed care."[53] Although it is more difficult to draw direct connections from lack of coverage to adverse outcomes, studies have estimated that widespread lack of health insurance causes more than 20,000 people to die each year.[54]

Nevertheless, that those without insurance receive *less* care does not mean that they receive *no* care. *See supra* pp. 11-14. The bills for much of that care, moreover, go unpaid. In the aggregate, those without insurance receive about $60 billion a year in uncompensated care.[55] People who go without insurance for an entire year on average receive more than $1,600 in care that year, of which they pay for about one-third themselves.[56] Among all hospitalizations

---

[53] Carole Roan Gresenz & José J. Escarce, *Spillover Effects of Community Uninsurance on Working-age Adults and Seniors: An Instrumental Variables Analysis*, 49 Med. Care e14, e14 (Sept. 2011), *available at* http://www.rwjf.org/files/research/72828fullmedicalcarespilloverefects20110920.pdf.

[54] *See* Stan Dorn, Urban Institute, *Uninsured and Dying Because of It: Updating the Institute of Medicine Analysis on the Impact of Uninsurance on Mortality* 3 (Jan. 2008) (estimating 22,000 such deaths in 2006, "an average of one death every 24 minutes"), *available at* http://www.urban.org/uploadedPDF/411588_uninsured_dying.pdf. These figures are "reasonable indicators of the general magnitude of excess mortality that results from uninsurance" rather than "precise 'body counts.'" *Id.* at 4.

[55] *See* Families USA, *Paying a Premium: The Added Cost of Care for the Uninsured* 3 (June 2005) (projected costs for 2010), *available at* http://www.familiesusa.org/assets/pdfs/Paying_a_Premium_rev_July_13731e.pdf.

[56] *See* Jack Hadley et al., *Covering The Uninsured In 2008: Current Costs, Sources Of Payment, And Incremental Costs*, 27 Health Aff. 399, 401 (Aug. 2008), *available at* http://content.healthaffairs.org/content/27/5/w399.full.pdf+html.

by the uninsured, on average only 12% are by uninsured people who have sufficient assets to pay their bill in full.[57] Even the wealthiest 10% of the uninsured have sufficient assets, on average, to pay for only about half of their hospitalizations in full.[58]

The unpaid portion is absorbed by hospitals (an estimated $35 billion in 2008), clinics ($14.6 billion), and physicians ($7.8 billion).[59] Those costs are in turn passed on (known as "cost-shifting" in the literature) to public and private insurers, as well as targeted charity and government programs. Overall, experts estimate that, in 2008, unpaid care increased federal spending by $25.6 billion, state spending by $17.2 billion, and private spending by $14.5 billion.[60]

Further, the care received by those without insurance tends to be provided in ways that are not only less effective but more costly. According to a 2004 report by the Institute of Medicine, the "lack of timely screening services and preventive care" for the uninsured population leads to "delayed diagnoses and failure to control treatable conditions," so that, "[w]hen they finally receive treatment, those without health insurance are more likely to require more expensive services because of deteriorating health."[61] For example, conditions such as "hypertension"; "asthma; ear, nose, and throat infections; pneumonia; [and] diabetes," which might be successfully (and

---

[57] *See Value of Health Insurance*, *supra* note 12, at 6 & tbl. 4a.

[58] *See id.*

[59] *See* Hadley, 27 Health Aff. at 403-06.

[60] *See id.*

[61] INSTITUTE OF MEDICINE, INSURING AMERICA'S HEALTH: PRINCIPLES AND RECOMMENDATIONS 43 (2004), *available at* http://www.nap.edu/catalog.php?record_id=10874.

inexpensively) treated through outpatient care for an insured patient, can result in "unnecessary hospitalizations" for an uninsured patient who does not have access to nonemergency care.[62] A follow-up report by the Institute in 2009 cited "fewer avoidable hospitalizations" as a benefit of extending insurance to children in particular.[63]

III. REQUIRING INDIVIDUALS TO BE INSURED STABILIZES THE NATIONAL HEALTH CARE MARKET

A. The Individual Mandate Advances PPACA's Purpose of Guaranteeing Access

Although PPACA has many purposes as a regulatory intervention in the health care market, one dominates the others, especially for purposes of this case. That purpose is to give all Americans reliable, affordable access to health care, ensuring that they do not suffer the poorer health outcomes or the higher costs of later care that come from being uninsurable or facing unaffordable premiums.

Mandating that individuals maintain or obtain minimum coverage – whether through public or private sources[64] – is a logical means for advancing

---

[62] *Id.* at 44.

[63] AMERICA'S UNINSURED CRISIS, *supra* note 39, at 5, 8, 49, 71.

[64] The mandate is sometimes described, including by the court of appeals, as a "mandate . . . to purchase insurance from a private company." Pet. App. 155a (No. 11-398). This is inaccurate because, as the court of appeals elsewhere acknowledged, the mandate as applied to some individuals requires them only to "maintain" insurance they have previously purchased, and does not require any purchase by those individuals who can obtain coverage for free through an employer or through a federal program such as Medicaid or the Department of Veterans Affairs. *Id.* at 2a-3a & n.3; *see* 26 U.S.C. § 5000A(f).

PPACA's purposes of guaranteeing access and reducing costs in light of the basic facts discussed in Parts I and II about the health care market and health insurance. Everyone in America is practically certain to use a significant amount of health care prospectively, whether or not there is a mechanism in place to finance the costs of that care. Some – we often do not know who, in advance – will use a great deal of costly health care because they will experience unexpected illness or injury. Once that illness or injury actually occurs, the affected individuals will in many cases be unable to pay for the care they need. Accordingly, while they will still *use* health care (as everyone does), the costs of that care will be paid by other participants in the health care market. The mandate is one of several ways that PPACA aims to solve these problems by ensuring in advance that individuals have made provisions to pay for the care that, in aggregate, they will predictably need.

Finally, the individual mandate, which has become the most contentious aspect of PPACA, must be seen in the context of the legislation and indeed the system of financing health care as a whole. As has been pointed out, there are a variety of more or less well-coordinated financing mechanisms in the health care market, a market in which virtually everyone participates. Congress, eschewing a total government takeover of the financing of health care, chose instead to incorporate existing private health insurance mechanisms as an important payment mechanism in the health care market. The mandate is a part of the PPACA regulatory scheme, but by no means the only part. PPACA also expands the public insurance programs that currently cover about a third of all Americans. It greatly expands Medicaid, which is

the public health insurance program for low income individuals, and enhances prescription drug coverage under Medicare, the public health insurance program for the elderly and disabled. And it makes additional changes to existing regulation of the private insurance market and employer-provided plans.

B. PPACA Provides Nationwide and Individual Benefits to All Americans Participating in the Market for Health Care

The Congressional Budget Office has projected that PPACA will reduce the number of uninsured Americans by 60% (32 million).[65] A majority of the remaining 23 million uninsured would be those exempt from the individual mandate for one reason or another, such as individuals who would have to pay more than 8% of their income in premiums to obtain coverage.[66] Because insurance coverage affects health outcomes, *see supra* pp. 21-24, the increased coverage secured by PPACA should lead to an overall improvement in health outcomes as well. PPACA is also expected to decrease significantly the systemic costs of uncompensated care: a study by the Urban Institute estimated that, if PPACA had been implemented in 2010, the cost of uncompensated care would have "decline[d] by 60 percent, resulting in savings of $42.3 billion" to the government and health care providers who currently bear those costs.[67]

---

[65] *See* Congressional Budget Office, *Selected CBO Publications Related to Health Care Legislation, 2009-2010*, at 11, 23 tbl. 4 (Dec. 2010), *available at* http://www.cbo.gov/ftpdocs/120xx/doc12033/12-23-SelectedHealthcarePublications.pdf.

[66] *See id.* at 71.

[67] Matthew Buettgens et al., Urban Institute, *America Under the Affordable Care Act* 11 (Dec. 1, 2010), *available at* http://www.urban.org/UploadedPDF/412267-america-under-aca.pdf.

In addition to these broad effects, PPACA also provides an individual benefit to all Americans, including those who may be healthy and may not currently be using health care. Before PPACA's enactment, every individual and family, regardless of their current health or insurance coverage, has faced the risk that illness or injury will render them "uninsurable" by increasing their likely future costs for health care far beyond their ability to pay or their insurer's willingness to cover.[68]

PPACA eliminates this possibility through its guaranteed-issue and community-rating provisions. Those measures require insurers to accept and keep all applicants, at average rates that do not vary by individual health care characteristics. PPACA also prohibits insurers from limiting coverage based on preexisting conditions.

In economic terms, these provisions create the equivalent of a contractual option to buy health insurance at market rates from any insurer at any future time, regardless of one's health status. That option has real economic value. A 2005 study estimated that, under conservative assumptions, a guaranteed option to renew an individual health policy with the same insurer at a constant rate would be worth $1,084 *annually* to the average man and

---

[68] According to a recent estimate by the Department of Health and Human Services, "50 to 129 million (19 to 50 percent of) non-elderly Americans have some type of pre-existing health condition" that threatens their ability to obtain or afford health insurance. HealthCare.gov, *At Risk: Pre-Existing Conditions Could Affect 1 in 2 Americans*, http://www.healthcare.gov/law/resources/reports/preexisting.html (last visited Jan. 9, 2012).

$1,891 to the average woman.[69] The value of an option to purchase from *any* insurer, which is the effect of PPACA's guaranteed-issue provision, would presumably be higher.

Congress coupled this protection of insurability with the individual mandate for obvious reasons. If individuals do not have a general obligation to obtain coverage, a guaranteed-issue option at community rates with no limits on preexisting conditions becomes much more expensive because it removes most of the incentive to obtain coverage before injury or illness occurs. The increased expense would threaten PPACA's regulatory goal of stabilizing health care financing. The mandate thus helps to correct distortions in the health care market in which a significant number of uninsured Americans have consumed significant quantities of health care for which they have not been able pay.

CONCLUSION

For the reasons given above and in the brief of the United States, the judgment of the court of appeals should be reversed.

---

[69] *See* Bradley Herring & Mark V. Pauly, *Incentive-Compatible Guaranteed Renewable Health Insurance Premiums*, 25 J. Health Econ. 395, 415 (2006). The numbers quoted in text assume a 10% real discount rate; a lower 5% discount rate would increase the estimate for men to $3,937, and the estimate for women to $3,333. *See id.*

Respectfully submitted,

CHARLES FRIED
Counsel of Record
1563 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636
(fried@law.harvard.edu)

ABBE R. GLUCK
435 West 116th Street
New York, NY 10027
(212) 854-0679

GREGORY G. RAPAWY
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

January 13, 2012

APPENDIX

List of Amici
(Titles and institutional affiliations are provided for identification purposes only)

Mark A. Hall, JD
Fred D. & Elizabeth L. Turnage Professor of Law
Wake Forest University School of Law

Wendy K. Mariner, JD, LLM, MPH
Edward R. Utley Professor of Health Law
Boston University School of Public Health
Professor of Law
Boston University School of Law

Lori B. Andrews, JD
Distinguished Professor of Law; Director of the Institute for Science, Law and Technology; and Associate Vice President
Chicago-Kent College of Law, Illinois Institute of Technology

George J. Annas, JD, MPH
William Fairfield Warren Distinguished Professor
Chair and Professor of Health Law, Bioethics & Human Rights
Boston University School of Public Health
Professor of Law
Boston University School of Law

Paul G. Arshagouni, MD, JD, MPH
Associate Professor of Law
Michigan State University College of Law

W. Eugene Basanta
Southern Illinois Healthcare Professor of Law and Director, Center for Health Law and Policy
Southern Illinois University School of Law

Hazel Glenn Beh, PhD, JD
Professor of Law and Director, Health Law Policy Center
University of Hawai'i at Manoa, William J. Richardson School of Law

Peter Bell, JD
Professor of Law
Syracuse University College of Law

Kimberly Cogdell Boies, JD, MPH
Assistant Professor and Director, Biotechnology and Pharmaceutical Law Institute
North Carolina Central University School of Law

Richard J. Bonnie, JD
Harrison Foundation Professor of Law and Medicine
Professor of Public Policy, and Director, Institute of Law, Psychiatry and Public Policy
University of Virginia

Kathleen M. Boozang, JD, LLM
Professor of Law
Seton Hall School of Law

Scott C. Burris, JD
Professor and Director, Center for Health Law, Policy and Practice
Temple University Beasley School of Law

Steve Calandrillo, JD
Charles I. Stone Professor of Law
University of Washington School of Law

Kathy L. Cerminara, JD, LLM, JSD
Professor of Law
Nova Southeastern University Shepard Broad
Law Center

Marguerite Chapman, JD
Director, Health Law Certificate
University of Tulsa College of Law

Glenn Cohen, JD
Assistant Professor
Harvard Law School

Carl H. Coleman, JD
Professor of Law
Seton Hall University School of Law

Kenneth De Ville, PhD, JD
Professor, Department of Bioethics &
Interdisciplinary Studies
Brody School of Medicine at East Carolina University

Janet L. Dolgin, MA, PhD, JD
Jack and Freda Dicker Distinguished Professor
of Health Care Law
Hofstra University School of Law
Professor of Science Education
Hofstra University School of Medicine

Nancy Dubler, LL.B
Professor Emerita
Albert Einstein College of Medicine

Einer Elhauge, JD
Petrie Professor of Law
Harvard Law School

Cheryl Erwin, JD, PhD
Director, Medical Humanities Certificate Program
University of Texas Health Science Center
Visiting Law Professor
Texas Tech University School of Law

Linda C. Fentiman
James D. Hopkins Professor
Pace University Law School

Jacqueline Fox, JD, LLM
Associate Professor
University of South Carolina School of Law

David M. Frankford, JD
Professor of Law
Rutgers University School of Law – Camden

Barry Furrow, JD
Professor of Law and Director, The Health Law Program
The Earle Mack School of Law at Drexel University

Lance Gable, JD, MPH
Assistant Professor of Law
Wayne State University Law School

Amy Lewis Gilbert, JD, MPH
Visiting Assistant Professor of Pediatrics
Indiana University School of Medicine

Margaret Gilhooley, JD
Professor of Law Emeritus
Seton Hall Law Center

Leonard H. Glantz
Professor of Health Law, Bioethics & Human Rights
Associate Dean Emeritus, Academic Affairs
Boston University School of Public Health
Professor of Law
Boston University School of Law

Michele Bratcher Goodwin, JD, LLM
Everett Fraser Professor of Law and Professor of Medicine
University of Minnesota

Thomas (Tim) Greaney
Chester A. Meyers Professor and Co-Director, Center for Health Law Studies
Saint Louis University School of Law

Henry T. Greely, JD
Deane F. and Kate Edelman Johnson Professor of Law
Professor, by courtesy, of Genetics
Stanford University

Michael Greenberger, JD
Professor of Law
Founder and Director, University of Maryland Center for Health & Homeland Security
Francis King Carey School of Law, University of Maryland

Sofia Gruskin, JD, MIA
Professor of Preventive Medicine, Keck School of Medicine
Professor of Law and Preventive Medicine, Gould School of Law
University of Southern California

Dean M. Harris, JD
Clinical Associate Professor, Health Policy and Management
University of North Carolina at Chapel Hill Gillings School of Global Public Health

Dean Hashimoto, JD, MD
Associate Professor
Boston College Law School

Leslie Meltzer Henry, JD, MSc
Assistant Professor of Law
University of Maryland Carey School of Law

Laura Hermer, JD, LLM
Assistant Professor
University of Texas Medical Branch

Christina S. Ho, JD, MPP
Assistant Professor of Law
Rutgers School of Law, Newark

Allison K. Hoffman, JD
Acting Professor of Law
UCLA School of Law

Sharona Hoffman, JD, LLM
Professor of Law and Bioethics and Co-Director, Law-Medicine Center
Case Western Reserve University School of Law

Nicole L. Huberfeld, JD
Gallion & Baker Associate Professor of Law
University of Kentucky College of Law

Nan D. Hunter, JD
Associate Dean for Graduate Programs and Professor of Law
Georgetown University Law Center

Peter D. Jacobson, JD, MPH
Professor of Health Law and Policy and Director, Center for Law, Ethics, and Health
University of Michigan School of Public Health

Fazal R. Khan, MD, JD
Associate Professor of Law
University of Georgia School of Law

Nancy M. P. King, JD
Professor of Social Sciences and Health Policy
Wake Forest School of Medicine

Eleanor D. Kinney, JD, MPH
Hall Render Professor of Law Emeritus
Indiana University Robert H. McKinney School of Law

Sylvia A. Law
Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry
New York University School of Law

Robert B. Leflar
Ben J. Altheimer Professor of Legal Advocacy
University of Arkansas School of Law

Elizabeth Weeks Leonard
Associate Professor
University of Georgia School of Law

Kristin Madison, JD, PhD
Professor of Law and Health Science
Northeastern University

Gwendolyn Roberts Majette, JD, LLM
Assistant Professor of Law
Cleveland-Marshall College of Law

Anna Mastroianni, JD, MPH
Professor of Law
University of Washington School of Law

Dayna Bowen Matthew
Professor of Law
University of Colorado Law School and
Colorado School of Public Health

Thomas Wm. Mayo, JD
Associate Professor
Southern Methodist University (SMU) Dedman
School of Law

Maxwell J. Mehlman
Arthur E.Petersilge Professor of Law and Director,
Law-Medicine Center
Case Western Reserve University School of Law
Professor of Bioethics
Case Western Reserve University School of Medicine

Alan Meisel, JD
Professor of Law and Dickie, McCamey & Chilcote
Professor of Bioethics
University of Pittsburgh

Michelle M. Mello, JD, PhD
Professor of Law and Public Health
Harvard School of Public Health

Kate Mewhinney
Clinical Professor
Wake Forest University School of Law

Frances H. Miller, JD
Professor of Law Emerita
Boston University School of Law

Michelle Oberman, JD, MPH
Professor of Law
Santa Clara University

David Orentlicher, MD, JD
Samuel R. Rosen Professor of Law and Co-Director,
Hall Center for Law and Health
Indiana University Robert J. Kinney School of Law

Efthimios Parasidis, JD, MBE
Assistant Professor of Law
Center for Health Law Studies, Saint Louis
University School of Law

Sallyann Payton, LLB
William W. Cook Professor of Law
University of Michigan Law School

Philip G. Peters, Jr., JD
Ruth L. Hulston Professor of Law
University of Missouri School of Law

Thaddeus Mason Pope, JD, PhD
Associate Professor of Law and Director,
Health Law Institute
Hamline University School of Law

Vernellia R. Randall
Professor of Law
The University of Dayton School of Law

Ben A. Rich, JD, PhD
Professor and School of Medicine Alumni Association
Endowed Chair of Bioethics
University of California, Davis School of Medicine

Edward P. Richards, III, JD, MPH
Clarence W. Edwards Professor of Law and Director,
Program in Law, Science and Public Health
Louisiana State University Law Center

Margaret Foster Riley, JD
Professor of Law
University of Virginia School of Law and School
of Medicine

Jessica L. Roberts
Assistant Professor of Law
University of Houston Law Center

Christopher T. Robertson
Associate Professor
James E. Rogers College of Law, University of
Arizona

John A. Robertson, JD
Vinson & Elkins Chair in Law
University of Texas School of Law

Patricia (Winnie) Roche, JD
Associate Professor of Health Law, Bioethics
& Human Rights
Boston University School of Public Health

Marc A. Rodwin, JD, PhD
Professor
Suffolk University Law School

Sara Rosenbaum, JD
Harold and Jane Hirsh Professor, Health Law and Policy
George Washington University School of Public Health Services and School of Law

Rand E. Rosenblatt, JD
Professor of Law
Rutgers University School of Law – Camden

Arnold J. Rosoff, JD
Professor of Legal Studies & Health Care Management
The Wharton School, University of Pennsylvania

Karen H. Rothenberg, JD, MPA
Marjorie Cook Professor of Law
University of Maryland Francis King Carey School of Law

Mark A. Rothstein, JD
Herbert F. Boehl Chair of Law and Medicine
Director, Institute for Bioethics, Health Policy and Law
University of Louisville School of Medicine

William M. Sage, MD, JD
Vice Provost for Health Affairs and James R. Dougherty Chair for Faculty Excellence
University of Texas at Austin

Sallie T. Sanford, JD
Assistant Professor
University of Washington School of Law

Richard S. Saver, JD
Professor of Law and Adjunct Professor of Social Medicine and Public Health
University of North Carolina – Chapel Hill

Nadia N. Sawicki
Assistant Professor of Law
Beazley Institution for Health Law and Policy
Loyola University Chicago School of Law

Winsor C. Schmidt, JD, LLM
Endowed Chair / Distinguished Scholar in Urban Health Policy
University of Louisville School of Medicine and School of Public Health and Information Sciences

Robert Schwartz, JD
Professor of Law
University of New Mexico

Sheila R. Shulman, LLB, MPH
Research Associate Professor, Retired
SUNY Buffalo Law School

Ross D. Silverman, JD, MPH
Professor of Medical Humanities and Medical Jurisprudence
Southern Illinois University Schools of Medicine and Law

Lawrence E. Singer, JD, MHSA
Associate Professor and Director, Beazley Institute for Health Law and Policy
Loyola University Chicago School of Law

Jason Smith, MTS, JD
Assistant Professor
University of Connecticut School of Medicine

Jennifer Smith, JD
Associate Professor of Law
Florida A&M University College of Law

Roy G. Spece
Professor of Law
University of Arizona James E. Rogers College of Law

Joel Teitelbaum, JD, LLM
Associate Professor of Health Policy
George Washington University

Evelyn M. Tenenbaum, JD
Professor of Law
Albany Law School
Professor of Medical Education
Albany Medical College

Nicolas P. Terry, LLM
Hall Render Professor of Law and Director, Hall Center for Law and Health
Indiana University Robert H. McKinney School of Law

Lance Tibbles, JD
Professor of Law
Capital University Law School

Stacey A. Tovino, JD, PhD
Professor of Law
William S. Boyd School of Law, University of Nevada, Las Vegas

David Trueman, JD, PhD
Lecturer-in-Law
Columbia University School of Law

Jean Wright Veilleux, JD, LLM
Assistant Professor of Law
Charlotte School of Law

Walter J. Wadlington
James Madison Professor Emeritus
University of Virginia School of Law

Joanna K. Weinberg, JD, LLM
Senior Lecturer, Center for State and Local Government Law
UC Hastings College of the Law

Lindsay F. Wiley, JD, MPH
Assistant Professor of Law
American University Washington College of Law

Susan M. Wolf, JD
McKnight Presidential Professor of Law, Medicine & Public Policy
University of Minnesota

AMICUS CURIAE BRIEF

No. 11-398

In The
Supreme Court of the United States

DEPARTMENT OF HEALTH
AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

STATE OF FLORIDA, *et al.*,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

BRIEF OF *AMICUS CURIAE* PARTNERSHIP FOR AMERICA IN SUPPORT OF RESPONDENTS ON THE MINIMUM COVERAGE PROVISION ISSUE

BRIAN S. KOUKOUTCHOS
28 Eagle Trace
Mandeville, LA 70471
(985) 626-5052

CHARLES J. COOPER
Counsel of Record
DAVID H. THOMPSON
HOWARD C. NIELSON, JR.
COOPER & KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 Fax
ccooper@cooperkirk.com

*Attorneys for Amicus Curiae
Partnership for America*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF THE ISSUE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. The Individual Mandate Is Wholly Unprecedented	7
II. None of This Court's Commerce Clause Decisions Authorizes Congress To Compel Unwilling Individuals To Purchase Unwanted Products	9
III. There Is a Constitutionally Significant Distinction between Regulating Voluntary Activity and Coercing Activity	12
IV. The Government Proffers No Limiting Principle To Contain a Commerce Clause Power To Compel Involuntary Activity	16
V. A Statute Is Not "Proper" Under the Necessary and Proper Clause if it Would Negate the Purpose, Embodied in Article I and the Ninth and Tenth Amendments, of Enumerating, and Thereby Limiting, Federal Power	21
CONCLUSION	32

TABLE OF AUTHORITIES

Page

CASES

Ashwander v. TVA,
297 U.S. 288 (1936) 30

Bond v. United States,
131 S. Ct. 2355 (2011) ..... *passim*

County of Washington v. Gunther,
452 U.S. 161 (1981) 17

Florida ex rel. Attorney Gen. v. Department of HHS,
648 F.3d 1235 (11th Cir. 2011) ..... *passim*

Florida v. Department of HHS,
780 F. Supp. 2d 1307 (N.D. Fla. 2011) 19

Florida v. Department of HHS,
780 F. Supp. 2d 1256 (N.D. Fla. 2011) 7, 31

Gibbons v. Ogden,
22 U.S. (9 Wheat.) 1 (1824) 12

Gonzales v. Raich,
545 U.S. 1 (2005) 5, 9, 10, 11, 13

Gregory v. Ashcroft,
501 U.S. 456 (1991) 24

Griswold v. Connecticut,
381 U.S. 479 (1965) 30

Liberty Univ. v. Geithner,
No. 10-2347, 2011 WL 3962915 (4th Cir. Nov. 8, 2011) 1

Lugar v. Edmundson Oil Co.,
457 U.S. 922 (1982) 25

TABLE OF AUTHORITIES – Continued

Page

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 22

New York v. United States,
505 U.S. 144 (1992) 21, 24

Palmer v. Thompson,
403 U.S. 217 (1971) 30

Printz v. United States,
521 U.S. 898 (1997) 9, 22

Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) ..... *passim*

Thomas More Law Ctr. v. Obama,
651 F.3d 529 (6th Cir. 2011) 7, 9

United States v. Lopez,
514 U.S. 549 (1995) ..... *passim*

United States v. Morrison,
529 U.S. 598 (2000) 13, 17, 24, 25

Wickard v. Filburn,
317 U.S. 111 (1942) 9, 10, 11, 19

CONSTITUTION, RULES AND LEGISLATIVE MATERIALS

U.S. CONST. art. I, § 8 ..... *passim*

U.S. CONST. amend. IX ..... *passim*

U.S. CONST. amend. X 3, 6, 21, 24

TABLE OF AUTHORITIES – Continued

Page

Pub. L. No. 111-148, §§ 1501(b), 10106, 124 Stat. 119, 244, 907 (2010) 1, 2

S. Ct. Rule 37.6 1

OTHER

1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Perennial Classics ed. 2000) (1835) 5

1 ANNALS OF CONGRESS (Joseph Gales & William Seaton eds., 1834) 28, 31

2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (reprint 1966) (Jonathan Elliot ed., 2d ed. 1836) 27

Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J. L. & POL. 63 (1987) 26

CONGRESSIONAL BUDGET OFFICE MEMORANDUM: *Budgetary Treatment of an Individual Mandate To Buy Health Insurance* (1994) 4, 8, 20, 21

CONGRESSIONAL RESEARCH SERVICE, *Requiring Individuals To Obtain Health Insurance: A Constitutional Analysis* (2009) 14

Partnership for America, http://partnership4 america.org 1

JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* (Gerald Gunther ed., 1969) 24

TABLE OF AUTHORITIES – Continued

Page

Letter from James Madison to George Washington (Dec. 5, 1789), *in* 5 THE WRITINGS OF JAMES MADISON 432 (Gaillard Hunt ed., 1904) 29

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 5 THE WRITINGS OF JAMES MADISON 271 (Gaillard Hunt ed., 1904) 28

Samuel Adams, *The Rights of the Colonists* (Nov. 20, 1772), *in* 5 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) 26

THE FEDERALIST NO. 33 (Hamilton) (Clinton Rossiter ed., 1961) 22

THE FEDERALIST NO. 45 (Madison) (Clinton Rossiter ed., 1961) 22, 25

THE FEDERALIST NO. 84 (Hamilton) (Clinton Rossiter ed., 1961) 26

THE WRITINGS OF GEORGE WASHINGTON 478 (Fitzpatrick ed., 1939) 26

INTEREST OF *AMICUS CURIAE*[1]

The Partnership for America is an advocacy organization dedicated to advancing common sense public policies rooted in America's traditions of individual freedom and free markets. http://partnership4 america.org. Partnership for America opposes stripping Americans of the freedom to make their own individual decisions about medical care by forcing people to purchase health insurance or to incur a government penalty but is developing economically and politically viable legislation which would address the problems of adverse selection and preexisting conditions without mandating the purchase of health insurance. Partnership for America, through a closely related predecessor organization, Revere America Foundation, collected over one million petitions to repeal and replace the Patient Protection and Affordable Care Act and filed briefs *amicus curiae* in several cases challenging Section 1501 of the Patient Protection and Affordable Care Act. *See Liberty Univ. v. Geithner*, No. 10-2347, 2011 WL 3962915 (4th Cir. Nov. 8, 2011); *Florida v. Department of HHS*, 648 F.3d 1235 (11th Cir. 2011); *Kinder v. Geithner*, No. 11-1973

---

[1] The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus* and its counsel, make a monetary contribution to the preparation and submission of this brief. *See* S. Ct. Rule 37.6.

(8th Cir. argued Oct. 20, 2011), and *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011).

STATEMENT OF THE ISSUE

Whether Congress' authority to regulate interstate commerce includes the power to compel individuals to engage in commerce by purchasing a product they do not want.

SUMMARY OF ARGUMENT

This case presents the Court with a pivotal moment in its history – one in which it must face its "responsibility to confront the great questions of the proper federal balance in terms of lasting consequences for the constitutional design." *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring). At issue is the validity of a law without precedent in American history, a law compelling individual Americans to purchase a consumer product that they do not want. Section 1501 of the Patient Protection and Affordable Care Act contains an individual mandate ("Individual Mandate") that requires most people to purchase health insurance policies. *See* Pub. L. No. 111-148, §§ 1501(b), 10106, 124 Stat. 119, 244, 907 (2010).

Although modern jurisprudence has gradually eliminated the distinction between interstate and

intrastate commerce, this Court has never doubted its "duty to recognize meaningful limits on the commerce power of Congress," *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring), lest the limited powers enumerated in Article I become the general federal police power that the Framers deliberately withheld. As the Court of Appeals correctly recognized, the Individual Mandate represents "a sharp departure from all prior exercises of federal power." *Florida ex rel. Attorney Gen. v. Department of HHS*, 648 F.3d 1235, 1290 (11th Cir. 2011). The mandate is triggered not by any sort of commercial, economic, or even noneconomic activity, but rather by an individual's *decision not to engage in economic activity*. It regulates *in*activity, conscripting unwilling individuals into the market to buy an unwanted product. The Individual Mandate thus introduces *compulsory commerce* into the American economy – commerce that Congress not only regulates, but *creates*. If Congress has power to regulate an individual's *inactivity* in this fashion, then one is "hard pressed to posit any *activity* by an individual that Congress is without power to regulate." *Lopez*, 514 U.S. at 564 (emphasis added). Such sweeping federal regulatory power offends "the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Because the Individual Mandate ousts the States of their reserved sovereign powers, it violates the Tenth Amendment, as the 26 States now before this Court have amply demonstrated. Brief for State Respondents on the Minimum Coverage Provision, No. 11-398 (U.S. filed Feb. 6, 2012).

But the Individual Mandate commits a constitutional offense that is graver still, for "[f]ederalism is more than an exercise in setting the boundary between different institutions of government for their own integrity." *Bond*, 131 S. Ct. at 2364. Federalism has an even higher, antecedent purpose: it "protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power *cannot direct or control their actions*." *Id.* (emphasis added). Because the Individual Mandate exceeds Congress' enumerated powers to regulate individual conduct, it infringes the retained rights of the People, rights expressly protected by the Ninth Amendment.

Although it is difficult to posit what Congress could *not* do with the power it claims here, it is not hard to envision what it *could* do. Indeed, Congress' own budget office, concerned that federally mandated private expenditures ought to be included in the federal budget, understood that implementation of such a power could lead to, "[i]n the extreme, a command economy, in which the President and the Congress dictated how much each individual and family spent on all goods and services." CONGRESSIONAL BUDGET OFFICE MEMORANDUM: *Budgetary Treatment of an Individual Mandate to Buy Health Insurance* 9 (1994) ("CBO MEMORANDUM"). A nation that takes the first step along that path will find the second less difficult. And that path leads ultimately to a place where the "central authority," as Tocqueville warned, "monopolizes all activity and life," where "there are

subjects still, but no citizens." 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 93-94 (Perennial Classics ed. 2000) (1835).

If Congress' claimed power to force citizens to buy products they do not want is countenanced by this Court, then little if anything will be left of the doctrine of enumerated and thus limited powers of the national government, of the retained rights of the People guaranteed by the Ninth Amendment, and of the distinction between a free People and a servile one.

ARGUMENT

The Individual Mandate does not regulate the "channels of interstate commerce," the "instrumentalities of interstate commerce," or "persons or things in interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). Nor does the Government contend otherwise. Therefore the mandate may be sustained, if at all, only as an exercise of power under the Necessary and Proper Clause to "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 17.

The Government, accordingly, defends the Individual Mandate as necessary to ensure the effectiveness of Congress' *other* reforms of the health insurance market: extending coverage to those with preexisting medical conditions and preventing

premiums based on individual medical history. According to the Government, unless everyone is required by law to purchase health insurance (or to pay a penalty), the revenue base will be insufficient to underwrite the costs of insuring individuals presently deemed high risk or uninsurable. Therefore, the Government reasons, insofar as Congress has power under the Commerce Clause to reform the interstate health insurance market, it also possesses, under the Necessary and Proper Clause, power to make that regulation effective by *coercing commerce* – that is, by forcing unwilling individuals to enter the health-insurance market to buy a product they do not want.

The Individual Mandate, however, "represents a wholly novel and potentially unbounded assertion of congressional authority." *Florida*, 648 F.3d at 1328. Unlike other regulations sustained by this Court as necessary and proper to implement Congress' power under the Commerce Clause, the Individual Mandate does not regulate economic activity. Rather, it attempts to regulate individual decisions *to refrain from activity*, to remain *outside* the stream of commerce by choosing *not* to purchase health insurance. As demonstrated below, the Individual Mandate exceeds Congress' enumerated powers and thus infringes the powers of the States and the rights of the People preserved under the Tenth and Ninth Amendments.

I. The Individual Mandate Is Wholly Unprecedented.

To uphold the Individual Mandate under the Commerce and Necessary and Proper Clauses, this Court "would have to uphold a law that is unprecedented on the federal level in American history." *Seven-Sky v. Holder*, 661 F.3d 1, 51 (D.C. Cir. 2011) (Kavanaugh, J., dissenting with respect to jurisdiction). "Never before has Congress sought to *regulate* commerce by compelling non-market participants to *enter into* commerce so that Congress may regulate them." *Florida*, 648 F.3d at 1311. Even judges upholding the Individual Mandate have acknowledged that in asserting power to "compel individuals to buy products they do not want," Congress "crossed [a] line" it had never before crossed. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 558 (6th Cir. 2011) (Sutton, J., concurring). Likewise, the Government, which in the litigation below offered various singularly unpersuasive examples in support of its claim that the Individual Mandate was not unprecedented,[2] has subsequently been forced to "conced[e] the novelty of the mandate." *Seven-Sky*, 661 F.3d at 14.

To be sure, Congress has repeatedly "sought to *encourage* commercial activity it favors." *Florida*, 648

---

[2] *See Florida v. Department of HHS*, 780 F. Supp. 2d 1256, 1285 (N.D. Fla. 2011) (noting that Government's strained attempt to find historical precedents for the mandate "only underscores and highlights its unprecedented nature"); *see also Florida*, 648 F.3d at 1290-91.

F.3d at 1289 (emphasis added). But it has never before sought to *compel* such activity. *Id.* Indeed, when legislation that would have imposed an Individual Mandate was first considered by Congress in 1994, the Congressional Budget Office concluded that "[a] mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States." CBO MEMORANDUM at 1. "The fact that Congress has never before exercised this supposed authority is telling." *Florida*, 648 F.3d at 1289. As the Court of Appeals explained,

> Few powers, if any, could be more attractive to Congress than compelling the purchase of certain products. Yet even if we focus on the modern era, when congressional power under the Commerce Clause has been at its height, Congress still has not asserted this authority. Even in the face of a Great Depression, a World War, a Cold War, recessions, oil shocks, inflation, and unemployment, Congress never sought to require the purchase of wheat or war bonds, force a higher savings rate or greater consumption of American goods, or require every American to purchase a more fuel efficient vehicle.

Id. Given the stunning versatility and infinite applicability of a power to correct perceived market distortions by mandating that consumers buy this or that product, "the utter lack of statutes imposing

obligations" anything like the Individual Mandate "suggests an assumed *absence* of such power." *Printz v. United States*, 521 U.S. 898, 907-08 (1997). The fact that "earlier Congresses avoided use of this highly attractive power" surely provides "reason to believe that the power was thought not to exist." *Id.* at 905.

II. None of This Court's Commerce Clause Decisions Authorizes Congress To Compel Unwilling Individuals To Purchase Unwanted Products.

This Court has never "interpret[ed] the Commerce Clause to allow Congress to dictate the financial decisions of Americans through an economic mandate." *Florida*, 648 F.3d at 1288. Again, even judges upholding the Individual Mandate agree. *See Thomas More Law Ctr.*, 651 F.3d at 558 (Sutton, J., concurring). Yet the Government insists that the Individual Mandate is supported by *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Gonzales v. Raich*, 545 U.S. 1 (2005). Those cases, however, involved federal regulation of individuals who voluntarily engaged in economic activity that was subject to Congress' power to regulate. They do "not show that Congress may compel individuals to buy products they do not want." *Thomas More Law Ctr.*, 651 F.3d at 558 (Sutton, J., concurring).

Wickard upheld a federal price-support program that penalized a participating farmer for growing more than his statutory allotment of wheat, even

though he used it solely for his own family and livestock. The Court reasoned that Congress could rationally conclude that a decision by many farmers to grow their own wheat, rather than entering the marketplace to buy it, could in the aggregate affect prices and undermine the federal price-support program. According to the Government, a person's "preference" for paying for healthcare needs out of pocket rather than purchasing insurance is much like the preference of farmer Filburn for fulfilling his need for wheat by growing his own rather than by purchasing it. But the law in *Wickard* imposed a penalty not on farmer Filburn's merely philosophical and passive "preference," but on his affirmative *activity of actually producing grain*. *See* 317 U.S. at 127-29. Obviously, a farmer's production and consumption of a commodity falls within the Court's definition of "activities" that "are quintessentially economic. 'Economics' refers to 'the production, distribution, and consumption of commodities.'" *Raich*, 545 U.S. at 25.

Moreover, farmer Filburn *chose* to participate in the federal price-support program and, in return for abiding by its production limits, he was guaranteed a price for his wheat that was nearly three times what the market price would otherwise have been. *Wickard*, 317 U.S. at 126, 130, 133. Even then, the regulation at issue in *Wickard*, unlike the Individual Mandate, did not force Filburn to grow wheat, nor did it compel him, or anyone else, to buy it. "Instead, Filburn had any number of other options open to him. He could have decided to make do with the amount of

wheat he was allowed to grow. He could have redirected his efforts to agricultural endeavors that required less wheat. He could have even ceased part of his farming operations." *Florida*, 648 F.3d at 1291. "The wheat-acreage regulation" thus "was a limitation – not a mandate – and left Filburn with a choice." *Id.* Thus, "*Wickard* is striking not for its similarity to [the] present case, but in how different it is." *Florida*, 648 F.3d at 1291.

Gonzales v. Raich is equally inapposite. The statute upheld there did not mandate that individuals engage in economic activity nor did it otherwise regulate their *inactivity*. Rather, it "regulate[d] the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Raich*, 545 U.S. at 26. "Like the farmer in *Wickard*," the plaintiffs in *Raich* were themselves "cultivating, for home consumption, a fungible commodity for which there is an established . . . interstate market." *Id.* at 18. Thus, "the activities engaged in by the plaintiffs themselves fit the Court's definition of economic, since they involved the production, distribution, and consumption of marijuana." *Florida*, 648 F.3d at 1278. By contrast, "in choosing not to purchase health insurance, the individuals regulated by the individual mandate are hardly involved in the 'production, distribution, and consumption of commodities.'" *Id.* at 1286 (quoting *Raich*, 545 U.S. at 25). To the contrary, they exhibit "the *absence* of such behavior, at least with respect to health insurance." *Id.* at 1287 (emphasis added).

III. There Is a Constitutionally Significant Distinction between Regulating Voluntary Activity and Coercing Activity.

The Government strives to avoid the obvious and intuitive distinction between laws regulating voluntary economic activity and laws compelling individuals to engage in such activity by purchasing a product they do not want. *See* Brief for Petitioners (Minimum Coverage Provision) at 48-52, No. 11-398 (U.S. filed Jan. 6, 2012) ("Gov't Br."). All its efforts fail.

First, focusing on the definition of "regulate," the Government argues that there is "no textual support in the Commerce Clause" for this distinction. *Id.* at 48. But however broad the definition of "regulate" may be, the Constitution nowhere grants Congress blanket power to "regulate," let alone to "regulate inactivity." Rather, it grants Congress specific power "to regulate *Commerce . . . among the several States*." U.S. CONST. art. I, § 8 (emphasis added). Plainly, a decision to *refrain* from purchasing health insurance is not that.[3]

---

[3] The Government argues that at the time of the Founding "the term 'commerce'" was not "limited to only *existing* commerce." Gov't Br. 48 (quoting *Seven-Sky*, 661 F.3d at 16). But "[t]he power to regulate commerce, of course, presupposes that something exists to regulate." *Florida*, 648 F.3d at 1285. As Chief Justice Marshall explained in *Gibbons v. Ogden*, "If Congress has the power to regulate it, that power must be exercised whenever the subject *exists*." 22 U.S. (9 Wheat.) 1, 195 (1824) (emphasis added).

Further, although the Court has not restricted congressional power to regulations of interstate commerce *per se*, it "has always described the commerce power as operating on *already existing or ongoing activity*." *Florida*, 648 F.3d at 1286 (emphasis added). *See, e.g.*, *Lopez*, 514 U.S. at 558 (identifying the "categories of *activity* that Congress may regulate") (emphasis added); *United States v. Morrison*, 529 U.S. 598, 611 (2000) ("[W]here we have sustained federal regulation of intrastate *activity* . . . , the *activity* in question has been *some sort of economic endeavor*.") (emphases added); *Raich*, 545 U.S. at 17 ("Our case law firmly establishes Congress' power to regulate purely local *activities* that are part of an *economic 'class of activities.'*") (emphases added). While this Court's "Commerce Clause cases run the gamut of possible regulation[,] [they] share at least one commonality: they all involved attempts by Congress to regulate preexisting, freely chosen classes of activities." *Florida*, 648 F.3d at 1286.

Second, the Government argues that any distinction between regulating voluntary activity and forcing individuals to engage in involuntary activity is mere semantics. Gov't Br. 48-50. But there is a real and obvious distinction between regulating commerce and other voluntary activity and forcing unwilling consumers into the market to purchase a product they do not want. Indeed, even Congress' own staff recognized that it may "be questioned whether a

requirement to purchase health insurance is really a regulation of an economic activity or enterprise, if individuals who would be required to purchase health insurance are not, but for this regulation, a part of the health insurance market." CONGRESSIONAL RESEARCH SERVICE, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* 6 (2009). The fact that clever lawyers can identify real or supposed hard cases in applying such a distinction does not distinguish it from the line this Court has drawn between economic and noneconomic activity or, for that matter, from any other legal rule. As this Court explained in *Lopez*:

> Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender legal uncertainty.

514 U.S. at 566. "Any possible benefit from eliminating this 'legal uncertainty' would be at the expense of the Constitution's system of enumerated powers." *Id.*

Third, the Government argues that the Individual Mandate does not regulate inactivity because "the uninsured as a class are active in the market for

health care," are "always at risk" of needing medical services that they may be unable to pay for, and may have purchased insurance in the past or may do so in the future. Gov't Br. 50-51. But the mandate is not conditioned on the purchase of insurance, the receipt of healthcare services, or the failure to pay for such services. *See Florida*, 648 F.3d at 1295. And the fact that an individual has purchased a product or service before and may purchase it again at some indefinite point in the future surely does not change the character of a Government mandate that he purchase even that product – let alone a *different* product – now. More important still, the Government's focus on the details of the healthcare market is at bottom "a convenient sleight of hand to deflect attention" from the sweeping and unprecedented power it asserts, *Florida*, 648 F.3d at 1297, for the Government has proved unable to "identify *any* mandate to purchase a product or service in interstate commerce that would be unconstitutional" under the Commerce Clause, *Seven-Sky*, 661 F.3d at 14-15 (emphasis added); *see also infra* Part IV.

Fourth, the Government argues that the distinction between regulating activity and regulating inaction "'seems more redolent of Due Process Clause arguments' than any principled enumerated powers analysis." Gov't Br. 51-52 (quoting *Seven-Sky*, 661 F.3d at 19). It is unclear what, exactly, the Government means by this. But if it means to suggest that federalism, unlike due process, is not intended to protect individual autonomy from government

overreaching, it is simply wrong. As this Court recently reaffirmed, "federalism protects the liberty of the individual from arbitrary power." *Bond*, 131 S. Ct. at 2364; *see also infra* Part V.

IV. The Government Proffers No Limiting Principle To Contain a Commerce Clause Power To Compel Involuntary Activity.

In *Lopez*, the Court struck down a federal gun-possession statute because the Government's "hip bone connected to the thigh bone" theory of how gun possession near schools affects interstate commerce had no stopping point: the Government could not identify a single activity that did not, under its theory, affect interstate commerce. Nor could the Court: "[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." 514 U.S. at 564. Upholding this claim of congressional power would thus negate the central premise of federalism: that the Constitution's enumeration of congressional powers "'presupposes something not enumerated.'" *Id.* at 566.

The interpretation of the Commerce Clause urged by the Government here is likewise "breathtaking in its expansive scope" and similarly "affords no limiting principles in which to confine Congress' enumerated power." *Florida*, 648 F.3d at 1295; *see also Seven-Sky*, 661 F.3d at 51 (Kavanaugh, J., dissenting as to jurisdiction) (noting "the extraordinary

ramifications of [the D.C. Circuit's] decision expanding Congress' authority to impose mandatory-purchase requirements"). Although the Government places great emphasis on the specific characteristics of the markets for health care and health insurance, as a matter of legal principle Congress' power under the Commerce and Necessary and Proper Clauses is not, and cannot be, conditioned on the "uniqueness" of the market at issue. Although the supposedly "distinctive characteristics" of the healthcare market, even if true, might provide *policy* reasons why Congress *should choose not* to enact individual mandates in other areas, they certainly are not *constitutional* reasons why Congress *could not* do so. Only the latter can provide a judicially enforceable principle to cabin Congress' exercise of its commerce power. After all, "[u]nder our written Constitution, . . . the limitation of congressional authority is not solely a matter of legislative grace." *Morrison*, 529 U.S. at 616.

The Government's implicit assurance that a decision expanding the commerce power far enough to uphold the Individual Mandate will be "a restricted railroad ticket, 'good for this day and train only,'" *County of Washington v. Gunther*, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting), is cold comfort. Indeed, this Court in *Lopez* rejected the dissent's similar argument – that congressional regulation of gun possession near schools should be upheld as a "rare case," due to the "particularly acute threat" to commerce posed by firearms and the "special way in which guns and education are incompatible." 514 U.S.

at 624 (Breyer, J., dissenting). The *Lopez* Court rightly dismissed this supposed limiting principle as "devoid of substance." *Id.* at 564-65.

Furthermore, the specific characteristics of the markets for health care and health insurance highlighted by the Government – such as general need, uncertainty, and cost-shifting – are in no way unique to these markets. *See, e.g.*, *Florida*, 648 F.3d at 1296 ("virtually all forms of insurance entail decisions about timing and planning for unpredictable events with high associated costs"). Thus, as Judge Kavanaugh aptly explained, "despite the Government's effort to cabin its Commerce Clause argument to mandatory purchases of health insurance, there seems no good reason its theory would not ultimately extend as well to mandatory purchases of retirement accounts, housing accounts, college savings accounts, disaster insurance, disability insurance, and life insurance, for example." *Seven-Sky*, 661 F.3d at 51-52.

Nor could the Government's claimed regulatory power be confined to insurance and other private financial products. For, "[g]iven the economic reality of our national marketplace, any person's decision not to purchase a good would, when aggregated, substantially affect interstate commerce in that good." *Florida*, 648 F.3d at 1292. That is why the Government cannot "identify any mandate to purchase a product or service in interstate commerce that would be unconstitutional" under the Commerce Clause. *Seven-Sky*, 661 F.3d at 14-15. It is simply impossible "to

conceive of *any* product whose purchase Congress could not mandate under this line of argument." *Florida*, 648 F.3d at 1292; *see also Seven-Sky*, 661 F.3d at 18 (upholding Individual Mandate despite court's inability to identify "any clear doctrinal principles limiting congressional mandates that any American purchase any product or service in interstate commerce"). This chilling fact is all one needs to know about the size of the stakes in this case.

In short, under the Government's theory, Congress is empowered to regulate grain prices not only by penalizing wheat production in excess of a quota, as it did in *Wickard*, but by mandating that individuals enter the market to purchase bread and other grain products. Likewise, the need to prop up the domestic auto industry, recently owned in large part by the federal government, might lead Congress to impose a tax penalty on those who do not buy American cars – even if they do not purchase any car at all.[4]

The Government's argument thus admits of no judicially enforceable principle that would restrain Congress from addressing real or perceived problems in other markets by compelling individuals to enter the stream of commerce to buy products that they do

---

[4] During the Senate hearings, Professor Charles Fried testified – while *defending* the constitutionality of the Mandate – that "Congress could, indeed, mandate that everyone buy broccoli." *See Florida v. Department of HHS*, 780 F. Supp. 2d 1307, 1311 n.2 (N.D. Fla. 2011) (citing both the Senate transcript and Professor Fried's written testimony).

not want. Congress' own nonpartisan Congressional Budget Office reviewed the first bill contemplating an individual mandate 17 years ago and cautioned that "the essence of private choice is the ability *not* to act. Decisions about resource allocation are not private unless individuals can choose not to spend their money in response to market forces." CBO MEMORANDUM at 7 (emphasis in original). Given the degree of control that the federal government would exert over mandated purchases of health insurance by individuals who had been conscripted into commerce by congressional decree, the CBO was concerned that the cost to individuals of complying with the mandate should be counted as part of the federal budget. *Id.* at 6-7. The CBO then offered this warning:

> Failure to record the cost of this compulsory activity in the budget would open the door to a mandate-issuing government taking control of virtually any resource allocation decision that would otherwise be left to the private sector, without the federal budget recording any increase in the size of government. In the extreme, a command economy, in which the President and the Congress dictated how much each individual and family spent on all goods and services, could be instituted without any change in total federal receipts or outlays.

CBO MEMORANDUM at 9.[5] Embracing the unlimited regulatory authority asserted by the Government here would open the constitutional door to the same result.

V. A Statute Is Not "Proper" Under the Necessary and Proper Clause if it Would Negate the Purpose, Embodied in Article I and the Ninth and Tenth Amendments, of Enumerating, and Thereby Limiting, Federal Power.

The Government's argument that the Individual Mandate is essential to its larger regulatory scheme for the interstate healthcare market, even if credited, goes only to the "Necessary" element of the Necessary and Proper Clause.[6] Even a "necessary" exercise

---

[5] As this report makes clear, Congress' use of mandates such as the one at issue here, rather than its Article I powers to tax and spend, would allow it to increase the size and control of the federal government while masking the true cost of that growth. It would thus undermine a key component of our constitutional system – the accountability of representatives to voters and taxpayers. *Cf. New York v. United States*, 505 U.S. 144, 168-69 (1992).

[6] Both the numerous exceptions to the Individual Mandate and the anemic measures specified for enforcing it plainly cast doubt on the Government's claim that it is "necessary" to its other healthcare reforms. *See, e.g.*, *Florida*, 648 F.3d at 1310-11 (discussing the "broad exemptions and exceptions to the individual mandate (and its penalty)" and the "toothless enforcement mechanisms"); *id.* at 1299 (explaining that those responsible for incurring healthcare costs without paying will be "largely persons who either (1) are exempted from the mandate,

(Continued on following page)

of Commerce Clause authority must also be "a 'Law . . . *proper* for carrying into Execution the Commerce Clause.'" *Printz*, 521 U.S. at 923-24 (quoting Art. I, § 8, cl. 18) (alteration omitted; emphasis added by the Court). In Chief Justice Marshall's words, for a law to be "proper," it must "consist with the letter and spirit of the constitution." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). A law that does not do so is, in Alexander Hamilton's phrase, "merely [an] act[ ] of usurpation" which "deserve[s] to be treated as such." THE FEDERALIST NO. 33, at 204 (Hamilton) (Clinton Rossiter ed., 1961), *quoted in Printz*, 521 U.S. at 924. The Individual Mandate fails to comport with "the letter and spirit of the Constitution" because it is inconsistent with – indeed, it negates – the "first principle[ ]" that Article I "creates a Federal Government of enumerated powers" that are "'few and defined.'" *Lopez*, 514 U.S. at 552 (quoting THE FEDERALIST NO. 45, at 292-93 (Madison) (Clinton

---

(2) are excepted from the mandate penalty, or (3) are now covered by the Act's Medicaid expansion").

In all events, the "necessity" identified by the Government, at bottom, is the need for additional monetary resources. *See id.* at 1310 ("At best, the individual mandate is designed *not* to enable the execution of the Act's regulations, but to counteract the significant regulatory costs on insurance companies and adverse consequences stemming from the fully executed reforms."). But the Internal Revenue Code is a testament to the innumerable ways in which revenues can be raised in accord with the Constitution, and thus a justification based on a need for additional resources is one of the least compelling showings of "necessity" imaginable.

Rossiter ed., 1961)). As discussed above, under the Government's theory of compulsory commerce, Congress can impress unwilling individuals into commerce and compel them to buy unwanted products whenever doing so is deemed by Congress to be a desirable part of its regulatory plans.

That makes this case *easier* than *Lopez*, where the Court balked at the extreme attenuation between the regulated "actors" and the ultimate effect of "their conduct" on commerce. 514 U.S. at 580 (Kennedy, J., concurring); *see also id.* at 559-61, 565-67 (opinion of the Court). Although the Court admitted that "some of our prior cases have taken long steps down [the] road" toward granting Congress a general police power by "giving great deference to congressional" programs regulating activities with remote effects on commerce, *id.* at 567, the Court drew the line at "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561.

The Individual Mandate strains the concept of commerce even more than the gun-possession statute in *Lopez*, for it reflects not a difference *in degree* from prior exercises of Commerce Clause power, but a difference *in kind*. Again, the Individual Mandate reaches beyond even noneconomic "actors" to command those who have decided *not* to act. Far from what Chief Justice Marshall described as "the natural, direct, and *appropriate* means, or the *known and usual means*, for the execution of a given power,"

JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 186 (Gerald Gunther ed., 1969) (emphasis added), the Individual Mandate is the ultimate form of congressional bootstrapping: unwilling individuals are first coerced into the health insurance market and then their involuntary participation in that market is used to justify the mandate as an exercise of the commerce power. Upholding the Individual Mandate "would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States," and leave no apparent "activity that the States may regulate but Congress may not." *Lopez*, 514 U.S. at 564, 567. The Individual Mandate thus encroaches on the reserved sovereign powers of the States in violation of the Tenth Amendment.

But that is not all. "Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). "To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992); *see also, e.g.*, *Morrison*, 529 U.S. at 616 n.7; *Lopez*, 514 U.S. at 552; *Gregory v. Ashcroft*, 501 U.S. 456, 458-59 (1991). Indeed, "our constitutional structure" plays a "vital . . . role in securing freedom for us." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

To uphold the claim of congressional power underlying the Individual Mandate would fundamentally alter the nature of the relationship between the federal government and the governed. That relationship is defined, in large part, by the boundaries on federal regulation inherent in the Constitution's enumeration of congressional powers. Adherence to these boundaries "preserves an area of individual freedom by limiting the reach of federal law." *Morrison*, 529 U.S. at 622 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982)). As this Court recently emphasized in *Bond v. United States*, "Federalism" – and the enumeration of powers, in particular – thus "protects the liberty of all persons . . . by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." 131 S. Ct. at 2364. And it is precisely this liberty – the liberty of individuals to direct and control their own actions, free of federal regulatory interference, in areas lying beyond the "few and defined" regulatory powers "delegated by the . . . Constitution to the federal government," THE FEDERALIST NO. 45, *supra*, at 292-93 – that the Ninth Amendment was specifically designed to protect.

Central to the Framers' concept of republican government was the belief that the enumerated *powers* of the federal government are reciprocally related to the retained *rights* of the People. By delegating certain legislative powers to the national government, the People consented to abide by the laws enacted by the federal government pursuant to

those powers. But as to those matters over which the national government had no enumerated power, the People had a retained right to do as they pleased, free of federal regulation. *See, e.g.*, Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J. L. & POL. 63, 64 (1987). As George Washington, President of the Constitutional Convention explained in a letter to his friend Lafayette, "The people evidently retained everything which they did not in express terms give up." THE WRITINGS OF GEORGE WASHINGTON 478 (Fitzpatrick ed., 1939); *cf.* Samuel Adams, *The Rights of the Colonists* (Nov. 20, 1772), in 5 THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 1987) ("Every natural Right not expressly given up or from the nature of a Social Compact necessarily ceded remains.").

Indeed, many of the Framers opposed the incorporation of a Bill of Rights in the Constitution for fear that an attempt to "enumerate" the rights of the People would carry the risk that any omission from the list would be construed to grant Congress an implied, *unenumerated* power to legislate on the subject at issue. *See* THE FEDERALIST NO. 84, at 513-14 (Hamilton) (Clinton Rossiter ed., 1961); Cooper, *Limited Government and Individual Liberty*, *supra*, at 69-70.[7]

---

[7] This concern was succinctly expressed by James Wilson in the Pennsylvania ratifying convention: "If we attempt an enumeration [of rights], every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect

(Continued on following page)

As James Madison explained in introducing his proposal for a bill of rights in the First Congress:

> It has been objected also against the bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.

---

enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete." 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 436 (reprint 1966) (Jonathan Elliot ed., 2d ed. 1836) (statement of J. Wilson at Pennsylvania Ratifying Convention, Oct. 28, 1787). The Framers believed that the limited nature of Congress' enumerated powers created a body of reciprocal rights that was virtually limitless. No one could hope to catalogue all of these rights, and Wilson was indignant at the suggestion that such a task should have been undertaken in the Constitutional Convention: "Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing." *Id.* at 54 (statement of J. Wilson at the Pennsylvania Ratifying Convention, Dec. 4, 1787).

James Madison, 1 ANNALS OF CONGRESS 439 (Joseph Gales & William Seaton eds., 1834).[8] The provision to which Madison was referring was framed as follows:

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

Id. at 435.

Since the Framers understood that delegated powers and retained rights were two sides of the same coin, the clause in Madison's proposal negating any implied purpose "to diminish the just importance of other rights retained by the people" was entirely redundant to the clause negating any intent "to enlarge the powers delegated by the Constitution." Neither clause added anything of substance to the other. Accordingly, the meaning of the Ninth Amendment was not changed when Madison's original proposal was amended by the House to delete reference to delegated powers and to provide simply that

---

[8] Several months earlier, Madison wrote to Thomas Jefferson that he had come to favor a Bill of Rights "provided it be so formed as not to imply powers not to be included in the enumeration." Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 5 THE WRITINGS OF JAMES MADISON 271 (Gaillard Hunt ed., 1904).

"[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Indeed, the congruence of meaning between Madison's original proposal and what ultimately became the Ninth Amendment was confirmed by Madison himself, in a letter to George Washington. Madison was advising President Washington of Edmund Randolph's opposition to Virginia's ratification of the Ninth Amendment. Governor Randolph had argued against the enlargement of delegated powers rather than a preservation of retained rights. Madison found Randolph's point "altogether fanciful." Letter from James Madison to George Washington (Dec. 5, 1789), *in* 5 THE WRITINGS OF JAMES MADISON 432 (Gaillard Hunt ed., 1904). As he put it,

> If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended. If no line can be drawn, a declaration in either form would amount to nothing.

Id.

Thus, the wording of Madison's original proposal and the Ninth Amendment are merely two complementary ways of saying the same thing – namely, that with respect to any area over which the national government lacked delegated power, the American people retained the right, vis-à-vis the national

government, to do as they pleased.[9] Or, as this Court put it in *Bond*, "laws enacted in excess of delegated governmental power cannot direct or control their actions." 131 S. Ct. at 2364.

The Framers conceived of the People's reserved rights as ranging from the fundamental to the mundane, from the rights of free speech and assembly to an individual's "right to wear his hat if he pleased."[10]

---

[9] Any suggestion that the Ninth Amendment authorizes judges to recognize and enforce specific positive rights against Congress *when it is acting within the scope of its enumerated powers* thus turns the Ninth Amendment on its head. Although this view has been suggested by some Justices, *see, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring); *Palmer v. Thompson*, 403 U.S. 217, 233-34 (1971) (Douglas, J., dissenting), this Court has properly held that the Ninth Amendment "does not withdraw the rights *which are expressly granted* to the Federal Government." *Ashwander v. TVA*, 297 U.S. 288, 330-31 (1936) (emphasis added); *see also Griswold*, 381 U.S. at 520 (Black, J., dissenting) (Ninth Amendment was adopted "to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication"); *id.* at 529-30 (Stewart, J., dissenting) (Amendment was adopted "to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers").

[10] During the debates on the Bill of Rights, Congressman Sedgwick of Massachusetts objected that no amendment protecting free assembly was needed, for "it is a self-evident, unalienable right which the people possess . . . [and] that never would be called in question." He argued that, if Congress were going to "descend to such minutiae," it may as well "have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought

(Continued on following page)

There is little doubt that, somewhere along that continuum, the Framers would have placed the right of individuals to refuse to buy products and services that they do not want. Indeed, the right not to buy an unwanted product has an honored American pedigree. The colonists in Boston boycotted tea and other products bearing the imprimatur of the Crown, and not even King George III claimed a sovereign power to compel his American subjects to buy English products. "It is difficult to imagine that a nation which began . . . as the result of opposition to a British mandate giving the East India Company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place." *Florida v. Department of HHS*, 780 F. Supp. 2d at 1286.

---

proper; but [I] would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights, in a Government where none of them were intended to be infringed." 1 ANNALS OF CONGRESS, *supra*, at 759-60.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully submits that this Court should hold that the Individual Mandate exceeds Congress' enumerated powers under the Interstate Commerce and Necessary and Proper Clauses.

Respectfully submitted,

BRIAN S. KOUKOUTCHOS
28 Eagle Trace
Mandeville, LA 70471
(985) 626-5052

CHARLES J. COOPER
Counsel of Record
DAVID H. THOMPSON
HOWARD C. NIELSON, JR.
COOPER & KIRK, PLLC
1523 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 220-9600
(202) 220-9601 Fax
ccooper@cooperkirk.com

Attorneys for Amicus Curiae Partnership for America

AMICUS CURIAE BRIEF

No. 11-398

IN THE

Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

On Writ of Certiorari To
The United States Court of Appeals
For The Eleventh Circuit

BRIEF *AMICUS CURIAE* OF SENATOR RAND PAUL ADDRESSING THE MINIMUM COVERAGE PROVISION ISSUE IN SUPPORT OF RESPONDENTS, URGING AFFIRMANCE

JESSICA A. BURKE
2719 Camelot Way
Greenwood, IN 46143
(859) 533-3269

ELIZABETH G. POWELL
401 South Fourth Street
Louisville, KY 40202
(502) 581-1135

*BRIDGET MALONEY BUSH
LANDRUM & SHOUSE LLP
220 W. Main St., Ste 1900
Louisville, KY 40202
(502) 589-7616
bbush@landrumshouse.com

Attorneys for Amicus Curiae
**Counsel of Record*

PRESS OF BYRON S. ADAMS ♦ WASHINGTON, D.C. ♦ 1-800-347-8208

QUESTION PRESENTED

Whether the Court should overrule *Wickard v. Filburn*, 317 U.S. 111 (1942), as part of holding that under Article I of the U.S. Constitution, Congress may not compel all individuals in the United States to acquire and maintain health insurance or pay a penalty, as set forth in the minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

INTEREST OF *AMICUS CURIAE* 1

STATEMENT 2

ARGUMENT 5

I. THIS COURT SHOULD STRIKE DOWN PPACA AS EXCEEDING THE ENUMERATED POWER OF CONGRESS UNDER THE COMMERCE CLAUSE 5

A. The Court Should Reconsider The Constitutional Validity Of Its Reasoning In *Wickard v. Filburn* 5

B. *Wickard* Is At Odds With The Framers' Understanding Of The Commerce Clause 9

C. *Wickard* And *Raich* Did Not Disclose Any Commerce Properly Subject To Congressional Regulation As Understood By The Framers 13

D. PPACA Presents The Opportunity To Better Define The Parameters Of The Commerce Power Consistent With The Framers' Original Understanding 17

II. THE NECESSARY AND PROPER CLAUSE CANNOT SAVE PPACA BECAUSE, BY VIOLATING THE TENTH AMENDMENT, PPACA IS INHERENTLY IMPROPER 21

A. The Necessary And Proper Clause Cannot Replace The Absence of Commerce Clause Jurisdiction Or Spending Powers 21

B. The Government's Arguments Conflict With The Framers' Understanding Of The Necessary And Proper Clause 22

C. PPACA Fails The Test Of *South Dakota v. Dole* 26

D. **PPACA Contravenes Our System Of Federalism As Envisioned By The Framers** 29

CONCLUSION 31

TABLE OF AUTHORITIES

Cases **Page(s)**

Bond v. United States, 131 S. Ct. 2355 (2011) 29

Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011), *cert. granted*, 132 S. Ct. 603, 604 (U.S. Nov. 14, 2011) (Nos. 11-393, 11-398, 11-400) 4,18

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) 21

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 9,10

Gonzales v. Oregon, 546 U.S. 243 (2006) 19

Gonzales v. Raich, 545 U.S. 1 (2004) ..... *passim*

Heart of Atlanta Motel v. United States, 379 U.S. 241 17

Hill v. Colorado, 530 U.S. 703 (2000) 19

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 22,24

New York v. United States, 505 U.S. 144 (1992) 21

NLRB v. Jones & Laughlin Steel Corp.,
301 U.S. 1 41 (1937) 20

Printz v. United States,
521 U.S. 898 (1997) 24

Seven-Sky v. Holder, 661 F.3d 1
(D.C. Cir. 2011), *petition for cert. filed*,
80 U.S.L.W. 3359 (U.S. Nov. 30, 2011)
(No.11-679) 4,7

South Dakota v. Dole,
483 U.S. 203 (1987) 26,27,29

Steward Machine Co. v. Davis,
301 U.S. 548 (1937) 29

Thomas More Law Ctr. v. Obama,
651 F.3d 529 (6th Cir. 2011), *petition for cert. filed* (U.S. June 29, 2011)
(No. 11-117) ..... *passim*

United States v. Comstock,
560 U.S. 1951 (2010) 20,24

United States v. Lopez, 514 U.S. 549
(1995) ..... *passim*

United States v. Morrison, 529 U.S. 598
(2000) 16,17,18

Wickard v. Filburn, 317 U.S. 111 (1942) ..... *passim*

Constitutional and Statutory Provisions

U.S. CONST. art. I, § 8, cl. 3 ..... *passim*

U.S. CONST. art. I, § 8, cl. 18 ..... *passim*

U.S. CONST. amend. X ..... *passim*

26 U.S.C. § 5000A(a) (2011) 28

42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (2011) 27

42 U.S.C. § 1396d(b) (2011) 28

42 U.S.C. § 1396d(y)(1) (2011) 28

Rule

S. Ct. R. 37.6 1

Other Authorities

Alexander Hamilton, Opinion on the Constitutionality of the Bank (23 Feb. 1791) in 8 THE PAPERS OF ALEXANDER HAMILTON 2 (Harold C. Syrett ed., 1961) 24

CONG. BUDGET OFFICE, THE LONG-TERM OUTLOOK FOR HEALTHCARE SPENDING (2007), available at http://www.cbo.gov/ftpdocs/87xx/doc8758/11-13-LT-Health.pdf 2

DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888 (1985) 9

DAVID O. STEWART, THE MEN WHO INVENTED THE CONSTITUTION: THE SUMMER OF 1787 (2007) 1

Donald H. Regan, *How To Think About The Federal Commerce Power And Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554 (1995) 17

James F. Blumstein & Frank A. Sloan, *Health Care Reform Through Medicaid Managed Care: Tennessee as a Case Study and a Paradigm*, 53 VAND. L. REV. 125, 133 (2000) 28

JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 (W.W. Norton 1987) 11

James Madison, The Bank Bill, House of Representatives (Feb. 2, 1791) in 13 THE PAPERS OF JAMES MADISON 376-78 (William T. Hutchinson ed.,1977) 23

Jim Chen, *Filburn's Legacy*, 52 EMORY L.J. 1719 (2003) 6,15

John C. Eastman, *The Spending Power*, in THE HERITAGE GUIDE TO THE CONSTITUTION 95 (Edwin Meese III ed., 2005) 25

Letter from Thomas Jefferson to Wilson Cary Nicholas (September 7, 1803) in 10 THE WRITINGS OF THOMAS JEFFERSON 419 (Andrew A. Lipscomb ed., 1904) 30

Mark Knoller, *U.S. National Debt Tops Debt Limit*, CBS NEWS ONLINE, December 16, 2009, http://www.cbsnews.com/8301-503544_162-5987341-503544.html 2

NATIONAL ASS'N OF STATE BUDGET OFFICERS, 2010 STATE EXPENDITURE REPORT: EXAMINING FISCAL 2009-2011 STATE SPENDING 47 (2011) 28

ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven Calabresi ed., 2007) 25

OXFORD ENGLISH DICTIONARY (2d ed. 1989) 11

Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL'Y 5 (2012) 17

Randy E. Barnett, *New Evidence of the Original Meaning of The Commerce Clause*, 55 ARK. L. REV. 847 (2003). 10

Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001) 11

Richard W. Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1 (2003) 25

SAMUEL A. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1785) 11

THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 (Jonathan Elliot ed., 1888) 23

THE FEDERALIST No. 12 (Alexander Hamilton) (Clinton Rossiter ed. 1961) 11

THE FEDERALIST No. 17 (Alexander Hamilton) (Clinton Rossiter ed. 1961) 12

THE FEDERALIST No. 36 (Alexander Hamilton) (Clinton Rossiter ed. 1961) 12

THE FEDERALIST No. 45 (James Madison) (Clinton Rossiter ed. 1961) 9

Yuval Levin, *Pass It To Find Out What's In It*, NATIONAL REVIEW ONLINE, March 9, 2010, http://www.nationalreview.com/corner/195976/pass-it-find-out-whats-it/yuval-levin 3

INTRODUCTION

The purpose of this brief *amicus curiae* is to ask this Court to restore some limiting principle to Commerce Clause jurisprudence by overruling *Wickard v. Filburn*, 317 U.S. 111 (1942), consistent with the original meaning of Congressional power under the Commerce Clause, as the Court addresses the constitutionality of healthcare reform legislation.

INTEREST OF *AMICUS CURIAE*[1]

United States Senator Rand Paul respectfully submits this brief *amicus curiae* in support of Respondents. Senator Paul represents the Commonwealth of Kentucky and is also a founding member of the U.S. Senate Tea Party Caucus. Senator Paul is a physician of ophthalmology and one of only three physicians in the Senate.[2]

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus* discloses that no counsel for any party authored any portion of this brief and no person or entity other than *amicus* made any monetary contributions to the preparation or submission of this brief. All parties have consented to the filing of this brief in that counsel for petitioners and respondents have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs.

[2] The proportion of physician-legislators has changed little since the founding of this nation. Three of the Constitutional Convention's fifty-five delegates – Maryland's James McHenry, North Carolina's Hugh Williamson and Virginia's James McClurg – were practicing physicians. DAVID O. STEWART, THE MEN WHO INVENTED THE CONSTITUTION: THE SUMMER OF 1787 ix, x (2007).

Senator Paul has a vital interest in protecting the Constitutional rights of the American people, including his constituents, as well as ensuring that Congress does not exceed its authority. Pursuant to his oath of office, Senator Paul has sworn to "support and defend the Constitution." As a Senator, physician, and member of the Tea Party, Senator Paul has a special interest in the implications of the minimum coverage provision for individual liberty and our system of federalism.

STATEMENT

The breathtaking scope of the Patient Protection and Affordable Care Act ("PPACA") extends to more than one sixth of the economy of the United States.[3] PPACA was passed by the U.S. Senate on Christmas Eve, December 24, 2009. At that time, the national debt was nearly $12.135 trillion, exceeding the statutory debt limit.[4] Upon passage of the statute in March 2010, private sector job growth halted and dropped sharply in the following months.

PPACA contains nine titles and hundreds of new laws scattered throughout the U.S. Code. The approximately 2000-page bill in its entirety was

---

[3] CONG. BUDGET OFFICE, THE LONG-TERM OUTLOOK FOR HEALTH CARE SPENDING (2007), available at http://www.cbo.gov/ftpdocs/87xx/doc8758/11-13-LT-Health.pdf.

[4] Mark Knoller, *U.S. National Debt Tops Debt Limit*, CBS NEWS ONLINE, December 16, 2009, http://www.cbsnews.com/8301-503544_162-5987341-503544.html.

admittedly read by few members of Congress before their vote. As then-Speaker of the U.S. House of Representatives, Nancy Pelosi, said shortly after the Congressional vote, "We have to pass the bill so you find out what's in it."[5]

The nature of the minimum coverage provision compelling all individuals in the United States to acquire and maintain health insurance is an unprecedented assertion of Federal Government authority at the expense of the States as well as an assault on individual liberty. For the first time in history, Congress has required private citizens to buy an expensive product from a private company every month for the rest of their lives, just by virtue of being U.S. citizens. In addition, PPACA mandates a significant expansion of the States' Medicaid schemes. Under PPACA, States must spend an enormous sum of additional dollars. They are required to broaden their Medicaid eligibility standards to accommodate as much as fifty percent more individuals, many of whom are compelled to enroll by the mandate, or else face a tax penalty.

Public response to the passage of PPACA was extraordinary. Thousands of Americans publicly protested in opposition to passage of the legislation, in particular the individual mandate. Ordinary Americans – not legal scholars – became keenly interested in the Constitution and the history of its framing and ratification. The Tea Party movement

---

[5] Yuval Levin, *Pass It To Find Out What's In It*, NATIONAL REVIEW ONLINE, March 9, 2010, http://www.nationalreview.com/corner/195976/pass-it-find-out-whats-it/yuval-levin.

was born and the U.S. House of Representatives changed hands, with Democrats losing more seats in a single election than any party in more than seventy years. Court challenges to the constitutionality of PPACA soon followed.

The U.S. Court of Appeals for the Eleventh Circuit concluded that Congressional enactment of the minimum coverage provision was an unconstitutional exercise of authority, falling outside Congress's enumerated power under the Commerce Clause. *See Florida ex rel. Att'y Gen. v. U.S. Dep't of Health and Human Servs.*, 648 F.3d 1235, 1298 (11th Cir. 2011), *cert. granted*, 132 S.Ct. 603, 604 (U.S. Nov. 14, 2011) (Nos. 11-393, 11-398, 11-400).

The Eleventh Circuit's decision directly conflicts with those of the United States Courts of Appeal for the District of Columbia and Sixth Circuits, both of which upheld the minimum coverage provision based on *Wickard v. Filburn*. *See Seven-Sky* v. *Holder*, 661 F.3d 1, 20 (D.C. Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3359 (U.S. Nov. 30, 2011) (No. 11-679); *Thomas More Law Ctr.* v. *Obama*, 651 F.3d 529, 564 (6th Cir. 2011), *petition for cert. filed* (U.S. July 29, 2011) (No. 11-117).

As explained below, this Court should affirm the Eleventh Circuit's decision striking down the minimum coverage provision and in so doing overrule *Wickard*, which extended application of the Commerce Clause, through the Necessary and Proper Clause, far beyond the historical meaning of "commerce" as used in the text of the Commerce Clause.

ARGUMENT

I. THIS COURT SHOULD STRIKE DOWN PPACA AS EXCEEDING THE ENUMERATED POWER OF CONGRESS UNDER THE COMMERCE CLAUSE

A. The Court Should Reconsider The Constitutional Validity Of Its Reasoning In *Wickard v. Filburn*

Other parties and *amici* will attempt to assure the Court that it need not alter existing doctrine to hold that PPACA is unconstitutional. It is true that PPACA's individual mandate is – literally – unprecedented in the violence that it does to the notion of a Congress constrained by enumerated powers. Nonetheless, the rationale for Congress's assertion of power over individuals and against the several States through PPACA has been decades in the making. The seeds for this case were sown in *Wickard v. Filburn,* 317 U.S. 111 (1942).

Wickard stands for the sad proposition that Congress can prevent a man from feeding his family in his own home with food he grew himself. *See id.* at 125.[6] Rather than engaging in a tortured exercise

---

[6] So infamous is the case, it has been set to music, to the 1970s tune of "Convoy":

> "His name was farmer Filburn, we looked in on his wheat sales. We caught him exceeding his quota. A criminal hard as nails. He said, "I don't sell none interstate." I said, "That don't mean cow flop." We think you're affecting commerce. And I set fire to his crop,

to distinguish *Wickard*, the more intellectually honest course would be to use this opportunity to overrule *Wickard* as a case that was wrongly decided and that has caused manifold mischief and confusion. *Wickard*, like PPACA, cannot be squared with the plain text of the Commerce Clause as understood by those who drafted it

Chief Justice Rehnquist characterized *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." *United States v. Lopez*, 514 U.S. 549, 560 (1995). Indeed, concurring in *Lopez*, Justice Thomas called for reconsideration in a future case of the "substantial effects" test with a view to better reflect the text and history of the Commerce Clause. 514 U.S. at 584 (Thomas, J., concurring). This is such a case, and examination of the "substantial effects" test must necessarily include *Wickard*, wherein the test was extended beyond all limits by allowing aggregation of personal consumption of a commodity in a purely local setting.

The issue of whether PPACA is constitutional presents the Court with the proper opportunity to show that the Commerce Clause power is not limitless, and reject the aggregation theory as applied in *Wickard*. Judge Sutton said it best in his

---

> HOT DAMN! Cause we got interstate commerce. Ain't no where to run! We gone regulate you. That's how we have fun."

Jim Chen, *Filburn's Legacy*, 52 EMORY L.J. 1719, 1721 (2003) (quoting Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 674 (1995) (emphasis in original)).

concurrence in *Thomas More Law Center*: "At one level, past is precedent, and one tilts at hopeless causes in proposing new categorical limits on the commerce power. But there is another way to look at these precedents – that the Court either should stop saying that there is a meaningful limit on Congress's commerce power or prove that it is so." 651 F.3d at 555 (Sutton, J., concurring in part).

The D.C. Circuit upheld PPACA with explicit reliance on *Wickard* and *Gonzales v. Raich*, 545 U.S. 1 (2005). Judge Silberman wrote, "We think the closest Supreme Court precedent to our case is *Wickard v. Filburn*." *Seven-Sky*, 661 F.3d at 17 (citation omitted). Judge Silberman recognized that the aggregation of individual conduct was the means by which the activity was deemed substantially to affect interstate commerce:

> The logic of the *[Wickard]* opinion would apply to force any farmer, no matter how small, into buying wheat in the open market. *See Raich*, 545 U.S. at 20. *Wickard*, therefore, comes very close to authorizing a mandate similar to ours, at least indirectly, and the farmer's 'activity' could be as incidental to the regulation as simply owning a farm.

See id. (parallel citation omitted).

The Sixth Circuit also relied on *Wickard* and *Raich* to uphold PPACA. *See Thomas More Law Center*, 651 F.3d at 542. That court reasoned:

> Similar to the causal relationship in *Wickard*, self-insuring individuals are attempting to fulfill their own demand for a commodity rather than resort to the market and are thereby thwarting Congress's efforts to stabilize prices. Therefore, the minimum coverage provision is a valid exercise of the Commerce Power because Congress had a rational basis for concluding that, *in the aggregate*, the practice of self-insuring for the cost of health care substantially affects interstate commerce.

Id. at 545 (emphasis added).

The lower appellate courts' explicit reliance on *Wickard* underscores its doctrinal importance to the issues presented in this case. It is therefore appropriate for the Court to reexamine the Constitutional validity of this shaky foundation on which the edifice of the government's argument in support of PPACA is built.

B. *Wickard* Is At Odds With The Framers' Understanding Of The Commerce Clause

Wickard (followed in *Raich*) is far removed from the appropriate starting point, which is the plain text of the Constitution. "The Congress shall have power to . . . regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3.

This authority to regulate commerce is one of Congress's enumerated powers. Such "powers delegated . . . to the federal government" were "few and defined," while the powers "to remain in the State governments" were "numerous and indefinite," as James Madison wrote. *See* THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961). Federal authority was to "be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected." *Id.* "The powers reserved to the several States," in contrast, were to "extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people," *id.* – a category one would expect to include the purely intrastate growing of wheat or individual purchase of health insurance.

In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the first significant Commerce Clause case decided by this Court, Chief Justice Marshall observed that "[t]he enumeration" of commerce as a Congressional power "presupposes something not enumerated; and that something, if we regard the language or subject of the sentence, must be the exclusively internal commerce of a state." *Id.* "Marshall emphasized that federal power extended only to commerce 'with foreign Nations, and among the several States, and with the Indian Tribes.'" DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888 170 (1985). This "enumeration of the particular classes of commerce to which the [federal] power was to be extended, would not have been made, had the intention been

to extend the power to every description." *Gibbons*, 22 U.S. (9 Wheat.) at 194-95. "Commerce 'among' the states thus was limited to that 'commerce which concerns more states than one. . . . The completely internal commerce of a state, then, may be considered as reserved for the state itself.'" Currie, *supra*, at 170 (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 194-95).

In the time since *Wickard* was decided in 1942, there has been considerable legal scholarship to advance our understanding of the specific words that the Framers of the Constitution chose to use when drafting the Commerce Clause. *See, e.g.*, Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003). The point is not to try to "channel" the Framers, but rather to understand the meaning of the words they so carefully chose at the time they chose them. It is a search for an objective, contemporaneous meaning regarding what the Framers actually wrote, not a speculative foray into what they might or might not have intended to write.

The word "commerce" was used repeatedly during the Constitutional Convention, during the state ratification debates and in *The Federalist* papers. In each of those contexts, "commerce" was used in a narrow sense that is synonymous with trade, or exchange, or transportation to effect the trade or exchange of something. *See Raich*, 545 U.S. at 56 (Thomas, J., dissenting) ("The [Commerce] Clause's text, structure and history all indicate that at the time of the founding, the term 'commerce'

consisted of selling, buying and bartering, as well as transporting for those purposes."). The Framers used "commerce" in its ordinary sense. Dictionaries at the time of the drafting of the Constitution defined "commerce" as "Exchange of one thing for another; trade." *See, e.g.*, SAMUEL A. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1785); *see also Lopez*, 514 U.S. at 585 (Thomas, J., concurring) (citing founding era dictionaries). The word commerce derives from the Latin. Its etymology is *com* (with) *merci* (merchandise). *See, e.g.*, 3 OXFORD ENGLISH DICTIONARY 552 (2d ed. 1989).

Professor Barnett reviewed James Madison's notes from the Constitutional Convention and concluded that of the thirty-four uses of commerce, all but eight were equivalent to "trade or exchange"; those eight other uses referred to trade with foreign nations. *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 114 (2001) (citing JAMES MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787 (W.W. Norton 1987)). Likewise, in the sixty-three times in which the term "commerce" appears in *The Federalist* papers, its meaning is uniformly synonymous with trade. *See id.*

Even Alexander Hamilton, who of all *The Federalist* authors (and perhaps of any Framer) desired a strong central government, used "commerce" in a narrow sense for which trade or exchange could have been substituted. Take, for example, *The Federalist* No. 12, wherein Hamilton discussed the "rivalship" "between agriculture and commerce." Plainly, Hamilton viewed commerce

and agriculture as different things. THE FEDERALIST NO. 12, at 86 (Alexander Hamilton) (Clinton Rossiter ed., 1961). He reiterated the point in *The Federalist* No. 17, where he noted that the authority to regulate interstate commerce, a national matter, should be distinguished from "the supervision of agriculture and other concerns of a similar nature, all those things, in short, which are proper to be provided by local legislation." *See id.* at 114; *see also* THE FEDERALIST NO. 36, at 214 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing "agriculture, commerce and manufactures"). Congress's authority under the Commerce Clause, therefore, was limited to regulation of interstate or foreign transactions such as the trade or exchange of goods between States or with foreign nations, not purely intrastate activities such as a person's growing of crops for his own family's use or the purchase of health insurance for an individual.

C. *Wickard* and *Raich* Did Not Disclose Any Commerce Properly Subject To Congressional Regulation As Understood By The Framers

The concept of commerce the Court used in *Wickard* and later in *Raich* bears no resemblance whatsoever to the word as the Framers understood it. The facts in *Wickard* have become a symbol of an overreaching Federal Government and a Congress that disrespects the limits of a written Constitution of enumerated powers.

In *Wickard*, Roscoe Filburn sought to enjoin the enforcement of a penalty against him under the Agricultural Adjustment Act of 1938 that limited the amount of wheat he could grow. Filburn, a fifth-generation Ohio farmer, "operated a small farm." 317 U.S. at 114. It was hardly an operation that possessed an economy of scale to cause a swing fluctuation in the interstate price of wheat. Pursuant to the Agricultural Adjustment Act, the government notified Filburn that his "wheat acreage allotment" was 11.1 acres. Filburn, however, defied the government: he had the temerity to sow 23 acres, and was fined as a result. And when Filburn refused to pay the fine, he was denied a "marketing card" and a lien was placed against his crop. *Id.* at 115.

Filburn's practice, according to the Court's opinion, was to "raise a small acreage of winter wheat. . . ; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding." *Id.* Only the portion of wheat that he did not sell was at issue. *Id.* Filburn argued that the Commerce Clause could not apply to his production and consumption of wheat, activities which are "local in character" and with "effects upon interstate commerce that are at most 'indirect.'" *Id.* at 119.

The Court held that:

> even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'

Id. at 125.

Where *Wickard* broke new ground was the concept of aggregating the personal, local, non-commercial conduct. It was undisputed (and inconceivable) that a small-time farmer like Filburn by himself could exert any effect on interstate commerce whatsoever, certainly not a "substantial effect." Filburn's excess wheat production cannot be characterized as having even a *de minimus* effect on interstate commerce: it never left the farm, let alone the State. That is, even if growing wheat is commerce – which the Framers made clear it is not – the so-called "commerce" cannot be called interstate in any sense. Nonetheless, the Court reasoned that by growing wheat to make his own flour and then his own bread, Filburn affected interstate commerce by not buying the bread at the store: his failure to engage in commerce was the rationale for asserting that Congress could regulate him. *See id.* at 129.

Filburn's conduct was not commerce. It was not interstate. And because the amount of wheat at issue was so miniscule, the Court extended the Commerce Clause power beyond all limits by aggregating Filburn's personal consumption of a

home-grown plant: "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.* at 128. Aggregation was the doctrinal tool used to assault self-sufficiency.[7]

So convoluted was the reasoning in *Wickard,* and so outrageous the result, that the Court attempted to bolster the opinion with a nod to international law. *See id.* at 125-26 (discussing wheat regulations of Argentina, Australia, and Canada).

Wickard's reasoning recurred more recently in *Gonzales v. Raich,* 545 U.S. at 17-18. Change the wheat in *Wickard* to medical marijuana, and that is *Raich:* personal use of a home-grown, legal plant in miniscule quantities, which was never bought or sold, and never crossed state lines. *See id.* at 57-58 (Thomas, J., dissenting). To find a "substantial effect" on interstate commerce, the Court had to aggregate the six plants. It was a doctrinal trick that proved too much. Justice Thomas pointed out that the aggregated substantial effects holding has no limiting principle: "If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything and the Federal Government is no longer one of limited and enumerated powers." *Id.*

---

[7] The Filburn Family History notes of Roscoe C. Filburn: "I never worked for another man in my life." Chen, *supra,* at 115.

Justice Thomas called the majority's decision "further proof that the 'substantial effects' test is a 'rootless and malleable standard' at odds with the constitutional design." 545 U.S. at 67 (Thomas, J., dissenting) (quoting his concurrence in *United States v. Morrison,* 529 U.S. 598, 627 (2000)). "The majority's treatment of the substantial effects test is rootless, because it is not tethered to either the Commerce Clause or the Necessary and Proper Clause." *Id.* at 67.

> The majority's treatment of the substantial effects test is malleable because the majority expands the relevant conduct. By defining the class at a high level of generality (as the intrastate manufacture and possession of marijuana), the majority overlooks that individuals authorized by state law to manufacture and possess medical marijuana exert no demonstrable effect on the interstate drug market.

Id. at 68.

As with *Wickard,* the analytical device in *Raich* used to justify a Commerce Clause power inconceivable to the Framers was not just the "substantial effects" test but rather the aggregation of individual conduct that was personal and local to demonstrate the supposed "substantial effect." Therefore, in overruling *Wickard,* this Court need not invalidate all "substantial effects" cases – only those in which it was necessary to aggregate

individual local conduct in order to portray a "substantial effect on interstate commerce."[8]

D. PPACA Presents The Opportunity To Better Define The Parameters Of The Commerce Power Consistent With The Framers' Original Understanding

Perhaps recognizing that the aggregation principles risked turning the Commerce Clause into a Congressional police power, the Court has attempted to limit aggregation to "economic activities," noting that "in every case where we have sustained federal regulation under the aggregation principles in *[Wickard]*, the regulated activity was of an apparent commercial character." *Morrison*, 529

---

[8] Nor would interstate Commerce Clause precedents be diminished in which the activity or substance regulated was an instrumentality or a channel of interstate commerce. Thus, Congress could enact environmental regulations because pollution, by its nature, crosses state lines. Likewise, Congress can enact civil rights laws regarding restaurants and hotels, because those businesses by their nature are open to and designed to attract people in interstate commerce. In any event, the civil rights cases have other Constitutional text that supplies the authority to legislate: namely, the Thirteenth, Fourteenth, and Fifteenth Amendments. That is, some cases decided under the aggregated substantial effects doctrine might be right for other reasons. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 279 (Douglas, J., concurring); *see also* Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL'Y 5, 8 (2012); *see also* Donald H. Regan, *How To Think About The Federal Commerce Power And Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 595, 609 (1995).

U.S. at 611 n.4; *see also Lopez*, 514 U.S. at 559-60, 580. Though *Lopez* and *Morrison* were correctly decided – and gave hope that Congress's power is still enumerated and hence limited – the supposed distinction between economic and non-economic activity as a threshold for aggregation is simply unworkable, because any activity can be quantified and described in economic terms. Courts routinely quantify even the most personal and non-commercial activity in order to award damages, for example the loss of consortium.

To uphold PPACA, this Court would need to extend *Wickard* and *Raich* even further. The government's justification of PPACA forces it to conflate two markets: (1) the present market for health insurance, and (2) the future and hypothetical purchase of health care. *See Florida v. United States*, 648 F.3d at 1286 (quoting 42 U.S.C. § 18091(a)(2)(A) (2011) to note that Congress described "the activity" it chose to regulate as "economic and financial *decisions* about how and when health care is paid for and when health insurance is purchased") (emphasis added). That is, the government asks this Court not only to aggregate individual conduct but to *aggregate two distinctly different markets, as well.* Justice Thomas warned of defining interstate commerce at such a level of generality to justify Congressional regulation. *Raich*, 545 U.S. at 72 (Thomas, J., dissenting).

Moreover, unlike the wheat in *Wickard* or the marijuana in *Raich*, neither of the government's suggested markets concerns a fungible product. *See Raich*, 545 U.S. at 18. To the contrary, the delivery

of health care is highly personal. Healthcare, because it is the opposite of a fungible product, is therefore especially unsuited for aggregation. Health insurance is similarly personal, non-fungible and inappropriate for aggregation.

Even assuming, for sake of argument, that aggregation were proper in this case, it still does not justify Congress acting under the Commerce Clause. As the parties and other *amici* will explain, the individual mandate punishes inactivity: the failure or refusal to enter the market for health insurance. The present effect on interstate commerce of the failure to purchase health insurance is zero. No matter how many people are subject to the regulation by aggregation, that number multiplied times zero will always equal zero. That is why the government conflated the present market for health insurance with that of the future market for the potential purchase of health care. But collapsing those two markets would require the Court to "pile inference upon inference in a manner that would bid fair to convert Congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

The government's characterization of the market as national also fails because it ignores the local nature of purchases of health care and health insurance: areas that fall within the traditional police power of the States. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006); *Hill v. Colorado*, 530 U.S. 703, 715 (2000). Congress attempts to justify PPACA with the reasoning that uninsured people eventually show up sick at the emergency room, which then is forced to treat them and shifts

the cost on to insured patients. Even so, sick people rarely cross state lines to go to the emergency room. The nature of an emergency forces the sick or injured to go to the closest emergency room to save time. The delivery of emergency care, therefore, is done, as a general matter, locally rather than interstate. *Cf. NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41-42 (1937) (noting that court should use a "practical conception" of interstate commerce that "does not ignore actual experience"). Likewise, consumers cannot purchase health insurance from out of state.

The regulatory scheme that PPACA purports to establish is far larger and more complicated than the federal narcotics regulations in *Raich*. However, the breadth and complexity of PPACA is no justification for deference to Congress. If anything, the fact that Congress passed a bill too big for most members even to read suggests that the Court should heighten the standard of review. The breadth of the substantial effects doctrine cries out for a judicial review that is more searching than a cursory review for a rational basis for Congress to justify its usurpation of the States' police power. *Cf. United States v. Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring) (Commerce Clause cases may require a different test than the rational-basis test to demonstrate a tangible link to commerce).

II. THE NECESSARY AND PROPER CLAUSE CANNOT SAVE PPACA BECAUSE, BY VIOLATING THE TENTH AMENDMENT, PPACA IS INHERENTLY IMPROPER

A. The Necessary And Proper Clause Cannot Replace The Absence Of Commerce Clause Jurisdiction Or Spending Powers

As is often the case when Congress asserts jurisdiction under the Commerce Clause to regulate conduct that is neither interstate nor commerce, the government invokes the Necessary and Proper Clause to shore up the attenuated nature of the so-called "substantial effect" on interstate commerce. *See New York v. United States*, 505 U.S. 144, 158 (1992); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 584 (1985) (O'Connor, J., dissenting). Indeed, the government's brief in *Wickard* relied on the Necessary and Proper Clause. *See* Appellants' Br. on Reargument at 49; *Wickard*, 317 U.S. at 119; So, too, with PPACA, the statute's proponents lean on the Commerce Clause, the Necessary and Proper Clause and the spending power to form a three-legged stool to support the Act. None of these legs can support the Act's constitutionality either in isolation or cobbled together in the regulatory morass that is PPACA.

In *Raich*, the Court found a "necessary and proper" application of the Commerce Clause because the regulation at issue was "an essential part of a larger regulation of economic activity, in which the

regulatory scheme could be undercut unless the intrastate activities were regulated." *Raich*, 545 U.S. at 24 (quoting *Lopez*, 514 U.S. at 561). Justice O'Connor warned that such a justification actually encourages Congress to legislate imprecisely: "[T]he Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause – nestling questionable assertions of its authority into comprehensive regulatory schemes – rather than with precision." *Raich*, 514 U.S. at 43 (O'Connor, J., dissenting). And that is exactly what occurred with PPACA. Congress passed an approximately 2,000 page bill – which few members of Congress had even read before voting upon – before recessing for the holidays. The statute's complexity, however, does not justify and cannot mask just how far Congress has strayed from the enumerations of Article I.

B. The Government's Arguments Conflict With Framers' Understanding Of The Necessary And Proper Clause

Writings contemporaneous with the framing of the Constitution make clear that the Necessary and Proper Clause does not confer any additional enumerated power upon Congress. Rather, it clarifies what is implicit in the structure of the Constitution – that Congress has the authority to effectuate its enumerated powers. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

Edmund Pendleton, president of the Virginia Constitutional Ratification Convention, flatly denied that the Necessary and Proper Clause went "a

single step beyond the delegated powers" of Congress. "If [Congress were] about to pass a law in consequence of this clause, they must pursue some of the delegated powers, but can by no means depart from them, or arrogate any new powers; for the plain language of the clause is, to give them power to pass laws in order to give effect to the delegated powers." THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 313 (Jonathan Elliot ed., 1888). James Madison agreed, noting that "whatever meaning [the Necessary and Proper] [C]lause may have, none can be admitted, that would give an unlimited discretion to Congress." James Madison, The Bank Bill, House of Representatives (Feb. 2, 1791), in 13 THE PAPERS OF JAMES MADISON 376-78 (William T. Hutchinson ed., 1977).

Even when the Necessary and Proper Clause is used to carry out enumerated powers such as the commerce and spending powers, the Clause does not give Congress *carte blanche* to use whatever means it fancies to carry out its enumerated powers. To the contrary, as Alexander Hamilton explained, the means that may be necessary for carrying out Congress's enumerated powers were nonetheless improper if those means violated an independent provision of the Constitution: "[P]ower vested in a Government is in its nature sovereign, and includes by force of the term, a right to employ all the means requisite, and fairly applicable to the attainment of the ends of such power; and which are not precluded by restrictions and exceptions specified in the

constitution . . . ." Alexander Hamilton, Opinion on the Constitutionality of the Bank (23 Feb. 1791) in 8 THE PAPERS OF ALEXANDER HAMILTON 2 (Harold C. Syrett ed., 1961).

In *McCulloch v. Maryland*, Chief Justice Marshall reasoned: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." 17 U.S. at 421.

More recently, Justice Thomas, joined by Justice Scalia, addressed the *McCulloch* standard for assessing the propriety of Congressional action: "The means Congress selects will be deemed . . . 'proper' if they are not otherwise 'prohibited' by the Constitution and not '[in]consistent' with its 'letter and spirit.'" *United States v. Comstock*, 130 S.Ct. 1949, 1972 (2010) (Thomas, J., dissenting). In the same opinion, Justice Thomas noted that the Court's expansive construction has "come[ ] perilously close to transforming the necessary and proper clause into a basis for the federal police power that 'we have always rejected.'" *Id.* at 1983 (quoting concurrence of Thomas, J., in *Lopez*) (citations omitted).

The Necessary and Proper Clause is "the last, best hope of those who defend ultra vires congressional action." *Printz v. United States*, 521 U.S. 898, 923 (1997). "When a law . . . violates the principle of state sovereignty reflected in the Tenth Amendment and other constitutional provisions, it is not a law proper . . . and is thus merely an act of

usurpation which deserves to be treated as such." *Id.*

Judged under the standard as understood by the Framers, PPACA cannot be justified under the Necessary and Proper Clause, regardless of the enumerated power under which Congress purports to act. By commanding that States accept a staggering expansion of Medicaid eligibility or lose all Medicaid funding, while at the same time mandating that all individuals obtain insurance even if they would not have taken advantage of their Medicaid eligibility before, Congress has far exceeded both its commerce and spending powers and has violated the Tenth Amendment by encroaching on State sovereignty.

The spending power is not a roundabout to evade the Constitution's federalist plan of limited and enumerated powers. *See* Richard W. Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law,* 89 CORNELL L. REV. 1, 24 (2003). Indeed, there is no "Spending Clause" per se, and there is considerable scholarly debate about what constitutional provision empowers Congress to spend. *See, e.g.*, ORIGINALISM: A QUARTER-CENTURY OF DEBATE 253-85 (Steven Calabresi ed., 2007). For most of the first seventy years after the Constitution's ratification, the spending power was understood to be limited to the enumerated powers, rather than a free-standing power. *See* John C. Eastman, *The Spending Power*, in THE HERITAGE GUIDE TO THE CONSTITUTION 95 (Edwin Meese III ed., 2005) (discussing narrow view of spending power leading to vetoes by Presidents Thomas Jefferson, James Madison and James Monroe).

PPACA cannot be squared with this original understanding.

C. PPACA Fails The Test Of *South Dakota v. Dole*

Nor can PPACA be justified under *South Dakota v.* Dole, 483 U.S. 203 (1987).[9] Congress does not have unconstrained authority to use conditional grants of federal funds to achieve regulation outside of the limited areas allowed under Article I. *Id.* at 207-08. Only two prongs of the *Dole* test are at issue here. The Medicaid provisions of PPACA fail the *Dole* test because (1) States did not make the choice to enter into the Medicaid partnership with the federal government knowing that they would eventually be forced to drastically expand the program or forfeit the funds they relied on, and (2) the Medicaid provisions' conditioning of all federal Medicaid dollars on a State's acceptance of the unprecedented Medicaid expansion is as a practical matter compulsory and thereby violates the final *Dole* prong and the Tenth Amendment. *See id.*

In the past, when Congress sought to expand Medicaid coverage, it offered additional funding to States that agreed to additional obligations, without threatening existing funding of States that did not elect to participate in the new provisions. However, under PPACA, Congress did not tie the new

---

[9] Other *amici* and parties are addressing the Tenth Amendment issue. This brief simply notes that the Tenth Amendment violation precludes upholding the individual mandate under the Necessary and Proper Clause.

conditions only to those additional federal funds made newly available under PPACA. It instead made the new terms a condition of continued participation in Medicaid, thereby threatening each State with the loss of *all* federal Medicaid funds unless it adopts the Act's substantial expansions of state obligations.

Even worse is PPACA's manifest contempt for the principles of federalism. PPACA Medicaid provisions leave the States no choice but to accept, violating the anti-compulsion prong of *Dole* and amounting to direct regulation of the States in contravention of the Tenth Amendment. *See id.* at 211 (noting that "in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion"). Moreover, the Medicaid provisions of PPACA go so far beyond the previous conditional allotments of federal Medicaid dollars that any prior jurisprudence in this area is inapplicable.

PPACA drastically expands the eligibility and coverage thresholds that States must adopt to remain eligible to participate in Medicaid. Whereas States previously retained significant flexibility to determine who would be covered by Medicaid, PPACA requires States, with few exceptions, to cover all legal citizens under age 65 with incomes up to 133 percent of the poverty level. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (2011). Although the Federal Government will initially fund 100 percent of that expansion, by 2017, States will be responsible for 5 percent of those costs, with that number increasing to 10 percent by 2020. 42 U.S.C §

1396d(y)(1) (2011). Compounding the burden on the States, Congress offered no increased funding to cover the millions of individuals who were previously eligible for Medicaid and opted not to enroll, but now must enroll to comply with the individual mandate provision of PPACA. 26 U.S.C. § 5000A(a) (2011). Despite the massive burden these new provisions impose on the States, PPACA requires States to either implement and fund this expansion of benefits or forfeit *all* federal Medicaid funds.

In recent years, most States have received at least $1 billion in federal Medicaid funding, which covers at least half of each State's total Medicaid costs. NATIONAL ASS'N OF STATE BUDGET OFFICERS, 2010 STATE EXPENDITURE REPORT: EXAMINING FISCAL 2009-2011 STATE SPENDING 47 (2011); 42 U.S.C. § 1396d(b) (2010). "Once adopted, a cooperative federalism program such as Medicaid has a political 'lock-in' effect." James F. Blumstein & Frank A. Sloan, *Health Care Reform Through Medicaid Managed Care: Tennessee as a Case Study and a Paradigm,* 53 VAND. L. REV. 125, 133 (2000).

If a State refused to accept the expanded Medicaid eligibility requirements of PPACA, then that State would have to fund 100 percent of healthcare costs for lower income citizens. At the same time, the citizens of that State still would be subject to significant taxation to fund Medicaid in the other States–without receiving any of the benefits.

If the loss of all of a State's federal Medicaid funding whatsoever does not rise to the level of coercion envisioned by the *Dole* Court to reflect unconstitutional compulsion, then it is difficult to imagine what would.

The Court has noted that, in regards to the line where coercion becomes compulsion, "definition more precise must abide the wisdom of the future." *Steward Machine Co. v. Davis*, 301 U.S. 548, 591 (1937). The future is here. More is at issue than the constitutionality of PPACA. The Court here is faced with the continued validity of the principles of enumerated and limited powers in a federalist system. If Congress is allowed to entice the States to create massive programs based on the promise of federal funding but then later threaten to remove that funding unless the States do as Congress wills, then the States are no longer sovereign in any real sense. To uphold that kind of compulsion of the States is to allow Congress to regulate the States in any area it deems fit, thereby rendering federalism an historical curiosity. By coercing the States to surrender their sovereignty, Congress diminishes the freedom of individual citizens.

D. PPACA Contravenes Our System Of Federalism As Envisioned By The Framers

In *Bond v. United States* 131 S. Ct. 2355, 2364 (2011), Justice Kennedy, writing for a unanimous Court, emphasized that "[f]ederalism is more than an exercise in setting the boundary between different institutions of government for their own

integrity. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" It is this system of federalism, and our very Constitution, that PPACA imperils.

PPACA Medicaid provisions violate the "clear notice" requirement of *Dole,* are impermissibly compulsive, and contravene the Tenth Amendment. In light of the violation of an independent constitutional provision, the Tenth Amendment, PPACA is not a "proper" exercise of Congress's enumerated powers under the Commerce Clause, the spending powers or any other constitutional provision. The Court should strike down PPACA as an unconstitutional attempt to evade the plain meaning of the words our Framers used to draft our Constitution. It is those written words that constrain judicial authority and thereby secure our liberty. It is to those written words that We the People have consented to be governed.

As Thomas Jefferson wrote, "[o]ur peculiar security is in the possession of a written Constitution." Letter from Thomas Jefferson to Wilson Cary Nicholas, (September 7, 1803) in 10 THE WRITINGS OF THOMAS JEFFERSON 419 (Andrew A. Lipscomb ed., 1904). This Court should heed Jefferson's warning: "Let us not make it a blank paper by construction." *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals on the minimum coverage provision should be affirmed.

February 7, 2012

Respectfully submitted,

JESSICA BURKE
2719 Camelot Way
Greenwood, IN 46143
(859) 533-3269
jessicaburke08@gmail.com

*BRIDGET MALONEY BUSH
LANDRUM & SHOUSE LLP
220 West Main Street
Louisville, KY 40202
(502) 589-7616
bbush@landrumshouse.com

Elizabeth G. Powell
401 South Fourth Street
Louisville, KY 40202
(502) 581-1135
EPowell@MiddReut.com

Attorneys for Amicus Curiae
U.S. Senator Rand Paul
**Counsel of Record*

AMICUS CURIAE BRIEF

39

No. 11-398

In The
Supreme Court of the United States

DEPARTMENT OF HEALTH
AND HUMAN SERVICES, et al.,

Petitioners,

v.

STATE OF FLORIDA, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

BRIEF *AMICI CURIAE* OF PRESCRIPTION POLICY CHOICES, PROFESSORS OF LAW, AND PROFESSORS OF HEALTH POLICY IN SUPPORT OF PETITIONERS ON THE MINIMUM COVERAGE PROVISION

MICHAEL KEVIN OUTTERSON
(*Counsel of Record*)
Associate Professor of Law
BOSTON UNIVERSITY SCHOOL OF LAW
765 Commonwealth Avenue
Boston, MA 02215
office (617) 353-3103
fax (617) 353-3077
mko@bu.edu

QUESTION PRESENTED

One purpose of the individual mandate is to eliminate the market for self-insured healthcare transactions. It is well-established in this Court's precedent that the elimination of an interstate commercial market is a constitutionally legitimate end for Congress to pursue under the Commerce Clause. Under the Necessary and Proper Clause, Congress may use any reasonably adapted means to accomplish constitutionally legitimate ends. The individual mandate is not only reasonably adapted but is quite elegant as a means of eliminating the market for self-insured healthcare transactions. The provision effectively encourages individuals to shift from the inefficient market for self-insured care to its more efficient substitute market for fully-insured care.

The question presented is whether the minimum coverage provision is a valid exercise of Congress's powers under Article I of the Constitution.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. The Individual Mandate Is A Rational Means Of Eliminating The Interstate Market For Self-Insured Healthcare Transactions 4

A. Eliminating The Market for Self-Insured Care Was One of Congress's Central Goals in Passing The Individual Mandate 6

B. Eliminating The National Market For Self-Insured Care Is A Legitimate Exercise Of Congress's Article I Power To Regulate Interstate Commerce 9

C. The Individual Mandate Is A Rational, Permissible, And Reasonably Adapted Means Of Eliminating The Self-Insured Healthcare Market 16

II. The Market For Self-Insured Care Is, In Fact, Less Efficient Than The Market For Fully-Insured Care 20

A. The Market For Self-Insured Healthcare Transactions Is Inefficient 21

1. Individuals Underestimate Their Personal Risks For Bad Health Outcomes 22

TABLE OF CONTENTS – Continued

Page

2. Individuals Undervalue Long-Term Costs Relative To Short-Term Costs... 23

3. Optimism Bias And Hyperbolic Discounting Lead To Over-Consumption Of Healthcare Relative To What An Individual Can Afford And Over-Consumption Of Inefficient Emergency Care 26

B. Insurance Cures Many Of The Self-Insured Market's Inefficiencies And Creates Additional Efficiencies, Making It An Attractive Substitute For Self-Insurance..... 29

1. The Insured Market Fixes The Optimism Bias Problems Present In The Self-Insured Market..... 29

2. Insurance Reduces Over-Use Of Emergency Room Facilities By Charging High Copays If The Patient Is Not Admitted To The Hospital..... 31

3. Beyond Correcting Inefficiencies Experienced In The Self-Insured Market, The Insured Market Has Additional Efficiency Advantages 33

CONCLUSION 40

TABLE OF AUTHORITIES

Page

CASES

Aetna Health, Inc. v. *Davila*, 542 U.S. 200 (2004) 14

Florida ex rel. Att'y Gen. v. *U.S. Dept. of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) 4

Florida ex rel. Bondi v. *U.S. Dept. of Health & Human Servs.*, 780 F.Supp.2d 1256 (N.D. Fla. 2011), aff'd in part, rev'd in part *sub nom. Florida*, 648 F.3d 1235 ..... 11, 17

Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) 10

Gonzales v. *Raich*, 545 U.S. 1 (2005) 10, 16

Helvering v. *Davis*, 301 U.S. 619 (1937) 19

McCulloch v. *Maryland*, 4 Wheat. 316 (1819) 16

Perez v. *United States*, 402 U.S. 146 (1971) 10

Riegel v. *Medtronic, Inc.*, 552 U.S. 312 (2008) 14

Sabri v. *United States*, 541 U.S. 600 (2004) 16

United States v. *Comstock*, 130 S.Ct. 1949 (2010) 15, 16

United States v. *Darby*, 312 U.S. 100 (1941) 10, 16

United States v. *Maxwell*, 446 F.3d 1210 (11th Cir. 2006) 10

United States v. *Morrison*, 529 U.S. 598 (2000) 11

TABLE OF AUTHORITIES – Continued

Page

United States v. *Rutherford*, 442 U.S. 544 (1979) 10

Wickard v. Filburn, 317 U.S. 111 (1942) 10

CONSTITUTION AND STATUTES

U.S. Const. art. I, § 8, cl. 3 ..... 10, 15

U.S. Const. art. I, § 8, cl. 18 16

Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (1986) 18, 27

Employee Retirement Income Security Act of 1974, Pub. L. No. 93–406, 88 Stat. 829 13

Federal Food, Drug, and Cosmetic Act of 1938, Pub. L. No. 75–717, 52 Stat. 1040 13

Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111–152, 124 Stat. 1029 ..... 4, 30

Health Insurance Portability and Accountability Act, Pub. L. No. 104–191, 101 Stat. 1936 (1996) 13

Old-Age, Survivors, and Disability Insurance Act of 1965, Pub. L. No. 89–97, 79 Stat. 286 13

Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 4

Women's Health and Cancer Rights Act of 1998, Pub. L. No. 105–277, § 902, 112 Stat. 2681 13

26 U.S.C.A. § 5000A 4

TABLE OF AUTHORITIES – Continued

Page

26 U.S.C.A. § 5000A(b) 9, 17

26 U.S.C.A. § 5000A(c)(1) 17

42 U.S.C.A. § 299b-4 30

42 U.S.C.A. § 300gg-13 30

42 U.S.C.A. § 13951(a)(1) 30

42 U.S.C.A. § 18091(a)(2)(A) 7

42 U.S.C.A. § 18091(a)(2)(C) 7

42 U.S.C.A. § 18091(a)(2)(D) 7

42 U.S.C.A. § 18091(a)(2)(E) 7, 8

42 U.S.C.A. § 18091(a)(2)(F) 27

42 U.S.C.A. § 18091(a)(2)(G) 8, 19, 27

ACA Title VI 34

ACA § 10326 36

ACA § 10327 36

ACA § 10329 36

ACA § 10331 36

ACA § 10332 36

MISCELLANEOUS

Kenneth Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 Am. Econ. Rev. 941 (1963) 34

TABLE OF AUTHORITIES – Continued

Page

Uri Benzion, Amnon Rapoport & Joseph Yagil, *Discount Rates Inferred From Decisions: An Experimental Study*, 35 Management Science 270 (1989) 24

BlueCross BlueShield, *Blue Care Elect Preferred (PPO) Summary of Benefits: 2011-2012 Massachusetts State Universities Student Blue Plan* (2011), http://www.universityhealthplans.com/brochures_pdf/MSU_SOB1112.pdf 32

BlueCross BlueShield of Illinois, *Health Insurance Plan Comparison Guide* (2011), http://bcbsil.com/country/pdf/30026.pdf 30

Brief for Petitioners (Minimum Coverage Provision), *Dept. of Health & Human Servs. v. Florida* (2012) (No. 11-398) 4, 19

Gretchen Chapmen & Arthur Elstein, *Valuing the Future: Temporal Discounting of Health and Money*, 15 Med. Decision Making 373 (1995) 24, 25

Anne B. Claiborne, Julia R. Hesse & Daniel T. Roble, *Legal Impediments to Implementing Value Based Purchasing Healthcare*, 35 Am. J.L. & Med. 442 (2009) 36

Dept. of Health & Human Servs., Report to the President: Prescription Drug Coverage, Spending and Prices 96 (2000), http://aspe.hhs.gov/health/reports/drugstudy/c3.pdf 26, 34

TABLE OF AUTHORITIES – Continued

Page

Families USA, *Getting Less Care: The Uninsured With Chronic Health Conditions*, Families USA 2 (2001), http://familiesusa2.org/assets/pdfs/gettinglesscare387c.pdf 25

Peter Fishburn & Ariel Rubenstein, *Time Preference*, 12 Int'l Econ. Rev. 39 (1982) 24

Mark A. Hall & Gerard F. Anderson, *Health Insurers' Assessment of Medical Necessity*, 140 U. Pa. L. Rev. 1637 (1992) 37, 38

Robert L. Kane, Paul E. Johnson, Robert J. Town & Mary Butler, *A Structured Review of the Effect of Economic Incentives on Consumers' Preventive Behavior*, 27 Am. J. Preventive Med. 372 (2004) 30

David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q.J. Econ. 443 (1997) 31

Adam Liptak, *Common Ground for Legal Adversaries on Health Care*, N.Y. Times, Sept. 29, 2011, at A16 20

Conrad F. Meier, Council for Affordable Health Insurance, *Destroying Insurance Markets: How Guaranteed Issue and Community Rating Destroyed the Individual Health Insurance Market in Eight States* (2005), available at http://www.cahi.org/cahi_contents/resources/pdf/destroyinginsmrkts05.pdf 14

TABLE OF AUTHORITIES – Continued

Page

Wilhelmine Miller, Elizabeth Richardson Vigdor & Willard G. Manning, *Covering the Uninsured: What Is It Worth?*, Health Affairs W4-157 (Web Supp.) (2004) 28

Abigail R. Moncrieff, *The Supreme Court's Assault on Litigation: Why (and How) It Might Be Good for Health Law*, 90 B.U. L. Rev. 2323 (2010) 36

Abigail R. Moncrieff & Eric Lee, *The Positive Case for Centralization in Health Care Regulation: The Federalism Failures of the ACA*, 20 Kan. J.L. & Pub. Pol'y 266 (2011) 14

Office of the Assistant Sec'y for Planning & Evaluation, Office of Health Policy, Dep't of Health & Human Servs., The Value of Health Insurance: Few of the Uninsured Have Adequate Resources to Pay Potential Hospital Bills (2011), http://aspe.hhs.gov/health/reports/2011/ValueofInsurance/rb.pdf 26

Kevin Outterson, *Health Care, Technology and Federalism*, 103 W. Va. L. Rev. 503 (2001) 15

Ruth M. Parker, Scott C. Ratzan & Nicole Lurie, *Health Literacy: A Policy Challenge for Advancing High-Quality Health Care*, 22 Health Aff. 147 (2003) 35

John W. Rowe, *Pay-for-Performance and Accountability: Related Themes in Improving Health Care*, 145 Annals Internal Med. 695 (2006) 36

TABLE OF AUTHORITIES – Continued

Page

Phillip Rucker, *Sen. DeMint of S.C. is Voice of Opposition to Health-Care Reform*, Wash. Post, July 28, 2009, at A4 20

Daniel Simonet, *Cost Reduction Strategies for Emergency Services: Insurance Role, Practice Changes and Patients Accountability*, 17 Health Care Analysis 1 (2009) 27, 38

Barbara Starfield, Leiyu Shi & James Macinko, *Contribution of Primary Care to Health Systems and Health*, 83 Millbank Q. 457 (2005) 39

Richard Thaler, *Some Empirical Evidence on Dynamic Inconsistency*, 8 Econ. Letters 201 (1981) 24

United States National Health Care Act, H.R. 676, 111th Cong. (2009) 19

Neil D. Weinstein, *Reducing Unrealistic Optimism About Illness Susceptibility*, 2 Health Psychol. 11 (1983) 22, 23

Neil D. Weinstein & William M. Klein, *Resistance of Personal Risk Perceptions to Debiasing Interventions*, 14 Health Psychol. 132 (1995) 22, 23

Vivian Y. Wu, *Managed Care's Price Bargaining with Hospitals*, 28 J. Health Econ. 350 (2009) 33

INTEREST OF *AMICI CURIAE*[1]

Prescription Policy Choices is a nonprofit educational and public policy organization providing objective research and expertise on prescription drug policy. Our mission is to serve as an independent voice in educating and providing advocacy services to stakeholders and consumers on issues relating to access to safe, effective, and affordable prescription drugs in the U.S. The Patient Protection and Affordable Care Act (ACA) will further our goal to effectively reduce prescription drug prices and increase access to medications and comprehensive health care.

Professors of Law and **Professors of Health Policy** are experts in the fields with particular interest in this case. The professors supporting this brief, with their student research assistants, include: **Paula Berg**, J.D., Professor of Law, City University of New York Law School; **Alexander Capron**, LL.B., Scott H. Bice Chair in Health Law, Policy and Ethics, Gould School of Law, Professor of Law and Medicine, Keck School of Medicine, University of Southern California; **Alan B. Cohen**, Sc.D., Professor of Health Policy and Management, Boston University School of Management; **Marsha Garrison**, J.D., Suzanne J. & Norman Miles Professor of Law, Brooklyn Law

---

[1] This brief is submitted with the consent of the parties, as lodged with the Clerk per the Docket Sheets. Pursuant to Rule 37.6, counsel represent that this brief was not authored in whole or in part by counsel for any party. Expenses of *amici* have been borne by their own resources, without support from any party.

School; **Jesse A. Goldner**, J.D., M.A., John D. Valentine Professor of Law, Saint Louis University School of Law; **Seema Mohapatra**, J.D., M.P.H., Assistant Professor of Law, Barry University, Dwayne O. Andreas School of Law; **Kevin Outterson**, J.D., LL.M., Associate Professor of Law, Boston University School of Law; **Katrina Angela Pagonis**, J.D., M.P.H., LL.M., Assistant Professor of Law, Hamline University School of Law; **Daniel G. Partan**, LL.M., LL.B., Professor of Law Emeritus, Boston University School of Law; **Robert D. Sloane**, J.D., Associate Professor of Law, Boston University School of Law; **Kyle Thomson**, M.P.H., J.D. expected 2012, Boston University School of Law; **David J. Arnold**, J.D. expected 2012, Boston University School of Law; **Julia Grace Mirabella**, J.D. expected 2012, Boston University School of Law; **Hao Wang**, J.D. expected 2012, Boston University School of Law.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit and the parties failed to identify one of Congress's most important goals in passing the individual mandate: eliminating the market for self-insured healthcare transactions. The parties have considered only Congress's goals of correcting adverse selection and reducing cost-shifting in the health insurance market, overlooking the additional goal of eliminating the market for self-insured care.

Regardless of whether the individual mandate is a necessary or proper means of stimulating the market for health insurance, Congress's goal of eliminating the self-insured market is undoubtedly a legitimate exercise of congressional power, and the individual mandate is a reasonably adapted means of accomplishing that goal. Congress has well-established authority to ban an interstate commercial market or otherwise to prohibit interstate commerce, as well as clear concomitant authority to accomplish such bans by penalizing intrastate behavior. Because the market for self-insured healthcare is a national market, Congress may try to eliminate it.

Furthermore, Congress chose an eminently rational and minimally intrusive means of accomplishing its ban: a small financial incentive for individuals to choose fully-insured care over self-insured care, where fully-insured care is a sufficient substitute that is demonstrably more efficient. The market for self-insured care is inefficient because individuals systematically underestimate their need to save for future medical care, due to proven tendencies to underestimate personal health risks and to undervalue long-term healthcare costs. Insurance corrects these inefficiencies through payment structures that encourage patients to consume preventive care and that guarantee sufficient savings for future costs. Shifting individuals into the fully-insured market also introduces other efficiencies that underscore the rationality of Congress's scheme.

ARGUMENT

I. THE INDIVIDUAL MANDATE IS A RATIONAL MEANS OF ELIMINATING THE INTERSTATE MARKET FOR SELF-INSURED HEALTHCARE TRANSACTIONS.

Throughout this litigation, the parties and the courts have treated the individual mandate, 26 U.S.C.A. § 5000A, of the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111–148, 124 Stat. 119, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111–152, 124 Stat. 1029, as though its only goals are to combat adverse selection in the health insurance market and to reduce cost-shifting in the healthcare market. See *Florida ex rel. Att'y Gen.* v. *U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1284-85 (11th Cir. 2011). So characterized, the mandate seems to raise a difficult question of whether Congress may require individual purchases in order to stimulate commerce.

But a different and equally valid characterization of the mandate presents a much easier – indeed, a well-settled – constitutional question: whether Congress may regulate intrastate behavior not to stimulate a market but to *eliminate* a market.[2] One of

---

[2] Petitioners raise issues related to inefficiencies of self-insured healthcare transactions, and they recognize that Congress may attempt to eliminate the entire self-insured market rather than penalizing only individuals who consume uncompensated care. *See* Brief for Petitioners (Minimum Coverage Provision) at 43-44, 50-51, *Dept. of Health & Human Servs. v. Florida* (2012) (No. 11-398). We present a full constitutional and economic defense of Congress's elimination goal and mandate strategy.

Congress's most important goals in passing the individual mandate was not to improve the market for insurance but to eliminate the market for self-insured[3] healthcare,[4] shifting individuals out of that market by requiring them to obtain insurance. Regardless of

---

[3] We refer to the market for "self-insured" rather than "uninsured" care because "uninsured" is both under-inclusive and over-inclusive of the problems Congress addressed. First, although it is true that most self-insured individuals are underinsured or uninsured for the care they need, even those with sufficient savings cause inefficiencies by paying out-of-pocket. Third-party insurance is more efficient than self-insurance for all consumers because insurers add bulk purchasing discounts, quality screening, and medical management. *See* Part II, *infra*. Congress therefore reasonably sought to eliminate the whole market for self-insured care, not just the market for uncompensated care. Second, some uninsured transactions are unproblematic but are not meaningfully "self-insured." For example, elective surgeries (e.g. cosmetic surgery) and extra diagnostics (e.g. non-indicated mammography) are common healthcare purchases that insurance rarely covers. But individuals needn't be insured against healthcare costs that are neither medically necessary nor time-sensitive. Elective healthcare purchases are not "self-insured" any more than the patient's last DVD purchase was "self-insured." Because these kinds of elective costs present few inefficiencies, Congress didn't intend to eliminate the market for uninsured *elective* care that is bought and paid for. The target market, then, is for self-insured healthcare: healthcare that is medically necessary but lacks coverage by a third-party insurer.

[4] Importantly, the market that Congress targeted is not the market for self-insurance itself – which is not a true market given that individuals don't buy or sell anything to self-insure – but rather the market for self-insured healthcare transactions. Healthcare purchases have different characteristics when made without third-party insurance, sufficiently so that self-insured and fully-insured transactions constitute separate markets.

whether Congress's goals of curing adverse selection and reducing cost-shifting are proper exercises of Congress's powers, the additional goal of eliminating a national market in self-insured healthcare transactions is clearly legitimate.

Furthermore, a small financial incentive for individuals to choose fully-insured[5] healthcare over self-insured healthcare – where the two options are near-perfect substitutes – is an eminently rational and minimally intrusive means of accomplishing that goal. The individual mandate is therefore a rational means of achieving the constitutionally legitimate end of eliminating the market for self-insured healthcare. Even if the mandate is not necessary or proper as a means of stimulating the insurance market, its constitutionality as a means of eliminating the self-insured market is sufficient to sustain the provision. We urge the Court to reverse the Eleventh Circuit's holding to the contrary.

A. Eliminating The Market for Self-Insured Care Was One of Congress's Central Goals in Passing The Individual Mandate.

According to Congress's legislative findings, the purpose of the individual mandate is to regulate not

---

[5] We use "fully-insured" as an antonym for "self-insured," to refer to all those who carry third-party insurance. Fully-insured individuals, by this definition, have to pay applicable copayments and deductibles but are "fully-insured" in the sense that they are insured against most conceivable healthcare-related losses.

only "when health insurance is purchased" but also "how and when health care is paid for." 42 U.S.C.A. § 18091(a)(2)(A). Although some of Congress's findings address only adverse selection or cost-shifting, four of the ten findings speak to an additional goal of eliminating the market for self-insured care.

First, Congress asserted in two findings that the individual mandate would "increase the number and share of Americans who are insured," 42 U.S.C.A. § 18091(a)(2)(C), and would achieve "near-universal coverage," § 18091(a)(2)(D). The next finding noted that "[t]he economy loses up to $207[billion] a year because of the poorer health and shorter lifespan of the uninsured" and that near-universal coverage "will significantly reduce this economic cost." 42 U.S.C.A. § 18091(a)(2)(E). Even without the explicit acknowledgement in § 18091(a)(2)(E) that Congress's goal is to eliminate self-insurance, the stated goal of near-universal coverage in §§ 18091(a)(2)(C)-(D) supports the notion that Congress sought to eliminate the self-insured market. Universality is neither necessary nor sufficient to avoid last-minute enrollments in particular insurance pools (adverse selection), and cost sharing depends on the health and wealth characteristics of the individuals in a given pool, not on the absolute number of people carrying insurance or on the percentage of the national population carrying insurance. Indeed, *merely* increasing the "number and share of Americans" participating in the insurance market accomplishes very little for the efficiency of that market, particularly when the market is

structured such that individuals can move among discrete insurance pools. The virtue of universal coverage, then, rests in the notion that near-universal insurance *definitionally* decreases – almost to the point of elimination – the market for self-insured care.[6] As the self-insured procure insurance, the market for medically necessary care purchased without third-party coverage will dwindle until it is virtually nonexistent. Congress made this point explicit in § 18091(a)(2)(E) by highlighting the overall cost of inefficiencies in the self-insured market and noting that the individual mandate sought to reduce that cost by reducing the market.

In the fourth relevant finding, Congress wrote: "62 percent of all personal bankruptcies are caused in part by medical expenses. By significantly increasing health insurance coverage, the [individual mandate] requirement . . . will improve financial security for families." 42 U.S.C.A. § 18091(a)(2)(G). This finding relates exclusively to the inefficiencies of the market for self-insured care – the problem that self-insured individuals frequently save too little to pay for the care that they inevitably consume. Furthermore, Congress made explicit here its conclusion that shifting individuals into the near-perfect substitute market for fully-insured care would solve the inefficiency of

---

[6] Fully-insured individuals are free to spend out-of-pocket money on healthcare, but patients making that choice are not "self-insured." They have third-party insurance available for any healthcare they need.

insufficient savings. That is, Congress found that individuals who attempt to self-insure save too little to cover their medical expenses, and the legislature concluded that incentivizing individuals to shift to the market for fully-insured care would successfully eliminate the unstable market for self-insured care.

In short, in addition to the goals that the Eleventh Circuit and the parties identify of curing inefficiencies in the insurance market, one of Congress's goals with the individual mandate was to eliminate the alternative but less efficient market for self-insured healthcare. The mandate accomplishes that goal by creating an incentive for individuals to shift from the self-insured market to the fully-insured market, on the theory that rational consumers would rather spend their money on insurance coverage than on the equivalently costly "shared responsibility payment" that leaves them self-insured. See 26 U.S.C.A. § 5000A(b).

B. Eliminating the National Market for Self-Insured Care is a Legitimate Exercise of Congress's Article I Power to Regulate Interstate Commerce.

When characterized as an attempt to stimulate the insurance market, the individual mandate raises potentially difficult questions about the limits of Congress's powers, including the now-infamous question of whether Congress may require individuals to buy broccoli in order to stimulate the vegetable market.

But Congress's goal of eliminating the market in self-insured care presents a much easier question with virtually no "slippery slope" implications. Congress has well-established authority to ban an interstate commercial market – as well as clear concomitant authority to accomplish such bans by penalizing purely intrastate behavior.[7] See U.S. Const. art. I, § 8, cl. 3; *Gonzales* v. *Raich*, 545 U.S. 1 (2005) (marijuana); *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (low-wage workers); *United States* v. *Rutherford*, 442 U.S. 544 (1979) (unapproved pharmaceuticals); *Perez* v. *United States*, 402 U.S. 146 (1971) (extortionate credit transactions); *Wickard* v. *Filburn*, 317 U.S. 111 (1942) (excess wheat); *United States* v. *Darby*, 312 U.S. 100, 113 (1941) (low-wage employees). Indeed, this Court has explicitly held that Congress's commerce authority "extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it." *Darby*, 312 U.S. at 113.

Under this Court's precedents, then, Congress's authority to eliminate markets has no constitutional limits beyond those in the Bill of Rights (which protects discrete markets, such as speech-related

---

[7] Notwithstanding its holding below, the Eleventh Circuit has explicitly acknowledged this authority. *See United States* v. *Maxwell*, 446 F.3d 1210, 1215 (11th Cir. 2006) ("Thus, where Congress has attempted to regulate (*or eliminate*) an interstate market, *Raich* grants Congress substantial leeway to regulate purely intrastate activity (whether economic or not). . . .") (emphasis added).

markets). But a limitless constitutional power to prohibit commerce has never been thought particularly troubling because there are such strong political checks against excessive bans. Imagine, for example, that Congress passed a purchase mandate for broccoli in an effort to ban the markets for all other foods, attempting to channel consumption to the legislatively-dictated healthiest nutrition source. Or imagine that Congress passed a purchase mandate for American-made cars in an attempt to ban the markets for foreign automobiles. See *Florida ex rel. Bondi* v. *U.S. Dept. of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2011) (analogizing the insurance mandate to a broccoli mandate and a GM car mandate), aff'd in part, rev'd in part *sub nom. Florida*, 648 F.3d 1235. Any admission on Congress's part that it sought to eliminate the markets for donuts or BMWs would cause tremendous political backlash, far more so than a stated goal of stimulating the markets for broccoli and Chevrolets. Importantly, this is not to say that political constraints are sufficient to enforce constitutional limits nor that constitutional limits are defined by political constraints. *Cf. United States* v. *Morrison*, 529 U.S. 598, 616 (2000) (noting that "the limitation of congressional authority is not solely a matter of legislative grace"). It is rather to say that this Court's long tradition of finding no constitutional limit on Congress's power to prohibit interstate commerce should not be worrying. Congress has clear and unbounded authority to eliminate any interstate commercial market, at least so long as

that market lacks substantive protection under the Bill of Rights.

Given this clear authority, the first question for the individual mandate ought to be whether the market for self-insured healthcare is, in fact, an interstate market over which the federal government has jurisdiction. Because the inputs and outputs into self-insured healthcare travel across state lines, because Congress has a long history of regulating the market for self-insured care, and because federalism doctrine and theory support federal jurisdiction in this context, the answer is clearly yes.

First, the inputs and outputs of the market for self-insured care travel interstate. Inputs, including prescription drugs, medical devices, and medical services, are all provided through interstate commerce. A doctor in Massachusetts may prescribe pills made in Illinois, use a syringe manufactured in New York, or take a continuing medical education course in Maryland. Decisions by a doctor in one state will therefore affect the availability and prices of those inputs in another. The outputs from the market for self-insured care are patients. These patients also regularly travel across state lines. Indeed, patients frequently travel interstate for the purpose of obtaining care, but even outside of a purely medical context, self-insured individuals regularly travel interstate, carrying with them some risk that they will experience a medical emergency requiring immediate care. Furthermore, individuals born in one state might not stay there forever, and a patient's long-term health status that

arose in one state will travel to future states, impacting the future states' healthcare infrastructures. Assuming, then, that self-insured care is less efficient than fully-insured care – assuming Congress is right that self-insured patients negatively impact input prices and output qualities – those effects will not be state-specific. Massachusetts's success in reducing its own market for self-insured care will not proportionally reduce the negative effects Massachusetts experiences from self-insurance because some of those negative effects will continue to seep in from other states' self-insured markets. The individual mandate thus clearly targets an *interstate* commercial market, not just intrastate decisions.

Second, Congress has a long history of regulatory involvement in the healthcare market, which includes a long history of prohibiting commerce in medical commodities. See, *e.g.*, Women's Health and Cancer Rights Act of 1998, Pub. L. No. 105–277, § 902, 112 Stat. 2681 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.); Health Insurance Portability and Accountability Act, Pub. L. No. 104–191, 101 Stat. 1936, 1936 (1996) (codified as amended in 42 U.S.C.); Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93–406, 88 Stat. 829 (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.); Old-Age, Survivors, and Disability Insurance Act of 1965, Pub. L. No. 89–97, 79 Stat. 286 (codified as amended in 42 U.S.C.) (establishing Medicare); Federal Food, Drug, and Cosmetic Act of 1938 (FDCA), Pub. L. No. 75–717, 52 Stat. 1040

(codified as amended in 21 U.S.C.). The Eleventh Circuit's apparent holding that Congress may not attempt to prohibit self-insured healthcare would, if adopted by this Court, require disruption of many deeply entrenched federal regulations.

Finally, federalism theory and doctrine support federal rather than state authority over a ban on self-insured care. Individual states face difficult challenges in regulating their own healthcare markets, including legal obstacles that this Court has specifically upheld, such as preemption under ERISA, see *Aetna Health, Inc.* v. *Davila*, 542 U.S. 200 (2004), and under the FDCA, see *Riegel* v. *Medtronic, Inc.*, 552 U.S. 312 (2008). Furthermore, the mobility of the citizenry and the reality of interstate competition create practical obstacles for state regulation. States that have implemented insurance regulations, for example, have found that insurers flee the state rather than adapting to regulation, making the regulations almost entirely ineffective. Conrad F. Meier, Council for Affordable Health Insurance, *Destroying Insurance Markets: How Guaranteed Issue and Community Rating Destroyed the Individual Health Insurance Market in Eight States* (2005). Furthermore, states can free-ride on their neighbors' reforms. For example, now that Massachusetts has nearly eliminated its market for self-insured care, strengthening its own healthcare infrastructure, residents of New Hampshire can simply use the better Massachusetts healthcare environment rather than banning New Hampshire's self-insured market. See generally Abigail R. Moncrieff

& Eric Lee, *The Positive Case for Centralization in Health Care Regulation: The Federalism Failures of the ACA*, 20 Kan. J.L. & Pub. Pol'y 266 (2011).

The Eleventh Circuit correctly noted that health-care and insurance regulation have historically fallen within the states' police power, *Florida*, 648 F.3d at 1305-06, but outright bans of commodities and enterprises – even those that relate to traditional police power regimes like health – have never been considered exclusive state realms. See generally Kevin Outterson, *Health Care, Technology and Federalism*, 103 W. Va. L. Rev. 503 (2001). The elimination of any nationwide market is necessarily a regulation of commerce *among the several states*, falling squarely within Congress's enumerated authority. U.S. Const. art. I, § 8, cl. 3. States have no claim to that power. See *United States* v. *Comstock*, 130 S.Ct. 1949, 1962 (2010). Because the market for self-insured health-care is an interstate commercial market, elimination of that market is unquestionably a permissible end under Congress's Article I powers. The individual mandate therefore should be upheld so long as the provision is a rational means of accomplishing that end.

C. The Individual Mandate is a Rational, Permissible, and Reasonably Adapted Means of Eliminating the Self-Insured Healthcare Market.

The Necessary and Proper Clause, art. I, § 8, cl. 18, grants Congress "broad power to enact laws that are convenient, or useful or conducive" to the beneficial exercise of an enumerated power. *Comstock*, *supra*, at 1956 (internal quotation marks omitted). In describing the scope of this authority, Justice Marshall famously stated: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819). The Court thus looks for means-ends rationality in conducting a Necessary and Proper analysis. *Sabri* v. *United States*, 541 U.S. 600, 605 (2004) (citing generally *McCulloch*). The "relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power." *Gonzales*, 545 U.S. at 37 (Scalia, J., concurring) (citing *Darby*, 312 U.S. at 121). The question here is whether the individual mandate is "reasonably adapted" to Congress's goal of eliminating the market for self-insured healthcare. There is no doubt that it is.

The individual mandate will make the market for self-insured care significantly less attractive, channeling consumers to the obvious substitute market for

fully-insured care. The mandate requires all able individuals to spend a fixed amount of money each year on supporting the healthcare infrastructure, either by purchasing a private insurance contract or by making an equal or lesser "shared responsibility payment" to the national treasury. See 26 U.S.C.A. § 5000A(b); § 5000A(c)(1) (capping the penalty at the cost of bronze-level insurance). Given the choice between giving money to a third-party insurer for the benefits of coverage and giving the same money to the government for no direct benefit at all, the vast majority of consumers will likely prefer to acquire insurance. As more consumers make the rational choice to purchase insurance, the market for self-insured healthcare will disappear. In short, because fully-insured healthcare is nearly a perfect substitute for self-insured healthcare (with limited exceptions for medically necessary care that the third-party insurer does not cover and for small copayments or deductibles that the patient must cover), a patient who has bought third-party insurance has definitionally left the market for self-insured care. The individual mandate is thus an elegant means of eliminating the inefficient self-insured market.

Of course, there are other approaches that Congress could take to eliminating the self-insured market. These approaches would be clearly constitutional, but they would be equally infringing of liberty, equally implicative of a federal police power, see *Florida*, 648 F.3d at 1309, and more problematic for various policy reasons. Because of these unfavorable

policy implications, the individual mandate is more "reasonably adapted" to Congress's goal than its alternatives.

One alternative to the individual mandate would be to repeal the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd. Enacted in 1986, EMTALA requires hospitals that accept Medicare reimbursement and that operate trauma centers to provide care to anyone who requires emergency medical attention, regardless of his ability to pay. *Id.* Repealing EMTALA would allow hospitals to refuse emergency care to the self-insured, even when the self-insured truly require emergent interventions. Individuals would then have a strong incentive to move from the self-insured market to the fully-insured market in order to guarantee that they would receive treatment when needed. The problem, of course, is that repealing EMTALA would allow hospitals to screen for insurance before providing emergency care, potentially delaying lifesaving treatments even for the fully-insured. Furthermore, insured individuals who forgot their insurance cards or whose wallets could not be found after an accident might be rejected for treatment. This is clearly undesirable policy.

Another possible and clearly constitutional means of eliminating a market for self-insured care would be to punish the consumption of such care. That is, Congress could require the self-insured to pay an additional fee to the government – a penalty for self-insurance – whenever they consume

healthcare without third-party insurance. This method of banning self-insurance, however, would be extremely impractical; individuals who can't afford to pay for care in the first place and who are filing for bankruptcy because of their medical bills would not be able to pay the penalty. See 42 U.S.C.A. § 18091(a)(2)(G). The punishment would therefore be ineffective absent a return to debtors' prisons – which would be far more infringing of liberty than the individual mandate. Furthermore, a consumption penalty would be no less implicative of liberty interests or of a federal police power than the individual mandate. Because all individuals will one day need healthcare, the consumption penalty would be equally unavoidable. In the end, a punishment that triggers upon consumption of self-insured care would be less rational than the individual mandate, and it would be equally anti-libertarian. See also Br. of Pet. at 43-44 (supporting the idea that Congress need not target only those patients who consume uncompensated care).

One final constitutional alternative to the individual mandate would be to provide mandatory public insurance, like "Medicare For All," which would serve an identical function to the individual mandate by compulsorily shifting individuals into a substitute for self-insured healthcare. See United States National Health Care Act, H.R. 676, 111th Cong. (2009). Medicare is constitutional, see *Helvering* v. *Davis*, 301 U.S. 619 (1937) (upholding the Social Security Act on logic that supports the constitutionality of Medicare), and

expanding the program would not raise any additional constitutional concerns, see Adam Liptak, *Some Common Ground for Legal Adversaries on Health Care*, N.Y. Times, Sept. 29, 2011, at A16 (noting that both sides of the fight over the ACA agree that Medicare For All would be constitutional). A single-payer program, though, would be more infringing of liberty and more implicative of a federal police power than the individual mandate. The mandate allows Americans to choose among many insurance options, and the ACA allows states to retain primacy over health insurance licensure, insurance exchange design, and enforcement of ACA regulations. Traditional Medicare, by contrast, creates a single insurance pool in which all elderly Americans must participate and over which states have virtually no influence. Medicare might well be better than private insurance – which might be why one protester infamously commanded Representative Robert Inglis to "keep your government hands off my Medicare," see Phillip Rucker, *Sen. DeMint of S.C. is Voice of Opposition to Health-Care Reform*, Wash. Post, July 28, 2009, at A4 – but the program is certainly more centralized and less libertarian than the individual mandate.

II. THE MARKET FOR SELF-INSURED CARE IS, IN FACT, LESS EFFICIENT THAN THE MARKET FOR FULLY-INSURED CARE.

Congress's attempt to eliminate the market for self-insured healthcare is rational given the proven economic inefficiencies in the market for self-insured

care, such as optimism bias and hyperbolic discounting, which lead patients to under-consume preventive care, over-consume catastrophic care, and under-save for future care. The market for fully-insured care corrects these inefficiencies through carefully designed cost-sharing structures, and insurance definitionally guarantees that patients are saving sufficiently for future costs. Insurance also adds its own efficiencies to the healthcare market by negotiating volume discounts, providing quality assurances, and engaging in medical management. Congress had these benefits in mind when it chose to shift patients from self-insurance to full-insurance. Of course, many voters – and perhaps many judges and justices – might have chosen a different approach to curing these problems, but the standard for constitutionality is only whether Congress had a rational basis for making the choice it did. Given the economies of healthcare and insurance, Congress's decision is clearly rational.

A. The Market for Self-Insured Healthcare Transactions is Inefficient.

Due to two proven cognitive failures, individuals systematically underestimate their need to save for future medical care. First, individuals underestimate their personal risks for bad health outcomes, and second, individuals undervalue long-term costs relative to short-term costs. As a result, patients forgo the immediate costs associated with living a healthy lifestyle and receiving preventive care while simultaneously saving too little to pay for future care. These

habits lead individuals to consume inefficient medical services such as emergent care and to over-consume catastrophic care relative to their ability to pay.

1. Individuals underestimate their personal risks for bad health outcomes.

One of the reasons that Congress wants to eliminate self-insurance is that individuals who self-insure systematically under-invest in healthcare savings due to a cognitive failure known as "optimism bias." Optimism bias describes a patient's proven tendency to be unrealistic about her vulnerability to bad health. See Neil D. Weinstein, *Reducing Unrealistic Optimism About Illness Susceptibility*, 2 Health Psychol. 11, 11-12 (1983); Neil D. Weinstein & William M. Klein, *Resistance of Personal Risk Perceptions to Debiasing Interventions*, 14 Health Psychol. 132, 132 (1995). It is an unfortunate statistical truth that not every individual in a given group can have below average risk for health complications. Patients, however, systematically underestimate their relative susceptibility to such complications, in part because they lack complete information about population characteristics and in part because they cognitively overemphasize their positive risk factors while underemphasizing their negative risk factors. Weinstein, *Reducing Unrealistic Optimism*, *supra*, at 12. Because of the inherent egocentrism involved in self-assessments of risk, a patient can lose sight of the fact that a majority of people share her positive risk

factors, overrating the effect those factors might have on her health outcomes. *Id.* at 18.

Importantly, optimism bias is not a matter of ignorance. Studies consistently show that even when risk information is effectively delivered to a patient that has greater than average risk factors for particular health problems, she does not change her behavior. See, *e.g.*, Weinstein & Klein, *supra* (describing multiple studies where education was ineffective in reducing individuals' tendency to overrate their susceptibility to illness). This systematic failure to take account of personal risk factors causes all patients to under-invest in protections against poor health outcomes, such as by making healthy choices and seeking preventive care. It also leads to underestimation of future health costs, leaving the patient unprepared to pay for the full costs of the healthcare she ultimately needs. Optimism bias is a well-established market failure that causes significant inefficiencies in the market for self-insured healthcare. Whether or not the individual mandate is constitutional as an attempt to combat adverse selection, it ought to be upheld as a rational attempt to steer individuals away from their tendency to under-invest in healthcare savings.

2. Individuals undervalue long-term costs relative to short-term costs.

Another cause of individual under-investment in healthcare savings – and another market failure that

justifies Congress's attempt to eliminate the market for self-insured care – is a cognitive bias known as hyperbolic discounting. In theory, a patient should refrain from engaging in an activity today if the long-term costs, in today's dollars, will outweigh the immediate benefits. In practice, however, patients frequently undervalue the present value of their actions because they underestimate the magnitude of the ultimate harm, a cognitive failure known as hyperbolic discounting.[8] See, *e.g.*, Peter Fishburn & Ariel Rubenstein, *Time Preference*, 12 Int'l Econ. Rev. 39 (1982); Uri Benzion, Amnon Rapoport & Joseph Yagil, *Discount Rates Inferred From Decisions: An Experimental Study*, 35 Management Science 270 (1989).

---

[8] While in theory a patient will discount at a constant rate over time, in practice individual preferences are inconsistent. *See* Gretchen Chapmen & Arthur Elstein, *Valuing the Future: Temporal Discounting of Health and Money*, 15 Med. Decision Making 373, 373 (1995). "[T]he relative marginal price of waiting for rewards" declines as the time necessary to wait increases. Richard Thaler, *Some Empirical Evidence on Dynamic Inconsistency*, 8 Econ. Letters 201, 205 (1981). To take a monetary example, while today one may prefer $100 three weeks from now to $50 a week from now, when the time comes to receive the $50 next week, she might reverse her preference, taking the $50 rather than waiting the marginal two weeks. Chapman & Elstein, *supra*, at 374. The rate at which she values the money has thus increased as the time horizon has decreased. *Id.* Since the resulting discount factor is described by a hyperbolic rather than constant or exponential function, the phenomenon is known as "hyperbolic discounting." Thaler, *supra*, at 374-75.

For example, a patient might resolve to start a new diet tomorrow, but when faced with the prospect of actually beginning the next day, his preference will switch for the short-term reward of eating a donut. The farther in the future a cost or reward is, the more likely he will be to discount the value at a lower rate. The end result is that the patient discounts the future benefits of maintaining a healthy lifestyle more than he should because the benefits are hidden while the costs are immediate. This leads the patient to make time-inconsistent choices about whether to maintain a healthy lifestyle, whether to receive preventive care, and whether to save for future care. See generally Chapman & Elstein, *supra* note 6. On the other hand, when the patient gets sick, the benefits of care are immediate and the long-term costs of healthcare inflation from over-consumption are less apparent, leading him to consume more healthcare than he potentially needs or can afford.

Like optimism bias, this market failure has been proven in patient behavior in numerous settings, and it provides a sufficient justification for Congress's decision to steer individuals away from self-insurance.

3. Optimism bias and hyperbolic discounting lead to over-consumption of healthcare relative to what an individual can afford and over-consumption of inefficient emergency care.

As a result of optimism bias and hyperbolic discounting, an uninsured patient under-consumes preventive care and fails to save enough to pay for future healthcare costs. See, for example, Families USA, *Getting Less Care: The Uninsured With Chronic Health Conditions*, Families USA 2 (2001) (showing that uninsured individuals with chronic conditions receive less preventive care than those with insurance). These trends have a compounding effect because the patient's under-consumption of preventive care leads to worse catastrophic events. For example, a patient that did not seek preventive care is unlikely to detect emerging health conditions such as heart failure and diabetes early enough to avoid them. The patient will also over-consume care when faced with a catastrophic event because she cannot see the long-term costs of these expenditures relative to the short term cost of forgoing care. At the same time, when a catastrophic event occurs, the patient who has saved too little to pay for her future healthcare costs will be unable to afford medically necessary care such as bypass surgery and diabetic management. A recent report from the Department of Health and Human Services shows that the median savings for self-insured families is only $20. Office of the Assistant Sec'y for Planning and Evaluation, Office of Health

Policy, Dep't of Health & Human Servs., The Value of Health Insurance: Few of the Uninsured Have Adequate Resources to Pay Potential Hospital Bills (2011). Over 58 percent of hospital stays result in bills of more than $10,000, so the median self-insured patient will not be able to pay for the services she receives at all. *Id.* Furthermore, as Congress found in its legislative findings, these problems lead to billions of dollars per year in uncompensated care, 42 U.S.C.A. § 18091(a)(2)(F), and they also contribute to more than half of all personal bankruptcies filed each year, 42 U.S.C.A. § 18091(a)(2)(G).

Another systematic inefficiency arises from these market failures: The self-insured patient's reliance on emergency departments and trauma centers – two of the least efficient settings for healthcare delivery. By failing to receive preventive care, a patient is more likely to suffer a catastrophic event that requires emergent care. Failure to save for catastrophic events drives patients to emergency rooms rather than cheaper urgent care centers because emergency rooms are required as a condition of Medicare participation to provide medically necessary treatment regardless of a patient's ability to pay. See 42 U.S.C. § 1395dd. The increased cost of treatment in an emergency room relative to an urgent care center adds even more to the over-consumption effects that arise from self-insurance, contributing significantly to the alarming rate of inflation in the healthcare sector. See generally Daniel Simonet, *Cost Reduction Strategies for Emergency Services: Insurance Role, Practice*

Changes and Patients Accountability, 17 Health Care Analysis 1 (2009).

Over-consumption of healthcare by a self-insured patient may manifest in other ways as well. For example, self-insured patients likely contribute to greater costs in Medicare consumption and Social Security disability payments. Wilhelmine Miller, Elizabeth Richardson Vigdor & Willard G. Manning, *Covering the Uninsured: What Is It Worth?*, Health Affairs W4-157 (Web Supp.) (2004). Because a patient abstains from receiving preventive care, she is more likely to need costly catastrophic care later in life, after she has joined Medicare. While these costs are difficult to quantify, the stress on the system is a direct result of inefficiencies in the market for self-insured healthcare.

In short, the many failures in the market for self-insured care combine to create a pathologically inefficient market that Congress may rationally seek to eliminate under its authority to regulate interstate commerce. The Eleventh Circuit and the parties have failed to consider Congress's authority to eliminate an inefficient marketplace, but that authority provides a sufficient basis to uphold the individual mandate. Because it is difficult to target the market for self-insured care directly, Congress enacted the individual mandate as a rational strategy to shift patients from that market to a near-perfect substitute market: the market for insured care.

B. Insurance Cures Many of the Self-Insured Market's Inefficiencies and Creates Additional Efficiencies, Making it an Attractive Substitute for Self-Insurance.

Many of the inefficiencies in the self-insured market are corrected when a patient becomes part of an insurance pool. The health insurance market fixes optimism bias and hyperbolic discounting problems present in the self-insured market by creating incentives for patients to obtain preventive care and to avoid emergency room care. Furthermore, the insurance market provides a commitment mechanism to help patients pay for future healthcare costs and creates additional efficiencies by leveraging market power. Congress's decision to channel patients from the market for self-insured care to the market for fully-insured care is therefore an eminently rational – indeed, quite an elegant – approach to the project of eliminating the market for self-insured healthcare. Insurance fixes all of the relevant problems.

1. The insured market fixes the optimism bias problems present in the self-insured market.

The insured market fixes optimism bias and hyperbolic discounting problems by providing incentives for a patient to seek preventive care and by requiring mandatory savings and risk coverage.

One of the primary ways that health insurance has historically corrected for the patient's inconsistent time preferences is by making preventive care as cheap as possible, setting low or zero copays. See, *e.g.*, BlueCross BlueShield of Illinois, *Health Insurance Plan Comparison Guide* (2011). This strategy reduces the patient's immediate cost of receiving preventive care, nudging the patient towards screening that can prevent larger medical problems in the future. For example, a patient is more likely to receive breast exams, cervical screenings, and influenza shots when the marginal costs are relatively low. Robert L. Kane, Paul E. Johnson, Robert J. Town & Mary Butler, *A Structured Review of the Effect of Economic Incentives on Consumers' Preventive Behavior*, 27 Am. J. Preventive Med. 327, 327 (2004). Furthermore, when faced with the choice of a small copayment for a primary care visit or full cost for a specialist visit, the patient will be much more likely to choose the cheaper primary care physician. All of this logic underlies the ACA regulatory scheme, motivating Congress to prohibit copayments entirely for at least some preventive care. See ACA § 1501, 42 U.S.C.A. § 300gg-13 (prohibiting cost-sharing for preventive services that the Preventive Services Task Force, see *id.* at 42 U.S.C.A. § 299b-4, finds to be successful in preventing health problems); *id.* at 42 U.S.C.A. § 13951(a)(1) (same for Medicare).

The insurance market further corrects for cognitive failures by creating a payment structure that requires mandatory saving and risk coverage. The required monthly payments for health insurance act as a commitment mechanism, requiring a patient to commit money to her healthcare costs ahead of time and ensuring that she will have enough available for care when it becomes necessary. David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q.J. Econ. 443, 443-45 (1997). As discussed at length above, without such a structured payment plan, a patient will not save enough for her future costs. The insurance market, thus, provides clear corrections to the market failures for self-insured care, making Congress's choice of an incentive to insure an elegant means of eliminating the market for self-insured transactions.

2. Insurance reduces over-use of emergency room facilities by charging high copays if the patient is not admitted to the hospital.

Just as insurance companies create incentives for primary and preventive care through copay design, so too do they correct for overuse of emergency departments by imposing higher copayments for emergency room visits that prove to be non-emergent. For example, many insurance contracts charge a $50 copay for an emergency room visit that does not result in the

patient's admission to the hospital but waive the copay if the patient is admitted. See, *e.g.*, BlueCross BlueShield, *Blue Care Elect Preferred (PPO) Summary of Benefits: 2011-2012 Massachusetts State Universities Student Blue Plan* (2011). If the patient's condition was truly emergent, then she has no copay, but if she was relying on the emergency room as a substitute for more efficient outpatient settings (like primary care offices or urgent care centers), she pays a hefty penalty. These financial incentives have been shown to reduce the number of emergency visits, correcting the uninsured market's inefficiency. See generally Daniel Simonet, *supra* (showing a 40 percent reduction in emergency room consultations from similar efforts).

Channeling a patient away from emergency rooms is beneficial not only to relieve over-burdened emergency rooms but also to allow patients to receive more efficient care. By seeing primary care physicians instead of emergency departments, the patient becomes part of a health management program that provides disease management for chronic diseases and consistent oversight moving forward. Insurance thus provides a structured bundle of incentives to help individuals overcome their cognitive failures and resulting over-consumption. Congress's preference for the insured market is therefore quite rational.

3. Beyond correcting for inefficiencies experienced in the self-insured market, the insured market has additional efficiency advantages.

Although insurance provides clear corrections to the particular failures in the self-insured market, those discrete corrections are not the only advantages of insurance. The insurance market adds at least three additional efficiencies that make it even better as a substitute for self-insured care. Unlike the self-insured market, the insured market is able to provide (1) negotiated volume discounts, (2) quality screening and assurance, and (3) medical management services such as medical necessity review.

First, the insurance market has been able to use patient volume as a bargaining chip in commercial market negotiations for discounts on physician payments, pharmaceutical prices, and hospital services. By contracting with pharmaceutical companies and health providers, insurance companies can agree to channel patients towards certain network providers or can threaten to exclude a provider from coverage under the insurance plan in an effort to receive price discounts. See Vivian Y. Wu, *Managed Care's Price Bargaining with Hospitals*, 28 J. Health Econ. 350 (2009). In other words, the insurance pool gives insurers collective bargaining power that can discipline healthcare inflation for insured patients.

A patient seeking care in the self-insured market, on the other hand, has no leverage to threaten or

incentivize providers to change their pricing structure. For example, a Department of Health and Human Services Report to the President from 2000 found that cash payers paid on average 14.6 percent more for the 200 most commonly prescribed drugs than did patients in the insured market. Dept. of Health & Human Servs., Report to the President: Prescription Drug Coverage, Spending and Prices 96 (2000). The insurance market thus creates a clear efficiency in controlling costs relative to the self-insured market.

Second, insurers provide quality screening and assurance that self-insured patients are incapable of providing for themselves. Congress was clearly cognizant of this problem as the ACA includes a number of provisions designed to increase transparency in the healthcare market, allowing patients better access to information. See generally ACA Title VI (codified as amended in scattered sections of 42 U.S.C.A.). But these provisions alone are insufficient to correct for the fundamental problem a patient faces in attempting to aggregate and analyze information. Most of the time, a patient is unequipped to draw appropriate conclusions about the quality of the care she is receiving. She often lacks both understanding of and access to the kinds of information necessary to make an intelligent and appropriate decision about her care. See generally Kenneth Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 Am. Econ. Rev. 941 (1963). Health literacy, the "degree to which people have the capacity to obtain, process, and

understand basic health information and services needed to make appropriate health decisions," is a difficult hurdle to overcome, and poor health literacy can result in a "worse health status, and a higher rate of hospitalization" for the patient. Ruth M. Parker, Scott C. Ratzan & Nicole Lurie, *Health Literacy: A Policy Challenge for Advancing High-Quality Health Care*, 22 Health Aff. 147, 147 (2003). Furthermore, even highly literate patients have a hard time drawing reliable conclusions about the quality of care they have received because causation is difficult to establish for many medical interventions. A patient who leaves the doctor feeling worse than she did before the encounter might have received poor quality care, or she might simply have been beyond help. Even patients with the highest possible health literacy – such as doctors themselves, when treated – often have a hard time differentiating between those scenarios based on an individual encounter. Only through population data can health analysts draw somewhat reliable conclusions about the quality of doctors and hospitals.

Of course, health insurers have ready-made access to such data based on the experiences of their insured. Health insurers thus provide a solution to the health literacy barrier by leveraging their access to collective data and their expertise in analyzing healthcare outcomes to provide quality screening. By comparing data on doctor quality alongside information about the risk factors of individual patients, insurers provide a more efficient mechanism for

assuring quality from health care providers, and they can channel their insured patients away from low-quality providers by refusing to cover visits to low-quality doctors and hospitals. See generally Abigail R. Moncrieff, *The Supreme Court's Assault on Litigation: Why (and How) It Might Be Good for Health Law*, 90 B.U. L. Rev. 2323 (2010).

Moreover, the same bargaining power that allows insurers to receive discounted rates on services will provide an incentive for physicians to keep their quality standards high. Along with patient channeling, insurers may provide pay-for-performance incentives to physicians who demonstrate elevated performance relative to their peers. John W. Rowe, *Pay-for-Performance and Accountability: Related Themes in Improving Health Care*, 145 Annals Internal Med. 695, 697 (2006). This is also a point that Congress clearly had in mind; the ACA contemplates increased use of performance measures, enabling insurers to make better use of their bargaining power moving forward. See, *e.g.*, ACA §§ 10326-27, 10329, 10331-32 (codified as amended in scattered sections of 42 U.S.C.A.) (improving the physician quality reporting system and facilitating public reporting of physician performance results); see also Anne B. Claiborne, Julia R. Hesse & Daniel T. Roble, *Legal Impediments to Implementing Value Based Purchasing Healthcare*, 35 Am. J.L. & Med. 442 (2009) (describing the legal barriers to implementing effective pay for performance evaluation prior to the ACA).

Third, many private insurers (though not all) provide medical management functions by engaging in medical necessity review and by serving as gatekeepers for access to specialists, both of which can create efficiencies relative to the self-insured market. Medical necessity review creates those efficiencies by preventing a patient from over-consuming care relative to need. As described above, a self-insured patient often over-consumes health care services, both relative to what she can pay for and relative to what she needs to maintain her health. Furthermore, a patient's physician sometimes drives costs by suggesting more care than the patient needs, in order to capture greater profits. Because of the information asymmetries between doctor and patient, patients can fall prey to physician-induced demand that drives health-care inflation. Private insurers are better than individual patients at reducing these over-consumption problems for three reasons. First, insurers' ability to aggregate data means they are in the best position to assess the effectiveness of treatments, leading to the elimination of treatments that are unnecessary or dangerous to the patient. Mark A. Hall & Gerard F. Anderson, *Health Insurers' Assessment of Medical Necessity*, 140 U. Pa. L. Rev. 1637, 1667 (1992). Second, insurers are able to provide oversight of physicians whose "financial incentives are . . . a significant determinant of treatment behavior," using their bargaining power and their collective data to combat physician-induced demand. *Id.* at 1667. Finally, the insurer's relationship to the patient places the insurer in a good position to make efficient decisions

regarding healthcare costs since insurers "operate in a marketplace that penalizes them for failing to balance the customers' desire for cost containment with the desire for access to necessary medical services." *Id.* at 1665. Although medical necessity review does not do a perfect job of combating physician-induced demand and although insurance can have a countervailing moral hazard effect that causes patients to demand more care than they would if paying out-of-pocket, insurers are certainly in a better position than self-insured patients to make smart decisions about the safety and necessity of a requested medical intervention. Besides, Congress's decision to shift patients from a market in which they over-consume catastrophic and emergency care to a market in which moral hazard might cause them to over-consume preventive and specialty care is a *rational* choice, particularly given the potentiality for medical necessity review to curb moral hazard effects. And rationality is all that is required for constitutionality.

Gatekeepers are less popular and less common than medical necessity review in the private insurance market (and nonexistent in traditional Medicare), but they are similarly capable of creating efficiencies that are quite difficult for self-insured patients to capture. By channeling patients through primary care physicians before they see specialists, gatekeepers allow primary care physicians to manage patient flow, determine whether patients require non-routine care, and avoid patient referral to a specialist for costly and redundant tests. Simonet, *supra* at 7-8.

Gatekeepers, thus, allow some patients who would otherwise be inclined to see a specialist to have their problem resolved first through the cheaper channel of primary care. Overall, encouraging patients to seek primary care instead of specialty care is demonstrably cost effective. For example, it costs less for a primary care physician to treat a common illness than it would for a specialist to treat the same illness, even though the patient's outcome will be the same. Barbara Starfield, Leiyu Shi & James Macinko, *Contribution of Primary Care to Health Systems and Health*, 83 Millbank Q. 457, 473 (2005) (showing this effect for pneumonia). Insurers can effectively channel patients to primary care instead of specialists by carefully designing the patient's financial obligation for each kind of visit through cost sharing and also by refusing to reimburse at all for a specialty visit absent a referral from a primary care doctor. Again, these gatekeepers are not as common among private insurers as medical necessity review, and traditional Medicare does not require primary care visits at all before reimbursing for specialty care. This added feature of insurance is merely available for patients who freely choose cheaper insurance, like Health Maintenance Organizations (HMOs), on the private market. Regardless, gatekeeping is an efficiency feature that is quite difficult for self-insured patients to capture, and it bolsters the rationality of Congress's decision to shift patients into the insurance market.

In sum, the insured market not only corrects for the inefficiencies experienced by the self-insured

market, but also it provides additional efficiencies that help drive down costs for patients while providing them with more effective care.

Congress's chosen approach to eliminating the market for self-insured healthcare transactions is not just rational; it is quite elegant. The broader healthcare marketplace operates best when most patients purchase care through insurance contracts, which use cost-sharing designs and oversight mechanisms to correct individual patients' cognitive failures and information asymmetries. By creating a legal incentive for patients to choose third-party insurance over self-insurance, Congress will not only steer patients out of the inefficient market for self-insured care but also steer patients into the significantly more efficient market for fully-insured care. The end is legitimate; the means are rational; and the provision is constitutional.

CONCLUSION

For the foregoing reasons, we urge this Court to reverse the Eleventh Circuit and direct entry of

judgment for the petitioners on the constitutional validity of the minimum coverage provision.

Respectfully submitted,

MICHAEL KEVIN OUTTERSON
Counsel of Record for the Amici Curiae
Associate Professor of Law
BOSTON UNIVERSITY SCHOOL OF LAW
765 Commonwealth Ave.
Boston, MA 02215

January 13, 2012

AMICUS CURIAE BRIEF

No. 11-398

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

v.

STATE OF FLORIDA, ET AL.,

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF *AMICI CURIAE* OF PROJECT LIBERTY, in support of the Respondents on the Individual Mandate.

Stephen B. Presser
Raoul Berger Professor of Legal History, Northwestern University School of Law, Professor of Business Law, Kellogg School of Management & Member of Faculty, Department of History Northwestern University
357 E. Chicago Ave.
Chicago, IL 60611

Steven W. Fitschen
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, VA 23454

Allan E. Parker
Counsel of Record
R. Clayton Trotter
The Justice Foundation
7210 Louis Pasteur Dr., Ste. 200
San Antonio, TX 78229
(210) 614-7157
aparker@txjf.org

Kathleen Cassidy Goodman
Law Office of Kathleen Cassidy Goodman
12274 Bandera Road, Ste. 228
Helotes, TX 78023

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 17

ARGUMENT 17

I. The Act Unconstitutionally Infringes upon the Free Exercise Rights of Those Who Oppose Abortion. 17

II. The Differential Treatment Accorded to Those Qualifying for "Religious Exemptions" Violates *Lukumi*. 25

III. The Act Fails to Prohibit the Government from Discriminating Against Abortion Conscience Objectors.... 28

CONCLUSION 32

APPENDIX A (Project Liberty Members) 1a

TABLE OF AUTHORITIES

Cases: **Page(s):**

Calvey v. Obama, 792 F. Supp. 2d 1262 (W.D. Okla. 2011) 19

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) 18, 25

Employment Div., Dep't of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990) 18

Gonzales v. Carhart, 550 U.S. 124 (2007) 15

Liberty University, Inc. v. Geithner, 753 F. Supp. 2d 611 W.D. Va. 2010.) 19

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 27

Constitutional Provisions:

U.S. Const. art 1, sec. 2, cl. 3 ..... 2, 8, 14, 19

U.S. Const. art 2 14

U.S. Const. art 9 14

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. IX 2, 7, 14

U.S. Const. amend. X 7, 14

TABLE OF AUTHORITIES (Continued)

Statutes: **Page(s):**

26 U.S.C. 5000A (2006) 26-27

42 U.S.C. 18091 (2006) 26

50 App. U.S.C. §456(j) (2006) 28

I.R.C. §1402(g)(1) 26

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, *amended by* the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 ..... *passim*

Other Sources:

A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sibelius, Jan. 20, 2012, www.hhs.gov/news/press/2012pres/01/20120120a.html 21

The Bible 15-16

Brief *Amici Curiae* of The National Women's Law Center, *et al.* on the Minimum Coverage Provision 22-24

Brief of Private Resp'ts on the Individual Mandate 17-18

TABLE OF AUTHORITIES (Continued)

Other Sources: **Page(s):**

Catholic Health Association of the United States, *Fast Facts*, http://www.chausa.org/Pages/Newsroom/Fast_Facts/ 29

http://www.cnn.com/2012/02/10/politics/contraception-controversy/index.html?hpt=hp_tl..... 21

http://www.ella-rx.com/whatisella.asp 22

Horace Cooper, *The Birth Control Mandate is Unconstitutional*, http://nationalcenter.org/NPA632.html 22

Intra-Uterine Device (IUD)/Mirena by Bayer, Sept. 2011, http://www.physicianforlife.org/content/view/182/36/ 22

Nightlight Christian Adoptions, http://www.nightlight.org/adoption-services/snowflakes-embryo/adopting-parents.aspx 25

Planned Parenthood, *Health Info & Services*, http://www.plannedparenthood.org/health-center/?utm_source=dotorg&utm_medium=highlight&utm_campaign=locate 20

Secretariat of Pro-Life Activities, *The Senate Health Care Reform Bill: Funding Abortion at Community Health Centers*, Mar. 16, 2010, http://nchla.org/datasource/idocuments/Community%20Health%20Centers.pdf..... 20

TABLE OF AUTHORITIES (Continued)

Other Sources: **Page(s):**

US Religious Views on Abortion: 10 Largest Christian Denominations and Five Largest non-Christian Religious Groups, Apr. 4, 2011, http://abortion.procon .org/view.resource.php?resource ID=004208 18-19

WebMD, *Intrauterine Device (IUD) for Birth Control*, http://www.webmd.com/ sex/birth-control/Intrauterine -device-iud-for-birth-control 22

INTEREST OF *AMICUS CURIAE*[1]

Amici are 295 individual United States citizens named in Appendix A who have joined together as Project Liberty. These members of Project Liberty believe that the Patient Protection and Affordable Care Act (hereinafter "the Act")[2] unconstitutionally compels them to fund abortion and does not provide adequate conscience protection for those who oppose abortion. The individual members of Project Liberty are men and women from all walks of life, including many post-abortive women who now regret their past choices and have vowed to never again assist in any way with abortion. Project Liberty was created specifically to allow these men and women to provide their insight as an aid to this Court's determination of the instant litigation.

The following are representative statements from *Amici* that demonstrate the deep-seated interests and religious convictions of *Amici*. They represent the views of millions of Americans whose religious liberty would be violated by being forced to pay for abortions. When asked why they wanted to join this

---

[1] All parties have consented to the filing of this Brief. Blanket letters of consent from Counsel for parties have been lodged with the Court. No counsel for any party has authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amici Curiae*, and their counsel.

[2] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, *amended by* the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

Brief and how they are hurt by the Act, they stated the following:

- Statement of JoAnn Fleming:

> I believe the Act to be thoroughly unconstitutional—an unprecedented distortion of the US Commerce Clause, a gross abuse of federal power and a liberty-destroying offense. For example, the PPACA violates our religious liberties under the First Amendment and our economic and personal liberties under the Ninth Amendment. . . .
>
> Finally, we are now beginning to see how insidious this Act really is as religious liberties protected under the First Amendment are openly attacked. The Obama Administration's mandate that religious employers, with the exception of churches, provide health care coverage for contraception—including abortion-inducing drugs—tramples their constitutionally guaranteed free exercise of religion through conscientious objection.
>
> I pray the United States Supreme Court grants relief from this intolerable Act as it is a gross abuse of federal power and an action which violates everything our Framers intended for a land of liberty.

- Statement of K.J.A.:

> Government control over my life will increase, and I will gradually lose the freedoms that God has granted me.

- Statement of Tina C. Brock:

I want to join this lawsuit because I believe that all life is precious to God and having suffered from an abortion over 25 years ago, I know the pain I felt for years has had a tremendous effect on my life. I do not want to be forced to pay for something that I do not believe in and I do not believe in abortion.

I will suffer emotionally if I am forced to pay for abortions. I suffered for many years after having an abortion and now have found healing and forgiveness. It would be a devastating turn in my life if under Obama Care I am forced to pay for abortions. It is murder of the ones who can not fend for themselves and I am totally against abortion. I do not want to be forced to pay for them.

- Statement of Brenda L. Bamburg:

I feel it is unconstitutional and takes away many of my inalienable rights to choose for myself and others to choose.

It will hurt my soul in the fact that I will be a part of murder in taking the life of babies.

- Statement of Fr. Tom J. Kennedy, (Roman Catholic Priest since 2007):

I am opposed to paying for abortion in anyway. . . . Yes, it saddens me that something so good can be so bad because it includes abortion. Before I became a priest, I was the father of a child aborted by my wife without my knowledge. I was

devastated when I learned of it and am to this day.

- Statement of J.G.B.:

Now I have a voice. I cry out for justice in the earth. Abortion is a deadly injustice to the families of the earth. We've lost six (6) babies in three (3) generations. No more abortions!

- Statement of Melanie A. Carmichael:

It will force me to fund abortions, which violates the tenets of my faith. It will force me under penalty of law to purchase a service that I may or may not want. It puts an additional burden on my employer, which could have an [adverse] economic impact on my family.

- Statement of Jason Hershey:

I have devoted my life to praying to Jesus for the ending of abortion in America, the greatest injustice and moral evil of our time. I stand regularly outside the Supreme Court praying for "Life". I find two moral issues at stake here: the moral issue of liberty and the moral issue of life for an unborn child.

- Statement of Jean:

I have personally been affected by long term depression following an abortion and it would grieve me deeply to know my tax money would promote abortions. I know women/men would suffer symptoms of post abortion trauma.

- Statement of Glenn:

  I have witnessed the long term depression of my wife following an abortion and do not believe my tax dollars should be used to cause this hurt to any other person or family. I also have experienced the depression of post abortion trauma.

- Statement of Brother Stanley L. Culotta:

  I am a Brother in a Catholic order (Brothers of the Holy Cross) deeply opposed to abortion, and the President of a Catholic high school.

  In particular, I do not want to pay for abortions and the suffering that women encounter as a result of abortion.

- Statement of Daniel R. During:

  It will cause me to pay to murder unborn children and scar women for life.

- Statement of Sammie J. Falls:

  I am a follower of Jesus Christ; I do not want to be responsible for the murder of innocent babies.

- Statement of Melanie T. Fleming:

  I had an abortion in 1992 and it has left a terrible and lasting impact on me.

- Statement of Lynn Frederick Frame and Carolyn Sue Day Frame:

  It will give my tax money to pay for providing abortions, as that is murder of innocent life, which is against my religious principles.

- Statement of Katharine Marie Hill:

  I am a woman who was hurt by abortion starting at age 16. I am sick of the stench of death that is hanging over our country. I am one who formerly believed abortion was okay. It isn't! I am the reason that stench of death is here.

  I want to know who is going to be paying for all the mental health care that will be needed for all the women that will be harmed by abortion. One abortion is likely to lead to another. I know by experience – I have had three! I was mentally devastated.

- Statement of Joseph M. Hill:

  The Obama Health care directly makes me a participant in abortion through the mandatory funding of abortion.

- Statement of Robert B. Hill:

  To protect the unborn and bring morality and truth back to America—**I am a post-abortive male** who has 2 children in heaven. I will now fight to see that people don't make the same mistake that I did.

  Murder is against the law and yet the president wants to force me to systematically pay

for abortion—which is the murder of an unborn child. It is not only against the law—**it is against my moral and religious obligation to my own soul.**

- Statement of Karen J. Holdren:

The Obama health care bill interferes with my Constitutional rights and beliefs. I believe life begins at conception in the womb of a woman, and this bill allows health care to remove life from the womb, again violating what I believe in

- Statement of Wayne Horton:

Our government is out of control enacting legislation against our wishes. Our constitution calls for limited government—not excessive and oppressive government. . . . **I am strongly against funding of abortions.**

- Statement of Joel D. Johnson:

I believe the Health Care Reform Act is unconstitutional and violates my personal liberties guaranteed under the Constitution. I do not believe the Constitution grants the federal Government the right to mandate purchase of health care.

It will increase taxes unnecessarily and drive health care costs up. It will destroy private health care insurance that I presently purchase. **It will force me to pay for federally funded abortions against my will and conscience.**

- Statement of David A. Kappeler:

  I'm against using my taxes to pay for abortion and bankrupting our government through excessive spending.

- Statement of Nelda J. Lawrence:

  I do not believe in abortions!

  Medicare is my primary care—my insurance requires I have Medicare. (FEHB) When the tax on "Cadillac" plans go into effect, AFSA has told us they will not be able to handle that cost: therefore, we will lose our private insurance.

- Statement of Brad L. Lundberg:

  The recently passed Health Care Plan exceeds Congress' constitutional power to regulate interstate commerce; it violates individual liberties protected under the first amendment, especially the free exercise of religion. It violates our personal liberties and rights and economic liberties and rights as protected under the ninth amendment, and it also violates states rights as protected under the tenth amendment.

  It will use my tax dollars to pay for something I feel is morally wrong and a violation of my religious belief protected by the first amendment, especially the use of my tax dollars to fund abortions on demand. I also know it is not the government's right to force anyone to purchase health insurance; that should be my freedom of choice

- **Statement of Linda J. Martin (Pediatrician):**

  It will force me to pay for abortions—the killing of the innocent unborn. It will also destroy our health care system and our economy and our children's economic future. **It will make it very difficult for me to practice excellent, moral medicine.**

- Statement of Dawn R. Nolen:

  I want to make a stand for the innocent lives of the unborn babies! I do not want to pay for something that goes against my religious beliefs. **I had an abortion and I know how it can affect you for life. I do not want to see anyone forced to do something that could harm them for the rest of their life. I have had years of counseling because of the abortion I had in 1974. I do not want to go through all of the mental anguish that paying for murder would cause me. It is a sin in God's eyes and it is a sin in mine! I would hurt emotionally over this demand by the federal government!**

- Statement of Jean:

  It's the just thing to do. It's a crime to destroy an eagle's egg. How much more precious is a child?!

  I fear further intrusion by the federal government.

- Statement of Sharra A.:

I had an abortion 3 decades ago and have experienced first-hand the devastation it brings. I have had many health problems in the past few years that I believe to be the result of that decision to abort my child, including a breast cancer scare.

I paid one time for an abortion and I will not pay again for me or anyone else as I would not wish on anyone the fallout of the decision. I am a diabetic today, unable to get affordable insurance, but through this health care bill? No way. I'll go without insurance first.

- Statement of Linda R. Reagan:

I believe abortion is taking a human life: therefore, U.S. Citizens that pay for this medical procedure are participating in murder. This is something I can do for my country for those that don't understand the takeover by the government of health care along with life and death decisions.

- Statement of Dardine M. Roedel:

I am 65 and on Medicare as my primary health care. . . . It is against my conscience to use federal money to support abortion. *This is spiritually very disturbing to me.*

- Statement of David L. Rosa:

I object as an orthodox Pro-Life Catholic sidewalk counselor being forced to pay for abortions, which I consider murder, thus

violating the free exercise of my Catholic Religion under the First Amendment.

- Statement of Lisa:

I oppose the Act because abortion hurt me, destroyed my faith for 20 years, caused problems in my marriage and my parenting abilities, and caused severe depression and anxiety.

It will force me to pay for a procedure that devastated my life and caused enormous psychological and emotional damage. **I could never pay for this to happen to someone else and live with myself for being a participant in any way contributing to the pain of others.**

- Statement of Carla A. Stream:

I cannot even fathom paying for someone else's abortion after what my own abortion did to me and my life!

- Statement of Carri A. Taylor:

I believe in the sanctity of life—created by God. It takes my freedom of real choice away and will use my tax dollars to fund abortion.

- Statement of Betty D. Underwood:

I am extremely saddened to think that my tax dollars would be used to "snuff out" the life of an unborn child.

- Statement of Ray:

My rights are being violated by the U.S. government. They force me to pay for killing children, which I believe is murder. They force me to pay for a government which has run away spending, which will bankrupt this nation.

I am 74.

- Statement of Nicole W Cooley:

My abortion following rape was the most deeply painful experience of my life. I learned the hard way that abortion doesn't help women and only further traumatizes rape victims, making healing from both events infinitely more difficult. Since the abortion, I have been unable to participate in anything remotely similar to abortion, which includes insisting on traditional deliveries after two miscarriages and refusing chemical contraception. I also have written a book about my story and shared in numerous public venues, most recently on college campuses, to help other women avoid my mistakes.

It violates my personal religious and moral beliefs to participate in abortion in any way. **My personal experience with rape and abortion compels me to my present convictions.** I feel I would be forced to be an unwilling participant in abortions that I view as the murder of innocent human beings. **Knowing that my money would be spent against my will to inflict further trauma on women and their unborn**

children will cause me tremendous additional pain and heartache.

- Statement of Leslie G. Sneddon:

I don't want women to be hurt by abortion. Abortion is not a solution. I believe that women do not have a choice when they are faced with the choice of abortion because women have not been fully informed about the repercussions of this simple and quick procedure.

- Statement of Lizbeth L. Liefer-Hall:

The voices of the women who have been negatively affected by abortion need to be heard so people realize abortion destroys two lives - the mother's life and the baby's life.

I DO NOT want to pay for abortions for other women as it will grieve my heart to know I am also participating in destroying two lives each and every time an abortion is performed.

- Statement of Debra C. Picarello:

I do not want to see any woman suffer the physical, emotional, and psychological damage that comes from abortion. *I actively work with women, like myself, who have had an abortion, and have suffered terribly from it. I do not want to see my tax dollars go towards what I so vehemently oppose.* The killing of innocent children must stop and I oppose having to pay for it.

Knowing that my tax dollars, through Obamacare, would be directly paying for

abortions violates my conscience. *I cannot fathom having to pay for abortions, knowing how badly having an abortion affected me for many years after the abortion.* Being forced to pay for abortions, through Obamacare, violates my conscience and causes me mental anguish just thinking about it. I actively now work to help women who have suffered the emotional, physical, and spiritual fallout from having an abortion.

Amici believe the Act is unconstitutional in at least 4 ways:

1) It exceeds Congress' constitutional legislative power; specifically to regulate interstate commerce (Article 1, Section 8, Clause 3) and the taxing power (Article 1, Sections 2 and 9) of the Constitution;
2) it violates individual liberties under the First Amendment, including the right of individuals to object to being forced to pay for abortions, which they consider murder, thus violating the free exercise of their religion under the First Amendment;
3) it violates the Ninth Amendment, economic and personal liberties and rights that are reserved to the people; and
4) it violates the Tenth Amendment of the Constitution, which reserves rights to individuals and states.

Because of the unique perspective of many of *Amici*, and because of this Court's Briefing Order separating the issues, this Brief will focus solely on the unconstitutionality of the Individual Mandate.

This Court has acknowledged that "whether to have an abortion is a *difficult and painful moral decision*." *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007). Thus, this Court has already acknowledged the interest of those *Amici* who, as noted, have actually participated in abortion to their deep pain, repentance, and regret.

This Court also recognized that "*severe depression and loss of esteem*" can follow an abortion for some women. *Id.* (emphasis added). This has been the fate of some of the *Amici*. The issue is whether *Amici* and millions of others will now be forced to participate in causing that same severe loss of esteem and depression in others.

Amici's deeply and sincerely held religious beliefs are based in part upon Scriptures—which are considered sacred and divinely inspired in both the Jewish and Christian traditions—that *Amici* believe apply to abortion. Of course, others may disagree with these scriptures, thus exercising their own religious liberty. But in light of these Scriptures, if the Act is upheld, *Amici* and innumerable other Christian and Jewish citizens will be forced into an agonizing crisis of conscience.

- "Do not give any of your children to be sacrificed to Molech [a god worshipped by, among others, the ancient Canaanites], for you must not profane the name of your God. I am the LORD." Leviticus 18:21.

- "The LORD sent . . . raiders . . . to destroy Judah, . . . in order to remove them from his presence *because of the sins of Manasseh and all he had done, including the shedding of innocent blood*. For he filled Jerusalem with innocent

blood, and the LORD was not willing to forgive." 2 Kings 24:2-4.

- "The LORD said [to Cain], 'What have you done? Listen! Your brother's [Abel's] blood cries out to me from the ground.'" Genesis 4:10.

- "For God will deliver the needy who cry out, the afflicted who have no one to help. He will take pity on the weak and the needy and save the needy from death. He will rescue them from oppression and violence, for *precious is their blood in his sight*." Psalm 72:12-14.

- "There are six things the LORD hates, seven that are detestable to him: haughty eyes, a lying tongue, *hands that shed innocent blood . . . .*" Proverbs 6:16-17.

- "Therefore as surely as I live, declares the Sovereign LORD, I will give you over to bloodshed and it will pursue you. *Since you did not hate bloodshed, bloodshed will pursue you*." Ezekiel 35:6.

- "For you formed my inward parts; you knitted me together in my mother's womb. I praise you, for I am fearfully and wonderfully made. Wonderful are your works; my soul knows it very well. My frame was not hidden from you, when I was being made in secret, intricately woven in the depths of the earth." Psalms 139:13-15.

Many other Scriptures could be provided by *Amici*.

SUMMARY OF THE ARGUMENT

The Act violates the free exercise rights of people of faith, such as *Amici*, by forcing them to pay for the abortions of others. Because the Act is not a neutral, generally applicable law, it must survive strict scrutiny. This it cannot do because Congress did not and cannot explain why it allowed exemptions for those who have religious objections to insurance *per se*, but not for those who have religious objections to abortion. Similarly, Congress did not and cannot explain why it allowed exemptions for some religious persons but not others. A related constitutional infirmity is the Act's lack of an adequate conscience protection provision for religious health care providers.

ARGUMENT

I. The Act Unconstitutionally Infringes upon the Free Exercise Rights of Those Who Oppose Abortion.

In their Brief on the Individual Mandate, the Private Respondents employ an apt analogy to explain why the mandate is unconstitutional:

> [W]hile the "substantial effects" doctrine allows Congress to regulate local bootleggers because of their aggregate harm to the interstate liquor market, it may not conscript teetotalers merely because conditions in the liquor market would be improved if more people imbibed. Yet the uninsured regulated by the mandate are the teetotalers, not the bootleggers, of the health-insurance market.

(Br. Private Resp't 30.)

This analogy applies with particular force to the objections of *Amici*. Just as many teetotalers object to the consumption of alcohol on deeply-held religious grounds, so the *Amici*—and millions of other Americans—object to funding abortion on deeply-held religious grounds.

People of faith will often be at special risk when government seeks to compel action. Any time the compelled action conflicts with deeply-held religious beliefs, the free exercise rights of those holding such beliefs will be trampled.

Admittedly, government can enact neutral laws of general applicability with which religious adherents must comply. *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872, 881-82(1990). As will be explained below, however, the Act is not such a law. Instead, it is a law that on its face "burden[s] religious practice that is not neutral or not of general application [and that therefore] must *undergo the most rigorous of scrutiny*." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 542 (1993) (emphasis added). In other words, "[t]o satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Id.* (internal quotation marks & citation omitted).

The free exercise of religion—as documented by the statements included above in the Interest of *Amici*—encompasses the right to refuse to participate in abortion, which *Amici* believe to be an unjust evil, just as do millions of Americans of virtually every religious stripe. *See, e.g., US*

Religious Views on Abortion: 10 Largest Christian Denominations and Five Largest non-Christian Religious Groups, Apr. 4, 2011, http://abortion.procon.org/view.resource.php?resourceID=004208 (last visited Feb. 8, 2012) (compiling statistic data about and official positions of 15 religious bodies).

As noted, *Amici* support the position of the Private Respondents (and, of course, the State Respondents, as well), that the Commerce Clause does not support the Individual Mandate. The Commerce Clause does not give the federal government the power to force individuals to buy insurance. *If the Act is struck down on those grounds in whole because it lacks a severability clause, and because it was passed as a complete reform package, then the constitutional concerns of Amici are avoided.* Should this Court not strike the entire Act, however, then *Amici* would be forced to violate their deeply-held religious convictions. Prior to this Act, the federal government refused to force citizens to pay for other people's abortions, and the Act imposes a radical new compulsion and crisis of conscience on people of faith.

As a preliminary matter, *Amici* note that some courts have rejected the argument that the Act forces people of faith to fund abortions. *See, e.g.*, *Liberty University, Inc. v. Geithner*, 753 F. Supp. 2d 611 W.D. Va. 2010.); and *Calvey v. Obama*, 792 F. Supp. 2d 1262 (W.D. Okla. 2011). This view is incorrect for two reasons. First, this view relies on an Executive Order that applies the Hyde Amendment to the Act and on the fact that individuals will be able to enroll in a health benefit exchange that does not cover abortion services. *See, e.g.*, *Calvey*, 792 F. Supp. 2d at 1272-73. This view misses the point that neither the Executive Order nor (through it or otherwise) the

Hyde Amendment apply to the Community Health Center *direct* funding in the Act. *See*, Secretariat of Pro-Life Activities, *The Senate Health Care Reform Bill: Funding Abortion at Community Health Centers*, Mar. 16, 2010, http://nchla.org/datasource/idocuments/Community%20Health%20Centers.pdf (last visited Feb. 8, 2012) (documenting provisions of the then-pending bill and explaining the application of this Court's Hyde Amendment jurisprudence to them). Thus, the direct funding of Community Health Centers could easily include Planned Parenthood, the largest abortion provider in America. Planned Parenthood operates "more than 800 health centers around the country." Planned Parenthood, *Health Info & Services*, http://www.plannedparenthood.org/health-center/?utm_source=dotorg&utm_medium=highlight&utm_campaign=locate (last vistied Feb. 10, 2012). It also misses the point that even if people of faith have an avenue to personally enroll in a no-abortion exchange, their tax dollars are still paying for the abortions of others, in violation of their conscience.

The view that the Act does not force people of faith to fund abortion is wrong for a second reason. These courts have not recognized that some forms of "contraception" are actually abortifacients.

The fears of *Amici*, and millions of Americans, that the Act would be used to radically expand and fund abortions have already come to pass with regard to such contraceptive abortions, despite the Administration's protestations during the passage battle that abortion would not be funded and despite the Executive Order and the Hyde Amendment. On January 20, 2012, Health and Human Services Secretary Kathleen Sibelius (using her powers under the Act) announced:

> [T]he final rule on *preventive health services* will ensure that women with health insurance coverage will have access to the full range of the Institute of Medicine's recommended preventive services, including all FDA approved forms of contraception. Women will not have to forego these services because of expensive co-pays or deductibles, or because an insurance plan does not include contraceptive services. . . . Beginning August 1, 2012, most new and renewed health plans will be required to cover these services without cost sharing for women across the country.

A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sibelius, Jan. 20, 2012, www.hhs.gov/news/press/2012pres/01/2012 0120a.html (last visited Feb. 8, 2012) (emphasis added). While there is an exception for a very narrow range of church-related non-profit organizations, individuals like *Amici* who object will still be funding contraceptive abortions with their tax dollars.[3]

---

[3] As this brief was being prepared for printing, President Obama has announced a "compromise" which does not eliminate *Amici's* religious liberty objection. Insurance companies would be **forced** to provide a separate policy to all women employees that did cover abortion contraception. http://www.cnn.com/2012/02/10/politics/con traception-controversy/index.html?hpt=hp_tl (last visited Feb. 10 2012). So who will pay for the coverage? Obviously the employer will see his premiums rise because of the forced coverage. Insurance companies must pass on costs to survive. Another way to look at it is this: If, in order to get the type of life insurance that best fit a family's needs, it was required to contribute to a "death fund," through

Covered contraceptives include intra-uterine devices (I.U.D.'s), which in many instances prevent the birth of a live human being by preventing the implantation of a fertilized egg already having the complete separate DNA characteristic of another living human being from implanting onto the uterine wall. The human being is thus killed by the I.U.D., and expelled or absorbed by the body. WebMD, *Intrauterine Device (IUD) for Birth Control*, http://www.webmd.com/sex/birth-control/Intrauterine-device-iud-for-birth-control (last visited Feb. 10, 2012); *Intra-Uterine Device (IUD)/Mirena by Bayer*, Sept. 2011, http://www.physiciansforlife.org/content/view/182/36/ (last visited Feb. 10, 2012). The rule also covers "Ella", a morning after pill that can also act as an abortifacient, killing the child. *See*, http://www.ella-rx.com/whatisella.asp (last visited Feb. 10, 2012).

Tellingly, the interest of several *Amici* on the other side of this issue confirms the link between abortion and the Act. Among the organizations that served as *Amici* on the Brief of The National Women's Law Center, *et al.* as *Amici Curiae* in support of Petitioner on the Minimum Coverage Provision are the following:

---

which other members of the insurance group might be murdered by being torn apart limb-by-limb, that would be profoundly objectionable. Segregating the "death fund" would not reduce its objectionable nature one iota. Hiding the forced transfer of costs from the employee who may want an abortion drug to her employer who objects on religious liberty grounds may be politically expedient, but it does not solve the constitutional impediment. See, also, Horace Cooper, *The Birth Control Mandate is Unconstitutional*, http://nationalcenter.org/NPA632.html (last visited Feb 10, 2012).

- "The Chicago Abortion Fund (CAF) [which] is an abortion fund in the Midwest that is working from a reproductive justice framework [and that] has worked for 26 years to provide the most marginalized and disadvantaged women with financial assistance for their second trimester abortion procedures. . . . CAF believes that without access there is no choice." (*id.* at 6a.)

- "National Advocates for Pregnant Women ('NAPW') [which] is a non-profit organization that works to ensure the human rights, health, and dignity of all pregnant and parenting women, especially the most vulnerable including low income and women of color. NAPW advocates for reproductive justice, including the right to an abortion, ..." (*id.* at 14a.)

- "NARAL Pro-Choice America [which] is a non-profit organization dedicated to developing and sustaining a constituency that uses the political process to guarantee every woman the right to make personal decisions regarding the full range of reproductive choices, including preventing unintended pregnancy, bearing healthy children, and choosing legal abortion. *The Affordable Care Act presents an historic opportunity to advance America's healthcare system and promises to improve greatly women's access to reproductive-health services. NARAL Pro-Choice America is concerned about the impact that the Court's decision may have on women's access to affordable insurance coverage, particularly to coverage of reproductive- and preventive-health services.*" (*id.* (emphasis added).)

Furthermore, NARAL Pro-Choice America specifically trumpets the Act as a source of contraceptive funding—including, as noted above, abortion-producing contraceptives: "As a result of the ACA, women will also have access to prescription contraceptives and family planning services without cost, as well as other important preventive care."

Thus, it is not only by purported contraception that funding can find its way to abortion. For example, in defining "essential health benefits" the Secretary shall: "(C) take into account the health care needs of diverse segments of the population, including women, children, persons with disabilities, and other groups." Thus, the HHS Secretary arguably—and perhaps beyond arguably—has discretion under the Act to include the provision of abortion within the "needs" of women. Despite *Amici*'s belief that killing the child in the womb is not healthcare, it is obvious the current administration disagrees, as may future administrations.

Additionally, nothing in the Act precludes the interpretation of "essential" services, "essential health benefit," "ambulatory patient services," or "prescription drugs," from including abortion within their ambits. Indeed as noted above, the FDA has already approved an abortifacient drug in the name of contraception.

Amici are not the only ones whose consciences are at risk. The Act grants potentially dangerous discretion to federal agencies about standards for qualifying doctors or institutions or insurance companies, without conditioning that discretion upon respect for individual or institutional conscience. Physicians, hospitals and insurance companies must

not be squeezed into an unjust dilemma of choosing between full participation in the healthcare system or their consciences.

Finally, if the Act is interpreted to provide assisted reproductive technologies such as *in vitro* fertilization (IVF), then it would be supporting the destruction of unwanted embryos, which millions of Americans consider to be just as much living members of the species *homo sapiens* as anyone else outside of a womb. Many of those frozen embryos have now been born and adopted through "snowflake" adoptions. *See, e.g.*, Nightlight Christian Adoptions, http://www.nightlight.org/adoption-services/snowflakes-embryo/adopting-parents.aspx (last visited Feb. 10, 2012).

II. The Differential Treatment Accorded to Those Qualifying for "Religious Exemptions" Violates *Lukumi*.

As noted above, the Act tramples on the free exercise and conscience rights of *Amici* and millions of others, which it may not do because it is not a neutral, generally applicable law. Specifically, Section 1501 of the Act creates "religious exemptions" that are applicable only to members of favored religious groups, but not *Amici*. The Section 1501 exemptions, which confer privileged status on the limited categories of qualifying individuals based on their religious objection to insurance is not narrowly tailored to serve a compelling state interest as *Lukumi* requires.

In allowing exemptions for those who have religious objections to insurance, Congress acknowledged that allowing exemptions based on religion does not threaten the Act's scheme. In doing

so, however, the categories of individuals who may have religious objections were left under-inclusive. Section 1501 allows only two categories of individuals who are exempt from the penalties: those with a *"religious conscience" objection to insurance* and those who are members of a "health care sharing ministry." *Amici* fit neither category; while believing strongly that abortion is murder, they have no religious objection to insurance itself that does not cover murder.

The religious conscience exemption applies to anyone who is "a member of a recognized religious sect or division thereof described in Section 1402(g)(1) [of the Internal Code]" and meets the additional requirements laid out in that section. The additional requirements limit the exemptions to (1) sects that have been in existence since December 31, 1950 and (2) sects that "make provision for their dependent members which [are] reasonable in view of their general level of living." Members of religious groups that meet those criteria do not have to comply with the mandates and will not be subject to the penalties for non-compliance. *Amici and millions of other individuals, who are not part of those denominations, however, must comply with the requirements or pay the penalties, placing them at a disadvantage for no reason other than they do not belong to the preferred religious group(s).* Their particular religious objection to paying for a procedure they believe is murder is ignored.

As already mentioned briefly, Congress did not and cannot explain how exempting certain uninsured people from the provisions meets the goals of increasing demand for health insurance, decreasing the number of uninsured, and attaining near universal coverage. *See* 42 U.S.C. 18091 (2006); 26

U.S.C. 5000A (2006). Congress did not and cannot explain how exempting members of 50-year-old religious sects with member care programs and conscientious objections to insurance, but not members of similar sects that are less than 50 years old, advances its stated goals. Nor can Congress explain how exempting members of "healthcare sharing ministries" that are at least 10 years but not members of similar ministries that are less than 10 years old advances its legislative goals.

All of these congressional omissions occurred in the face of this Court's recognition in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), that

> though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophical enterprise. *Abortion is a unique act.* It is an act fraught with consequences for others . . . for the spouse, family, and society which must confront the knowledge that these procedures exist, *procedures some deem nothing short of an act of violence against innocent human life*; and, depending on one's beliefs, for the life or potential life that is aborted.

Id. at 852 (emphasis added). The Court also stated, "[a]s with abortion, reasonable people will have differences of opinion about these matters [contraception]. *Id.* at 853.

Finally, this Court's statement that one "could classify *Roe* as *sui generis*," *id.* at 857, means that religious liberty can be upheld in this matter of abortion without necessarily

extending such a rule to other areas of government funding with which people might disagree. A separate exemption for abortion could be created.

After all, in matters of life and death, we recognize a conscientious objection even to being required to serve in the military in the capacity that would require a person to kill someone. 50 App. U.S.C. §456(j) (2006). National security is a much higher value than whether government should fund abortions, and national survival in war could even be considered a compelling governmental interest, which is absent from "healthcare" provisions and insurance requirements.

There is a vast difference between requiring individuals to live in a society that tolerates abortion for others, and forcing them by compulsory laws to either purchase insurance or pay penalties that requires them to participate in or pay for others' roles in the killing of children in the womb.

While individuals may disagree with how their government spends their funds for a variety of reasons, abortion is a matter of life and death and is *sui generis*. This case—like the time-honored recognition of conscientious objection from military conscription—would not have to establish a precedent for other objections to government spending.

III. The Act Fails to Prohibit the Government from Discriminating Against Abortion Conscience Objectors.

The Act is entirely silent regarding *government*

discrimination against health care facilities and health care providers on the basis of religious, moral and philosophical objection to abortion as murder. *Amicus* Dr. Linda Martin is a healthcare provider who believes abortion kills a human child in the womb. *See, supra*, p. 9. Because the scope of the prohibition against discrimination is limited to state health insurance exchanges, only a state health insurance exchange is prohibited from discriminating against any individual health care provider or health care facility for refusing "to provide, pay for, provide coverage of or refer for abortions." §1303(d)(4). *The prohibition against discrimination by other state or federal governmental entities, however, is never mentioned.* The absence of language prohibiting government agencies and government entities from discriminating against health care facilities has tremendous implications for Catholic hospitals, among others, and for *Amicus* Dr. Martin. Because all *Amici* will be forced to support the Act's scheme directly or through the Act's penalties, the coercive effect of potential government discrimination is of concern to all *Amici* and many other Americans.

Catholic hospitals provide a significant portion of this nation's health care, treating 2,486,769 Medicare patients (16.6% of all "community hospital" Medicare patients) and 976,802 Medicaid patients (13.6% of all "community hospital" Medicare patients) in 2010. Catholic Health Association of the United States, *Fast Facts*, http://www.chausa.org/Pages/Newsroom/Fast_Facts/ (last visited Feb. 10, 2012) (explaining that figures are approximate since all hospitals participated in the survey).

Discrimination by governmental entities against Catholic hospitals may occur by the government's refusal to provide federal funding for those health

care providers and health care facilities refusing to provide, pay for, provide coverage of, or refer for abortions. Such discrimination by the government could devastate healthcare as it currently exists in the United States. Historically, Catholic and non-profit health care systems, premised on their moral and religious goals to care for the sick and the poor, have provided many of the general public with health care institutions and health care providers. Without protection against discrimination in the Act, the tenets of those health care facilities and health care workers are in jeopardy and will be ripe for discrimination under the Act.

It is very significant that while the original Section 1303 mandated a general prohibition against discrimination for specific conscience protections, the Amendments to Subtitle D, Section 1303 *eliminate* the general prohibition against discrimination. Prior to the Amendment to Subtitle D, Section 1303, the following language was applicable:

> (C) PROVIDER PROTECTIONS.—No individual health care provider or health care facility may be discriminated against because of a willingness or an unwillingness, if doing so is contrary to the religious or moral beliefs of the provider or facility, to provide, pay for, provide coverage of, or refer for abortions.

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119.

This protection was intentionally removed in the Amendments to Subtitle D. Without clearly articulated conscience protections—and with the clear inference that ***no*** protection is accorded, health care facilities are left without guidance regarding

their ability to refuse to provide, to pay for, cover, refer for abortion or to provide or participate in training to provide abortion. The ambiguity created by the Amended §1303 is not resolved by §1303(c)(2)(A) of the Act, which provides:

> (A)—Nothing in this Act shall be construed to have any effect on Federal laws regarding—
>
> (i) conscience protection;
>
> (ii) willingness or refusal to provide abortion; and
>
> (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion.

At the present time, Federal law regarding conscience protection is non-existent as it relates to the Act. Section 1303(c)(2)(A).[4] Combined with the elimination of conscience protection from the Original §1303 and the promulgation of rules promoting contraception (with, as discussed *supra*, very narrow conscience protections), the current section 1303(c)(2)(A) is virtually toothless. Conscience rights of health care providers will be violated by this critical omission in the Act.

Finally, this Court should consider the big picture. In addition to individual *Amici* being forced to pay for insurance coverage or penalties that cover abortion and the billions of dollars appropriated to community health centers that can fund abortion, *the overall forced inclusion of millions of Americans like*

---

[4] A search of an electronic version of the Act produces no results except the religious exemption discussed *supra* and the conscience protection provision discussed here.

Amici in this "system" will finance a vast increase in the overall number of abortions, a result that is anathema to the conscience of *Amici*. How will that happen?

Millions of individuals who were "uninsured" will now be covered under the Act by Medicaid or forced to buy insurance. Many of these individuals will have no qualms about getting abortions (as they could do at their own expense before the Act). Thus, the overall number of abortions paid for by this "system" will increase vastly. And the "system" only works—in other words, this vast expansion of abortion (along with other medical procedures) is only possible—with the forced, compulsory inclusion of millions of Americans like *Amici* who object on religious grounds. Therefore, forcing individuals to participate in a "system" that promotes more abortions, violates their conscience and is a violation of their religious liberty.

This may be a somewhat non-traditional way of looking at a religious liberty issue, but the Act is a non-traditional way of violating religious liberty on a massive scale and requires a big picture analysis.

CONCLUSION

While the issue of whether forcing Americans to pay for abortions that they believe are murders, is constitutional may not need to be decided in this case (if the entire statute is declared unconstitutional on other grounds), the issue is of such deep national interest and personal moral and religious interest to *Amici* that it is appropriate to be raised at this stage. *Invalidating the entire statute as unconstitutional avoids a deeply divisive issue with immense constitutional ramifications.* It is one thing for *Amici*

to live in a country that tolerates abortion on the grounds that it should be a "woman's free and voluntary choice." *It is entirely another to force Amici and millions of Americans with sincere, deeply held religious, moral, and philosophical beliefs that such action is murder to actually participate in such murder. Where is freedom of choice for Amici?* Congress should be warned as it revisits the issue of health care that forcing people to participate in what they believe to be murder raises substantial constitutional questions.

Respectfully submitted,
this 13th day of February, 2012,

Allan E. Parker
Counsel of Record for *Amici Curiae*
R. Clayton Trotter
The Justice Foundation
7210 Louis Pasteur Dr., Ste. 200
San Antonio, TX 78229
(210) 614-7157
aparker@txjf.org

Stephen B. Presser
Raoul Berger Professor of Legal History,
Northwestern University School of Law, Professor of Business Law, Kellogg School of Management &
Member of Faculty, Department of History
Northwestern University
357 E. Chicago Ave.
Chicago, IL 60611

Steven W. Fitschen
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, Virginia 23454

Kathleen Cassidy Goodman
Law Office of Kathleen Cassidy Goodman
12274 Bandera Road, Suite 228
Helotes, TX 78023

APPENDIX A
Project Liberty Members

Below are listed the members of Project Liberty. Due to the highly sensitive nature of disclosing actual abortion participation, as many members did when joining Project Liberty, first names and initials have been used for confidentiality purposes.

Diana C.
Mary M.
Mackie G.
Adams
Jackson P.
William F.
Cindy Y.
David
Esther
Eugene L.
Lawrence
Sarah E.
Karen
William D.
Brenda L.
Maria
Thomas L.
Richard
Ronald
Salena D.
Ronald
Leslie
Lori
Leo
Nancy A.
Jana G.

Linda F.
James
Richard
Juanita
Jared
Arch
Sherry
Robert L.
Tina C.
Jason
M.V.
Anthony
Mary Lou
Todd D.
Toni P.
Kenneth
Mary B.
Mary J.
James
Donn R.
V'Ann
Arthur L.
Master
Melanie A.
Douglas
James S.

Jean M.
Glenn R.
Ernest R.
Della
Leigh
John C.
Lisa A.
Dwayne
Carol T.
Mary E.
Rex H.
Cecilia A.
Brother
Stanley
Ella M.
Leigh
Charlotte H.
Hope
Doris K.
Richard C.
Robert E.
Jan
Edward
Lynn P.
Bonnie
Betty

Dr. Wiley S.
Edwin
Darlene A.
Brother Daniel
Martha
Larry Rick
Sharon K.
Robert L.
Katherine
Joy
Sammie J.
Florence
Rick
Katherine
Norman
Melanie T.
Jo Ann
Dagne
Rebecca S.
Lynn
Carolyn Sue
Michelle R.
William
Victor
Shirley K.
Steven F.
Nancy M.
Donna L.
James I.
Richard
Thelma
Pat R.
Sharon C.
Carol M.
Myra L.
Thalia
Jason
Katharine M.
Robert B.
Joseph M.
Kelly L.
Bobby J.
Karen J.
Joseph F.
Sandra W.
Gary O.
Rosalie Ann
Wayne C.
Rosalie
Malcolm
John
Brian K.
Bruce
Shirley
Douglas L.
Joel D.
Marcia K.
Robert R.
Tammy J.
David
Robert A.
Father Tom J.
Thomas H.
J.D.
Leslie R.
Monalee
Nelda
Deborah K.
Barbara J.
Jennifer
Walter
Thomas
Dawn D.
Brandi
Sharon
Brad L.
Janet L.
John
Tonya
Patricia E
Dr. Linda J.
Scott A.
Claudine
Charles
Julia K.
Erica
Josette
Debra K.
Eleanor A.
Edgar L.
Gary E.
Maureen
Anne S.
W. L.
Marion S.
Marianne J.
Jennifer
Fred G.
Brandi J.
Daniel J.
Suzanne
Daria J.
Christine A.
Maurice M.
Barbara S.
Holly J.
Joseph S.
Peggy

Cary
Dawn
Sarah N.
Thomas
Madeline
William R.
J. Ashton
Sue
Emily
Jean M.
Sheila
Kerri N.
James L.
Andrea
Jorge L.
Becky
David E.
Susan P.
Richard W.
Peggy
Sharra A.
Patricia Ann
James
Jane
Sheila E.
Jesse G.
Linda R.
Kathy J.
Diane
Jimmie D.
Wilma R.
Pamela
Barbara R.
Lisa M.
Lisa K.
Larry

Dardine M.
Alice M.
David L.
Narda L.
Carol L.
Franklin K.
Ruth Eileen
Deborah A.
James
Michael J.
Linda J.
Wilma
Terry V.
Angela R.
Lisa M.
Aubrey L.
Richard M.
Gary L.
Don
Polly T.
Lana
Robbie
Arthur L.
Dr. Ann Marie
Rusty
Mary A.
Elwood
Al
William
David J.
Betty
Carla
Christine M.
Franklin L.
T. R.
Gordon

Carrolith A.
Julia M.
Joe M.
Helanie
Eugene
Tommy D.
Lauretta M.
Betty D.
Robert D.
Lee Ann
Cristine
Larry
Mary Anne
Milton
Molly S.
Elvin D.
Piper
James H.
Dale
Doyle R.
Earl Z.
D.R.
Liz
Nicole
Leslie G.
Lizbeth L.
Debra C.
Ruth E.
Catherine M.
Betty
Elizabeth
Leonard
Phillip
Jennifer
Karrie
Ralph

Carl
Francisco

AMICUS CURIAE BRIEF

No. 11-398

In the
Supreme Court of the United States

DEPARTMENT OF
HEALTH AND HUMAN SERVICES, et al.,
Petitioners,

v.

STATE OF FLORIDA, et al.,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For The Eleventh Circuit

BRIEF OF SENATE MAJORITY LEADER HARRY REID, HOUSE DEMOCRATIC LEADER NANCY PELOSI, AND CONGRESSIONAL LEADERS AND LEADERS OF COMMITTEES OF RELEVANT JURISDICTION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS
(Minimum Coverage Provision)

CHRISTOPHER J. WRIGHT
TIMOTHY J. SIMEONE
WILTSHIRE & GRANNIS LLP
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 730-1300

PROFESSOR WALTER DELLINGER
Counsel of Record
1701 18th Street, N.W.
Washington, D.C. 20009
(202) 383-5319

JANUARY 13, 2012

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 8

I. THE PATIENT PROTECTION AND AFFORDABLE CARE ACT, INCLUDING ITS MINIMUM COVERAGE REQUIREMENT, IS A VALID EXERCISE OF CONGRESS'S ENUMERATED CONSTITUTIONAL POWER TO REGULATE COMMERCE AMONG THE SEVERAL STATES 8

A. Congress Has Plenary Authority To Regulate Interstate Markets, Including Matters Affecting The Prices Of Commodities Traded In Interstate Commerce 8

B. The Act, Of Which The Minimum Coverage Requirement Is An Integral Part, Is A Constitutional Regulation Of Interstate Commerce 11

1. The Commerce Clause authorizes the minimum coverage requirement as congressional regulation of the national health insurance market 11

2. The minimum coverage requirement is fully consistent with limits on the

Commerce Clause described in recent Supreme Court decisions 17

C. There Is No Constitutional Basis For Carving Out A Novel Exception To Congress's Recognized Power To Regulate Interstate Commerce 18

1. Whether the minimum coverage requirement should be categorized as activity or inactivity is an artificial distinction irrelevant to the question of the Act's constitutionality 18

2. The challengers' proposed distinction between activity and inactivity rests on a discredited substantive due process theory of economic liberty that is not cognizable in a legal action challenging a federal statute on Article I grounds 22

3. Upholding the Act and the minimum coverage requirement would not render Congress's Commerce Clause authority without limits 26

II. CONGRESS HAS POWER UNDER THE NECESSARY AND PROPER CLAUSE TO ADOPT THE MINIMUM COVERAGE REQUIREMENT AS A MEANS CONGRESS DEEMS APPROPRIATE AND CONDUCIVE TO ACCOMPLISH THE ENDS OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT 30

A. The Necessary And Proper Clause Empowers Congress To Choose The Means Best Suited In Its Judgment To Execute Its Express Powers, As Long As The Means Are Conducive To A Constitutionally Legitimate Legislative End 31

B. The Minimum Coverage Requirement Is An Appropriate Means Of Executing The Act's Regulation Of The Interstate Health Care Insurance Market, Is Plainly Adapted To The End Of Assuring Affordable Health Care For All Americans, And Violates No Constitutional Prohibition 32

III. CONGRESS HAS INDEPENDENT AUTHORITY UNDER ITS TAXING POWER TO ADOPT THE MINIMUM COVERAGE REQUIREMENT 34

CONCLUSION 37

TABLE OF AUTHORITIES

Cases: **Page**

Bd. of Trade of Chicago v. Olsen,
262 U.S. 1 (1923) 19

Cruzan v. Director, Mo. Dept. of Health,
497 U.S. 261 (1990) 6-7, 27

Currin v. Wallace, 306 U.S. 1 (1939) 14

Edward J. DeBartolo Corp v. Florida Gulf Coast Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) 36

Ferguson v. Skrupa, 372 U.S. 726 (1963) 23

Florida ex rel. Atty. Gen. v. U.S. Dept. of Health and Human Serv., 648 F.3d 1235
(11th Cir. 2011) ..... *passim*

Gibbons v. Ogden,
22 U.S. (9 Wheat.) 1 (1824) 3-4, 9

Gonzales v. Raich, 545 U.S. 1 (2005) ..... *passim*

Griswold v. Connecticut,
381 U.S. 479 (1965) 27

Group Life & Health Ins. Co. v. Royal Drug Co.,
440 U.S. 205 (1979) 28

Helvering v. Davis, 301 U.S. 619 (1937) 8

Hodel v. Va. Surface Mining Ass'n,
452 U.S. 264 (1981) 9

Kovacs v. Cooper, 336 U.S. 77 (1949) 28

Lawrence v. State Tax. Comm'n,
286 U.S. 276 (1932) 35

Liberty Univ., Inc. v. Geithner,
753 F. Supp. 2d 611 (W.D. Va. 2010) 7

License Tax Cases,
72 U.S. (5 Wall.) 462 (1867) 34-35

Lochner v. New York, 198 U.S. 45 (1905) 22-23, 28

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 31-32, 33

Nebbia v. New York, 291 U.S. 502 (1934) 25

Nelson v. Sears, Roebuck & Co.,
312 U.S. 359 (1941) 35

Perez v. United States, 402 U.S. 146 (1971) 14

Prudential Ins. Co. v. Benjamin,
328 U.S. 408 (1946) 18

Rumsfeld v. FAIR, 547 U.S. 47 (2006) 25

Second Employers' Liab. Cases,
223 U.S. 1 (1912) 9

Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) ..... *passim*

Skinner v. Oklahoma ex rel. Williamson,
316 U.S. 535 (1942) 27

Stafford v. Wallace, 258 U.S. 495 (1922) 19

Stanley v. Illinois, 405 U.S. 605 (1972) 28

Sunshine Anthracite Coal Co. v. Adkins,
310 U.S. 381 (1940) 25

Thomas More Law Center v. Obama,
651 F.3d 529 (6th Cir. 2011) 17-18, 19, 29-30

United States v. Comstock,
130 S. Ct. 1949 (2010) 32, 33, 34

United States v. Coombs,
37 U.S. (12 Pet.) 72 (1838) 9

United States v. Lopez,
514 U.S. 549 (1995) ..... *passim*

United States v. Morrison,
529 U.S. 598 (2000) ..... *passim*

United States v. South-Eastern Underwriters,
322 U.S. 533 (1944) 11-12, 16, 32

United States v. Sullivan, 451 F.3d 884
(D.C. Cir. 2006) 21

W. Coast Hotel v. Parrish, 300 U.S. 379 (1937) 24

Wickard v. Filburn,
317 U.S. 111 (1942) 15, 18, 21, 24

Constitutional Provisions

U.S. Const. art. I, § 8, cl. 1 34

U.S. Const. art. I, § 8, cl. 3 8

U.S. Const. art. I, § 8, cl. 18 30

Statutes and Other Legislative Authorities

26 U.S.C.A. § 5000A(a) 36

26 U.S.C.A. § 5000A(b)(2) 36

26 U.S.C.A. § 5000A(b)(3) 36

26 U.S.C.A. § 5000A(b)(3)(b) 36

26 U.S.C.A. § 5000A(c) 36

26 U.S.C.A. § 5000A(g) 36

155 Cong. Rec. S13,751 (daily ed. Dec. 22, 2009) 6

155 Cong. Rec. S13,830-31 (daily ed. Dec. 23, 2009) . 6

155 Cong. Rec. S13,832 (daily ed. Dec. 23, 2009) 6

Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd 13

Health Equity and Access Reform Today Act of 1993, S. 1770, 103d Cong.. 23

Patient Protection and Affordable Care Act § 1501(a)(2)(A) 14

Patient Protection and Affordable Care Act § 1501(b) 35

Patient Protection and Affordable Care Act § 10106 ..... 13, 15

Patient Protection and Affordable Care Act § 10106(a) 12

Patient Protection and Affordable Care Act § 10106(b)(1) 25

Other Authorities

National Center for Health Statistics, *Health, United States, 2009* 12-13

Congressional Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* (Dec. 2008) 13

Congressional Budget Office Letter to Nancy Pelosi (Mar. 20, 2010) 35

Dept. of Health & Human Services, *At Risk: Pre-Existing Conditions Could Affect 1 in 2 Americans* (2011) 12

June E. O'Neill & Dave M. O'Neill, *Who Are the Uninsured? An Analysis of America's Uninsured Population, Their Characteristics, and their Health*, Employment Policies Institute (2009) 12

Rahul Rajkumar & Harold Pollack, *An Essential Mandate*, L.A. Times (Jan. 7, 2011) 24

INTEREST OF *AMICI CURIAE*[1]

Amici are Senate Majority Leader Harry Reid, House Democratic Leader Nancy Pelosi, and the following congressional leaders and leaders of the relevant committees of jurisdiction:

Sen. Dick Durbin (Assistant Majority Leader)	Rep. Steny H. Hoyer (Democratic Whip)
Sen. Charles Schumer (Conference Vice Chair)	Rep. James E. Clyburn (Democratic Assistant Leader)
Sen. Patty Murray (Conference Secretary)	Rep. John B. Larson (Chair of Democratic Caucus)
Sen. Max Baucus (Chair, Committee on Finance)	Rep. Xavier Becerra (Vice Chair of Democratic Caucus)
Sen. Tom Harkin (Chair, Committee on Health, Education, Labor, and Pensions)	Rep. John D. Dingell (Lead Sponsor of House Health Care reform legislation)
Sen. Patrick Leahy (Chair, Committee on the Judiciary)	Rep. Henry A. Waxman (Ranking Member, Committee on Energy and Commerce)

---

[1] Counsel for all parties have consented to the filing of *amicus* briefs, and their consents are reflected on the docket. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

Sen. John D. Rockefeller IV (Chair, Committee on Commerce)	Rep. Frank Pallone, Jr. (Ranking Member, Commerce Subcommittee on Health)
Rep. Fortney Pete Stark (Ranking Member, Ways and Means Subcommittee on Health)	Rep. Sander M. Levin (Ranking Member, Committee on Ways and Means)
Rep. Robert E. Andrews (Ranking Member, Education and the Workforce Subcommittee on Health, Employment, Labor and Pensions)	Rep. George Miller (Ranking Member, Education and the Workforce Committee)
Rep. Jerrold Nadler (Ranking Member, Judiciary Subcommittee on Constitution)	Rep. John Conyers, Jr. (Ranking Member, Committee on the Judiciary)

Amici file this brief for two reasons. First, as elected Members of Congress, *amici* have a duty to support the Constitution, and in exercise of that duty they write to defend the constitutionality of the Patient Protection and Affordable Care Act. The Act is a landmark accomplishment of the national Legislature, which brings to fruition a decades-long effort to guarantee comprehensive, affordable, and secure health care insurance for all Americans. *Amici* paid careful attention to Supreme Court precedents defining the proper bounds of Congress's constitutional authority, and relied upon these established rules, in formulating, debating, and voting on the Act. They wish to put before the Court

their views on why the Act is a valid exercise of Congress's Article I powers.

Second, *amici* believe that the legal theories advanced by the Act's challengers, if embraced by the courts, would seriously undermine Congress's constitutional authority and its practical ability to address pressing national problems. Congress regularly relies on its enumerated powers to protect American consumers and workers, keep families safe, and ensure civil rights. *Amici* take seriously their oath to "support and defend the Constitution of the United States," and write in their constitutional role as Members of a coequal branch of government.

INTRODUCTION AND SUMMARY OF ARGUMENT

The central and dispositive fact in this case is that the Patient Protection and Affordable Care Act ("the Act" or "ACA"), including the provision that individuals maintain minimum health insurance coverage, is a congressional regulation of the interstate health insurance market. The effective regulation of health insurance, moreover, is critical to the effective functioning of the enormously important national health care market. The assertion that Congress lacks the legislative authority to regulate these national, commercial markets is an astonishing proposition. Its acceptance would mean that the Commerce Clause falls short of authorizing the full and effective regulation of interstate commerce. That novel claim is inconsistent with the Constitution and contrary to longstanding Supreme Court precedent. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) (the commerce power is "complete in itself, may be

exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution ... in plain terms").

The ACA includes a minimum coverage requirement ("MCR") as part of its comprehensive regulatory plan designed to ensure that affordable health insurance coverage is widely available. The MCR is accompanied by a penalty provision applicable to most taxpayers that encourages individuals who lack adequate health insurance to obtain coverage that meets minimum standards. Congress determined after exhaustive hearings that without this financial incentive for individuals to maintain adequate coverage, it would not be financially practicable to prohibit insurance companies from denying coverage to those with pre-existing conditions or otherwise to regulate effectively the national markets in health insurance and health care.

The State Respondents and other challengers ("challengers") of the MCR, however, urge this Court to carve out an unprecedented exception to Congress's plenary authority to regulate interstate commerce. They contend that even matters vital to the national economy may not be regulated if they fall within an artificial category that the challengers call "inactivity." This is descriptively inaccurate, because (1) the penalty for failing to maintain minimum coverage applies only to those who participate in the economy by earning sufficient taxable income that they are otherwise required to file federal income tax returns and (2) virtually everyone subject to the penalty participates in some way in the health care market in any given year even

if they choose not to purchase health insurance. Moreover, the Supreme Court long ago rejected using arbitrary characterizations to constrain Congress's power to regulate the national economy. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 556 (1995).

There is nothing unprecedented about Congress imposing requirements on citizens who would prefer to be left alone, when those regulations are necessary to accomplish an objective wholly within the powers assigned to Congress. Nor is there anything so surprising or severe about the provision in question that would suggest that it crosses some constitutional boundary and must thus be judicially excised. The provision is no more intrusive than Social Security or Medicare. The Social Security Act requires individuals to make payments to provide for their retirement. Medicare requires individuals to make payments to provide for their health coverage after they are 65 years of age or if they meet other criteria. The ACA requires individuals to obtain health coverage before they are 65. Under Medicare, individuals choose between privately insured plans or a government-administered plan. Under the ACA, individuals are given an option to choose among insurers in the private market. Neither Social Security nor Medicare nor the ACA is such a novel intrusion into liberty that judges would be justified in overriding the considered judgment of the elected branches that adopted those laws.

As members of Congress, we are mindful of the Supreme Court's concern, stated in cases such as *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), that Congress not use the commerce power to

regulate matters that are local and non-economic.[2] Those cases involved the attempt to regulate local crime (guns near schools and violence against women) because of a presumed ultimate effect on interstate commerce. The MCR, in contrast, is itself a regulation of an interstate commercial matter—health insurance. The effective functioning of that major commercial activity is critical to the national health care market in which virtually every American participates.

This case tests no limits and approaches no slippery slope. Notwithstanding the challengers' improbable hypotheticals, Congress never has required Americans to exercise or eat certain foods – and in our view it never would. Were Congress ever to consider laws of that kind infringing on personal autonomy, the judiciary would have ample tools under the liberty clause of the Fifth Amendment to identify and enforce constitutional limits. *See*

---

[2] Indeed, the Senate expressly acknowledged its independent responsibility to address and determine the constitutionality of enactments in adopting the ACA. In response to a constitutional point of order questioning "Congress's authority under Constitution to enact" the ACA, Senator Leahy stated that such authority exists under the Commerce Clause, the Necessary and Proper Clause, and the General Welfare Clause (which includes the "Power To lay and collect Taxes"). 155 Cong. Rec. S13,751 (daily ed. Dec. 22, 2009). Following substantial further debate on these sources of authority, the Senate upheld the Act's constitutionality as both a proper exercise of these enumerated powers and as consistent with the limitations on federal power imposed by the Tenth Amendment. *See* 155 Cong. Rec. S13,830-31 (daily ed. Dec. 23, 2009) (vote upholding the ACA as within Congress's enumerated powers); 155 Cong. Rec. S13,832 (daily ed. Dec. 23, 2009) (vote upholding the ACA as consistent with the Tenth Amendment).

Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990). What the ACA regulates is not personal autonomy, but commercial transactions.

Suggestions that sustaining the MCR would mean that Congress could mandate the purchase of cars, vegetables, or other items are also disingenuous. The provision requiring minimum health insurance cannot be viewed in isolation. In this case, Congress has regulated a unique market, insurance that provides a means of paying for health care services. Health care is a unique product that no one can be certain he or she will never utilize, as the district court in *Liberty University, Inc. v. Geithner* noted "[r]egardless of whether one relies on an insurance policy, one's savings, or the backstop of free or reduced-cost emergency room services" to address the financial risks. 753 F. Supp. 2d 611, 633 (W.D. Va. 2010).

The MCR regulates participation in this singular market, which plays a central role in the nation's commerce. And were there any doubt that the MCR is a valid exercise of Congress's commerce power, the Necessary and Proper Clause provides a reinforcing and independent basis for the provision's constitutionality. The minimum coverage provision is a valid means to the full and effective exercise of Congress's regulation of interstate commerce in the larger Act.

The challengers' disagreement with the manner Congress has chosen to regulate the health insurance market is an occasion for political debate, not a matter for judicial imposition. *Amici* stand by the wisdom of the Act, which expands quality, affordable insurance to millions of Americans while

limiting costs and reducing the deficit. But, as Justice Benjamin Cardozo wrote for the Supreme Court nearly 75 years ago:

> Whether wisdom or unwisdom resides in the scheme of [the statute in question], it is not for us to say. The answer to such inquiries must come from Congress, not the courts.

Helvering v. Davis, 301 U.S. 619 (1937) (rejecting a constitutional challenge to the Social Security Act of 1935).

ARGUMENT

I. THE PATIENT PROTECTION AND AFFORDABLE CARE ACT, INCLUDING ITS MINIMUM COVERAGE REQUIREMENT, IS A VALID EXERCISE OF CONGRESS'S ENUMERATED CONSTITUTIONAL POWER TO REGULATE COMMERCE AMONG THE SEVERAL STATES.

A. Congress Has Plenary Authority To Regulate Interstate Markets, Including Matters Affecting The Prices Of Commodities Traded In Interstate Commerce.

The Constitution provides that "Congress shall have Power ... To regulate Commerce...among the several States." Art. I, § 8, cl. 3. In decisions reaching back to the early years of the Republic, the Supreme Court has recognized that this crucial provision grants Congress plenary power to regulate the nation's commercial affairs. For, as the Supreme Court recently observed, "The Commerce Clause emerged as the Framers' response to the central

problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation." *Gonzales v. Raich*, 545 U.S. 1, 16 (2005).

Almost two hundred years ago, the Supreme Court stated that Congress's regulatory authority under the Commerce Clause "is plenary as to [its] objects" and "co-extensive with the subject itself." *Gibbons*, 22 U.S. at 197. Numerous decisions establish that when Congress regulates an interstate market it acts within the core of the Commerce Clause – and that "the power to regulate commerce ... extends" not just to the literal commercial transactions of the relevant market but also to behavior or acts "which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce" in that market. *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 78 (1838); *see also Gibbons*, 22 U.S. at 189-90. Thus, "Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that act more secure, more reliable, or more efficient." *Second Employers' Liab. Cases*, 223 U.S. 1, 48 (1912). Congress's commerce power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons*, 22 U.S. at 196 (quoted in *Hodel v. Va. Surface Mining Ass'n*, 452 U.S. 264, 276 (1981)).

In the D.C. Circuit's recent *Seven-Sky* decision, Judge Silberman described those limitations succinctly: "Today, the only recognized limitations [on the commerce power] are that (1) Congress may

not regulate non-*economic* behavior based solely on an attenuated link to interstate commerce, and (2) Congress may not regulate intrastate economic behavior if its aggregate impact on interstate commerce is negligible." *Seven-Sky v. Holder*, 661 F.3d 1, 16 (D.C. Cir. 2011) ("*Seven-Sky*"). The D.C. Circuit found, however, that "[t]hose limitations are quite inapposite to the constitutionality of the individual mandate." *Id.* Indeed, the challengers do not seriously question that the MCR "certainly is focused on economic behavior . . . that does substantially affect interstate commerce." *Id.* at 16-17.

Two recent cases, *Lopez* and *Morrison*, illustrate the specific limitations set forth by Judge Silberman. In those cases, the Court found that Congress cannot use an *attenuated* connection to interstate commerce to enact laws governing purely local, *non-commercial* matters. *Lopez* and *Morrison* involved provisions governing *non-commercial* (criminal) behavior – possessing guns near a school and gender-motivated violence – with *no* immediate connection to *any* market, interstate or intrastate. The Court cautioned against reasoning that would permit congressional regulation of matters unrelated to the national economy by "pil[ing] inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. In order to maintain the constitutional principle that Congress is a legislature of limited and enumerated powers, *Lopez* and *Morrison* concluded that the gap between some local, non-economic matter that Congress wishes to regulate and interstate commerce cannot

be bridged by pointing to a remote causal relationship. *See Morrison*, 529 U.S. at 617-18.

The Court has made clear, however, that the limitations set forth in *Lopez* and *Morrison* do not detract from Congress's plenary authority to regulate interstate commerce itself. In *Raich*, the Court reaffirmed that where "the [act under review] is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality." 545 U.S. at 26. Indeed, the "case law firmly establishes Congress' power to regulate purely local activities" as part of interstate commerce regulation. *Id.* at 17; *see also Lopez*, 514 U.S. at 558 (confirming Congress's unquestioned regulatory authority "where a general regulatory statute bears a substantial relation to commerce" (emphasis omitted)). As Justice Kennedy explained, "Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy." *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring).

B. The Act, Of Which The Minimum Coverage Requirement Is An Integral Part, Is A Constitutional Regulation Of Interstate Commerce.

1. The Commerce Clause authorizes the minimum coverage requirement as congressional regulation of the national health insurance market.

The Supreme Court recognized long ago that the Commerce Clause authorizes Congress to regulate "the business of insurance": "[t]hat power, ... is vested in the Congress, available to be exercised for

the national welfare as Congress shall deem necessary." *United States v. South-Eastern Underwriters*, 322 U.S. 533, 552-53 (1944).

In the Act, Congress set forth findings about the central role of health insurance in the U.S. economy. In 2009, the U.S. spent more than 17% of its gross domestic product on health care. ACA § 10106(a). Despite that expense, some 45 million Americans lacked health insurance for at least part of the year before enactment of the ACA. One reason so many Americans lack health insurance is that historically—and until the ACA is fully implemented in 2014—insurers' practices have excluded many of those most in need of medical care, often by avoiding coverage of people with pre-existing conditions. Given that as many as 129 million Americans under 65 have some pre-existing condition, Dept. of Health & Human Services, *At Risk: Pre-Existing Conditions Could Affect 1 in 2 Americans* (2011), http://www.healthcare.gov/center/reports/preexisting.html, these practices place numerous families at risk for loss of health insurance.

Uninsured Americans are not immune from injury, sickness, and the need for medical services. According to recent reports, 94% of the long-term uninsured have received some medical care. June E. O'Neill & Dave M. O'Neill, *Who Are the Uninsured? An Analysis of America's Uninsured Population, Their Characteristics, and their Health* 20-22, Employment Policies Institute (2009). When Americans lack health insurance, they often resort to treatment in emergency rooms: according to one study, in 2007, 62.6% of the uninsured at a given point in time had made at least one visit to a doctor

or emergency room within the year. National Center for Health Statistics, *Health, United States, 2009* 318.

America is a generous and caring nation, and the uninsured are, in many instances, provided basic health care with the cost passed on to other participants in the market. A federal statute requires as much. *See* Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd. The cost of medical care for the uninsured is shifted through the interstate market. In 2008, such cost-shifting amounted to $43 billion, *see* Congressional Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 114 (Dec. 2008), creating a hidden burden passed along to other market participants through increased fees and premiums and to taxpayers through burdens on the public fisc. Congress, in passing the Act, understood that barriers to full coverage in the health insurance market have substantial economic effects extending beyond the health care sector. *See, e.g.*, ACA § 10106 (medical expenses contribute to 62% of personal bankruptcies).

The Act regulates the health insurance market to protect the American people by barring insurers from refusing or rescinding coverage based on pre-existing conditions, establishing new insurance markets, and promoting access to affordable insurance. It also requires individuals, with certain specified exceptions, to maintain minimum levels of health insurance coverage or (in some cases) pay a tax penalty. The Act as a whole is thus a core exercise of Congress's Commerce Clause power to regulate the interstate health insurance industry.

The challenged component of the Act, the MCR, fits within Congress's enumerated Commerce Clause authority because (1) on its own it regulates this interstate market, and (2) it is an integral part of Congress's broader regulatory scheme of assuring affordable health care insurance coverage for all Americans.

First, the MCR directly addresses the affordability of health insurance and therefore (in light of the basic principle that insurance rests on the pooling of risks) its availability in the private market. As Congress explained, the MCR "regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased." ACA § 1501(a)(2)(A). Congress acted for the purposes of "giv[ing] protection to sellers [and] purchasers" and stabilizing "the price structure" of the health care insurance market – regulatory purposes the Supreme Court has long recognized as within the core of the commerce power. *See Currin v. Wallace*, 306 U.S. 1, 11 (1939); *Perez v. United States*, 402 U.S. 146, 151 (1971). As with the law in *Raich*, the MCR regulates commerce by addressing "supply and demand in the national market" for health insurance. *See Raich*, 545 U.S. at 19.

As a matter of economic fact, whether an individual purchases health insurance, self-insures, or ignores the issue altogether is one element in the mass of decisions (and failures to decide) that determine the cost, and thus availability, of health insurance in the market. It is "economic" in a common-language or business sense: health

insurance, unlike carrying guns near schools, is a product which people buy and sell. The Court employs a "practical conception of commercial regulation." *Id.* at 25 n.35 (quoting *Lopez*, 514 U.S. at 574 (Kennedy, J., concurring)). It is "well established" that the commerce power "includes the power to regulate the prices at which commodities in that commerce are dealt in." *Wickard v. Filburn*, 317 U.S. 111, 128 (1942). The failure to obtain health insurance affects the cost of health insurance for others and, in the future, for oneself.

Second, in the Act, Congress expressly found that the MCR "is an essential part of this larger regulation of economic activity," the absence of which "would undercut Federal regulation of the health insurance market." ACA § 10106. Congress found that the MCR is "essential" for a simple reason: otherwise, the new regulations would encourage individuals to delay or forgo insurance, knowing that they could not be excluded later for pre-existing conditions. That would cause higher insurance prices and greater cost-shifting. The MCR, however, will "significantly reduce[] the uninsured" and "together with the [Act's] other provisions ... lower health insurance premiums." *Id.*

When Congress creates a "comprehensive regulatory regime," it may regulate a particular matter if the "failure to regulate ... would leave a gaping hole in the" statutory regime. *Raich*, 545 U.S. at 22, 27. Without the MCR, the objective of the Act's regulation of interstate commerce would be far more difficult, if not impossible, to attain. "[L]eaving [individuals who do not purchase health care insurance although financially able to do so] outside

the regulatory scheme would have a substantial influence on price and market conditions," *id.* at 19, and so undermine Congress's objectives. The Court thus explained in *Raich* that, "[a]s we have done many times before, we refuse to excise individual components of th[e] larger scheme." *Id.* at 22. The same rule holds here.

Viewed through the lens of recent cases, the Act and its MCR exercise the core of Congress's Commerce Clause authority. *See Lopez*, 514 U.S. at 558 (commerce power encompasses "the channels of interstate commerce ... the instrumentalities of interstate commerce, or persons or things in interstate commerce" and "activities affecting commerce"). The Act regulates the channels of interstate commerce, which permit the existence of insurance markets. It also regulates "things in interstate commerce" – insurance contracts and transactions. *See South-Eastern Underwriters*, 322 U.S. at 550 (insurance "involve[s] the transmission of great quantities of money, documents, and communications across dozens of state lines"). Finally, health insurance makes up a significant interstate market itself and provides a means of payment for participants in the unique national health care market, and so the MCR regulates matters "substantially affecting interstate commerce."

2. The minimum coverage requirement is fully consistent with limits on the Commerce Clause described in recent Supreme Court decisions.

The MCR, as a regulation of an economic market, also complies with the limits on Congress's authority articulated in *Lopez* and *Morrison*. The Act regulates interstate commerce, not in order to reach some further, non-commercial behavior but precisely in order to regulate a commercial market to achieve national purposes. There is thus no gap between the regulation and interstate commerce. As the Supreme Court concluded in *Raich*, where Congress's clear purpose is to regulate an interstate market, the limiting principles of *Lopez* and *Morrison* are irrelevant. *See Raich*, 545 U.S. at 26.

We are sensitive to the Court's concern that Congress not overstep its authority by using its national commercial powers to regulate truly local or non-economic matters that do not sufficiently affect commerce. But that is simply not this case—here, the challengers "do not question that Congress can regulate the interstate health care and health insurance markets, or that Congress reasonably could conclude that decisions about whether to purchase health insurance substantially affect interstate commerce." *Seven-Sky*, 661 F.3d at 16. No chain of inferences is necessary to relate the MCR to the regulation of interstate commerce; instead, Congress is regulating a national market – the very subject matter and purpose of the Commerce Clause. *See also Thomas More Law Ctr. v. Obama*, 651 F. 3d 529, 545 (6th Cir. 2011) ("*Thomas More*") (The effects on interstate commerce here "are not at all

attenuated as were the links between the regulated activities and interstate commerce in *Lopez* and *Morrison*. Similar to the causal relationship in *Wickard*, self-insuring individuals are attempting to fulfill their own demand for a commodity rather than resort to the market and are thereby thwarting Congress's efforts to stabilize prices.")

The relevant limitation to the MCR is that expressed by the terms of the Commerce Clause itself, and the MCR's constitutionality rests on the fact that what it regulates is interstate commerce. *See Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423 (1946) ("The only limitation [the Clause] places upon Congress' power is in respect to what constitutes commerce, including whatever rightly may be found to affect it sufficiently to make Congressional regulation necessary or appropriate"). Upholding a regulation of commerce itself poses no danger of transforming the Commerce Clause into a federal police power.

C. There Is No Constitutional Basis For Carving Out A Novel Exception To Congress's Recognized Power To Regulate Interstate Commerce.

1. Whether the minimum coverage requirement should be categorized as activity or inactivity is an artificial distinction irrelevant to the question of the Act's constitutionality.

The challengers repeatedly proclaim a constitutional rule limiting the Commerce Clause to regulations affecting economic "activities." But the

challengers have manufactured this supposed "rule" out of whole cloth. To put it simply, as Judge Silberman wrote in *Seven-Sky*, "[n]o Supreme Court case has ever held or implied that Congress's Commerce Clause authority is limited to individuals who are presently engaging in an *activity* involving, or substantially affecting, interstate commerce," *Seven-Sky*, 661 F.3d at 16; *see also Florida ex rel. Atty. Gen. v. U.S. Dept. of Health and Human Serv.*, 648 F.3d 1235, 1286 (11th Cir. 2011) ("Florida") ("[W]e are not persuaded that the formalistic dichotomy of activity and inactivity provides a workable or persuasive enough answer in this case. ... The Court has never expressly held that activity is a precondition for Congress's ability to regulate commerce ..."); *Thomas More*, 651 F.3d at 547 ("As long as Congress does not exceed the established limits of its Commerce Power, there is no constitutional impediment to enacting legislation that could be characterized as regulating inactivity.")

The challengers' claim is simply wordplay with the terminology found in some judicial opinions, none of which concern a difference between action and inaction. The challengers' claim rests on the happenstance that some opinions have used that language,[3] even though the Court has never

---

[3] The Court uses other terms elsewhere. *See, e.g.*, *Bd. of Trade of Chicago v. Olsen*, 262 U.S. 1, 37 (1923) (commerce power authorizes regulation of "'[w]hatever amounts to more or less constant practice and threatens to obstruct or unduly to burden'" interstate commerce) (quoting with approval *Stafford v. Wallace*, 258 U.S. 495, 521 (1922)). The challengers' theory is as futile as it would be to argue that the Court's use in *Olsen* and *Stafford* of the word "practice" limited the commerce power to "practices" as opposed to "non-practices."

suggested the existence of any *per se* limitation on the commerce power based on such conceptual categories. "[S]uch formulas are not provided by the great concepts of the Constitution." *Lopez*, 514 U.S. at 573 (Kennedy, J., concurring) (internal quotation marks omitted). It is implausible that without saying so, and contrary to its long-standing acknowledgment that the commerce power is plenary, the Court's choice of wording established a new category of matters related to commerce but beyond congressional regulation because someone might not label them an "activity." *See Raich*, 545 U.S. at 22. As Judge Silberman explained in *Seven-Sky*:

> To be sure, a number of the Supreme Court's Commerce Clause cases have used the word "activity" to describe behavior that was either regarded as within or without Congress's authority. But those cases did not purport to limit Congress to reach only *existing* activities. They were merely identifying the relevant conduct in a descriptive way, because the facts of those cases did not raise the question—presented here—of whether "inactivity" can also be regulated.

661 F.3d at 17 (footnote omitted). In short, as the D.C. Circuit correctly concluded, the cases upon which the challengers rely simply do not "endorse the view that an existing activity is some kind of touchstone or a necessary precursor to Commerce Clause regulation." *Id.*

Moreover, while the challengers incorrectly claim that upholding the MCR would lead down a slippery slope, their proposed line between activity and inactivity is itself a slippery one: "[W]ere 'activities' of some sort to be required before the Commerce Clause could be invoked, it would be rather difficult to define such 'activity.'" *Seven-Sky*, 661 F.3d at 17. After all, laws criminalizing "mere possession" of child pornography or drugs have been consistently upheld on the theory that passive possession makes active trade more likely in the future. *See, e.g.*, *Raich*, 545 U.S. at 19; *United States v. Sullivan*, 451 F.3d 884, 891-92 (D.C. Cir. 2006). And perhaps more importantly, this Court has repeatedly rejected a whole host of similarly uncertain semantic distinctions in the Commerce Clause context—such as the now-discredited line between "indirect" and "direct" effects on interstate commerce—because they are unworkable. *See Wickard*, 317 U.S. at 119-20; *see also Lopez*, 514 U.S. at 569-71 (Kennedy, J., concurring); *Florida*, 648 F.3d at 1287 ("[T]he Court's attempts throughout history to define by 'semantic or formalistic categories those activities that were commerce and those that were not' are doomed to fail.") (quoting *Lopez*, 514 U.S. at 569 (Kennedy, J., concurring)).

In any event, the distinction between "activity" and "inactivity" proposed by the challengers is an artificial one. The choice not to purchase health care insurance is *not* without effect on the health insurance market. As discussed above, the vast majority of uninsured Americans do seek and receive often expensive medical care, and those costs are shifted to people who do have health care insurance in the form of higher premiums. The behavior that

the challengers characterize as "inactivity" thus in actuality significant effect on the nationwide health care insurance market.

The Court long ago concluded that "artificial" categories and "abstract distinction[s]" provide no proper basis for constraining the scope of the commerce power. *See Lopez*, 514 U. S. at 556 (pre-1937 distinction between "direct" and indirect" effects abandoned because it "artificially had constrained the authority of Congress to regulate interstate commerce"); *id.* at 572-73 (Kennedy, J., concurring) (approving Court's rejection of "the abandoned abstract distinction between direct and indirect effects on interstate commerce"). The challengers' argument is a novel version of the same discarded mistake.

2. The challengers' proposed distinction between activity and inactivity rests on a discredited substantive due process theory of economic liberty that is not cognizable in a legal action challenging a federal statute on Article I grounds.

The challengers' real claim is that by imposing an obligation on certain Americans to participate in a market at a particular time, the Act invades their economic liberty. *See Seven-Sky*, 661 F.3d at 19 ("Appellants' view that an individual cannot be subject to Commerce Clause regulation absent voluntary, affirmative acts ... expresses a concern for individual liberty that seems more redolent of Due Process Clause arguments."). As the D.C. Circuit thus acknowledged, the challengers' concerns sound

in what we now call economic substantive due process, and associate with the famous decision in *Lochner v. New York*, 198 U.S. 45 (1905). The challengers mention neither *Lochner* nor economic substantive due process, and for good reason: the Supreme Court rejected the doctrine many decades ago. "The doctrine that prevailed in *Lochner* ... has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). Cast as a challenge to Congress's Article I powers, the challengers' theory fails even to state a cognizable legal claim. The substantive powers enumerated in Article I authorize Congress to impose obligations and duties on individuals. In the absence of a violation of one of the Constitution's limitations on legislative power, the challengers' claims are *political* arguments that can only receive a political remedy.

In any event, the claim that there is anything novel about the MCR because it obligates citizens to take action or denies them the "right" to be left alone is wrong.[4] Every time the federal government

---

[4] The MCR is not a novelty in the debate over health care. Legislation requiring Americans to purchase health insurance was first introduced by Republican Senators in 1993. *See* Health Equity and Access Reform Today Act of 1993, S. 1770, 103d Cong., 1st Sess. (1993). In 2006, a Democratic legislature and Republican governor in Massachusetts adopted a health reform law with an individual mandate. And while Congress was formulating the Act in 2009, a plan released by former Senate Majority Leaders Howard Baker, Tom Daschle, and Bob Dole through the Bipartisan Policy Center also advocated an individual mandate.

requires someone to move in order to build an interstate highway, Congress is exercising the commerce power to require action by individuals who might prefer inactivity to compensation for the taking. Congress has put obligations on individuals at least since the Militia Act of 1792. In *Wickard*, 317 U.S. at 129, the Court upheld Commerce Clause legislation despite the objection that the law "forc[ed] some farmers into the market to buy what they could provide for themselves." In parallel fashion, the MCR forces some taxpayers who benefit from the Act's health care protections "into the market" to purchase health insurance despite claims they "could provide [it] for themselves" by self-insurance. Neither in *Wickard* nor in the present case do these observations even suggest a constitutional infirmity.

As these examples demonstrate, there is nothing unconstitutional or unusual about legislation that requires individuals to bear some obligation to achieve a broader public goal. In the present case, moreover, the MCR is simply "a coordination mechanism to ensure that everyone participates in a well-functioning private insurance market. By discouraging any one of us from free-riding, the mandate allows each of us greater protection and more affordable coverage" – just like Social Security and Medicare. *See* Rahul Rajkumar & Harold Pollack, *An Essential Mandate*, L.A. Times (Jan. 7, 2011). The Constitution presupposes the legitimacy of legislative authority when exercised within its express limitations. "There is no absolute freedom to do as one wills or to contract as one chooses" and "the Constitution does not recognize an absolute and uncontrollable liberty." *W. Coast Hotel v. Parrish*, 300 U.S. 379, 391-92 (1937) (quotation omitted).

When, as here, Congress executes its enumerated powers, "the United States possesses the power ... to regulate the conduct of the citizen [and thus] abridge his liberty or affect his property." *Nebbia v. New York*, 291 U.S. 502, 524-25 (1934).

We agree with the challengers' insistence that the Constitution is dedicated to the principles of freedom. Nonetheless, it is unclear what they think so severe about the Act as to be an unconstitutional interference with liberty. The constitutional validity of Medicare is beyond question, yet Medicare requires individual taxpayers to pay for health insurance they will need in old age. The difference is that the MCR allows individual taxpayers to choose to purchase insurance in the market or pay a penalty, while under Medicare taxpayers must pay into the program. The MCR is thus arguably a *less* intrusive approach to achieving Congress's legislative purpose than Medicare, and therefore cannot be an unconstitutional deprivation of liberty. *See, e.g.*, *Rumsfeld v. FAIR*, 547 U.S. 47, 59-60 (2006) (holding that where Congress could directly impose a requirement it cannot be unconstitutional for Congress to permit private choices and impose financial consequences). Moreover, the MCR does not require that people receive particular medical care and, in fact, explicitly exempts those with religious objections. ACA § 10106(b)(1).

The Commerce Clause empowers Congress to enact legislation that places obligations on individuals and imposes penalties for violating those obligations. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 401 (1940). Liberty under our Constitution is liberty in a system authorizing the

exercise of the governmental authority the Constitution delegates to Congress. If the challengers disagree with elements of the Act, they may address them in the proper, democratic forum.

3. Upholding the Act and the minimum coverage requirement would not render Congress's Commerce Clause authority without limits.

The Eleventh Circuit suggested that accepting the government's Commerce Clause arguments here would necessarily permit Congress to "compel[] Americans to purchase a certain product from a private company," such as a car. *Florida*, 648 F.3d at 1297. But that is simply not true. As the D.C. Circuit found, "the health insurance market is a rather unique one, both because virtually everyone will enter or affect it, and because the uninsured inflict a disproportionate harm on the rest of the market as a result of their later consumption of health care services." *Seven-Sky*, 661 F.3d at 18. There is nothing speculative about these harms; as Judge Silberman recognized, Congress here specifically found that "$43 billion in annual costs [arising from the consumption of health care services by the uninsured] are shifted to the insured, through higher premiums." *Id.* at 14. As a result, "Congress reasonably determined that as a *class*, the uninsured create market failures," *id.* at 20, and reasonably sought to correct those failures by imposing the MCR.

In contrast, it cannot seriously be maintained that individuals who fail to buy cars from a particular private company create any comparable market failure or inflict any similarly

"disproportionate harm" on car buyers as a class. To parallel the problem that Congress faced here, the Eleventh Circuit's hypothetical would need to be altered fundamentally to involve the redistribution of risks and costs in a national market. If, for example, certain individuals across the country were somehow able to obtain cars worth billions of dollars without paying for them—thereby imposing an extra $43 billion a year in increased costs on legitimate car buyers—then *that* would begin to resemble the problem that Congress faced here. In that unlikely event, if state and local governments were unable to take corrective action, Congress presumably could step in—as here—to provide a financial incentive for people to pay for their own cars rather than passing those costs on to others.

But the real point here is not to debate hypotheticals—the fact is that consideration of the grave question of whether this Court must invalidate a landmark act of Congress is not advanced by entertaining a parade of hypotheticals. This is particularly true with respect to imagined laws that would impinge on an individual's bodily autonomy. The Supreme Court long ago recognized a constitutionally protected liberty interest in decisions about an individual's bodily integrity. *See, e.g.*, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Cruzan*, 497 U.S. at 278-79. In the unlikely event a Congress someday attempted to invade such a personal liberty as the interest in refusing to eat a certain food, a significant constitutional issue would be posed. The judiciary possesses authority and doctrinal tools to address laws that interfere oppressively with an individual's

physical integrity. It is quite unnecessary to return to *Lochner* or deny Congress the authority to regulate an interstate market in order to prevent an Orwellian state. There is a familiar and principled distinction between personal freedoms that the courts protect by searching analysis of legislation restricting them, and "'liberties which derive merely from shifting economic arrangements.'" *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)). Freedoms related to the individual's physical integrity come to the courts "with a momentum for respect lacking when appeal is made to" economic liberty. *Id.*

Even if this Court believes that principles of *economic* liberty might in some case call for curtailing a congressional requirement that individuals participate in a particular market, two factors make the health insurance market unique. *First*, as the Supreme Court has observed, insurance is uniquely and by definition "an arrangement for transferring and distributing risk." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979) (citation omitted). As a consequence, a "fundamental object" of insurance "is to distribute ... loss over as wide an area as possible." *Id.* at 213 (citation omitted). The power effectively to regulate the pricing structure of an insurance market necessarily involves the power to regulate the area over which the risks are spread – a characteristic of insurance that can be said of no other market.

Second, as the D.C. Circuit pointed out, health care is distinctive in that almost every individual will, at some point, require health care and yet the

timing and costs of those needs are unpredictable: health care insurance is, as a consequence, the only practicable way in which health care can be financed. And existing state and federal laws, which embody a basic and permanent commitment of the American people, already result in the transfer of the costs of health care for the uninsured to other market participants, thus creating a burden on other payers. The MCR merely regulates the unavoidable participation of individuals in this singular market in order to make its financing more efficient and eliminate its current inequities. Because this market is unique, Congress infringes no general principle of liberty in ordering its activities in a unique way to increase efficiency and eliminate inequity. Accordingly, reversal in this case need not commit the Court to affirmance in any case involving a mandate to make a purchase, but would reflect the unique characteristics of insurance markets in general and the health care insurance market in particular.

Nor is there any validity to the Eleventh Circuit's view that the MCR oversteps Congress's commerce power because it "trenches on an area of traditional state concern." *Florida*, 648 F.3d at 1303. Judge Silberman expressly addressed and rejected this argument in *Seven-Sky*, finding that "decades of established federal legislation in these areas suggest the contrary." *Seven-Sky*, 661 F.3d at 19. Moreover, the D.C. Circuit found, the "states' powers over health and general welfare" does *not* "make the health care *industry* a traditional state concern." *Id.* And the Sixth Circuit did not even seriously consider this argument because there the "plaintiffs concede[d]" that "Congress has the power under the

Commerce Clause to regulate the interstate markets in health care delivery and health insurance." *Thomas More*, 651 F.3d at 546.

Finally, it bears emphasis that conducting the Commerce Clause inquiry here by requiring the *government* to articulate and defend "limiting principles" on its commerce power—as the Eleventh Circuit did, *see Florida*, 648 F.3d at 1295-98—turns the proper constitutional analysis upside down. As Judge Silberman explained in *Seven-Sky*, the "most important consideration" in this case "might well be" that the courts are "obliged . . . to presume that acts of Congress are constitutional," not the contrary. 661 F.3d at 18. Properly understood, in other words, the burden here is not on Congress to demonstrate the constitutional use of its well-established commerce power, but rather is on the challengers to make "a clear showing" of *unconstitutionality*—and they have not done so. *Id.*

II. CONGRESS HAS POWER UNDER THE NECESSARY AND PROPER CLAUSE TO ADOPT THE MINIMUM COVERAGE REQUIREMENT AS A MEANS CONGRESS DEEMS APPROPRIATE AND CONDUCIVE TO ACCOMPLISH THE ENDS OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT.

The Constitution grants Congress certain enumerated powers, and also authority to "make all Laws which shall be necessary and proper for carrying into Execution th[os]e foregoing Powers." Art. I, § 8, cl. 18. Because the MCR is a direct regulation of interstate commerce, we think it unnecessary to consider Congress's additional

powers under the Necessary and Proper Clause. Were there any doubt that the MCR is a valid exercise of Congress's commerce power, however, the provision is a valid means to the full and effective execution of the Act.

A. The Necessary And Proper Clause Empowers Congress To Choose The Means Best Suited In Its Judgment To Execute Its Express Powers, As Long As The Means Are Conducive To A Constitutionally Legitimate Legislative End.

Since *McCulloch v. Maryland*, it has been settled law that the Necessary and Proper Clause empowers Congress to choose those means that *Congress* deems necessary to the effective exercise of its enumerated powers. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). As the Supreme Court held in *McCulloch*, the Clause does not limit Congress to choose only those means that are necessary in some strictly logical sense, a rule that would render the federal government unworkable. *Id.* at 415-16, 420-21. Rather, the Clause permits Congress to adopt *any* means "appropriate" to the achievement of *any* legitimate congressional purpose:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Id. at 421. The Court recently reaffirmed the breadth of the Clause in *United States v. Comstock*, where it recognized that the concern expressed in *Lopez* about "pil[ing] inference upon inference" has no place in analyzing a provision that is a Necessary and Proper means to executing an enumerated power. 130 S. Ct. 1949, 1963 (2010) (quoting *Lopez*, 514 U.S. at 567).

B. The Minimum Coverage Requirement Is An Appropriate Means Of Executing The Act's Regulation Of The Interstate Health Care Insurance Market, Is Plainly Adapted To The End Of Assuring Affordable Health Care For All Americans, And Violates No Constitutional Prohibition.

The Act's purpose, to make affordable health insurance available to all Americans, is a constitutionally legitimate end. *See South-Eastern Underwriters*, 322 U.S. at 552-53. As described above, Congress carefully explained why the MCR is essential to the Act's broader goal. The challengers present no plausible claim that the MCR violates any express constitutional prohibition; their suggestion that the Necessary and Proper Clause itself imposes such a prohibition is contrary to both principle and precedent.[5] Since the MCR is "plainly adapted" to

---

[5] In *Comstock*, the Court repeatedly stressed the difference between the Necessary and Proper Clause issue and any individual liberty claims in that case. 130 S. Ct. at 1954, 1956, 1957, 1965. The Necessary and Proper Clause cannot be used to repackage an individual-liberty argument, such as a Fifth Amendment economic due process claim, into a claim about Congress's Article I powers.

Congress's legitimate regulatory end, the provision is, plainly, valid under the Necessary and Proper Clause.

This conclusion is bolstered by two additional considerations. *First*, the Court has maintained ever since *McCulloch* that Congress may choose any means it deems "conducive to the complete accomplishment of [its] object" – that is, appropriate to render its legislation completely effective. *See McCulloch*, 17 U.S. at 424. The Necessary and Proper Clause does not invite courts to overturn Congress's choices because litigants may prefer that Congress seek its goals through different measures.

Second, since *McCulloch* it has been clear that courts should not substitute their views on which means are appropriate for those of the legislature. In *McCulloch*, the Court explained that even if the constitutional "necessity" of a national bank were "less apparent" than the Court believed, "none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place" – that is, Congress. 17 U.S. at 423. Modern cases state this principle using the rational basis test: the Clause requires that "a federal statute represent a rational means for implementing a constitutional grant of legislative authority." *Comstock*, 130 S. Ct. at 1962. The issue in this case is therefore not whether this Court concludes that the MCR is in fact necessary to "the complete accomplishment" of Congress's goals "but only whether a 'rational basis' exists for so

concluding." *Raich*, 545 U.S. at 22; *see also Comstock*, 130 S. Ct. at 1956.[6]

Congress, through the Act, has used its constitutional powers to ensure that all Americans have access to quality, affordable health care, while significantly reducing long-term health care costs. Although the challengers may not agree with these goals, they are well within Congress's constitutional bounds.

III. CONGRESS HAS INDEPENDENT AUTHORITY UNDER ITS TAXING POWER TO ADOPT THE MINIMUM COVERAGE REQUIREMENT.

The Constitution grants Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises, to ... provide for the ... general Welfare of the United States[.]" U.S. Const. art. I, § 8, cl. 1. This Clause provides an additional constitutional basis for the MCR. As this Court has long recognized, Congress's General Welfare Clause power is "extensive," *License*

---

[6] In addition to the steep uphill battle that challengers face to demonstrate that Congress lacked a "rational basis" here, as a matter of common sense it is also implausible to maintain that the MCR is "improper" in the face of well-established programs like Social Security or Medicare. As discussed *supra* at 5, neither of those programs—which require individuals to make payments to provide for their retirement and to provide for their health coverage after they are 65 years of age or if they meet other criteria—has ever been considered such a novel intrusion into liberty that judges would be justified in overriding the considered judgment of the elected branches that adopted them.

Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1867), and the MCR fits well within this authority.

The Act requires individuals to obtain coverage or pay a penalty through the tax system. ACA § 1501(b). The tax penalty is codified in the Internal Revenue Code; it applies only to taxpayers otherwise required to file income tax returns; it is calculated with reference to an individual's income; it is assessed and collected like other tax penalties; and it is enforced by the Internal Revenue Service. Congress expected the provision to raise revenue for the federal government. In part because of the MCR, the Act is projected to reduce the budget deficit by $143 billion over ten years. CBO Letter to Nancy Pelosi (Mar. 20, 2010), *available at* http://www.cbo.gov/ftpdocs/113xx/doc11379/AmendReconProp.pdf.

The Eleventh Circuit found that the "plain language" of the minimum coverage provision makes clear that it "is not a tax, but rather ... a 'penalty.'" *Florida*, 648 F.3d at 1315. It is well established, however, that the validity of an assessment under the taxing power does not turn on the exaction's label. Rather, in "passing on the constitutionality of a tax law," a court is "'concerned only with its practical operation, not ... the precise form of descriptive words which may be applied to it.'" *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941) (quoting *Lawrence v. State Tax. Comm'n*, 286 U.S. 276, 280 (1932)) Against that backdrop, the Eleventh Circuit's suggestion that Congress somehow disavowed its taxing power by employing the term "penalty" in the minimum coverage requirement is unsupportable.

The Eleventh Circuit also found that because the Act contains "several provisions" where Congress used the word "tax," it must be presumed that Congress's use of the term "penalty" in the minimum coverage requirement was intended to convey a *different* meaning. *Florida*, 648 F.3d at 1316-17. But that finding, too, is inconsistent with the proper analysis of a tax law's constitutionality—as noted directly above, the validity of a congressional enactment under the taxing power does not turn on nomenclature. Here it is clear that the provision in question *functions* as a tax: the amount of the exaction is calculated as a percentage of household income for income tax purposes, 26 U.S.C.A. § 5000A(c); a taxpayer's responsibility for family members depends on their status as dependents under the Internal Revenue Code, 26 U.S.C.A §§ 5000A(a) and (b)(3); taxpayers filing jointly are jointly liable for the penalty, 26 U.S.C.A. § 5000A(b)(3)(B); and the IRS will assess and collect the penalty in the same manner as other penalties imposed under the Internal Revenue Code. 26 U.S.C.A. §§ 5000A(b)(2) and (g). Particularly given the lower courts' obligation to resort to "every reasonable construction" to save a statute from unconstitutionality, *Edward J. DeBartolo Corp v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988), the Eleventh Circuit's elevation of labels over substance in assessing the validity of the penalty provision under Congress's taxing authority should be reversed.

CONCLUSION

The judgment of the court of appeals invalidating the minimum coverage requirement should be reversed.

Respectfully submitted,

PROFESSOR WALTER DELLINGER
Counsel of Record
1701 18th Street, N.W.
Washington, D.C. 20009
(202) 383-5319

CHRISTOPHER J. WRIGHT
TIMOTHY J. SIMEONE
WILTSHIRE & GRANNIS LLP
1200 18th Street, N.W.
Washington, D.C. 20036
cwright@wiltshiregrannis.com
(202) 730-1300

JANUARY 13, 2012

AMICUS CURIAE BRIEF

No. 11-398

In The
Supreme Court of the United States

Department of Health and Human Services, et al.,
Petitioners,
v.
Florida, et al., *Respondents*

On Writ of Certiorari to the United States
States Court of Appeals
For the Eleventh Circuit

BRIEF AMICI CURIAE OF DAVID R. RIEMER AND COMMUNITY ADVOCATES IN SUPPORT OF PETITIONERS ON THE MINIMUM COVERAGE QUESTION

DAVID R. RIEMER
Senior Fellow
Community Advocates
Public Policy Institute
728 N. James Lovell St.
Milwaukee, WI 53233
(414) 270-2943
DRiemerMil@yahoo.com

DEAN A. STRANG *
Hurley, Burish &
Stanton, S.C.
33 E. Main St., Suite 400
Madison, WI 53703
(608) 257-0945
dstrang@hbslawfirm.com
* *Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 10

ARGUMENT 14

I. THE AFFORDABLE CARE ACT (ACA) MINIMUM COVERAGE PROVISION AIMS TO DETER THE 100% SELF-INSURED FROM CHOOSING TO SHIFT THEIR HEALTH CARE COSTS TO INSURED AMERICANS AND INSURING EMPLOYERS 14

A. Individuals Who Refuse to Buy Health Insurance Are Not Engaged in "Passive" Non-Economic Inactivity. Rather, They Have Decided to Make an "Active" Economic Choice to 100% Self-Insure 14

TABLE OF CONTENTS — Continued

Page

B. When Individuals Decide to Become 100% Self-Insured, They Turn Insured Americans and Insuring Employers Into "Excess Liability Carriers," and Make Us Pay For Over $42 Billion in Uncompensated Care Through Higher Premiums, Lower Living Standards, and Less Competitive Employers 18

C. The 100% Self-Insured Also Inflict Major Economic Harm on Themselves 25

II. THE ACA POLICY OF CREATING AN ECONOMIC INCENTIVE FOR THE 100% SELF-INSURED TO OBTAIN HEALTH INSURANCE IS A VALID EXERCISE OF POWER UNDER THE COMMERCE CLAUSE 29

TABLE OF CONTENTS — Continued

Page

III. CONCLUSION: CONGRESS' POLICY OF CREATING AN ECONOMIC MOTIVATION FOR THE 100% SELF-INSURED TO OBTAIN HEALTH INSURANCE IS A CONSTITUTIONALLY VALID MEANS TO ACHIEVING LEGITIMATE ENDS — FAIRER PAYMENT OF MEDICAL COSTS, IMPROVED HEALTH OUTCOMES, AND ECONOMIC RELIEF FOR THE NATION'S SELF-INSURED, INSURED, AND EMPLOYERS 36

TABLE OF AUTHORITIES

Page

CASES

Gonzales v. Raich, 545 U.S. 1 (2005) 35

Wickard v. Filburn, 317 U.S. 111 (1942) 35

CODES AND STATUTES

Emergency Medical Treatment and Labor Act
42 U.S.C. 1395dd (2006) 20

Patient Protection and Affordable Care Act,
Pub. L. No. 111-148, 124 Stat. 119, (2010) (as
amended) 29, 30

MISCELLANEOUS PUBLICATIONS

Centers for Medicare & Medicaid Services,
National Health Expenditure Data: History,
https://www.cms.gov/NationalHealthExpend
Data/02_NationalHealthAccountsHistorical.
asp#TopOfPage (last modified Nov. 4, 2011) 15

Page

Centers for Medicare & Medicaid Services, *National Health Expenditure Data: NHE Fact Sheet*, http://www.cms.gov/National HealthExpendData/25_NHE_Fact_Sheet.asp (last modified Nov. 4, 2011). 16

Carmen DeNavas-Walt et al., U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2010*, 23-27 (Sept. 2011), http://www.census. gov/prod/2011pubs/p60-239 pdf 16, 22

Gorman Actuarial et al., *The Impact of the ACA on Wisconsin's Health Insurance Market*, (July 18, 2011), http://www.free markethealthcare.wi.gov/section.asp?linkid= 1748&locid=173 (prepared for the Wisconsin Department of Health Services) 8

Page

Jack Hadley et al., *Covering The Uninsured In 2008: Current Costs, Sources Of Payment, And Incremental Costs*, Health Affairs, No.5, 2008.http://content.healthaffairs.org/content /27/5/w399.full.pdf 21

Kaiser Commission on Medicaid and the Uninsured, *The Uninsured: A Primer, Key Facts about Americans without Health Insurance*, (Washington: Kaiser Family Foundation, December 2010), http://www.kff. org/uninsured/upload/7451-06.pdf 25-28

Kaiser Family Foundation, *Heath Care Costs: A Primer*, (March 2009), http://www. kff.org/insurance/upload/7670_02.pdf 16

David R. Riemer and Alain Enthoven, *The Only Public Health Plan We Need*, New York Times (June 24, 2009), http://www.nytimes.com/2009/06/25/opinion/ 25enthoven.html 5, 6

Page

David R. Riemer, *Prescription for a Health Insurance Compromise: Forget the Public Option and Co-ops, Rewire the Exchange,* Committee for Economic Development (September 24, 2009), http://www.ced.org/commentary/65-commentary/378- prescription -for-a-health-insurance-compromise-forget-the-public-option-and-co-ops-rewire--the-exchange 5, 6

Jeannine S. Schiller et al., *Summary Health Statistics for U.S. Adults: National Health Interview Survey, 2010*, 10 Vital and Health Statistics, (Nov. 2011), http://www.cdc.gov/nchs/data/series/sr_10/sr10_252.pdf 15

Kathleen Stoll et al., "Hidden Health Tax: Americans Pay a Premium," Families USA, (May 14, 2009) 23

INTEREST OF THE AMICI CURIAE

David R. Riemer and Community Advocates join in this brief in support of the petitioners in No. 11-398 (Department of Health and Human Services, et al. v. Florida, et al.) with respect to the minimum coverage question.[1]

Community Advocates (CA), founded in 1976, provides basic needs and advocacy services each year to tens of thousands of low-income, at-risk individuals and families in the Milwaukee area. The organization's services include health insurance advocacy. Every year, CA helps impoverished and uninsured Milwaukeeans to enroll in Wisconsin's Medicaid program and assists those ineligible for the program to find alternative ways of obtaining medical care.

David Riemer, Senior Fellow at the Community Advocates Public Policy Institute, is a health policy expert who has worked for over 35 years to create state and federal policies that expand health care

---

[1] No counsel for any party authored this brief in whole or in part. Neither counsel for any party, nor any party, made a monetary contribution intended to fund the preparation or submission of this brief.

coverage to low-income workers and control health care costs.[2]

In the 1970s, Riemer drafted Wisconsin's first Medicaid rule during the Administration of former Wisconsin Governor Patrick Lucey. He also worked on drug regulation and mental health policy reform for the U.S. Senate Subcommittee on Health and Scientific Research, chaired by the late Senator Edward Kennedy. Returning to Wisconsin in the 1980s, he helped to draft legislation that converted the state employee health plan into a large and long-lasting health insurance exchange.

While serving in the 1990s as budget director and administration director for Milwaukee Mayor John Norquist, Riemer teamed up with the Administration of former Wisconsin Governor Tommy Thompson to design the state's BadgerCare program. BadgerCare weaves together the portion of Medicaid that serves the poorest uninsured children and custodial parents with the State Children's Health Insurance Program (SCHIP) to greatly

---

[2] *See generally* http://ca-ppi.org (providing additional information on David Riemer and the Community Advocates Public Policy Institute).

expand coverage for low-income families.

In 2003, as State Budget Director for former Wisconsin Governor Jim Doyle, Riemer worked to further improve the state employee health plan's exchange mechanism. From 2004 through 2007, as head of the Wisconsin Health Project, he coordinated the development of bi-partisan legislation to create a comprehensive state health insurance plan, which was folded into a bill passed by the Wisconsin State Senate.

In 2008, Riemer joined CA to lead its Public Policy Institute (PPI), and is now a Senior Fellow. Drawing on CA's experience in directly assisting poor people, and seeking to create for the poor and non-poor alike a rational system of comprehensive and affordable health insurance, Riemer and CA have worked to bring about policy changes at the state and national level. Their goal has been to persuade policy-makers to enact laws that expand health insurance coverage to the low-income uninsured population, control health insurance costs, and improve the quality of health care. Much of Riemer's and CA's work has focused on the ACA.

Specifically, Riemer and CA have played a major role in Wisconsin, and a significant role nationally, in advocating for: (1) the expansion of BadgerCare coverage to low-income non-custodial parents, both in advance of and pursuant to the ACA's extension of Medicaid to this group; and (2) the adoption of federal and state policies for the insurance exchanges created by the ACA that will enable them to be effective in covering uninsured individuals between 133% and 400% of the Federal Poverty Level (FPL), assisting small employers to obtain affordable coverage for their employees, and holding down health insurance costs while improving health care quality.

The position that Riemer and CA have taken on health insurance exchanges is unique. Typically, advocates for the low-income population have favored non-market models of health insurance reform (such as a "single payer" plan, the expansion of Medicare, or the inclusion of a "public option") that critics often labeled as "socialized medicine." In contrast, Riemer and CA have supported an evidence-based mechanism for organizing *private market forces*—choice, competition, and incentives—

to induce private insurance companies to hold down health insurance costs and improve the quality of health care. Drawing on official data that demonstrate that the marketplace competition model used by the Wisconsin state employee health plan in Dane County has lowered health insurance premiums by approximately $1,000 for individual coverage and $3,000 for family coverage (compared to the state's other 71 counties), Riemer and CA have advocated for the adoption of the Dane County model by the ACA and states' exchanges. Doing so, they have argued, will stimulate competition in the private insurance market, lower costs and improve health quality.[3]

Thus, instead of championing a regulatory approach, Riemer and CA urged federal policy-makers during the debate on the ACA in 2009-

---

[3] See, *e.g.*, David R. Riemer and Alain Enthoven, *The Only Public Health Plan We Need*, New York Times (June 24, 2009), http://www.nytimes.com/2009/06/25/opinion/25enthoven.html; David R. Riemer, *Prescription for a Health Insurance Compromise: Forget the Public Option and Co-ops, Rewire the Exchange*, Committee for Economic Development (September 24, 2009), http://www.ced.org/commentary/65-commentary/378-prescription-for-a-health-insurance-compromise-forget-the-public-option-and-co-ops-rewire--the-exchange.

2010—and state policy-makers since 2010—to design state health insurance exchange "pools" that, as in the Dane County experience, were (1) average in risk, (2) very large in size (approximately 25% of the county's population not enrolled in Medicaid or Medicare), and (3) composed of participants who had extensive choice among competing health care but also clear economic incentives to select the low-cost plan.[4] They argued that the evidence showed that such a market-oriented approach would create the kind of stern and lasting discipline of the health insurance market that is needed to constrain costs and upgrade quality.[5]

Advancing these positions on the uninsured and exchanges, Riemer served in 2010 and 2011 on the Wisconsin Legislative Council Special Committee on Health Care Reform Implementation, as well as on the National Association of Social Insurance (NASI) Study Panel on Health Insurance Exchanges. In 2011, CA launched a Project for Health Insurance Exchange Education (PHIXE) to provide technical

---

[4] *Id.*
[5] *Id.*

support to state policy-makers to design exchanges that are effective in controlling costs.

The low-income, uninsured individuals and families that CA serves, and on whose behalf Riemer and CA work, will benefit greatly if the ACA's minimum coverage provision in dispute in this case is upheld.

If the minimum coverage provision is found to be constitutional, health insurance will be extended by 2016 to thousands of CA's clients who are now 100% self-insured, but who will respond to the provision's economic incentive to obtain health insurance coverage by either enrolling in Medicaid (i.e., BadgerCare), obtaining individual policies from competing private health companies, or enrolling in their employers' health care programs (if their employers offer health insurance). Independent experts estimate that 340,000 uninsured individuals across Wisconsin will obtain coverage due to a combination of the ACA's minimum coverage provision, expanded Medicaid eligibility for those below 133% of FPL, and federal tax credits aimed at

inducing low-to-moderate income individuals to obtain health insurance.[6]

Upholding the ACA's minimum coverage provision will also benefit CA's low-income clients, Wisconsinites in general, and Americans who work—as well as the nation's small employers—by helping to shore up the law's new health insurance exchanges. The minimum coverage provision's clear economic incentive to obtain health insurance will encourage more working individuals above 133% of FPL and more small employers to use these exchanges. Those who do so will then gain (compared to now) a much wider choice of health care plans, regardless of health status, at normal

---

[6] In 2016, implementation of the ACA in Wisconsin is estimated to reduce the number of uninsured from 520,000 to 180,000. This expansion in insurance coverage is attributable in part to the ACA's extension of Medicaid to currently uninsured individuals below 133% of FPL, but also to the operation of the minimum coverage provision's incentive to those between 133% and 400% of FPL to obtain coverage as well as the law's federal tax credits for members of the 133%-400% group who obtain coverage through a state health insurance exchange. Gorman Actuarial et al., *The Impact of the ACA on Wisconsin's Health Insurance Market*, 7 tbl.2 (July 18, 2011), http://www.freemarkethealthcare.wi.gov/section.asp?linkid=1748&locid=173 (prepared for the Wisconsin Department of Heath Services).

market-rate premiums. In addition, expanding the size of the pool of workers and small employers that enroll in the ACA's exchanges will strengthen the exchanges' capacity to trigger more intense market competition by the private insurance companies that bid on the exchange. Such enhanced competition will in turn help to hold down insurance costs for individuals and businesses alike, while enhancing the quality of health care.

On the other hand, the elimination of the law's minimum coverage provision (even if the law's Medicaid expansion is upheld) will mean that a large portion of low-income, uninsured CA clients, Wisconsin residents, and Americans will remain uninsured. Striking down the provision would also shrink the pool of participants that use health insurance exchanges, thus diminishing their potential to galvanize private market forces to constrain costs and improve quality.

SUMMARY OF THE ARGUMENT

The Affordable Care Act (ACA) is lengthy and complex, but it rests on a simple philosophy and just a few major building blocks.

Rejecting calls for a radical "socialized" approach to health insurance reform (such as a "single payer" program), Congress decided instead to preserve, but modify, the nation's three major health insurance institutions: Medicaid for the poor, the private health insurance market for the non-poor non-elderly, and Medicare for persons 65 and over. At the same time, Congress substantially modified all three to make sure that virtually every legal American resident obtains coverage, give small employers more and less costly insurance choices, and hold down insurance costs while advancing health care quality.

This case focuses on a challenge to the constitutionality of one the ACA's modifications of the current system—the minimum coverage provision, which provides a penalty for those who do not have health insurance coverage and thus creates a clear economic incentive for 100% self-insured

individuals to obtain coverage and stop using the majority of insured Americans and the nation's employers as their "excess liability carriers."

The respondents in No. 11-398 (Department of Health and Human Services, et al, v. Florida, et al.), with respect to the minimum coverage issue, argue that the penalty exceeds Congress' power to regulate the economy under the Commerce Clause.

In fact, the decision to go entirely without health insurance—to be 100% self-insured—is not "passive" non-economic conduct. Rather, it is an "active" economic decision. The decision imposes a major economic burden on the majority of insuring Americans, harms the nation's employers who provide health insurance, and undermines the ability of the U.S. economy to compete, sell products and services, and create jobs.

There is clear evidence that the choice made by the 100% self-insured harms others. An independent actuarial analysis by Milliman, Inc., indicates that the failure of over 40 million Americans to obtain health insurance shifts more than $42 billion in costs to insured Americans, imposing an extra $368 in annual insurance costs for individual coverage

and an extra $1,017 per year for family coverage. In essence, the 100% self-insured are using the rest of us, and America's employers, as their "excess liability carriers."

The choice made by the 100% self-insured to avoid insurance coverage also creates serious health and economic risks for those individuals. They are more likely to fail to get needed medical care for both children and adults. They are more likely, when they do get care, to be unable to pay the bill, lose their savings, and be hounded by bill collectors.

Just as the current crisis of over 40 million uninsured and over $42 billion in cost-shifting has profound economic effects, the ACA's policy of creating an incentive for the 100% self-insured to obtain health insurance, and to stop using insured Americans and insuring employers as their "excess liability carriers," will profoundly alter the U.S. economy as a whole. Those currently 100% self-insured will spend less on non-health commodities and services and more on health insurance. Those with insurance will spend more on non-health commodities and services, since the cost-shifting they now bear will diminish. The nation's employers

will also experience less cost-shifting, helping them to lower prices, sell more, and hire additional American workers.

The ACA's incentive to the 100% self-insured to obtain coverage, and to stop using the rest of us as their "excess liability carriers," will thus result in a major reallocation of economic activity within the U.S. Redirecting the flow of billions of health care dollars across such a vast swath of the American economic landscape, altering the purchasing patterns of almost every American, and strengthening the competitiveness of the nation's employers, is surely within Congress' authority under the Commerce Clause.

ARGUMENT

I. THE AFFORDABLE CARE ACT (ACA) MINIMUM COVERAGE PROVISION AIMS TO DETER THE 100% SELF-INSURED FROM CHOOSING TO SHIFT THEIR HEALTH CARE COSTS TO INSURED AMERICANS AND INSURING EMPLOYERS.

A. Individuals Who Refuse to Buy Health Insurance Are Not Engaged in "Passive" Non-Economic Inactivity. Rather, They Have Decided to Make an "Active" Economic Choice to 100% Self-Insure.

Virtually all Americans get sick or have an accident at some point.[7] As a result, we spend an

---

[7] The 2010 National Health Interview Survey found that 80% of American adults aged 18 years and over contacted or visited a doctor or other health professional in the previous year. The survey found that 66% had done so during the previous six

annual average of more than $8,000 for health care.[8] We pay for these costs through a combination of self-insurance[9] and insurance.[10]

We are all self-insured, in the sense that virtually all of us pay out-of-pocket for at least a portion of our health care costs.[11] But the self-

---

months. *See* Jeannine S. Schiller et al., *Summary Health Statistics for U.S. Adults: National Health Interview Survey, 2010*, 10 Vital and Health Statistics, 44 (Nov. 2011), http://www.cdc.gov/nchs/data/series/sr_10/sr10_252.pdf.

[8] The average annual per capital health expenditure was $8,086 in 2009. *See* Centers for Medicare & Medicaid Services, *National Health Expenditure Data: History*, https://www.cms.gov/NationalHealthExpendData/ 02_NationalHealthAccountsHistorical.asp#TopOfPage (last modified Nov. 4, 2011).

[9] Self-insurance is sometimes described as "self-pay." As used here, the phrase does not refer to the practice that many large employers have of paying directly for their employees' health care costs and, thus, functioning as their own insurance issuer.

[10] Health insurance is sometimes purchased by individuals directly from an insurance issuer; sometimes purchased on an individual's behalf from an insurance issuer by an employer or other entity (with, at times, the employee paying a portion of the cost, typically in the form of a pre-tax deduction from earnings); and sometimes provided to an individual by an employer or other entity that functions as the insurer (with, at times, the employee paying a portion of the cost), often with a third-party administrator handling payments made to health care providers.

[11] *E.g.*, in 2009, average out-of-pocket spending for health care exceeded $800, compared to an average annual per capita health expenditure of $8,086. *See* Centers for Medicare & Medicaid Services, *supra* note 8. According to CMS, "[O]ut of

insured can be divided into two major groups: (1) the minority who are 100% self-insured and attempt to pay out-of-pocket for the full amount of their health care costs, and (2) the majority of us who are partially self-insured, use our own funds to pay only for a limited share of our health care costs, and rely on health insurance to pay for the larger part of our health care costs.[12]

Americans do not simply "fall" by chance into either category. We *choose* whether to be 100% self-

---

pocket spending in 2009 was $299.3 billion, or 12 percent of total national health expenditures." Centers for Medicare & Medicaid Services, *National Health Expenditure Data: NHE Fact Sheet*, https://www.cms.gov/NationalHealthExpendData/25_NHE_Fact_Sheet.asp (last modified Nov. 4, 2011).

[12] In 2010, 49.9 million Americans, or 16.3% of the total U.S. population of 306.1 million, were uninsured for the entire year, i.e., 100% self-insured. The number of people with health insurance at some point during the year was 256.2 million, or 83.7% of the population. Carmen DeNavas-Walt et al., U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2010*, 23-27 (Sept. 2011), http://www.census.gov/prod/2011pubs/p60-239.pdf. Private health insurance accounted for 35% of all health spending in 2007, and public programs, such as Medicaid, the State Children's Health Insurance Program (SCHIP), and Medicare, accounted for 46% of all health spending in 2007. Kaiser Family Foundation, *Heath Care Costs: A Primer*, (March 2009), http://www.kff.org/insurance/upload/7670_02.pdf.

insured. We *choose* how much we want to obtain insurance. We can alter that economic choice.[13]

Whatever choice Americans make with respect to the degree to which they self-insure—100% *vs.* partial (in combination with insurance)—it is a conscious choice.[14] It also is an economic choice—a decision about income, assets and risk. And those who make the choice to 100% self-insure are making economic decisions not only for themselves but also for their fellow Americans.

---

[13] Those who are 100% self-insured can choose to become largely insured through three primary mechanisms: (1) enrolling in Medicaid if they have sufficiently low-incomes; (2) buying an individual health insurance policy, sacrificing other forms of consumption to pay the required premium; or (3) electing to join employer-sponsored insurance (ESI), typically reducing their earnings—and thus sacrificing other forms of consumption—in order to pay the employee's share of insurance coverage. Conversely, those who are partially self-insured but largely insured can choose to become 100% self-insured by dropping coverage. They can quit Medicaid though eligible; refuse to buy individual health insurance; and refuse to participate in ESI. They can, in the language of health insurance, "go bare." (The preceding discussion does not apply to those who have reached age 65. With rare exceptions, they are automatically insured through Medicare.)

[14] Obviously, children and some adults do not make this choice. They are bound by the choices of their parents or guardians.

B. When Individuals Become 100% Self-Insured, They Turn Insured Americans and Insuring Employers Into "Excess Liability Carriers" and Make Us Pay Over $42 Billion in Uncompensated Care Through Higher Premiums, Lower Living Standards, and Less Competitive Employers.

The 100% self-insured knowingly decide to retain more income, enabling them to buy more non-health products and services, when they choose to forego health insurance. By the same token, they knowingly decide to increase the odds that they will not be able to pay their bills if they incur significant health care costs. By making this economic trade-off, they have decided to shift the risk of their inability to pay their health care bills *from* themselves *to* the majority of their fellow citizens and to businesses that pay for insurance. In short, the 100% self-insured have made an economic decision to rely on the rest of us as their "excess liability carriers."

By contrast, the great majority of Americans, who annually elect to obtain health insurance, have

decided to diminish our disposable incomes—money we might have otherwise used for non-health necessities and other expenses—to pay for health insurance. We have opted to shrink our living standard to greatly increase the odds that we can pay our health care bills. We have thus acquiesced in shouldering the economic burden of being the 100% self-insured population's "excess liability carriers"—not because we desire to subsidize them, but because the interaction between the current U.S. health insurance system and our prudence creates an economic chain reaction that permits them to "ride free" on us and gives us no way out.

As Americans make (and remake every year) our health insurance choices, many are aware—and all can be held responsible for the fact—that our decisions have wider economic consequences. In particular, those who choose to be 100% self-insured can be held responsible for the fact that their decision to forego health insurance means that a large chunk of *their* health care costs will be paid for by *others* who have made the opposite choice, as well as by the nation's businesses that provide health insurance. The 100% self-insured may not enjoy the

label of "free riders." Few will understand the concept of "excess liability carrier." But some of the 100% self-insured will acknowledge—and all of them can be held accountable for the fact—that their conscious economic choices impose a true economic burden on everybody else.

It is a burden that can be named and quantified. Its name is "uncompensated care." Its cost is over $55 billion per year. The economic hardships it imposes are real and serious.

We fortunately live in a society where the health care system does not turn its back on the dying, the victims of accidents, and those struck down by dangerous illnesses. In the U.S., if you have a medical emergency and the ambulance rushes you to a hospital emergency room, the law requires that you must be treated regardless of income or insurance coverage.[15] In addition, hundreds of thousands of Americans who do not face a 9-1-1 type

---

[15] Emergency Medical Treatment and Labor Act, 42 U.S.C. §1395dd (2006). This Act ensures access to emergency services regardless of the patient's ability to pay for the services. Many hospitals would, of course, admit and treat such patients even if no legal requirement existed.

of emergency, but simply need hospitalization and medical care, receive treatment even though they lack the resources to pay the bill. Altogether, the "uncompensated care" received by 100% self-insured and inadequately insured Americans now annually exceeds $55 billion.[16]

The American system of providing so-called "uncompensated care" is far from perfect. It denies care at times to the 100% self-insured who need it; more frequently it delays their receipt of care or cuts them off prematurely. But self-insured Americans nonetheless receive an enormous amount of "uncompensated care" for which they do not pay.

But somebody else does pay. America's $55-plus billion in unpaid health care bills does not vanish into thin air. "Uncompensated care" is just a fancy expression for cost-shifting. Hospitals and doctors do not work for free. They try to collect most of the debts they are owed. When they cannot

---

[16] The uninsured alone received approximately $56 billion in uncompensated care in 2008. *See* Jack Hadley et al., *Covering The Uninsured In 2008: Current Costs, Sources Of Payment, And Incremental Costs*, Health Affairs, 27, No.5, 2008. http://content.healthaffairs.org/content/27/5/w399.full.pdf.

induce the 100% self-insured to pay their bills,[17] health care providers shift most of the cost of the "uncompensated care" to their insured patients.

Insured patients thus finance a high portion of the 100% self-insured's health care costs *in addition to* their own health care costs. Insured patients provide this subsidy in part by paying deductibles, co-pays, and co-insurance amounts to hospitals, doctors, and other health care providers that exceed true cost. The largest portion of the subsidy that the 100% self-insured receive from insured patients, however, comes in the form of the higher insurance premiums or bills that insured patients and insuring employers must bear in excess of true cost.

Experts have documented the size of the cost-shift from the 100% self-insured to insured Americans and insuring employers—the

---

[17] Lack of income is often the reason why the 100% self-insured fail to pay their medical bills. Approximately one-third of the uninsured—16.2 million of the 49.9 million in 2010—had annual household incomes of less than $25,000. Roughly another third—15.4 million—had incomes between $25,000 and $50,000 that year. Thus, nearly two-thirds of the uninsured—31.6 million—had incomes below $50,000. *See* DeNavas-Walt, *supra* note 12, at 26 tbl.8.

"hydraulics" of the mechanism through which the 100% self-insured turn the rest of us their "excess liability carriers." Not all of the $55-plus billion in uncompensated care is shifted directly to insured Americans and insuring U.S. employers, but most of it is. According to a 2009 analysis by Milliman, Inc., an independent actuarial consulting firm, the portion of the 100% self-insureds' health care costs that neither they nor government programs pay for was $42.7 billion in 2008. The Milliman study concluded that this transfer of $42.7 billion from the 100% self-insured to insured individuals increased the health insurance costs of the insured population (excluding those covered by Medicaid and Medicare) by an annual average of $368 per insured individual person and $1,017 per insured family.[18]

This massive, $42.7 billion shift in costs from the 100% self-insured to the insured simultaneously harms not only insured individuals and the nation's employers, but also the competitiveness of the U.S. economy. Because the insured majority must absorb

---

[18] Kathleen Stoll et al., *Hidden Health Tax: Americans Pay a Premium*, Families USA, 17 (May 14, 2009).

an extra $368 per year for individual coverage and $1,017 for family coverage, the insured majority has less to spend for food, clothing, shelter, and other necessities. High school students who might continue go to college, as well as college students who might graduate, cannot do so because their parents' diminished incomes has made the cost of college tuition beyond reach. Workers who might otherwise be hired remain unemployed, and workers who hold jobs get laid off, as insuring employers cut labor costs to finance their excess insurance expenses. Finally, American businesses find they cannot sell their products and services—whether overseas or at home—because they are compelled to build the extra cost of health insurance into the prices of their products and services.

In short, the decision of the 100% self-insured to remain self-insured is not neutral. The choice they make inflicts economic pain on hundreds of millions of others. None of the self-insured may intend this to happen. Few even understand—at least fully—the harmful economic consequences. But the economic damage is real, and it is enduring.

C. The 100% Self-Insured Also Inflict Major Economic Harm On Themselves.

The decision of the 100% self-insured to forego insurance also exposes them to extremely serious health and economic hardship.

The 100% self-insured typically have low incomes and negligible assets. When combined with their lack of insurance coverage, their limited incomes and scant assets place them at severe risk for both poor health and economic trouble. The Kaiser Commission on Medicaid and the Uninsured reports that individuals below the poverty line comprise 40% of the uninsured, and nine out of ten uninsured are in low- or moderate-income families.[19] According to the Kaiser Commission:

> Half of uninsured households had $600 or less in total assets (not including their house and cars) in 2004, compared to

---

[19] Kaiser Commission on Medicaid and the Uninsured, *The Uninsured: A Primer, Key Facts about Americans without Health Insurance*, 5 (Washington: Kaiser Family Foundation, December 2010), http://www.kff.org/uninsured/upload/7451-06.pdf.

> median assets of $5,500 for insured households. Moreover, after households' debts are subtracted from assets, the median net worth of uninsured households drops to zero—leaving many of the uninsured with no financial reserves to pay unexpected medical bills.[20]

As a result, the 100% self-insured, with rare exception, cannot pay anything close to the full cost of a major illness or accident.

The most serious consequence is that the 100% self-insured—knowing they cannot pay—often fail to seek and receive the health care they need. They are far more likely than the insured to forego needed care. According to the Kaiser Commission: "Uninsured children with common childhood illnesses and injuries do not receive the same level of care as others. As a result, they are at higher risk for preventable hospitalizations and for missed diagnoses of serious health conditions."[21]

---

[20] *Id.* at 13.
[21] *Id.* at 10.

The Kaiser Commission reports similar problems for adults:

> About one-quarter of uninsured adults say that they have forgone care in the past year because of its cost—compared to 4% of adults with private coverage. .... More than a quarter of uninsured adults say they did not fill a drug prescription in the past year because they could not afford it. ... Uninsured nonelderly adults, compared to those with coverage, are far less likely to have had regular preventive care, including cancer screenings. Consequently, uninsured patients are diagnosed in later stages of diseases, including cancer, and die earlier than those with insurance.[22]

The 100% self-insured, when they do obtain medical care, also face far more severe financial stress and crises than the insured. According to the Kaiser Commission: "Uninsured adults are three times as likely as the insured to have been unable to

---

[22] *Id.* at 10-11.

pay for basic necessities such as housing or food due to medical bills. Medical bills may also force uninsured adults to exhaust their savings."[23] In 2010, 27% of uninsured adults used up all or most of their savings paying medical bills, compared to 7% of the insured. The same year, 33% of the uninsured were contacted by a collection agency about medical bills, compared to 8% of the insured.[24]

While some of the 100% self-insured may be lucky enough to avoid accidents or injuries in any year, their choice is a huge economic gamble. The decision can equally result in devastating economic consequences for children, adults, and entire families—eviction, repossession, homelessness, malnutrition, and destitution—if the bet does not pay.

Thus, the decision to become 100% self-insured has profound consequences across the economic board. It puts at risk and frequently harms the 100% self-insured themselves *at the same time* that it shifts over $42 billion in unpaid medical

---

[23] *Id.* at 12.
[24] *Id.*

bills to insured Americans and insuring employers. It temporarily raises the living standard of those who win the "non-insurance bet," while lowering the living standards of the insured and making U.S. employers less competitive and consequently less able to create jobs.

II. THE ACA POLICY OF CREATING AN ECONOMIC INCENTIVE FOR THE 100% SELF-INSURED TO OBTAIN HEALTH INSURANCE IS A VALID EXERCISE OF POWER UNDER THE COMMERCE CLAUSE.

The ACA creates an economic incentive for the overwhelming majority of Americans who are "applicable individuals" to obtain "minimal essential coverage." It does so by subjecting the members of this vast group to an "individual responsibility requirement" in the form of a "shared responsibility payment."[25] The law then provides that any

---

[25] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501(a)-(b), 124 Stat. 119, 242-44 (2010) (as amended) (citing the Patient Protection and Affordable Care Act since

"applicable individual who fails to meet the requirement" must pay a "penalty," in an amount specified in the law, as part of the individual's federal income tax return.[26]

It is clear from the history and structure of the ACA that the sole purpose and actual function of this penalty is to offer an incentive to the 100% self-insured to obtain health insurance coverage.

Unlike all major taxes (and most minor ones), the goal of the ACA's penalty is not to raise revenue for government. Indeed, by definition, the *less* revenue the provision produces, the *more* Americans have obtained health insurance and thus maximized the ACA's goal of near-universal coverage.

Also unlike most taxes, which do not seek to discourage the economic activity that generates tax revenue, the ACA's penalty was put in place precisely to deter individuals from making the economic decision that triggers payments to

---

the Affordable Care Act has not yet been fully codified in the United States Code).

[26] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501 (b).

government. Federal, state, and local taxes—whether imposed on income, sales, and property—are neither intended to dissuade, nor in general do dissuade, people from making the wide range of economic decisions that yield tax revenues (such as earning money, buying products, investing in stocks, making corporate profits, or acquiring or improving property). The ACA's penalty is the exact opposite in intent and effect. It explicitly aims to dissuade 100% self-insured Americans from continuing their choice to go without health insurance. It means to drive them away from the very decision that would yield revenue for the federal government.

Finally, unlike many other fines and other penalties, which truly seek to punish wrongdoers who engage in dangerous or obnoxious behavior (like running a red light, or tossing garbage out of the car window, or setting off fireworks in a city neighborhood at 3 AM) as much as they intend to encourage socially responsible conduct, the ACA provision does not treat the 100% self-insured as social malefactors. Their choices indeed do impose economic burdens on others, as well as create big health and economic risks—and frequent

consequences—for themselves. Some of them may know this; all can be held accountable for knowing this. But the national debate over the ACA did not treat the 100% self-insured as wrongdoers, but typically viewed them as beleaguered fellow-citizens who have chosen to cut economic corners in their struggle to get by, and should be simultaneously nudged by an incentive and helped by subsidies to go in a different direction

The purpose and function of the ACA's penalty is thus clear: *not* to raise tax revenues, *not* to discourage virtuous economic activities that spin off taxes, and *not* to inflict punishment, but to create an economic incentive (linked to substantial subsidies) that induce the 100% self-insured to join the vast majority of Americans and obtain health insurance coverage via either Medicaid, an individual policy, or employer-sponsored insurance. Congress' intent was never to trigger the penalty, but simply to stop the 100% self-insured from using the insured majority and the nation's struggling employers as their "excess liability carriers."

One economic side-effect of this incentive is that Congress also created an incentive for a large

portion of the 100% self-insured group—those not qualifying for Medicaid because their incomes exceed 133% of FPL, and who must therefore spend some of their own money to obtain health insurance—to *reduce* their consumption of non-health products and services.[27] This reduction in consumption will mirror an *increase* in the consumption of non-health products and services by those who are currently insured, but whose future premium costs will absorb far less of today's $42-plus billion cost shift. The ACA will thus greatly alter consumption patterns within the U.S. economy.

Whether Congress acted wisely to alter these consumption patterns is of course a matter of debate. What is beyond debate is that Congress's

---

[27] For the poorest of the 100% self-insured, it is unlikely that they will need to reduce their consumption of food, clothing, shelter, etc., in order to join Medicaid, since Medicaid typically charges no premiums, and imposes either no or extremely low deductibles and co-pays. For the remainder of the 100% self-insured, however, including those who qualify for federal tax credits if their income is between 133% and 400% of the poverty line, it will be necessary to spend less on non-health products and services in order to pay for a portion of their health insurance premiums, and also to pay for the deductibles, co-pays, and co-insurance that their health insurance plans are likely to require.

creation of an incentive that encourages the 15% of Americans who are 100% self-insured to make different economic choices, counteracts the shift of over $42 billion in uncompensated care to the insuring majority and the nation's insuring employers, and thus shrinks the role that the insured play as "excess liability carriers," will have profound economic effects across the country.

The ACA's policy will also increase utilization of doctors, prescription drugs, and hospitals by those who need care; protect families' savings; and decrease bankruptcies. The policy will enable more American workers to find a job and keep a job, by allowing insuring U.S. businesses—no longer the victims of a massive health cost shift—to hold down the prices of their products in an increasingly price-sensitive international marketplace. And, across the broad economic landscape of the nation, it will alter patterns of consumption of non-health items.

Because the ACA's penalty provision was designed to propel—and surely will propel—so many large economic waves to reshape both the health sector and non-health sector of the American economy, it is a legitimate exercise of Congress'

power to regulate the economy under the Commerce Clause.

Consider two reference points. Congress acted within the scope of the Commerce Clause in regulating a Kansas farm household that consumed all of its own wheat,[28] and in regulating a Californian who grew a few marijuana plants for personal consumption.[29] That so, it is hard to conceive how a law intended to alter a major purchasing decision made each year by millions of Americans, designed to counteract a $42.9 billion cost shift, and calculated to profoundly reshape the flow of billions of dollars and rearrange consumption patterns within a vast swath of the nation's economy, could be outside Congressional power.

The ACA's incentive "exerts a substantial economic effect on interstate commerce" and on international commerce as well.[30] It is constitutional.

---

[28] *Wickard v. Filburn*, 317 U.S. 111 (1942).
[29] *Gonzales v. Raich*, 545 U.S. 1 (2005).
[30] *Wickard*, 317 U.S. at 125.

III. CONCLUSION: CONGRESS' POLICY OF MOTIVATING THE 100% SELF-INSURED TO OBTAIN HEALTH INSURANCE IS A CONSTITUTIONALLY VALID MEANS TO ACHIEVING LEGITIMATE ENDS—FAIRER PAYMENT OF MEDICAL COSTS, IMPROVED HEALTH OUTCOMES, AND ECONOMIC RELIEF FOR THE NATION'S SELF-INSURED, INSURED, AND EMPLOYERS.

The ACA's minimum coverage requirement is not about raising revenue, nor is it about punishing wrongdoers. The provision has a simpler premise and a different purpose.

Its premise is that the 100% self-insured make an explicit economic decision when they choose not to obtain health insurance coverage, and that this decision (whether the 100% self-insured knowingly or intentionally wish for the result) imposes an unfair $42 billion economic burden on the majority of Americans and the nation's employers in the form of higher insurance costs.

The minimum coverage provision's purpose is equally simple: to create an incentive for the 100%

self-insured to obtain health insurance, to reverse a large part of the $42 billion cost shift and unburden the majority of Americans who have insurance, and to lower the cost of doing business—and increase the competitiveness—of U.S. employers.

The nation and Congress have debated with heightened intensity the merits of the provision. The question, however, is whether Congress' decision to impose a penalty on the 100% self-insured in order to give them an incentive to buy insurance, and to dissuade them from using the majority of insuring Americans and our employers as their "excess liability carriers," is valid under the Commerce Clause.

The minimum coverage provision, because of its massive and multi-dimensional impact on the U.S. economy and foreign commerce as well, lies well within the realm of Congress' authority under the Commerce Clause. It should be upheld.

Respectfully submitted,

DAVID R. RIEMER
Senior Fellow
Community Advocates
Public Policy Institute
728 N. James Lovell St.
Milwaukee, WI 53233
(414) 270-2943
DRiemerMil@yahoo.com

DEAN A. STRANG *
Hurley, Burish &
Stanton, S.C.
33 E. Main St., Suite 400
Madison, WI 53703
(608) 257-0945
dstrang@hbslawfirm.com
* *Counsel of Record*

AMICUS CURIAE BRIEF

No. 11-398

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES, *et al.*,
Petitioners,

v.

STATE OF FLORIDA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS ON THE MINIMUM COVERAGE PROVISION ISSUE

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22906
(434) 978-3888

ALFRED W. PUTNAM JR.
Counsel of Record
JASON P. GOSSELIN
D. ALICIA HICKOK
TODD N. HUTCHISON
DRINKER BIDDLE & REATH LLP
One Logan Square
Suite 2000
Philadelphia, PA 19103
(215) 988-2700
Alfred.Putnam@dbr.com

Counsel for Amicus Curiae

February 13, 2012

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Does Congress have the power, under Article I of the United States Constitution, to compel citizens to buy health insurance?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
IDENTITY AND INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. The Means of Financing Certain Health Care Choices is Not the Same as the Choice Itself	5
II. The Legislation at Issue Here is Not "Necessary and Proper" as Those Terms Were Understood by the Framers.	8
III. Under the Factors Set Forth in this Court's Most Recent "Necessary and Proper" Decision, the Legislation is Unconstitutional	12
CONCLUSION	19

TABLE OF AUTHORITIES

CASES Page

Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25 (1996) 16

Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011) 13

Gonzales v. Raich, 545 U.S. 1 (2005).. 8-9, 12, 13, 16

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 12

Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707 (1985) 15

Jacobson v. Massachusetts, 197 U.S. 11 (1905) 15, 16

Kansas v. Utilicorp United, Inc., 497 U.S. 199 (1990) 10

Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219 (1948) 9

Perpich v. Dep't of Def., 496 U.S. 334 (1990)... 6-7

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) 7

Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011) 13-14

Thomas More Law Ctr. v. Obama, 651 F.3d 529 (6th Cir. 2011) 13

United States v. Comstock, 560 U.S. __, 130 S. Ct. 1949 (2010) 13, 14, 17, 18

United States v. Lopez, 514 U.S. 549 (1995)... 15, 18

TABLE OF AUTHORITIES—Continued

Page

United States v. Morrison, 529 U.S. 598 (2000) 15

United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942) 13

Wickard v. Filburn, 317 U.S. 111 (1942) 8, 13

Zucht v. King, 260 U.S. 174 (1922) 15, 16

CONSTITUTION

U.S. Const. art. I 4

U.S. Const. art. I, § 8, cl. 3 ..... *passim*

U.S. Const. art. I, § 8, cl. 15 6-7

U.S. Const. art. I, § 8, cl. 18 ..... *passim*

STATUTES

15 U.S.C. § 1011 16

15 U.S.C. § 1012 16

26 U.S.C. § 5000A 3

Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 17-18

Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 18

Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 17

TABLE OF AUTHORITIES—Continued

Page

Mass. Gen. Laws ch. 111M, § 2 16-17

N.J. Stat. Ann. § 26:15-2..... 17

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.....*passim*

Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 18

Utah Code Ann. § 63M-1-2505.5 17

Va. Code Ann. § 38.2-3430.1:1..... 17

OTHER AUTHORITIES

Gary Lawson & David Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate,* 121 Yale L.J. Online 267 (Nov. 2011).....9, 10, 11, 12

H.R. Rep. No. 79-143 (1945) 16

S. Rep. No. 79-20 (1945) 16

IN THE

Supreme Court of the United States

No. 11-398

UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES, *et al.*,
Petitioners,

v.

STATE OF FLORIDA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS ON THE MINIMUM COVERAGE PROVISION ISSUE

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international non-profit organization headquartered in Charlottesville,

[1] This amicus brief is filed with the parties' consent. The parties filed their consents with the Clerk of Court in October 2011. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because this Court's decision on the breadth of Congress's authority under the Commerce Clause has implications not only as to the freedom of citizens to decide how to provide for their health care but more broadly on the federalism embodied in the United States Constitution that is meant to preserve liberty by preventing the concentration of power in the national government. The Rutherford Institute urges this Court to affirm the decision below on minimum coverage and prevent the arrogation of power represented by the Individual Mandate of the Patient Protection and Affordable Care Act.

SUMMARY OF THE ARGUMENT

The Individual Mandate is a wholly unprecedented exercise of unauthorized federal power in a field that has historically been a concern of the states. Congress has purported to act pursuant to its power to regulate interstate commerce, but that power has never been thought to reach persons who are not participating and do not wish to participate in the commerce that Congress is seeking to regulate. Heretofore, the power to compel individual action has been reserved to police or war powers. A law seeking to regulate interstate commerce in this fashion is not a "necessary and proper" exercise of the power given to Congress under Article I – either as those words were understood when they were written or at any time since.

ARGUMENT

The Patient Protection and Affordable Care Act (the "ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, requires that all United States citizens obtain and maintain health insurance or else pay a penalty (the "Individual Mandate"). 26 U.S.C. § 5000A. It is likely – although still uncertain – that most health insurance plans provided by or through an employer will be deemed to satisfy this mandate. The statute also includes certain exemptions, either from the mandate itself or from the penalty it imposes. As a result, most citizens who are below a certain income level will not be compelled to buy health insurance.

It follows that the citizens most affected by the Individual Mandate are those at whom it was aimed: people who at least arguably have the resources to buy health insurance but who have heretofore declined to do so. Congress concluded that these individuals – who have chosen, in effect, to "self-insure" their health in favor of spending their earnings in other ways – adversely affect the health insurance markets as a whole because their decision not to purchase insurance increases the costs of the product for everybody else.[2] As a matter of pure public policy, the choice that Congress has made is

---

[2] This is so because many of the "self-insured" are relatively young and relatively healthy and thus less likely to make claims on the health insurance policies Congress wants them to buy. From the point of view of an insurance company, the premiums paid by such insureds are particularly desirable because they help cover losses arising out of claims made by older and sicker insureds.

certainly defensible. It is a form of "cost-shifting" whereby some citizens are obliged to pay for services that they probably will not use so that others who are more likely to need those services will have them available to them. Congress engages in such "cost-shifting" all the time when it levies taxes.[3]

The Individual Mandate, however, is something entirely new. It is the first time that Congress has ever invoked its power "to regulate Commerce ... among the several States" to compel citizens to participate in such commerce. This power to compel a purchase is not a power listed in Article I. To the contrary, the authorization to "regulate" interstate commerce presumes that those persons who are to be regulated are engaged in the interstate commerce that Congress wishes to regulate. By definition, the citizens who have elected *not* to buy health insurance are *not* engaged in the insurance markets that Congress wishes to regulate. If Congress can force them to participate in that sort of "commerce"– or more precisely, if it can impose a penalty on them if

---

[3] Ironically, Congress identified those who do not buy insurance as creating a "cost-shifting" problem of their own because they can end up using health resources if and when they get sick – at which point health providers may be obliged to treat them without sufficient compensation. No doubt that happens from time to time in particular cases. Nevertheless, the principal policy reason for imposing the Individual Mandate on younger, healthier people is to force them to pay premiums in excess of their likely aggregate claims, thereby providing to the insurance companies at least some of the funds needed to cover the cost of treating the other insureds. In other words, the Individual Mandate is itself designed to accomplish a shift in the cost of health care, by – as Petitioner puts it – "regulating how health care consumption is financed." Pet. Br. at 17. One's perception of the desirability of "cost-shifting" thus depends on one's policy preferences.

they do not – it is transforming its power to regulate commercial activity into a power to compel conduct it deems to be socially desirable. That is a kind of police power. It is not a power that the Constitution gave to Congress as a part of the Interstate Commerce Clause.

The brief of the State Respondents correctly and persuasively addresses the constitutional flaws in the Individual Mandate, and The Rutherford Institute concurs wholeheartedly in its compelling arguments. There are, however, three aspects of the Petitioner's argument that are predicated on fallacies that may not be fully addressed in the briefing thus far. The Rutherford Institute writes to draw the Court's attention to these three.

I. The Means of Financing Certain Health Care Choices is Not the Same as the Choice Itself.

The Petitioner argues that compelling an individual to purchase insurance prior to his decision to use health care is the same as regulating that individual at the point at which he is using health care. Indeed, it is a pervasive assumption in the Petitioner's brief that there is no legally significant difference between the purchase of health insurance and the purchase of health care services because the former is just a means of "financing" the latter. Thus, Petitioner contends that a citizen's likely future participation in the market for health care services justifies forcing him or her to enter now into the insurance market so that insurance will be available to pay for the services he

or she will inevitably use in the future. *E.g.*, Pet. Br. at 38; *id.* at 50 ("The minimum coverage provision regulates the way in which the uninsured finance *what they will consume in the market for health care services (in which they participate)*, requiring that they 'resort to the market' for insurance rather than attempt to 'meet (their) own needs' through attempted self-insurance" (emphasis added)).

But none of this makes any sense. Perhaps most obviously, the proposition that a citizen will inevitably need to enter into interstate commerce by purchasing some kind of health care services simply isn't true. Citizens can and do die suddenly without purchasing any health care services. And others rightly conclude that any health care services they may want to purchase in the short term will be far less expensive than the cost of "financing" a portion of those services by purchasing insurance. A decision to obtain some health-related service (e.g., having a tooth pulled) may or may not be a decision to engage in interstate commerce, but it is logically as well as temporally distinct from a decision not to purchase dental insurance – which is a decision to refrain from commerce, interstate or otherwise. Forcing someone to engage in one sort of interstate commerce (by buying insurance) on the ground that it is probable that he will someday engage in a different kind of interstate commerce (by consulting a physician) is to mix apples and oranges and, more importantly, to compel participation in commerce by some citizens who would prefer not to participate at all.[4]

---

[4] There are constitutional powers, to be sure, that permit Congress to impose duties that transcend individual choice. Thus, for example, Congress's power "to compel military service and the duty of the citizen to render it when called for were

Which leads to another point. Even if a citizen does need to purchase some form of "health care," the decisions he or she makes about how to meet that need are not necessarily the same choices as those "financed" by Congressionally prescribed health insurance. Conspicuously absent from the ACA is any requirement that insurers cover all the health care providers and services available. Thus a citizen who thinks she wants or needs a midwife to deliver a child, or who wants to use acupuncture or herbs rather than prescriptions to relieve pain is not assured that she will be financing those choices by complying with the Individual Mandate. Telling citizens that they *must* subsidize some of the cost of certain services from whatever providers the insurance companies choose effectively prevents them from making other choices they might have made had they been left alone. The purchase of insurance does not deliver health care; health care providers deliver health care, and by coercing individuals to purchase insurance, the government is depriving them of the ability to make an informed decision among all available health care options. In other contexts, this Court has been very protective of "intimate and personal choices . . . central to personal dignity and autonomy" and very leery of any attempts to constrain such choices. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). It should be here as well.

---

derived from the authority given to Congress by the Constitution to declare war and to raise armies" – unrestricted by the militia clause. *Perpich v. Dep't of Def.*, 496 U.S. 334, 344 (1990). But it would be laughable to apply the "duty" rationale underlying a national need for all eligible persons to defend their country in time of war to a national need for all eligible persons to buy insurance.

For these reasons (among others) Petitioner's analogy to *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Gonzales v. Raich*, 545 U.S. 1 (2005), fails. In both of those cases, the regulation of commerce that the Court upheld was designed to control the price of a given good. In this regard, the Petitioner notes that in *Raich* the Court upheld regulation of marijuana cultivation for personal use because it was "never more than an instant from the interstate market." Pet. Br. at 43. Likewise, the wheat at issue in *Wickard*, grown on a farm for use by that farm, could be regulated even though the farmer stated that he did not sell or intend to sell the wheat in interstate commerce. 317 U.S. at 119. Both the marijuana and the wheat contributed to the overall level of production of products Congress was regulating. But Congress did not try to tell Filburn that he had to use his farm to grow wheat. And that is a significant difference. Attaching consequences to a decision to grow wheat is different in kind from attaching consequences to a decision not to. And, while The Rutherford Institute is among those who question whether the Interstate Commerce Clause should have been construed to reach the conduct in *Wickard* and *Raich*, the idea that the Clause can now be relied on to compel participation by citizens in a market in which they would prefer not to participate is surely to leave the Clause without any limitations at all.

II. The Legislation at Issue Here is Not "Necessary and Proper" as Those Terms Were Understood by the Framers.

Congress's power under the Interstate Commerce Clause is fully understood and appreciated only by reference to its authority under the Necessary and Proper Clause. *See Raich*, 545 U.S. at 34-35 (Scalia,

J., concurring) (explaining that Congress's power to regulate activities that have a "substantial effect" on interstate commerce depends for its authority on the Necessary and Proper Clause); *see also Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 232 n.11 (1948) (suggesting that the substantial effect theory of the commerce power revived the Necessary and Proper Clause). In their article in the online Yale Law Journal (121 Yale L.J. Online 267, November 2011), *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, Gary Lawson and David Kopel explain the antecedents of the "Necessary and Proper" Clause and the use of those words to reflect the then well-recognized agency law ensuring that actions of an agent were undertaken "only within granted authority" from his principal. *Id.* at 272.

It was commonly understood in the eighteenth century that an agent had to have the powers he needed to carry out the authority expressly given to him. *Id.* at 272-73. A power was "necessary" to the exercise of the granted authority if it was incidental to or a necessary part of that power. *Id.* at 274. If, on the other hand, the power was an entirely different power – a power of equal "dignity" with the expressly authorized power – but was not itself expressly authorized, it could not be presumed to go with the authorized power as a matter of course. *Id.* at 279-80. "Necessity" thus described the "requisite attachment of the incidental power to its principal end." *Id.* at 275. "Propriety," on the other hand, described the regard for individual rights: "conformance with other fiduciary norms, such as the duty of impartiality, the duty of good faith, and the primary duty to stay within the scope of granted authority." *Id.* at 275, 287. In other words, an agent could be

deemed to have powers "necessary and proper" to do what he was authorized to do but he was not thereby authorized to exercise *other* powers that were not within (incidental to) the expressly granted power.

As Lawson and Kopel explain, the Individual Mandate here is neither "necessary" nor "proper" in the sense that those words were used when the Constitution was written. The power to compel an individual to purchase a product has never been deemed "incidental" to the power to regulate existing interstate commerce. To the contrary, if a power to compel a person to purchase existed, it would be instead "an extraordinary power of independent significance, or 'high[] dignity.'" *Id.* at 280. Similarly, there is no way to characterize what Congress has done here as a reasonable, impartial, or "measured and proportionate" exercise in "causal efficacy," taken with regard for that individual's rights. *Id.* at 287. As set forth above, the rights of the individual are not respected in these statutes. Moreover, given the fact that the mandate requires the purchase of insurance rather than health care, one might also conclude that the mandate has no "causal efficacy." After all, there are many instances in the law where the threshold question is whether the person complaining is directly aggrieved. *See, e.g.*, *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 207 (1990) (consumers who purchased gas from utilities could not reach the suppliers that were alleged to be conspiring to fix prices). And, in fact, the statutory scheme here is even more attenuated, because here – by analogy – the consumer is being ordered to buy from the utility whatever the utility and producer together choose to supply.

In this regard, as Lawson and Kopel suggest, the Individual Mandate is not unlike the government-chartered monopolies with which the founders were well familiar and of which they strongly disapproved:

> Although the individual mandate is unprecedented, the Founders were familiar with a related, although less intrusive, commercial regulation: the government-chartered monopoly. When the government chartered a monopoly, it limited the market to one provider – although, unlike under the individual mandate, citizens remained free to choose not to purchase goods or services from the monopolist. Grants of monopolies were unpopular, since by erecting a system of commercial favoritism, they violated the government's fiduciary obligation to treat citizens impartially, and they were held to violate common law.

Lawson & Kopel, *supra*, at 290. Lawson and Kopel go on to argue that the men who drafted the Constitution would have been surprised to learn that the Necessary and Proper Clause could be misconstrued to authorize the very sort of conduct the Clause was intended to prohibit.

They observe that during the ratification debates there were many Anti-Federalists who warned that the new government would be able to create monopolies, but that – aside from "the textual, and obviously limited, examples of patents and copyrights," not one Federalist ascribed to Congress such power. *Id.* They quote a Federalist writer calling himself the "Impartial Citizen":

> In this case, the laws which Congress can make...must not only be *necessary*, but *proper* – So that if those powers cannot be executed without the aid of a law[ ] granting commercial monopolies ... such a law would be manifestly *not proper*, it would not be warranted by this clause, without absolutely departing from the usual acceptation of words.

Id. at 290-91, *quoting An Impartial Citizen V*, PETERSBURG VA. GAZETTE, Feb. 28, 1788, *reprinted in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 428, 431 (John P. Kaminski & Gaspare J. Saladino eds., 1988) (emphasis and ellipsis in original). With all due respect, the argument that the Necessary and Proper Clause authorizes Congress to do what it has never done before and what the common law never permitted is to make the words "necessary" and "proper" mean the very opposite of what they meant in 1789 – and what they mean today.

III. Under the Factors Set Forth in this Court's Most Recent "Necessary and Proper" Decision, the Legislation is Unconstitutional.

This Court has treated the Necessary and Proper Clause as requiring that Congress's authority under the Commerce Clause be exercised by means that are reasonably adapted to the end permitted by the Constitution. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62 (1964). It has recognized that this connection is particularly important when – as here – Congress regulates activities that "substantially affect" interstate commerce. *See Raich*, 545 U.S. at 34-35 (Scalia, J., concurring). In fact, the

Court has never approved a regulatory scheme under Congress's commerce power when the scheme lacks a connection between the regulatory means and the end. *Cf. id.* at 25-27 (majority opinion) (finding regulation of home-cultivated marijuana essential to scheme to regulate controlled substances); *Wickard*, 317 U.S. at 127-29 (concluding farmer's personal use of wheat crop could affect control of market supply and demand); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 120-21 (1942) (affirming regulation of intrastate milk because it could affect Congress's goal of regulating milk prices nationally).

The Court's most recent opinion addressing the Necessary and Proper Clause is *United States v. Comstock*, 560 U.S. __, 130 S. Ct. 1949 (2010). Three courts of appeals have addressed the constitutionality of the Individual Mandate.[5] But only one, the Court of Appeals for the Eleventh Circuit, in *Florida v. United States Department of Health & Human Services*, 648 F.3d 1235 (11th Cir. 2011) undertook a thorough analysis of the Interstate Commerce Clause in light of the necessary and proper aspects of the mandate.[6] Although it ultimately found the

---

[5] The two decisions of the Court of Appeals for the Fourth Circuit did not reach the constitutional questions at all.

[6] In *Thomas More Law Center v. Obama*, (S. Ct. Dkt. 11-117), the Court of Appeals for the Sixth Circuit produced three opinions, only one of which cited *Comstock* and none of which considered whether the Individual Mandate is "necessary." Instead, the opinions offered varying interpretations of the proper scope of Congress's commerce power, divorced from its necessary and proper moorings. *See generally* 651 F.3d 529, 542-49 (6th Cir. 2011); *id.* at 554-66 (Sutton, J., concurring); *id.* at 568-73 (Graham, Dist. J., concurring in part and dissenting in part). In *Seven-Sky v. Holder*, the majority and concurring opinions acknowledged the Necessary and Proper Clause, but

Individual Mandate unconstitutional but severable, *id.* at 1307, 1328, the Court of Appeals considered at length the implications of *Comstock*, and recognized that it established the proper framework on which to base its Commerce Clause analysis, *id.* at 1279-82. The Court considered the scope of the ACA, *id.* at 1293-95, the attenuated nature of the link between the regulated activity and interstate commerce, *id.* at 1300-02, and the fact that health care and health insurance are traditional areas of state concern, *id.* at 1304-06. And, after concluding that the Individual Mandate falls outside the scope of Congress's commerce power, *see id.* at 1307, the Court of Appeals also considered whether the provision was necessary and proper as an essential piece of a larger regulatory scheme, *id.* at 1307-11. "[T]he Necessary and Proper Clause enables Congress in some instances to reach intrastate activities that markedly burden or obstruct Congress's ability to regulate interstate commerce." *Id.* at 1310.

The Rutherford Institute agrees with the Court of Appeals' analysis in this regard, but it notes as well – consistent with the above discussion – that in the process of subordinating individual autonomy the statutory scheme runs roughshod over the rights of the states to exercise the police power when and to the extent necessary. Indeed, only a police power might justify such a preemption of personal autonomy as Congress has undertaken here.

---

did not evaluate the Individual Mandate under necessary and proper principles. *See* 661 F.3d 1, 5, 14-20 (D.C. Cir. 2011); *id.* at 21 (Edwards, J., concurring).

To find a comparable mandatory statute, one would have to look to cases such as *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (concluding compulsory smallpox vaccination is within a state's general police power) or *Zucht v. King*, 260 U.S. 174, 175-77 (1922) (holding that a state could compel public students to be vaccinated pursuant to the state's general police power). "According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." 197 U.S. at 25. But, as this Court said in considering whether plasma regulation was preempted: "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985) (internal citations and quotations omitted). It follows from that statement that in fields "traditionally occupied by the States 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* at 715. The Court has consistently denied that the federal government possesses a general police power, *see United States v. Morrison*, 529 U.S. 598, 618 (2000); *United States v. Lopez*, 514 U.S. 549, 567 (1995), and Congress has not asserted that it is exercising such a power here.

Indeed, it is difficult to infer anything about Congress's purposes regarding *health care* – the area that would be regulated pursuant to the police power – because the statute is facially directed to the regulation of *insurance*. The Individual Mandate does not require a person to be vaccinated or take

prescribed medication; it simply requires him or her to purchase insurance. Moreover, the ACA does not require insurance companies to cover all health care services or even to cover all of the cost of the services they insure. And even the Petitioner acknowledges that there is no intrinsic value in the insurance *qua* insurance. "No one purchases health insurance for its own sake; it exists only as a means of financing participation in the health care market." Pet. Br. at 41. In short, even if pressing health and safety concerns might be said to justify resort to the exercise of a police power (and even assuming such a federal police power exists), the Individual Mandate to purchase health *insurance* can hardly be said to fit that bill.

As a corollary, this Court has traditionally recognized that the Constitution permits *states* to make general health and welfare decisions for the public good, *see Zucht*, 260 U.S. at 175-76; *Jacobson*, 197 U.S. at 25-26; *Raich*, 545 U.S. at 42 (O'Connor, J., dissenting) ("The States' core police powers have always included authority . . . to protect the health, safety, and welfare of their citizens."). Indeed, both health and welfare and the business of insurance are traditionally matters of *state* concern. *See* 15 U.S.C. §§ 1011, 1012(a), (b); S. Rep. No. 79-20, at 2 (1945); H.R. Rep. No. 79-143, at 3 (1945); *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 39 (1996) (characterizing McCarran-Ferguson Act as Congress's effort to avoid inadvertently regulating insurance).

In this regard it is notable that Congress's action overrode the legislation of several states, some of which required some form of insurance and others of which did not. *Compare, e.g.*, Mass. Gen. Laws

ch. 111M, § 2 (requiring adults over age eighteen to "obtain and maintain creditable coverage"), *and* N.J. Stat. Ann. § 26:15-2 (requiring adults over age eighteen to obtain and maintain insurance providing hospital and medical benefits), *with* Utah Code Ann. § 63M-1-2505.5(4) (providing that individuals in Utah may not be required to obtain or maintain health insurance), *and* Va. Code Ann. § 38.2-3430.1:1 (excusing residents from obtaining or maintaining health insurance coverage). Sensitivity to federal-state relations cautions against the Petitioner's rationale that it can require of the citizens of *all* states what the citizens of *some* states have chosen. *See* Pet. Br. at 36-37 ("Congress therefore acted well within its constitutional authority by adopting a means of regulation parallel to insurance measures enacted by the states to address comparable risk-shifting").

Placed in the context of the *Comstock* factors, then, the statutory scheme here cannot be said to represent a "modest addition" to pre-existing federal statutes, nor a reasonable extension of those statutes by Congress. *See Comstock*, 130 S. Ct. at 1958, 1959-61. And the ACA fails adequately to accommodate states' interests. *Id.* at 1962. In *Comstock*, the detention statute was related to pre-existing statutes and reflected a modest extension because of the federal government's interest in protecting the community at large from mentally ill, sexually dangerous prisoners. *Id.* at 1959-62. That is not the case here. It is certainly true that Congress has heretofore enacted laws to protect patients, to ensure the availability of health care, and to facilitate state provision of health care. *See, e.g.*, Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936; Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), Pub. L. No.

99-272, 100 Stat. 82 (including requirement that hospitals treat any patient with an "emergency medical condition"); Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829; Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286. But this legislation cannot be characterized as an "extension" of those laws. By determining to regulate insurance and to compel the purchase of insurance without regard to state law, Congress has divorced itself from what might in the face of a different sort of legislation have been statutory precedents.

This Court explored an analogous concern in *Lopez* in the context of federal statutes that criminalized conduct already denounced by the states, observing that the intrusion "effects a change in the sensitive relation between federal and state criminal jurisdiction." *See Lopez*, 514 U.S. at 561 n.3 (internal quotations and citations omitted). In short, Congress has intruded on individuals' rights to make private decisions about their own health and in the process has disrupted the federal-state balance. *See Comstock*, 130 S. Ct. at 1962.

CONCLUSION

It is probably true that this Court has given both the Interstate Commerce Clause and the Necessary and Proper Clause a more expansive reading and a more extensive reach than the authors of those clauses anticipated when they wrote them down. And perhaps that has been a good result. But those clauses were intended to give Congress specific powers; they were not intended to give it the power to do anything and everything. Petitioner's argument here is for a power that is not and can not be limited. A faithful reading of the Constitution requires that such overreaching be rejected.

Respectfully submitted,

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22906
(434) 978-3888

ALFRED W. PUTNAM JR.
Counsel of Record
JASON P. GOSSELIN
D. ALICIA HICKOK
TODD N. HUTCHISON
DRINKER BIDDLE & REATH LLP
One Logan Square
Suite 2000
Philadelphia, PA 19103
(215) 988-2700
Alfred.Putnam@dbr.com

Counsel for Amicus Curiae

February 13, 2012

AMICUS CURIAE BRIEF

No. 11-398

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

STATE OF FLORIDA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AND CHANGE TO WIN AS *AMICI CURIAE* ADDRESSING THE MINIMUM COVERAGE PROVISION ISSUE AND SUPPORTING PETITIONERS AND REVERSAL

JUDITH A. SCOTT
WALTER KAMIAT
MARK SCHNEIDER
SERVICE EMPLOYEES INTERNATIONAL UNION
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
Tel: (202) 730-7455

Counsel for Amicus Curiae *Service Employees International Union*

SCOTT A. KRONLAND
JONATHAN WEISSGLASS
Counsel of Record
JENNIFER SUNG
P. CASEY PITTS
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Tel: (415) 421-7151
Fax: (415) 362-8064
jweissglass@altshulerberzon.com
Counsel for Amici Curiae *Service Employees International Union and Change to Win*

[Additional Counsel on Inside Cover]

January 2012

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

ADDITIONAL COUNSEL FOR AMICI CURIAE

PATRICK J. SZYMANSKI
CHANGE TO WIN
1900 L Street, N.W.
Suite 900
Washington, D.C. 20036
Tel: (202) 721-6035
Counsel for Amicus Curiae *Change to Win*

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The Minimum Coverage Provision Operates As An Income Tax That Is Within Congress' Taxation Power	4
A. The Minimum Coverage Provision Operates As An Income Tax	5
B. The Minimum Coverage Provision's Operative Provisions Fall Within Congress' Plenary Power To Tax Income	7
II. The Minimum Coverage Provision's Constitutionality Is Determined By Its Operation And Substance, Not By Constitutionally Irrelevant Matters of Form	10
III. The Purportedly Regulatory Or Punitive Features Of The Minimum Coverage Provision Do Not Take It Beyond Congress' Taxing Power	19
CONCLUSION	31

TABLE OF AUTHORITIES

Page

CASES

Barnhart v. Peabody Coal Co.,
537 U.S. 149 (2003) 14

Bob Jones University v. Simon,
416 U.S. 725 (1974) 27

Brock v. Pierce County,
476 U.S. 253 (1986) 14

Bromley v. McCaughn,
280 U.S. 124 (1929) 27

Brushaber v. Union Pac. R. Co.,
240 U.S. 1 (1916) 2, 5, 8, 9

Carmichael v. Southern Coal & Coke Co.,
301 U.S. 495 (1937) 15

Child Labor Tax Case,
259 U.S. 20 (1922) 22, 23, 25, 27

Complete Auto Transit Inc. v. Brady,
430 U.S. 274 (1977) 10, 11

DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) ... 3, 12, 13

Dellmuth v. Muth,
491 U.S. 223 (1989) 18

Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994)... 9, 21, 22, 23, 24, 25, 26, 28

EEOC v. Wyoming,
460 U.S. 226 (1983) 18

Fernandez v. Wiener,
326 U.S. 340 (1945) 27

Florida v. HHS,
648 F.3d 1235 (11th Cir. 2011) 15

Hampton & Co. v. United States,
276 U.S. 394 (1928) 21

TABLE OF AUTHORITIES—Continued

Page

Helvering v. Davis,
301 U.S. 619 (1937) 8, 28

Hylton v. United States,
3 U.S. (3 Dall.) 171 (1796) 8, 9

Jefferson County v. Acker,
527 U.S. 423 (1999) 6, 15, 16, 25

Knowlton v. Moore,
178 U.S. 41 (1900) 27

License Tax Cases,
72 U.S. 462 (1866) 4, 12, 14, 15, 16, 27

M'Culloch v. Maryland,
17 U.S. 316 (1819) 10, 30

Marchetti v. United States,
390 U.S. 39 (1968) 9

McCray v. United States,
195 U.S. 27 (1904) 10

Nelson v. Sears, Roebuck & Co.,
312 U.S. 359 (1941) 7, 11

New York v. United States,
505 U.S. 144 (1992) 3, 12, 13, 27

Pacific Ins. Co. v. Soule,
74 U.S. (7 Wall.) 433 (1868) 8, 9

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) 3, 11

Rousey v. Jacoway,
544 U.S. 320 (2005) 17

Scholey v. Rew,
90 U.S. 331 (1874) 27

Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) 15

Sonzinsky v. United States,
300 U.S. 506 (1937) 8, 20

TABLE OF AUTHORITIES—Continued

Page

South Dakota v. Dole,
483 U.S. 203 (1987) 27

Steward Machine Co. v. Davis,
301 U.S. 548 (1937) 22, 28, 29, 30

Texas v. Johnson,
491 U.S. 397 (1989) 14

Thomas More Law Center v. Obama,
651 F.3d 529 (6th Cir. 2011) 14, 22, 25

United States v. Butler,
297 U.S. 1 (1936) 22, 23, 24, 27

United States v. Constantine,
296 U.S. 287 (1935) 25

United States v. James Daniel Good Real Property,
510 U.S. 43 (1993) 14

United States v. Kahriger,
345 U.S. 22 (1953) 8, 26

United States v. New York,
315 U.S. 510 (1942) 30

United States v. Ptasynski,
462 U.S. 74 (1983) 9

United States v. Reorganized CF & I Fabricators of Utah, 518 U.S. 213 (1996) 11, 24

United States v. Safety Car Heating & Lighting Co., 297 U.S. 88 (1936) 8

United States v. Sanchez,
340 U.S. 42 (1950) 4, 21, 27

United States v. Sotelo,
436 U.S. 268 (1978) 17

Veazie Bank v. Fenno,
75 U.S. (8 Wall.) 533 (1869) 8

Western Union Telegraph Co. v. Kansas,
216 U.S. 1 (1910) 15

TABLE OF AUTHORITIES—Continued

Page

Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948) 18

Zadvydas v. Davis, 533 U.S. 678 (2001) 12

CONSTITUTION AND STATUTES

U.S. Const. amend. XVI 5, 9

U.S. Const., art. I, §8 8

Act of June 30, 1864, 13 Stat. 223 (1864) 16

Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001) 17

Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010) .. 19

4 U.S.C. §7(b) 15

4 U.S.C. §7(c) 15

4 U.S.C. §7(m) 15

4 U.S.C. §110(c) 6

26 U.S.C. §1(f) 17

26 U.S.C. §55 6

26 U.S.C. §151 7

26 U.S.C. §3121(a)(1) 6

26 U.S.C. §5000A 2, 11, 12

26 U.S.C. §5000A(a) 4

26 U.S.C. §5000A(b) 4

26 U.S.C. §5000A(b)(1) 11

26 U.S.C. §5000A(b)(2) 6, 7, 14

26 U.S.C. §5000A(b)(3) 7

26 U.S.C. §5000A(c)(1)(A) 25

26 U.S.C. §5000A(c)(2) 6, 7

26 U.S.C. §5000A(c)(3) 6

TABLE OF AUTHORITIES—Continued

Page

26 U.S.C. §5000A(c)(4) 7
26 U.S.C. §5000A(e)(1) 6, 24, 26
26 U.S.C. §5000A(e)(2) 6
26 U.S.C. §5000A(g)(1) 7, 17
26 U.S.C. §5000A(g)(2) 25
26 U.S.C. §5000A(g)(2)(A) 14
26 U.S.C. §6671(a) 7, 17
42 U.S.C. §430 6
42 U.S.C. §18091(a)(2) 9

MISCELLANEOUS

Congressional Budget Office, *"Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act,"* Apr. 30, 2010 5
155 Cong. Rec. S8644 (Aug. 3, 2009) 20
155 Cong. Rec. S10746 (Oct. 27, 2009) 20
155 Cong. Rec. S10877 (Oct. 29, 2009) 20
155 Cong. Rec. S11143 (Nov. 5, 2009) 20
155 Cong. Rec. H12576 (Nov. 6, 2009) 20
155 Cong. Rec. S11454 (Nov.18, 2009) 20
155 Cong. Rec. S12768 (Dec. 9, 2009) 20
155 Cong. Rec. S13581 (Dec. 20, 2009) 19
155 Cong. Rec. S13751 (Dec. 22, 2009) 19
156 Cong. Rec. E506 (Mar. 21, 2010) 20
156 Cong. Rec. H1826 (Mar. 21, 2010) 19
156 Cong. Rec. H1882 (Mar. 21, 2010) 19
156 Cong. Rec. H1917 (Mar. 21, 2010) 20

TABLE OF AUTHORITIES—Continued

Page

Dan Dhaliwal, Oliver Zhen Li, Robert Trezevant, *Is a Dividend Tax Penalty Incorporated into the Return on a Firm's Common Stock?*, 35 Journal of Accounting and Economics 155 (2003) 17

Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457 (1897) 21

H.R. Rep. No. 111-443 (2010) 5, 20

Joint Committee on Taxation, JCX-43-09 (Oct. 29, 2009) 19

Letter from Congressional Budget Office to Chairman Baucus (Sept. 16, 2009) 19

1 Joseph Story, *Commentaries on the Constitution of the United States* (4th ed. 1873) 26

Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) 18

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners,
v.
STATE OF FLORIDA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AND CHANGE TO WIN AS *AMICI CURIAE* ADDRESSING THE MINIMUM COVERAGE PROVISION ISSUE AND SUPPORTING PETITIONERS AND REVERSAL

INTEREST OF *AMICI CURIAE*

Amicus curiae Service Employees International Union ("SEIU") is the nation's largest healthcare union, with more than half its 2.1 million members in the healthcare field. SEIU supports the Patient Protection and Affordable Care Act of 2010 ("PPACA") because it helps ensure accessible, quality healthcare for all Americans, including SEIU members and their families.

Amicus curiae Change to Win is a federation of four labor unions – the International Brotherhood of Teamsters, United Farm Workers of America, United Food and Commercial Workers International Union, and

SEIU – which collectively represent 5.5 million working men and women. Change to Win is committed to achieving affordable healthcare for all workers and their families.[1]

SUMMARY OF ARGUMENT

The minimum coverage provision of the PPACA, 26 U.S.C. §5000A, operates as an income tax within Congress' "complete and all-embracing taxing power." *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 13 (1916). The provision gives taxpayers the choice to either purchase adequate health insurance coverage or pay additional money to the government with their annual income tax returns. The exaction applies only to those with taxable income above the income tax filing thresholds, represents no more than a small portion of any individual's income, is measured as a percentage of income, and is administered through the income tax collection system. The exaction generates substantial revenue for the federal government's use in addressing the cost of providing healthcare for taxpayers without adequate insurance, while creating an incentive for taxpayers to purchase affordable coverage, reducing future costs to the government. In every legally significant aspect, the minimum coverage provision operates as an income tax that satisfies the constitutional requirements for an exercise of Congress' taxing power.

Opponents of the PPACA nonetheless insist that the minimum coverage provision cannot be upheld as a tax because the PPACA states that covered individuals "shall" procure minimum essential coverage, and because

---

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed letters of consent with the Clerk of the Court.

Congress labeled the exaction a "penalty" and not a "tax." Although they point to no aspect of the provision's operation that is inconsistent with its status as a tax, according to the PPACA's opponents, one of the most significant pieces of legislation in the last 50 years must be overturned for being improperly worded.

This kind of "magic words" jurisprudence is not the law, and is deeply disrespectful of legislative prerogatives. *See, e.g.*, *Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992). Courts are charged with policing (and protecting) the substance of Congress' legislative authority. Whether an exaction is a valid exercise of the taxing power turns on its operation, not Congress' drafting skill or choice of label. Moreover, if there is any doubt about a statute's constitutionality, it is a "cardinal principle" of judicial review that courts, wherever possible, construe the statute to preserve its constitutionality. *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

There is no reason to construe the minimum coverage provision's use of the word "shall" as having any legal significance beyond stating the conditional basis against which the tax liability will be assessed, especially if, as opponents of the PPACA contend, such a construction renders the statute constitutionally vulnerable. The only consequence that flows from an individual's failure to act is payment of this income-based assessment as part of one's tax return. This Court has already construed an identically-structured statute as establishing "choices," rather than a "mandate," where the latter construction raised serious constitutional questions. *New York v. United States*, 505 U.S. 144, 169 (1992). The language here should be construed as establishing similar "choices" – individuals may purchase coverage or pay a tax. So construed, the statute's reach is entirely within Congress' taxing power.

Likewise, Congress' use of the word "penalty" rather than "tax" has no constitutional significance. The Court has previously recognized that Congress may exercise its taxing power through exactions with far more unambiguously regulatory labels. *See, e.g.*, *License Tax Cases*, 72 U.S. 462 (1866) (upholding "license" as tax).

The PPACA's opponents also claim that the minimum coverage provision cannot be a tax because Congress assertedly was motivated by a regulatory purpose or because the provision has a penalizing effect. But all taxes have regulatory consequences, and can be said to penalize those taxed. The presence (or even predominance) of a regulatory purpose is fully consistent with an exaction's validity as an exercise of Congress' taxing power. *See United States v. Sanchez*, 340 U.S. 42, 44 (1950).

It cannot be disputed that the PPACA's minimum coverage requirement could be accomplished without raising any constitutional objection through a differently worded but operationally indistinguishable exercise of the taxing power. Congress indisputably has the authority to tax the income of those who decline to purchase health insurance. That is all that the minimum coverage provision does. The provision should therefore be upheld.

ARGUMENT

I. The Minimum Coverage Provision Operates As An Income Tax That Is Within Congress' Taxation Power

The PPACA's "minimum coverage" provision states that "applicable individual[s]" "shall" maintain "minimum essential" health insurance coverage, and subjects those who do not maintain such coverage to a financial exaction. 26 U.S.C. §5000A(a)-(b). The provision is part of a comprehensive reform package designed to improve the nation's health and reduce the federal

deficit. In enacting the PPACA, Congress found that healthcare costs, including the costs of caring for the uninsured, significantly burden the federal budget. *See, e.g.*, H.R. Rep. No. 111-443, pt. 1, at 1 (2010); *id.*, pt. 2, at 983. The minimum coverage provision addresses this fiscal burden by encouraging individuals with sufficient income to purchase private health insurance, and by generating annual revenue of more than $4 billion. Congressional Budget Office ("CBO"), "Payments of Penalties for Being Uninsured Under the Patient Protection and Affordable Care Act," Apr. 30, 2010, at 3. The conditional financial exaction – paid only by those with income who have not otherwise obtained coverage – promotes the PPACA's fiscal goals without requiring those who have already incurred costs to obtain coverage to pay twice.

A. The Minimum Coverage Provision Operates As An Income Tax

Although Congress did not expressly label the minimum coverage provision a "tax," the only legal consequence for failing to procure "minimum adequate coverage" is a requirement to pay additional money to the government, and that exaction operates as an income tax in all legally relevant aspects. Accordingly, the minimum coverage provision in its practical operation is a conditional income tax.[2]

---

[2] The Sixteenth Amendment establishes that Congress' tax authority encompasses all income taxes, conditional or otherwise. U.S. Const. amend. XVI. Although the minimum coverage provision operates as an income tax within the scope of the Sixteenth Amendment, the provision is a valid exercise of Congress' tax authority even if it is understood as another form of excise tax, because income taxes are subject to the same constitutional constraints as other excise taxes. *See Brushaber*, 240 U.S. at 17-19.

First, payment of the exaction is conditioned upon the receipt of income. Only individuals who receive income in excess of the income tax filing threshold are subject to the exaction. 26 U.S.C. §5000A(e)(2). Like the "license fee" that this Court, in *Jefferson County v. Acker*, 527 U.S. 423, 437-42 (1999), recognized as an income tax, the exaction is "'levied on, with respect to, or measured by, net income, gross income, or gross receipts,'" *id.* at 438 (citing 4 U.S.C. §110(c)).

Second, no sources of wealth other than income are subject to the exaction. In most cases, the exaction is measured as a simple percentage of income. In others, it is subject to a floor and ceiling (with both always far below one's income). In virtually all cases, the exaction will be no more than a small fraction of a taxpayer's annual income.[3] Moreover, many individuals with moderate incomes are exempted from the exaction entirely. *See, e.g.*, 26 U.S.C. §5000A(e)(1) (affordability exemption).

Third, the exaction is collected and reported entirely through the income tax system and its self-reporting mechanisms, as a part of the taxpayer's total annual income tax obligations. 26 U.S.C. §5000A(b)(2). The provision defines the individuals subject to the exaction as "taxpayers" and the period during which they must

---

[3] In 2016, the payment by a taxpayer without coverage cannot be more than the greater of (1) 2.5% of household income above the filing threshold, or (2) a flat dollar amount well below the filing threshold, ranging from $695 to $2,085 depending on family size. 26 U.S.C. §5000A(c)(2)-(3). The payment will thus be calculated simply as a small and fixed percentage of income for single individuals with incomes from less than $40,000 to more than $200,000 (based on current filing thresholds). That the exaction is subject to a floor and ceiling does not affect its operation as an income tax. The Social Security tax is similarly capped, 26 U.S.C. §3121(a)(1); 42 U.S.C. §430; and the "alternative minimum tax," 26 U.S.C. §55, similarly ensures that taxpayers pay a minimum amount of federal income tax.

procure insurance as their "taxable year." *Id.* §5000A(b)(2), (b)(3), (c)(2). Payments are "assessed and collected in the same manner as taxes," and are included by law in "any reference in [the Internal Revenue Code] to 'tax.'" *Id.* §§5000A(g)(1), 6671(a). The provision treats family relationships in the same manner as the general income tax code. *Id.* §5000A(b)(3) (individuals liable for payments required by dependents or spouse); *id.* §5000A(c)(4) (household income and family size defined by dependents reported on income tax return) (citing 26 U.S.C. §151). Accordingly, taxpayers will simply experience the exaction as part of their income tax obligations.

Because the exaction bears all the functional characteristics of an income tax conditioned upon choosing not to purchase adequate coverage, the minimum coverage provision functions as an income tax in "practical operation" – which is what matters for this Court's constitutional analysis. *See, e.g.*, *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941); *see also infra* Part II.1.[4]

B. The Minimum Coverage Provision's Operative Provisions Fall Within Congress' Plenary Power To Tax Income

In its operation as an income tax, the minimum coverage provision falls well within Congress' constitutional taxing power.

---

[4] Opponents of the PPACA assert that the exaction does not operate as an income tax because income is not the *sole* factor that determines its applicability and amount. This is not the test. To the contrary, many of the factors that determine the minimum coverage tax's applicability and amount also determine a taxpayer's other income tax obligations. *E.g.*, 26 U.S.C. §151 (income tax determined by number of people within taxpayer's household).

"The great object of the Constitution was, to give Congress a power to lay taxes, adequate to the exigencies of government. . . ." *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 173 (1796) (Chase, J.). "[N]othing is clearer . . . than the purpose to give this power to Congress, as to the taxation of everything except exports, in its fullest extent." *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 540 (1869). This "complete and all-embracing taxing power" "is exhaustive and embraces every conceivable power of taxation." *Brushaber*, 240 U.S. at 13. Congress thus has a broad and comprehensive power to tax, independent of the other enumerated congressional powers, and subject only to narrow limitations. *Pacific Ins. Co. v. Soule*, 74 U.S. (7 Wall.) 433, 443-46 (1868). Congress' power to tax *income* is especially broad. *United States v. Safety Car Heating & Lighting Co.*, 297 U.S. 88, 99 (1936) ("When it is [income], it may be taxed . . . .").

The minimum coverage provision satisfies each of the narrow limitations on Congress' taxing power.

1. An exercise of Congress' taxation power must produce "some revenue." *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937). The minimum coverage provision easily satisfies this requirement. The PPACA was prompted in part by Congress' concern about the fiscal strain of rising healthcare costs, and, as CBO estimated, the minimum coverage provision will generate $4 billion in annual revenue. *Cf. United States v. Kahriger*, 345 U.S. 22, 28 n.4 (1953) (noting valid taxes generating $3,501 and $28,911).

2. Congress must use its taxation power to promote the "general welfare." U.S. Const., art. I, §8. The discretion to determine whether a tax serves the general welfare "belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Helvering v. Davis*, 301 U.S. 619, 640 (1937). The minimum coverage provision is part of a program-

matic response to the national problems caused by the number of Americans without adequate health insurance. *See, e.g.*, 42 U.S.C. §18091(a)(2). This readily satisfies the general welfare requirement.

3. The Constitution imposes two additional limits on the means by which Congress taxes: "direct taxes, including the capitation tax, shall be apportioned; [and] duties, imposts, and excises shall be uniform." *Soule*, 74 U.S. at 446. Opponents of the PPACA assert that the minimum coverage provision, if a tax, is a direct tax requiring apportionment. But payment of the tax is conditioned upon numerous circumstances, including the receipt of income and the failure to procure minimum coverage. *Hylton*, 3 U.S. at 175 (Chase, J.) (with exception of property taxes, direct taxes are those imposed without regard to circumstance). Moreover, the Sixteenth Amendment specifically grants Congress the "power to lay and collect taxes on incomes, from whatever source derived, *without apportionment* . . . ." U.S. Const. amend. XVI (emphasis added).

Under the Sixteenth Amendment, income taxes, like other excise taxes, need only be uniform. *Brushaber*, 240 U.S. at 18-19. A tax satisfies this requirement if it exhibits no "undue preference" for certain states. *United States v. Ptasynski*, 462 U.S. 74, 86 (1983). The minimum coverage tax readily satisfies this test because it applies the same non-discriminatory formula throughout the nation. *See id.*

4. An exercise of Congress' plenary taxation power must not offend the Constitution's individual rights provisions, such as prohibitions on double jeopardy or self-incrimination. *See Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767 (1994); *Marchetti v. United States*, 390 U.S. 39 (1968). There is no reasonable argument that the minimum coverage provision offends any provision of the Bill of Rights.

The minimum coverage provision's operations thus fall well within Congress' constitutional taxation power.

II. The Minimum Coverage Provision's Constitutionality Is Determined By Its Operation And Substance, Not By Constitutionally Irrelevant Matters of Form

Faced with a provision that indisputably operates as a constitutional income tax, opponents of the PPACA disregard the law's operation and instead argue that matters of form preclude treating it as a tax. They argue that the mandate cannot be upheld as an exercise of the taxing power because the mandate and the exaction are not linked in the same sentence but are placed in adjacent sentences, one of which states that covered individuals "shall" procure coverage; because Congress did not use the word "tax," but the word "penalty" in the minimum coverage provision; and because Congress made express findings regarding the provision's effects on commerce. These arguments fundamentally misconceive the roles of Congress and the courts, and improperly attach "constitutional significance" to mere "semantic difference[s]." *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 285 (1977).

1. The question before this Court when it reviews federal legislation is whether the enactment falls within the substantive scope of Congress' constitutional powers. *See, e.g., M'Culloch v. Maryland*, 17 U.S. 316, 421 (1819). In performing this review, the constitutionality of a congressional enactment is determined by its substantive operation, not by mere matters of form. *McCray v. United States*, 195 U.S. 27, 59 (1904) ("in determining whether a particular act is within a granted power," Court considers "its scope and effect").

This Court has uniformly and robustly applied this principle in considering whether a legislative enactment is a constitutionally permissible tax. The Court has determined a monetary exaction's constitutionality by examining its "practical effect," rather than name tag, and has repeatedly stressed that "magic words or labels" cannot "disable an otherwise constitutional levy." *Quill*, 504 U.S. at 310 (citation omitted); *see also United States v. Reorganized CF & I Fabricators of Utah*, 518 U.S. 213, 220 (1996) (in tax cases, "Court look[s] behind the label placed on the exaction and rest[s] its answer directly on the operation of the provision . . . ."); *Complete Auto Transit*, 430 U.S. at 285 (rejecting "rule[s] of draftsmanship" that "distract the courts and parties from their inquiry into whether the challenged [tax provision] produced [unconstitutional] results"); *Nelson*, 312 U.S. at 363 ("In passing on the constitutionality of a tax law [the Court is] concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.") (internal quotation omitted).

2. Opponents of the PPACA turn these principles inside out. They ignore the substance and operation of the minimum coverage provision, and ask the Court to act as Congress' copy editor and return the PPACA to Congress for word-smithing. Fundamentally, they ask the Court to give the law a strained and unnecessary construction that raises serious constitutional concerns. This is contrary to the proper judicial function.

First, they complain about Congress' word choice and sentence structure. They treat §5000A(a), the so-called "individual mandate," as a regulatory provision that *must* have legal significance independent of the income tax exaction, and argue that this "mandate," standing alone, cannot be an exercise of Congress' taxing power. They then argue that the provision's financial "penalty," §5000A(b)(1), *cannot* be construed as a tax because its

purpose is to force individuals to comply with the mandate.

These arguments ignore the "cardinal principle . . . beyond debate" that "every reasonable construction must be resorted to, in order to save [the] statute from unconstitutionality." *DeBartolo*, 485 U.S. at 575 (citation omitted). This rule "recognizes that Congress . . . is bound by and swears an oath to uphold the Constitution," and that courts may "not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Id.* When the constitutionality of a congressional act is questioned, the Court has a duty to "first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (citation omitted). Because the minimum coverage provision operates as a constitutional income tax in all legally relevant aspects, such a construction of the minimum coverage provision is not only "fairly possible," but the most reasonable construction.

Section §5000A can be construed as affording individuals a choice between purchasing insurance and paying a tax. For that reason, the provision *must* be construed as such if an alternate construction raises constitutional concerns. *See New York*, 505 U.S. at 170; *License Tax Cases*, 72 U.S. at 471-72 (construing federal "licenses" as imposing "taxes" instead of "giving authority to carry on the branches of business which they license" because, under latter interpretation, it "might be difficult, if not impossible, to reconcile the granting of them with the Constitution").

In *New York*, this Court considered a statute *identical* in structure to the minimum coverage provision. That statute expressly stated that the States "*shall* be responsible for providing . . . for the disposal of . . . radioactive waste," and imposed three sets of penalties for non-com-

pliance. 505 U.S. at 169 (emphasis added and citation omitted); *see also id.* at 151-53 (describing "penalties"). New York argued that the "shall be responsible" provision had to be construed "alone and in isolation, as a command to the States independent of the remainder of the Act," *id.* at 170, and that, as such, it was a constitutionally impermissible "direct command" on the States, *id.* at 169. The Court declared that the statute "could plausibly be understood *either* as a mandate to regulate or as a series of incentives," but rejected the former construction because it "would raise serious constitutional problems." *Id.* at 170 (emphasis added). The Court reiterated: "'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" *Id.* (quoting *DeBartolo*, 485 U.S. at 575). Construing the statute "as a whole," this Court concluded it imposed no "mandate," but instead afforded the States "choices" while establishing "incentives" to encourage compliance. *Id.* at 169-70.[5]

This case is no different from *New York*. The minimum coverage provision can plausibly be construed as simply affording taxpayers the choice to either purchase insurance or pay a financial exaction. This is the only legal consequence for noncompliance that Congress established. The provision nowhere declares that noncompliance is "unlawful," and it specifically prohibits its

---

[5] The Court reached that conclusion even though the consequences for non-compliance with the "mandate" at issue there were far more significant than the small income tax exaction here. *See, e.g.*, *New York*, 505 U.S. at 171-74 (States that did not comply would have to pay "surcharges" to dispose of their radioactive waste in other States, forfeit their share of those surcharges if they did not meet specified conditions, and eventually lose access to other States' sites altogether).

enforcement through criminal proceedings. 26 U.S.C. §5000A(g)(2)(A). People who decline to pay the "penalty" are characterized in the law as "taxpayers," not law violators. *Id.* §5000A(b)(2). Nothing in the PPACA requires construing the minimum coverage provision to have any legal effect beyond the financial exaction. *See, e.g.*, *Thomas More Law Center v. Obama*, 651 F.3d 529, 563 (6th Cir. 2011) ("*TMLC*") (Sutton, J., concurring) ("[The PPACA] does not compel individuals to buy insurance or even use insurance. They may pay a penalty instead . . . ."); *cf. United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) ("[I]f a statute does not specify a consequence for noncompliance . . . the federal courts will not in the ordinary course impose their own coercive sanction."). Just as in *New York*, this Court should not construe the so-called "individual mandate" "alone and in isolation" – especially if that construction raises constitutional concerns.

Contrary arguments rest on the view that the word "shall" can admit of no construction other than the creation of an independent legal mandate. But this is precisely what *New York* rejected. Indeed, the *New York* Court's refusal to interpret the word "shall" in that way was hardly novel. In *License Tax Cases*, 72 U.S. at 471, for example, the Court explained that Congress used the word "shall" "merely as a convenient mode of imposing taxes on several descriptions of business." *See infra* Part II.3. Likewise, the Court has refused to accord legal significance to statutory provisions stating that administrative actions "shall" occur within a given timeframe. *See, e.g.*, *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158-59 (2003); *Brock v. Pierce County*, 476 U.S. 253, 266 (1986). And the Court has recognized that the United States Flag Code establishes precatory "recommendations" concerning "the proper treatment of the flag," notwithstanding the Code's repeated use of the word "shall." *Compare Texas v. Johnson*, 491 U.S. 397, 418

(1989), *with, e.g.*, 4 U.S.C. §7(c) (original version at 36 U.S.C. §175(c) (1990)) ("*No person shall* display the flag of the United Nations or any other national or international flag equal, above, or in a position of superior prominence or honor to, or in place of, the flag of the United States at any place within the United States or any Territory or possession thereof[.]") (emphasis added); *id.* §7(b) ("When the flag is displayed on a motorcar, the staff *shall* be fixed firmly to the chassis or clamped to the right fender.") (emphasis added); *id.* §7(m) ("By order of the President, the flag *shall* be flown at half-staff . . . .") (emphasis added).[6]

3. The court below also took Congress to task for further poor word choice, claiming that, if Congress wished to enact a constitutional statute, it should have used the word "tax," not the word "penalty." *Florida v. HHS*, 648 F.3d 1235, 1319 (11th Cir. 2011).

But, as stated, deference to a co-equal branch of government requires that a monetary exaction's constitutionality be determined by its "practical impact, not [its] name tag." *Acker*, 527 U.S. at 439-42 (1999) (ordinance "declar[ing] it 'unlawful . . . to engage in' a covered occupation . . . without paying [a] license fee" established "income tax"); *see also Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 508 (1937); *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1, 27 (1910); *License Tax Cases*, 72 U.S. at 470-71. Under precedents dating

---

[6] Some have argued that the provision's "mandatory" language has independent legal significance because it may influence the behavior of citizens who desire to "comply[] with The Law," but would otherwise choose to pay the exaction. *See, e.g.*, *Seven-Sky v. Holder*, 661 F.3d 1, 49 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Leaving aside the unlikelihood that such a nuance of statutory text will lead to significantly different behavior, any such confusion about citizens' legal obligations would be eliminated by this Court's clarification that the provision merely operates as a tax and imposes no independent obligations once payment is made.

back well over a century, a monetary exaction may be an exercise of the taxing power even if Congress gives it a label that is unambiguously *regulatory*.

In 1866, the *License Tax Cases* upheld under Congress' taxing power a statute that expressly imposed a license requirement on liquor and gambling businesses. The statute stated that "no person, firm, company or corporation *shall* be engaged in" liquor and gambling businesses "until he or they *shall* have obtained a license therefor in the manner hereinafter provided," and further required that the business owner "shall register" with the collector of revenue. Act of June 30, 1864, ch. 173, §§71, 72, 13 Stat. 223, 248 (1864) (emphases added). Because liquor and gambling were considered intrastate activities, and "licenses" were generally understood to be regulatory devices that "confer[] an authority to carry on the licensed business," the statute's opponents argued that the license requirement was a regulatory act outside of Congress' commerce power. 72 U.S. at 470-71.

The Court, however, recognized that the "license" requirement *could* be construed as a financial exaction, not a regulatory device, and held that it was a constitutional exercise of Congress' taxing power even though Congress labeled the exaction a "license" and worded the "license" requirement as an absolute prohibition on unlicensed activity, *id.* at 468-69, 471; even though legislatures generally use "licenses" to regulate, *id.* at 470-71; and even though the "license" requirement discouraged businesses widely considered to be immoral, *id.* at 473.

The Court determined that these facts were constitutionally irrelevant. Because the only relevant fact was the way the "license" operated, the Court construed the statute as doing "nothing more than . . . imposing a tax." *Id.* at 471; *see also Acker*, 527 U.S. at 439-42 ("license fee" was income tax in practical applica-

tion); *United States v. Sotelo*, 436 U.S. 268, 275 (1978) ("We . . . cannot agree . . . that the 'penalty' language . . . is dispositive. . . . That the funds due are referred to as a 'penalty' . . . does not alter their essential character as taxes . . . .").

The result in *License Tax Cases* is irreconcilable with the argument that the "penalty" label is dispositive here. Indeed, the term "penalty" far more readily denotes a tax than the term "license." Congress explicitly required that the "penalty" be construed as a tax for purposes of the Internal Revenue Code, *see* 26 U.S.C. §§5000A(g)(1), 6671(a); and has long used the term "penalty" when referring to taxes. *E.g.*, Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107–16, 115 Stat. 38, 53-57 (2001), §§301-303; 26 U.S.C. §1(f) (repeatedly referring to income-tax differential paid by certain married couples as "marriage penalty"). The use of "penalty" to describe taxes is also common among courts, lawyers, and economists.[7]

Indeed, at all stages of the PPACA's consideration, legislators referred to the minimum coverage provision as a "tax" and used the terms "tax" and "penalty" interchangeably. *Infra* Part III.1. To strike down major legislation because Congress ultimately chose the word "penalty" would ignore all relevant aspects of the statute's prescribed operation, the relevant precedent on the tax authority (including the *License Tax Cases*), the historic usage of the term in tax contexts, the stated understand-

---

[7] *E.g.*, *Rousey v. Jacoway*, 544 U.S. 320, 327 (2005) (describing tax on early withdrawals from IRA accounts as "tax penalty"); *Sotelo*, 436 U.S. at 275 (funds labeled "penalty" by Congress retained "essential character as taxes"); Dan Dhaliwal, Oliver Zhen Li, Robert Trezevant, *Is a Dividend Tax Penalty Incorporated into the Return on a Firm's Common Stock?*, 35 Journal of Accounting and Economics 155 (2003).

ing of many in Congress (and the reasonableness of that understanding in light of these other sources), and the Court's duty to construe statutes to preserve their constitutionality and to uphold statutes that are, *in substance*, entirely constitutional.

4. Finally, opponents of the PPACA assert that the minimum coverage provision cannot be upheld because Congress made findings regarding its effects on interstate commerce, but did not expressly invoke its taxing power. But courts have never required "findings" regarding exercises of Congress' taxing power, nor required that Congress expressly identify the constitutional basis for its legislation. To the contrary, "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); *see also Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring). Indeed, in *EEOC v. Wyoming*, this Court recognized that Congress may exercise its non-Commerce Clause powers through legislation that contains findings regarding its effects on interstate commerce but no express invocation of any alternative constitutional basis for its authority. 460 U.S. 226, 231 n.3, 244 n.18 (1983); *see also* Laurence H. Tribe, *American Constitutional Law* 307 n.6 (2d ed. 1988) ("An otherwise valid exercise of congressional authority is not, of course, invalidated if Congress happens to recite the wrong clause . . . or, indeed, if Congress recites no clause at all.").

In any case, here Congress expressly invoked neither its taxation powers *nor* its commerce powers, but simply made factual findings regarding the provision's effects on commerce. (Proponents of the PPACA *did*, however, invoke Congress' taxation powers during congressional debates regarding the provision. *See infra* Part III.1 n.8.)

Put simply, the question here is *whether Congress had the constitutional power* to enact the minimum coverage provision, not whether Congress clearly enough identified that power. Congress' commerce findings are thus irrelevant to determining whether the provision is a constitutional exercise of Congress' taxation powers.

III. The Purportedly Regulatory Or Punitive Features Of The Minimum Coverage Provision Do Not Take It Beyond Congress' Taxing Power

Opponents of the PPACA have also suggested that Congress' word choice demonstrates that Congress was motivated by a desire to regulate, not a desire to tax. They contend that this regulatory motive, or its punitive effect, means that the provision cannot be justified as an exercise of Congress' taxing power. These arguments lack merit – both as to the legislative history of the enactment and as to the relevant law.

1. To begin, the assertion that Congress had no intent to tax is wrong. Congress enacted the PPACA and the minimum coverage provision, in part, for revenue purposes. *See, e.g.*, PPACA, Pub. L. No. 111-148, §1563(a)(1), 124 Stat. 119, 270 (2010) ("[T]his Act will reduce the Federal deficit . . . ."); Letter from CBO to Chairman Baucus (Sept. 16, 2009) (estimating revenues generated by "penalty"); Joint Committee on Taxation, JCX-43-09 (Oct. 29, 2009) (estimating revenue effects of "revenue provisions" including "Tax on Individual Without Acceptable Health Care Coverage"). Indeed, many in Congress recognized the minimum coverage provision as a tax. Proponents expressly invoked Congress' taxing power.[8] The measure

---

[8] *See, e.g.*, 155 Cong. Rec. S13581 (Dec. 20, 2009) (Sen. Baucus); 155 Cong. Rec. S13751-52 (Dec. 22, 2009) (Sen. Leahy); 156 Cong. Rec. H1882 (Mar. 21, 2010) (Rep. Miller); 156 Cong. Rec. H1826 (Mar. 21, 2010) (Rep. Slaughter).

was described as a tax.[9] And the label "penalty" is consistent with Congress' intent to tax. All taxes penalize the activities subject to the tax. Here, throughout the legislative record, Congress used terms like "tax," "assessable payment," "assessable penalty," "tax penalty," and "penalty" interchangeably – in all cases fully understanding and intending that this measure would raise significant revenue.[10]

2. More fundamentally, it is constitutionally irrelevant whether Congress was also "motivated" by regulatory goals. *Sonzinsky*, 300 U.S. at 513. "Every tax is in some measure regulatory," *id.*, and Congress may exercise its taxing power for regulatory purposes, including to deter

---

[9] *See, e.g.*, H.R. Rep. No. 111-443, pt. 1, at 265 (discussing "tax on individuals who opt not to purchase health insurance"); 156 Cong. Rec. E506 (Mar. 21, 2010) (Rep. Waxman) ("The individual responsibility requirement requires individuals to pay a tax on their individual tax filings . . . ."); 155 Cong. Rec. S10877 (Oct. 29, 2009) (Sen. Hatch) ("Some may say this is simply a penalty for not doing what Uncle Sam wants you to do, but let us face it, it is nothing more than a new tax.").

[10] *See, e.g.*, 156 Cong. Rec. H1917 (Mar. 21, 2010) (Rep. Kirk) ("Among the new taxes is a new 'Individual Mandate Tax . . . .'"); 155 Cong. Rec. S12768 (Dec. 9, 2009) (Sen. Grassley) ("The . . . individual mandate penalty . . . . can be called a penalty, but it is a tax."); 155 Cong. Rec. S11454 (Nov. 18, 2009) (Sen. McCain) ("Taxes on individuals who fail to maintain government-approved health insurance coverage will pay $4 billion in new penalties . . . ."); 155 Cong. Rec. H12576 (Nov. 6, 2009) (Rep. Franks) ("It would impose a 2.5 percent penalty tax on those who do not acquire healthcare insurance."); 155 Cong. Rec. S11143 (Nov. 5, 2009) (Sen. Johanns) (discussing "penalty tax on individuals without insurance"); 155 Cong. Rec. S10746 (Oct. 27, 2009) (Sen. Enzi) ("Most young people will probably do the math and decide . . . I can pay the $750-a year tax penalty rather than pay $5,000 a year more for health insurance."); 155 Cong. Rec. S8644 (Aug. 3, 2009) (Sen. Kyl) ("There would be a penalty if they refused to [buy health insurance] that would go directly to their income tax.").

or promote particular activities, *Sanchez*, 340 U.S. at 44 ("tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed"); *Kurth Ranch*, 511 U.S. at 782 (discussing "mixed-motive taxes that governments impose both to deter a disfavored activity and to raise money"); *Hampton & Co. v. United States*, 276 U.S. 394, 412 (1928) ("[O]ther motives in the selection of the subjects of taxes cannot invalidate congressional action."). As was articulated more than a century ago, there is no "difference between being fined and being taxed a certain sum for doing a certain thing" in the absence of "some *further* disadvantages." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897) (emphasis added).

Consequently, a revenue raising measure is a valid exercise of the taxing power even if Congress' primary purpose is regulatory. *See, e.g.*, *Sanchez*, 340 U.S. at 44 ("revenue purpose of the tax may be secondary"). *Hampton*, for example, held that a protectionist tariff expressly enacted "to regulate the foreign commerce" was a valid exercise of Congress' taxing power. 276 U.S. at 401. The Court noted that the first Congress imposed tariffs for protectionist purposes, and emphatically rejected the argument "that it is unconstitutional to frame [monetary exactions] with any other view than that of revenue raising." *Id.* at 411-12.

The minimum coverage provision was intended to, and will, generate significant revenue. *See supra* Part I.B.1. That is enough; the claim that the mandate was worded in a manner to encourage the purchase of insurance is of no legal consequence. Moreover, the revenue and regulatory purposes here are interrelated: Congress' goal of lessening the Treasury's healthcare burden is served whether individuals choose to pay the tax or

purchase essential coverage. As the Court recognized in upholding the similarly structured unemployment insurance system, an exaction does not lose its character as a tax simply because it can be avoided through an act that Congress wishes to encourage and that will itself reduce the nation's fiscal burden. *Steward Machine Co. v. Davis*, 301 U.S. 548, 590-92 (1937) ("*Steward*").

3. Those challenging the PPACA's constitutionality based on its regulatory effect rely on discredited *Lochner*-era cases – primarily *Child Labor Tax Case*, 259 U.S. 20 (1922); and *United States v. Butler*, 297 U.S. 1 (1936) – to contend that the minimum coverage provision's regulatory purpose takes it outside Congress' taxing power. *Cf. TMLC*, 651 F.3d at 550-54 (Sutton, J., concurring). This reliance is misplaced, because both *Child Labor Tax Case* and *Butler* involved exactions with numerous extreme penalizing features absent here. Those exactions could not be considered taxes at all, given the presence of penalizing features that were overwhelmingly non-revenue collecting in nature. Indeed, in *Kurth Ranch*, this Court made clear that the only principle of these *Lochner*-era cases that survives is that, whatever label Congress attaches to an exaction, "the extension of [its] penalizing features" may at some point be so substantial that the exaction "loses its character" as a tax. 511 U.S. at 779; *see also Steward*, 301 U.S. at 590-93 (limiting *Butler* and *Child Labor Tax Case* to their facts).

The enactment at issue here operates in all relevant respects as a tax, and has no *penalizing* features beyond those inherent in any tax. The exaction at issue in *Kurth Ranch* provides an illustration of the difference. Although labeled a tax, that exaction "not only hinge[d] on the commission of a crime, [but] also [was] exacted

only after the taxpayer ha[d] been arrested for the precise conduct that g[ave] rise to the tax obligation in the first place." *Kurth Ranch*, 511 U.S. at 781. This Court found that the exaction was a form of punishment, regardless of its label, and that it "differ[ed] . . . from mixed-motive taxes that governments impose both to deter a disfavored activity and to raise money" because any legitimate revenue-raising purposes "vanish when the taxed activity is completely forbidden." *Id.* at 782.

Likewise, the exaction in *Butler* was a draconian "tax" that threatened those subject thereto with financial ruin and thus worked "to compel submission" to a regulatory requirement. 297 U.S. at 71. This Court declared that the exaction, although labeled a tax, was not an exercise of the taxing power but "coercion by economic pressure," because "the asserted power of choice [between engaging in the disfavored conduct or paying the exaction] [was] illusory." *Id.* The "tax" was not within Congress' taxing power because it operated *exclusively* to compel compliance with Congress' regulatory scheme. And the punitive exaction in *Child Labor Tax Case* amounted to ten percent of the employer's total net income for the year, was "paid by the employer in full measure whether he employs 500 children for a year, or employs only one for a day," and (reflecting its punitive nature) required proof of *scienter*. 259 U.S. at 36-37.

If anything, these cases underscore the minimum coverage provision's constitutional status as a tax, because they demonstrate that – as we have explained – the provision's constitutionality must be measured by its practical operation. Just as Congress cannot insulate an excessively punitive exaction from constitutional scrutiny simply by labeling it a tax, an otherwise constitutional tax exaction is not rendered unconstitutional simply because Congress had some regulatory purpose or used the label

"penalty" rather than "tax." Whether a challenged exaction is a tax for constitutional purposes is determined by its actual operation and substance, not by the presence of mixed motives or by its label.

4. In terms of its actual substance and operation, the minimum coverage provision is at the furthest remove from an exaction with extended penalizing features precluding its treatment as a tax. The provision exhibits no penalizing features beyond those inherent in any tax obligation.

First, the minimum coverage provision gives taxpayers the realistic and practical option of purchasing coverage or paying the tax. Had Congress intended to ensure compliance with a regulatory "mandate," it would have structured the "penalty" so that payment would *not* relieve individuals of the underlying obligation, or it would have set the exaction so high that, as a practical matter, compliance would be the only option. *Cf. Butler*, 297 U.S. at 71 (exaction would cause "financial ruin" if collected); *Reorganized CF&I Fabricators*, 518 U.S. at 225-26 (exaction amounting to 100% of employer's pension funding deficiency was purely punitive where employer that paid exaction remained liable for all unfunded benefit liabilities). Here, Congress included no provisions with such coercive effects, and instead waived the exaction for taxpayers required to pay more than an affordably small percentage of their income to obtain insurance. *See, e.g.*, 26 U.S.C. §5000A(e)(1) (affordability exemption).

Second, and related, the amount of the exaction here is *at most* the approximate equivalent of the cost of insurance, not an excessively "high rate" "consistent with a punitive character." *Cf. Kurth Ranch*, 511 U.S. at 780 (punitive drug tax was eight times drug's market value). Indeed, "in the first several years of the Act, if not throughout its existence," paying the exaction "normally

will cost less than [procuring] medical insurance." *TMLC*, 651 F.3d at 563 (Sutton, J., concurring). Congress' non-punitive approach is evident both in the modest overall amount of the tax and in that the exaction is pro-rated if the taxpayer obtains insurance for part of the tax year. *See* 26 U.S.C. §5000A(c)(1)(A); *see also* 26 U.S.C. §5000A(e)(1) (affordability exemption); *cf. Child Labor Tax Case*, 259 U.S. at 36 ("penalty" not pro-rated).

Third, payment of the tax is not conditioned on illegal conduct. *Cf. Kurth Ranch*, 511 U.S. at 781-82 (conditioning payment of an exaction on commission of crime "is 'significant of penal and prohibitory intent rather than the gathering of revenue'") (quoting *United States v. Constantine*, 296 U.S. 287, 295 (1935)). As explained above, there is no legal consequence other than the exaction for opting not to purchase coverage. Indeed, the PPACA specifically bars particularly coercive remedies, such as criminal prosecution, penalties, liens, or levies, for failure to pay the exaction, 26 U.S.C. §5000A(g)(2), thereby limiting the government's remedies to collection actions and tax refund offsets.[11]

Finally, the minimum coverage provision is located in the Internal Revenue Code, collected through the tax system, enforced by the tax authorities, and in all ways experienced by the taxpayer as a tax obligation. *Cf. Child Labor Tax Case*, 259 U.S. at 35 (punitive penalty enforced by Secretary of Labor). Indeed, many features of the provision's opera-

---

[11] That Congress took pains to make the minimum coverage provision less punitive than other taxes further underscores that there has been no "extension of the penalizing features" that might take the exaction outside of Congress' taxing authority. *Kurth Ranch*, 511 U.S. at 779. Congress' reliance on less intrusive collection measures certainly cannot undermine the conclusion that the exaction is a tax for constitutional purposes. *Acker*, 527 U.S. at 440-41 (exaction was income tax where enforcement limited to suit for collection).

tion make sense only when the provision is understood as an income tax. If the provision were instead a regulatory mandate, Congress would not have conditioned its applicability on the receipt of income (thereby exempting individuals with low reported income but with enough wealth to procure coverage without difficulty), and would not have held taxpayers jointly liable for payments owed by those declared as dependents on their income tax returns.

In sum, the only arguably "penalizing" feature of the minimum coverage provision is the exaction itself. That is not enough to preclude its characterization as a tax. *All* taxes are punitive and "oppressive" inasmuch as the requirement of payment deters the behaviors that are taxed, but much *more* is needed before a tax becomes a punitive penalty that cannot be sustained as an exercise of Congress' taxing power. *Kurth Ranch*, 511 U.S. at 778-79; *see also Kahriger*, 345 U.S. at 28 (wagering tax was not penalty "regardless of its regulatory effect").

5. One aspect of the way that those challenging the PPACA have used these *Lochner*-era cases merits additional comment. To the extent that PPACA challengers have used them to support the broader proposition that taxes with regulatory consequences fall outside the Constitution's taxing power, that argument cannot be reconciled with the many pre- and post-*Lochner* era precedents establishing that federal taxes may be enacted for regulatory purposes.

"The taxing power is often, very often, applied for other purposes than revenue." 1 Joseph Story, *Commentaries on the Constitution of the United States* §965, at 687 (4th ed. 1873). "From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were *beyond* the constitutional power of the lawmakers to realize by legislation directly addressed to their accom-

plishment." *Sanchez*, 340 U.S. at 45 (quotation omitted, emphasis added).[12] Congress may thus impose conditional taxes or place conditions on the receipt of government funds to achieve "objectives not thought to be within Article I's enumerated legislative fields." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citation omitted).

The contrary language in *Butler* and *Child Labor Tax Case* (and other similar cases of that era) turned on the view that the Tenth Amendment bars Congress from seeking to impact, directly *or* indirectly, areas of policy deemed "matters of state concern" and thus "within power reserved to the States" – even through otherwise valid exercises of its taxing and spending powers. *Compare Butler*, 297 U.S. at 68-70; *and Child Labor Tax Case*, 259 U.S. at 36; *with, e.g., Fernandez*, 326 U.S. at 362 ("The Tenth Amendment does not operate as a limitation upon the powers, express or implied, delegated to the national government."). That view is now discredited: The Tenth Amendment does not prohibit Congress from using its taxing and spending powers to create financial incentives for conduct that serves the general welfare. *New York*, 505 U.S. at 166-67, 171-73. As *Steward*, *Sanchez*, and *Hampton* demonstrate, this Court has "abandoned" the *Lochner*-era "distinction[] between regulatory and revenue-raising taxes." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 741 n.12 (1974). Financial exactions with regulatory

---

[12] Because Congress' taxing power "is not limited by the direct grants of legislative power found in the Constitution," *Butler*, 297 U.S. at 66, this Court has repeatedly sustained taxes on intrastate activity, including in contexts (or during periods) where such activities were understood as beyond Congress' other enumerated powers. *See, e.g., Fernandez v. Wiener*, 326 U.S. 340 (1945) ("death tax"); *Bromley v. McCaughn*, 280 U.S. 124 (1929) (gift tax); *Knowlton v. Moore*, 178 U.S. 41 (1900) (inheritance and legacy tax); *Scholey v. Rew*, 90 U.S. 331 (1874) (estate tax); *License Tax Cases*, 72 U.S. at 470-71 (tax on intrastate lottery and liquor trades).

purposes or effects that lack unique "penalizing" or "punitive" features remain taxes enacted pursuant to Congress' taxing authority. *Kurth Ranch*, 511 U.S. at 779.

6. Those who have challenged the PPACA's constitutionality have focused on form and labels, rather than on the statute's substantive operations, demonstrating that there can simply be no dispute that Congress has every right to obtain exactly the result it prescribed here through its tax authority. In particular, this Court has made it absolutely clear that Congress can use that authority to increase participation in socially-desired insurance programs meeting minimum standards, which is what Congress did here. *See Helvering*, 301 U.S. 619; *and Steward*, 301 U.S. 548 (upholding the unemployment and old age insurance taxes Congress established in the Social Security Act). The constitutional propriety of such an exercise of Congress' taxation power is beyond dispute, and there is no substantive basis to treat the minimum coverage provision any differently.

The Social Security Act established comprehensive insurance programs to address the financial insecurity stemming from economic retrenchment and "old age." *Helvering*, 301 U.S. at 641. To fund the "Federal Old-Age Benefits," Congress enacted an income tax on employees and an excise tax on employers. *Id.* at 635-36. To promote the development of unemployment insurance programs, Congress paired a tax on employers with a credit for contributing to state insurance funds satisfying certain criteria. *Steward*, 301 U.S. at 574.

Helvering rejected claims that the tax on employers "was not an excise as excises were understood when the Constitution was adopted" and that the Act was "an invasion of powers reserved by the Tenth Amendment to the states or to the people." 301 U.S. at 638. *Steward* rejected the argument that Congress' tax and credit system was

a regulatory mandate on employers to make particular insurance contributions and on States to create particular programs, such that the "so-called tax was not a true one." 301 U.S. at 592. *Steward* instead concluded that the conditional tax credit was a reasonable way to structure a tax, as it "promoted . . . relief through local units" while "in all fairness" ensuring that employers making contributions that helped alleviate the problem would not "pay a second time." *Id.* at 589.

Instead of mandating participation in a single national public insurance program or providing incentives for state-administered programs, the aspects of the PPACA that are challenged here adopt a market-based approach, giving taxpayers the choice of either procuring adequate coverage through a public or private insurance provider or paying a tax. This measure generates revenue *and* provides an incentive for taxpayers to purchase health insurance, while imposing no additional obligations upon those who have purchased coverage. Payment of the minimum coverage exaction is, as in *Steward*, "dependent upon the conduct of the taxpayers," and *Steward* establishes that Congress may use its taxing power to encourage activity, including the purchase of insurance, where the failure to act contributes to a costly national problem. *Id.* at 591; *see also id.* at 588-89 (finding it reasonable to reduce tax liability of those whose conduct "simplified or diminished the problem . . . and the probable demand upon the resources of the fisc").

There can be no doubt that the PPACA, like the Social Security Act, is a comprehensive effort to solve major problems that have imposed huge costs on the nation, and on the federal fisc. The PPACA addresses these problems through a variety of interrelated measures, including, for example, by barring practices (such as denying coverage for pre-existing conditions) that make afford-

able health insurance unavailable to many, and in part by providing tax incentives for individuals to purchase private insurance through market mechanisms. Here, no less than with the challenged aspects of the Social Security Act, "[t]he purpose of [Congress'] intervention . . . is to safeguard its own treasury and as an incident to that protection to place the [taxpayers] upon a footing of equal opportunity." *Id.* at 590-91. By giving taxpayers the choice to purchase insurance or pay a tax that is at most the "approximate equivalent[]," *id.* at 591, the provisions of the PPACA that are challenged here, like the provisions of the Social Security Act challenged in *Steward*, are designed to prevent taxpayers who have already paid to help ameliorate a costly and serious problem from having "to pay a second time." *Id.* at 589.

That the measure here is structured in a slightly different form does not matter. It is meaningless formalism to argue that Congress could have passed the minimum coverage provision as an increased income tax on all taxpayers accompanied by a credit for those with adequate coverage, but that it could not take the more direct course of imposing a conditional tax with the same net cost only on those who do not procure adequate coverage. Both methods afford taxpayers the same choice, with the same net tax effect. *See United States v. New York*, 315 U.S. 510, 517 (1942). The Constitution gives Congress the "useful and necessary right . . . to select . . . means" "which, in its judgment, would most advantageously effect the object to be accomplished." *M'Culloch*, 17 U.S. at 419. Here, the means Congress chose – directly imposing an income tax upon those who have not purchased health insurance – are simpler and less administratively onerous than a functionally identical tax and credit system, especially because the majority of income earners already have health coverage. Nothing in the Constitution requires Congress to refrain from using the most efficient means to accomplish its permitted ends.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

SCOTT A. KRONLAND
JONATHAN WEISSGLASS
Counsel of Record
JENNIFER SUNG
P. CASEY PITTS
ALTSHULER BERZON LLP
177 Post St., Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151

JUDITH A. SCOTT
WALTER KAMIAT
MARK SCHNEIDER
SERVICE EMPLOYEES
INTERNATIONAL UNION
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036

PATRICK J. SZYMANSKI
CHANGE TO WIN
1900 L Street, N.W.
Suite 900
Washington, D.C. 20036

January 2012

AMICUS CURIAE BRIEF

No. 11-398

In the
Supreme Court of the United States

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF ON BEHALF OF SINGLE PAYER ACTION, IT'S OUR ECONOMY, AND FIFTY MEDICAL DOCTORS WHO SUPPORT SINGLE PAYER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS (MINIMUM COVERAGE PROVISION)

Oliver B. Hall
Counsel of Record
1835 16TH STREET NW #5
WASHINGTON, DC 20009
(617) 953-0161
oliverbhall@gmail.com

Counsel for Amici Curiae

February 13, 2012

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

INTRODUCTION 5

SUMMARY OF ARGUMENT 12

ARGUMENT 13

I. The Government Misconstrues the Nature of the Commerce Power By Asserting That Congress May Enact Any Provision It Deems Necessary to a Larger Regulatory Scheme. .. 13

A. Congress Does Not Determine the Limits of Its Own Power to Regulate Interstate Commerce. 13

B. The Cases Cited By the Government Do Not Support the Sweeping New Power It Asserts in This Case. 16

II. The Success of Single Payer Systems Currently Operating in the United States Demonstrates That Congress Can Regulate Healthcare Markets Effectively Without Requiring That Citizens Purchase Health Insurance From Private Insurance Companies. 20

A. Medicare and the Veterans Health Administration Are Both Single Payer Systems That Achieve Universal Coverage of

the Eligible Population While Controlling Costs. 20

B. The System of Private Insurers on Which the ACA Builds and Expands Is More Expensive and Less Efficient Than Single Payer Systems. 25

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

Gibbons v. *Ogden*,
9 Wheat. 1, 22 U. S. 195 (1824) 18

Gonzales v. *Raich*,
545 U.S. 1 (2005) 15, 16

Heart of Atlanta Motel, Inc. v. *United States*,
379 U.S. 241 (1964) 13, 17

Hodel v. *Indiana*,
452 U.S. 314 (1981) . . . . . *passim*

Katzenbach v. *McClung*,
379 U.S. 294 (1964) 14, 17, 18

Perez v. *United States*,
402 U.S. 146 (1971) 14, 18

United States v. *Comstock*,
130 S. Ct. 1949 (2010) 15

United States v. Darby,
312 U.S. 100 (1941) 14, 17

United States v. *Lopez*,
514 U.S. 549 (1995) 16

United States v. *Morrison*,
529 U.S. 598 (2000) 16

United States v. *Wrightwood Dairy Co.*,
315 U.S 110 (1942) 15, 16, 17

Wickard v. *Filburn*,
317 U.S. 111 (1942) 14, 18

Statutes and Rules

26 U.S.C.A. 5000A 1, 7

42 U.S.C.A. 300gg(a)(1) 7

42 U.S.C.A. 300gg-1 7

42 U.S.C.A. 300gg-3 7

42 U.S.C.A. 300gg-4(a) 7

42 U.S.C.A. 300gg-4(b) 7

Sup. Ct. Rule 37.6 1

Legislative Materials

H.R. 676 108th Cong. (2003-04) 26

S. 703 111th Cong. (2009) 26

Administrative Materials

Charles A. Bowsher, *Canadian Health Insurance: Lessons for the United States*, GENERAL ACCOUNTING OFFICE (June 4, 1991) 26

National Health Expenditures Aggregate, Per Capita Amounts, Percent Distribution, and Average Annual Percent Change: Selected Calendar Years 1960-2010, CENTERS FOR MEDICARE AND MEDICAID SERVICES 22-23

CBO Analysis, American Health Security Act of 1993, CONGRESSIONAL BUDGET OFFICE 27

CBO Staff Memorandum, Single-Payer and All-Payer Health Insurance Systems Using Medicare's Rates, CONGRESSIONAL BUDGET OFFICE (April 1993) 27

Quality Initiatives Undertaken By the Veterans Health Administration, CONGRESSIONAL BUDGET OFFICE (Aug. 2009) 23, 24

D.W. Elmendorf, et al.,
"Letter to Nancy Pelosi," CONGRESSIONAL BUDGET OFFICE (March 20, 2010) 6

D.W. Elmendorf,
"Letter to Paul Ryan," CONGRESSIONAL BUDGET OFFICE (Jan. 27, 2010) 22

Robert D. Reischauer, et al.,
Universal Health Insurance Coverage Using Medicare's Payment Rates, CONGRESSIONAL BUDGET OFFICE (Dec. 1991) 26

U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2009 (2010) 6

Paul Van de Water,
Estimates of Healthcare Proposals From the 102nd Congress, CONGRESSIONAL BUDGET OFFICE (July 1993) 27

Other

Steven M. Asch et al.,
Comparison of Quality of Care for Patients in the Veterans Health Administration and Patients in a National Sample, ANN. OF INT. MED., Vol. 141, No. 12 (Dec. 21, 2004) 25

Robert J. Blendon and John M. Benson,
The Public's Views About Medicare and the Budget Deficit, NEW. ENG. J. OF MED. (July 13, 2011) 10, 23

David Carey, Bradley Herring and Patrick Lenain,
Healthcare Reform in the United States, OECD Econ. Dept. Working Paper No. 665 (Feb. 6, 2009) 27, 28

Benjamin Day,
Single Payer Ballot Questions Pass in All Fourteen Massachusetts Districts!, PHYSICIANS FOR A NATIONAL HEALTH PROGRAM (NOV. 3, 2010) 9

Fear and Loathing at the Democratic Convention, FAIRNESS & ACCURACY IN REPORTING (July/Aug. 1988) 11

THE FEDERALIST NO. 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 15

Oliver Fein,
Keep the Single Payer Vision, MEDICAL CARE, Vol. 48, No. 9 (Sept. 2010) 29

David U. Himmelstein, Deborah Thorne and Steffie Woolhandler,
Medical Bankruptcy in Massachusetts: Has Health Reform Made a Difference? AM. J. OF MED., Vol. 124, No. 3 (March 2011) 9

Kristen Jensen,
Vets Loving Socialized Medicine Show, BLOOMBERG (Oct. 2, 2009) 25

Ashish K. Jha et al.,
Effect of the Transformation of the Veterans Affairs Health Care System on the Quality of Care, NEW ENG. J. OF MED., Vol. 348, No. 22 (May 29, 2003) 24

Isabelle Joumard, Christophe André and Chantal Nicq,
Healthcare Systems: Efficiency and Institutions, OECD Econ. Dept. Working Paper No. 769 (May 19, 2010) 27, 28

Kaiser Health Tracking Poll – January 2012, KAISER FAMILY FOUNDATION 11

Phillip Longman,
The Best Care Anywhere, THE WASHINGTON MONTHLY (Jan. 1, 2005) 24, 25

THE FEDERALIST NO. 44 (James Madison) (Clinton Rossiter ed., 1961) 15, 16

Merrill Matthews,
Medicare's Hidden Administrative Costs: A Comparison of Medicare and the Private Sector, COUNCIL FOR AFFORDABLE HEALTH INSURANCE 22

Who Is Eligible for Medicare?, Medicare.gov . 20, 21

Rachel Nardin, Assaad Sayah, Hermione Lokko, Steffie Woolhandler and Danny McCormick, *Reasons Why Patients Remain Uninsured After Massachusetts' Health Care Reform: A Survey of Patients at a Safety-Net Hospital*, J. OF GEN. INTERNAL MED. (Sept. 16, 2011) 8

Health at a Glance: 2011 Indicators, Organization for Economic Cooperation and Development . . 5

Why Is Health Spending in the United States So High?, Organization for Economic Cooperation and Development 28

Fact Sheet, *The Case for an Improved Medicare for All*, PHYSICIANS FOR A NATIONAL HEALTH PROGRAM 21

Press Release, *Single Payer Ballot Question Passes By Landslide in Ten Districts*, PHYSICIANS FOR A NATIONAL HEALTH PROGRAM (Nov. 5, 2008) . 9

Lisa Potetz,
Financing Medicare: An Issue Brief, KAISER FAMILY FOUNDATION (Jan. 2008) 21, 22

Quinnipiac University Polling (April 2, 2008) . . . 10

Howard Waitzkin,
Selling the Obama Plan: Mistakes, Misunderstandings and Other Misdemeanors, AM. J. OF PUBLIC HEALTH, Vol. 100, No. 3 (March 2010) 28

Poll Shows Strong Public Support For Range of Health Practices, WALL STREET JOURNAL (Oct. 20, 2005) 10

Tom Wilemon,
High-Deductible Health Plans on Rise, THE TENNESSEAN (Dec. 27, 2011) 7

Andrew P. Wilper, Steffie Woolhandler, Karen E. Lasser, Danny McCormick, David H. Bor and David U. Himmelstein,
Health Insurance and Mortality in US Adults, AM. J. OF PUB. HEALTH, Vol. 99, No. 12 (Dec. 2009) 6

Steffie Woolhandler, Terry Campbell and David U. Himmelstein,
Costs of Healthcare Administration in the United States and Canada, NEW ENG. J. MED., Vol. 349, No. 8 (August 21, 2003) 7

Steffie Woolhandler and David U. Himmelstein,
Massachusetts Health Reform Bill: A False Promise of Universal Coverage, PHYSICIANS FOR A NATIONAL HEALTH PROGRAM (April 5, 2006) . 8

INTEREST OF AMICI[1]

Amici are a coalition of non-profit organizations and medical doctors who are active in the effort to achieve universal and comprehensive healthcare access in the United States. *Amici* agree with Petitioners ("the Government") that the United States faces a healthcare crisis: the costs generated by the current healthcare system are unsustainable and continue to rise, yet nearly 50 million Americans risk denial of essential healthcare services because they lack insurance. *Amici* disagree, however, that this crisis can be solved by forcing uninsured Americans to purchase health insurance from private insurance companies, or pay a penalty, as the provision of the Patient Protection and Affordable Care Act ("ACA" or "the Act") commonly known as the "individual mandate" requires them to do. 26 U.S.C.A. 5000A. Instead, *Amici* believe, based upon sound empirical data and peer-reviewed research, that the only solution to the healthcare crisis in the United States, which will both control costs and achieve comprehensive coverage for the entire population, is to adopt a national publicly-financed single payer health insurance system, in which one public entity handles billing and other administrative transactions on behalf of all participants.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amici* certifies that counsel authored this brief in its entirety. No attorney for a party authored any part of the brief, and no person or entity other than *Amici* made any monetary contribution to its preparation or submission. Counsel for both the petitioners and the respondents have given blanket consent to the filing of amicus briefs.

Congress has already implemented successful single payer systems that provide universal coverage to certain subsets of the population, including Medicare for citizens aged 65 and older, and the Veterans Health Administration ("VHA") for those who have served in the military. Yet Congress never seriously considered whether such a system could achieve the Act's goals of controlling healthcare costs and increasing coverage nationwide. For example, healthcare experts who support adoption of a national single payer system were not permitted to testify or provide evidence in hearings before the Senate Finance Committee, which drafted the legislation that became the ACA. Consequently, the findings on which the Act relies do not reflect the best available evidence regarding potential solutions to the United States' healthcare crisis. Likewise, in defending the constitutionality of the individual mandate, the Government characterizes the provision as necessary to the effective regulation by Congress of the national healthcare market, but disregards the proven success of single payer systems currently operating in the United States.

Amici thus submit this brief for the purpose of disputing the primary tenet of the Government's position, that Congress cannot regulate the national healthcare market effectively unless it has power to require that citizens purchase insurance from private insurance companies. On the contrary, as set forth herein, Congress has already demonstrated that it can regulate healthcare markets effectively by implementing a single payer system such as Medicare or the VHA. In fact, comparative data from other nations suggest that the administrative cost-savings attainable by adopting a national single payer system

in the United States would be sufficient to guarantee comprehensive and universal coverage to the entire population, without an increase in overall healthcare spending.

The evidence set forth herein also suggests that the Act's reliance on the individual mandate will exacerbate the very problems it intends to solve – out-of-control costs and the denial of essential healthcare services to millions of Americans – which result in untold suffering and tens of thousands of preventable deaths each year. As longtime advocates for meaningful healthcare reform, and in the case of most medical doctor *Amici*, as providers of healthcare services to the public within the healthcare system as it is currently organized, *Amici* have a strong interest in providing the Court with such evidence. Therefore, they submit this brief in support of Respondents State of Florida, et al. (the "States") and in opposition to the constitutionality of the individual mandate.

Single Payer Action is a project of The Daily Citizen, Inc., a 501(c)(4) non-profit corporation. Single Payer Action has a single mission: to achieve a single payer healthcare system in the United States, which guarantees healthcare coverage for all. Single Payer Action engages in advocacy, public education and other outreach efforts to promote its goals. Its website is www.singlepayeraction.org.

It's Our Economy is a non-profit operating as a 501(c)(3) organization that seeks to democratize the economy by shifting power from corporations to the American people. It advocates for a national publicly-financed single payer system that guarantees coverage to everyone in the United States, because people gain

greater control over their healthcare when health insurance companies are removed from in-between doctors and patients. Its website is www.ItsOurEconomy.US.

Fifty Medical Doctors Who Support Single Payer: Henry L. Abrons, MD, Berkeley, California; Patch Adams, MD, Urbana, Illinois; Kris Alman, MD, Portland, Oregon; James Binder, MD, Huntington, West Virginia; Barbara Blaylock, MD, Rockville, Maryland; Claudia Chaufan, MD, San Francisco, California; Allen R. Chauvenet, MD, Charleston, West Virginia; Brad Cotton, MD, Circleville, Ohio; Richard A. Damon, MD, Bozeman, Montana; Mary L. De Luca, MD, Albuquerque, New Mexico; Jess G. Fiedorowicz, MD, Iowa City, Iowa; Margaret Flowers, MD, Baltimore, Maryland; Elizabeth Frost, MD, Minneapolis, Minnesota; Leslie Hartley Gise, MD, Kula, Hawaii; James S. Goodman, MD, Albuquerque, New Mexico; Jeoffry Gordon, MD, San Diego, California; Matthew Hahn, MD, Berkeley Springs, West Virginia; Hedda L. Haning, MD, Charleston, West Virginia; Paul Hochfeld, MD, Corvallis, Oregon; Michael Huntington, MD, Corvallis, Oregon; Joseph Q. Jarvis, MD, Salt Lake City, Utah; Timothy Jordan, MD, Phoenix, Arizona; James G. Kahn, MD, San Francisco, California; Jeffrey Kaplan, MD, Baltimore, Maryland; Stephen B. Kemble, MD, Honolulu, Hawaii; Ronald Lapp, MD, Paso Robles, California; David McLanahan, MD, Seattle, Washington; Samuel Metz, MD, Portland, Oregon; Eric Naumburg, MD, Columbia, Maryland; Clark Newhall, MD, Salt Lake City, Utah; Carol Paris, MD, Leonardtown, Maryland; George L. Pauk, MD, Phoenix, Arizona; Julie Keller Pease, MD, Brunswick, Maine; Robert W. Putsch, MD, Canyon Creek, Montana; Richard Quint, MD,

Berkeley, California; George Randt, MD, Cleveland, Ohio; Johnathon Ross, MD, Toledo, Ohio; Marc Sapir, MD, Berkeley, California; Elias Shaya, MD, Baltimore, Maryland; Harris Silver, MD, Albuquerque, New Mexico; Paul Y. Song, MD, Santa Monica, California; James Squire, MD, Seattle, Washington; Rob Stone, MD, Bloomington, Indiana; Elizabeth F. Thomas, MD, Oakland, California; Bruce Trigg, MD, Albuquerque, New Mexico; Sandra Turner, MD, New York, New York; William Ulwelling, MD, Albuquerque, New Mexico; John V. Walsh, MD, Cambridge, Massachusetts; Li-hsia Wang, MD, Berkeley, California; Daniel P. Wirt, MD, Houston, Texas.

INTRODUCTION

Few who are familiar with the facts surrounding healthcare in the United States would deny that it represents a national crisis of the greatest magnitude and urgency. Despite being the wealthiest nation in the world, the United States is one of the few Organization for Economic Cooperation and Development ("OECD") member nations that has failed to establish either a publicly-financed or a mixed public-private healthcare system that achieves universal coverage. *See* OECD, *Health at a Glance: 2011 Indicators*, 132 (visited Feb. 7, 2012) <http://www.oecd-ilibrary.org/sites/health_glance-2011-en/06/02/index.html?contentType=/ns/StatisticalPublication,/ns/Chapter&itemId=/content/chapter/health_glance-2011-53-en&containerItemId=/content/serial/19991312&accessItemIds=&mimeType=text/html> (reporting that lack of health coverage in the United States results mainly from "the increasing cost of premiums"). Approximately 50 million Americans, or one-sixth of the entire population, risk

denial of essential healthcare services because they lack private insurance and are ineligible for public programs such as Medicare and Medicaid. *See id.*; *see also U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2009*, 23 (2010). In 2009, researchers from Harvard Medical School linked this lack of coverage to 45,000 deaths per year. *See* Andrew P. Wilper, Steffie Woolhandler, Karen E. Lasser, Danny McCormick, David H. Bor and David U. Himmelstein, *Health Insurance and Mortality in US Adults*, AM. J. OF PUB. HEALTH, Vol. 99, No. 12 (Dec. 2009). Such facts demand action: healthcare reform that guarantees comprehensive coverage to every American is nothing short of a national moral obligation.

The question, however, is whether the ACA implements the necessary reform. Does it guarantee coverage to the millions of Americans who currently have none, while controlling and reducing the rising cost of healthcare? Will it save the lives of those who die each year because they cannot afford essential healthcare services? Can the individual mandate guarantee that Americans receive such services, when private insurers have a profit incentive to deny them?

The best available evidence suggests that the ACA will not and cannot achieve these fundamental goals. According to the Government's own estimates, in 2019, five years after the individual mandate takes effect, 23 million will remain uninsured. *See D.W. Elmendorf, et al., "Letter to Nancy Pelosi,"* CONGRESSIONAL BUDGET OFFICE (March 20, 2010) (visited Jan. 26, 2012) <http://www.cbo.gov/ftpdocs/120xx/doc12033/12-23-SelectedHealthcarePublications.pdf>. Further, the ACA does little to reduce the cost of healthcare

administration, which accounts for 31 percent of all health spending in the United States. *See* Steffie Woolhandler, Terry Campbell and David U. Himmelstein, *Costs of Healthcare Administration in the United States and Canada*, NEW ENG. J. MED., Vol. 349, No. 8, 772 (August 21, 2003). Instead, it entrenches, by force of federal law, the private insurance companies that comprise the greatest source of administrative waste in the current system. *See id.* at 771 (reporting that average overhead of private insurers in the United States was 11.7 percent, compared to 3.6 percent for the single payer Medicare system and 1.3 percent for Canada's single payer system). In 1999 alone, such waste amounted to $209 billion. *See id.* at 772.

Perhaps most important, the ACA's reliance on private, for-profit insurance companies to finance the delivery of healthcare institutionalizes a fundamental defect of the current system, which is that these corporations have a perverse profit incentive to deny healthcare to those who need it. Although the Act bars private insurers from denying coverage based upon a person's medical condition or history, 42 U.S.C.A. 300gg-1, 300gg-3, 300gg-4(a) (the "guaranteed-issue provision"), and from charging higher premiums based on a person's medical condition or history, 42 U.S.C.A. 300gg(a)(1), 300gg-4(b) (the "community-rating provision"), these provisions do not address the inherent tension arising from the private insurers' incentive to deny healthcare to those who must purchase insurance, or pay a fine, as required by the individual mandate. 26 U.S.C.A. 5000A. Thus, private insurance companies are likely to continue to maximize profits by denying healthcare, even after these provisions take effect. *See, e.g.*, Tom Wilemon,

High-Deductible Health Plans on Rise, THE TENNESSEAN (Dec. 27, 2011) (reporting that employer-based health plans increasingly require workers to pay $1,200-$5,000 deductibles before filing health insurance claims).

These concerns are borne out by the experience of Massachusetts' Health Care Reform Act ("HCRA"), which was enacted in 2006, and served as the model for the ACA. Like the ACA, the goal of the HCRA was not necessarily to achieve universal coverage, but to expand coverage by filling gaps in existing healthcare systems, and by requiring residents to purchase insurance from private insurance companies. The HCRA thus suffers the same key defects as the ACA: it fails to address the waste inherent in a system of private insurers spending separately on billing, marketing and other administrative costs, and its individual mandate requires the uninsured – an overwhelmingly poor segment of the population – to buy insurance they cannot afford, or to buy "nearly worthless stripped down policies that represent coverage in name only." Steffie Woolhandler and David U. Himmelstein, *Massachusetts Health Reform Bill: A False Promise of Universal Coverage*, PHYSICIANS FOR A NATIONAL HEALTH PROGRAM (April 5, 2006) (visited Feb. 7, 2012) <http://www.pnhp.org/news/2006/april/massachusetts_health.php.>

The inevitable results of the HCRA's inherent defects are now clear. In September 2011, approximately 370,000 Massachusetts residents – or 5.6 percent of the state's population – had no health insurance. *See* Rachel Nardin, Assaad Sayah, Hermione Lokko, Steffie Woolhandler and Danny McCormick, *Reasons Why Patients Remain Uninsured*

After Massachusetts' Health Care Reform: A Survey of Patients at a Safety-Net Hospital, J. OF GEN. INTERNAL MED. (Sept. 16, 2011). Researchers found the uninsured came predominantly from the state's working poor – those who had jobs but could not afford health insurance, and did not qualify for state assistance under the HCRA. *See id.* Consequently, while the HCRA increased the percentage of Massachusetts residents who are insured, it did nothing to lower the number of bankruptcy filings caused in whole or part by medical bills. *See* David U. Himmelstein, Deborah Thorne and Steffie Woolhandler, *Medical Bankruptcy in Massachusetts: Has Health Reform Made a Difference?* AM. J. OF MED., Vol. 124, No. 3 (March 2011). Perhaps most revealing, Massachusetts voters have expressed strong opposition to the HCRA's individual mandate, and strong support for replacing it with a single payer system. In the November 2008 elections, local ballot initiatives directing state legislators to support "legislation creating a cost-effective single payer health insurance system that is available to all residents, and [to] oppose laws penalizing those who fail to obtain health insurance" passed in all ten districts where they appeared, with the overall support of approximately 73 percent of voters. *See* Press Release, *Single Payer Ballot Question Passes By Landslide in Ten Districts*, PHYSICIANS FOR A NATIONAL HEALTH PROGRAM (Nov. 5, 2008) (visited Feb. 7, 2012) <http://www.pnhp.org/news/2008/november/single_payer_ballot_.php>. In the next election cycle, similar ballot initiatives favoring a single payer system and opposing the HCRA's individual mandate passed in all fourteen districts where they appeared. *See* Benjamin Day, *Single Payer Ballot Questions Pass in All Fourteen*

Massachusetts Districts!, PHYSICIANS FOR A NATIONAL HEALTH PROGRAM (NOV. 3, 2010) (visited Feb. 7, 2012) <http://pnhp.org/blog/2010/11/03/single-payer-ballot-questions-pass-in-all-fourteen-massachusetts-districts/>.

The impact of failed healthcare reforms is ultimately felt most keenly by the end-users in the healthcare system – those who become sick or injured and incur medical bills. On average, therefore, successful reforms that ensure quality, affordable coverage ought to be popular with the general public. Yet, only 32 percent of insured Americans under the age of 65 rate their coverage by private insurance companies as "excellent," whereas 51 percent of seniors, most of whom are covered by the single payer Medicare system, give their coverage an "excellent" rating. *See* Robert J. Blendon and John M. Benson, *The Public's Views About Medicare and the Budget Deficit*, NEW. ENG. J. OF MED., e8(1) (July 13, 2011) (visited Feb. 7, 2012) <http://www.nejm.org/doi/pdf/10.1056/NEJMp1107184>. Further, a majority of Americans, and a majority of physicians, consistently express support for adoption of a national, publicly-financed single payer system. *See, e.g.*, *Quinnipiac University Polling* (April 2, 2008) <http://www.quinnipiac.edu/institutes-and-centers/polling-institute/presidential-swing-states-%28fl-oh-and-pa%29/release-detail?ReleaseID=1164> (visited Feb. 7, 2012) (reporting that 64 percent of respondents say "it's the government's responsibility to make sure that everyone in the United States has adequate healthcare"); *Poll Shows Strong Public Support For Range of Health Practices*, WALL STREET JOURNAL (Oct. 20, 2005) <http://online.wsj.com/article/SB112973460667273222.html> (visited Feb. 7, 2012)

(reporting that 75 percent of respondents in Harris Interactive poll support "universal health insurance"); *Fear and Loathing at the Democratic Convention*, FAIRNESS & ACCURACY IN REPORTING (July/Aug. 1988) (visited Feb. 7, 2012) <http://www.fair.org/index.php?page=3633> (reporting that 78 percent of respondents in *New York Times / CBS* poll say "government should guarantee medical care to everyone"). By contrast, large majorities of Americans consistently disapprove of the individual mandate. *See, e.g.*, *Kaiser Health Tracking Poll – January 2012*, KAISER FAMILY FOUNDATION (visited Jan. 27, 2012) <http://www.kff.org/kaiserpolls/8274.cfm> (reporting that 67 percent of respondents had unfavorable view of the individual mandate).

In spite of all the evidence indicating that the individual mandate will not and cannot solve the United States' healthcare crisis, the Government contends that the provision is not only "reasonable" but also "necessary" to its broader regulation of the national healthcare market. Brief for Petitioners ("Pet. Br.") 18-19. In particular, the Government contends that the individual mandate is "key to the viability of the Act's guaranteed-issue and community-rating provisions." Pet. Br. 18. But while it might be true that these provisions will adversely impact private insurers' profits, and that the individual mandate offsets this adverse impact by guaranteeing the private insurers a large stream of new customers who are required by law to purchase insurance, that is not sufficient to render the individual mandate constitutional. If it were, Congress could "reform" any private industry – whether it be automobiles, coal, pharmaceuticals or any other – by enacting legislation requiring every that American purchase the industry's

goods or services in exchange for some perceived public good the industry provides. Yet Congress has never before enacted such a mandate. And contrary to the Government's contention, there is nothing unique or exceptional about healthcare markets, such that Congress cannot regulate them effectively without requiring that citizens purchase insurance from private insurance companies. Medicare and the VHA stand as living testaments to that fact. The evidence set forth herein therefore supports the States' position that the individual mandate exceeds the limits of Congress's power to regulate interstate commerce.

SUMMARY OF ARGUMENT

Despite its failure to cite any prior case in which Congress has compelled citizens to purchase goods or services from a private party, the Government asserts, as a primary tenet of its position, that the individual mandate is "plainly constitutional," because Congress "unquestionably" had power to enact the ACA, and Congress deemed the individual mandate "necessary" to make its reforms effective. Pet. Br. 24-25. This assertion misconstrues the nature of the power conferred by the Commerce Clause and the Necessary and Proper Clause. None of the cases cited by the Government hold that Congress may enact any regulation it deems necessary to a larger statutory scheme, as the Government contends. Instead, these cases recognize that Congress may regulate an activity if its power to regulate interstate commerce would otherwise be thwarted or obstructed.

The failure of Americans to purchase health insurance from private insurance companies does not in any way obstruct the power of Congress to regulate

the national healthcare market. As Medicare and the VHA demonstrate, Congress is capable of regulating healthcare markets effectively, without compelling citizens to purchase insurance from private insurance companies, by implementing single payer systems. Both Medicare and the VHA outperform the system of private insurers on which the ACA builds and expands, by guaranteeing universal and comprehensive coverage of the eligible population, while also controlling costs. The success of these single payer systems suggests that Congress could achieve similar results nationwide by implementing a national, publicly-financed single payer insurance.

ARGUMENT

I. The Government Misconstrues the Nature of the Commerce Power By Asserting That Congress May Enact Any Provision It Deems Necessary to a Larger Regulatory Scheme.

A. Congress Does Not Determine the Limits of Its Own Power to Regulate Interstate Commerce.

To support its view that the individual mandate is a valid exercise of the commerce power, the Government relies primarily on language it quotes from a footnote in *Hodel* v. *Indiana*, 452 U.S. 314 (1981). A statutory provision is permissible, the Government asserts, if it is "'an integral part of [a] regulatory program and...the regulatory scheme when considered as a whole' is within the commerce power." Pet. Br. 25 (quoting *Hodel*, 452 U.S at 329 n.17 (citing *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S.

241, 262 (1964), *Katzenbach* v. *McClung*, 379 U.S. 294, 303-304 (1964), *Perez* v. *United States*, 402 U.S. 146, 154-156 (1971), *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942), and *United States* v. *Darby*, 312 U.S. 100, 123 (1941)). Citing a congressional finding that the individual mandate is in fact "an essential part of [a] larger regulation of economic activity," the Government thus concludes that the provision is constitutional. Pet. Br. 29 (citation omitted). In the Government's view, the individual mandate is merely a "policy choice" entrusted to Congress, "and the Court should respect it." Pet. Br. 24.

As a threshold matter, the Government's partial quotation of the footnote in *Hodel* is selective and misleading. The Court did not conclude, as the Government suggests, that the enactment of a "complex regulatory program" effectively shields its individual provisions from constitutional review. Pet. Br. 25. Rather, the language the Government quotes must be understood in the context of the preceding language, which the Government omits. To sustain the constitutionality of a complex regulatory program, the Court clarified, it is not necessary to show "that every single facet of the program is independently and directly related to a valid congressional goal." *Hodel*, 452 U.S at 329 n.17. But this does not mean that the Court must instead treat every provision of a complex regulatory scheme as a "policy choice" entitled to deference. If that were the case, impermissible regulations could escape scrutiny simply because they were part of a larger statutory scheme.

Where Congress seeks to regulate activity on the ground that it has substantial effects on interstate commerce, the power of Congress to reach the activity

turns on whether, in the absence of federal regulation, the activity would "thwart the regulatory power granted by the Commerce Clause." *United States* v. *Wrightwood Dairy Co.*, 315 U.S 110, 119 (1942). To the extent that it would, Congress has power, pursuant to the Necessary and Proper Clause, to enact such regulations as are "necessary and appropriate to make the regulation of the interstate commerce effective." *Id.* at 121; *see Gonzales* v. *Raich*, 545 U.S. 1, 34 (2005) (Scalia, J. concurring). But whether a regulation is in fact necessary and proper is not a determination for Congress alone to make. Rather, this Court conducts an "exacting" review in such cases, which requires that the regulated activity be shown to have "a tangible link to commerce, not a mere conceivable rational relation." *United States* v. *Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring).

This conclusion is consistent with the Framers' understanding of the meaning and purpose of the Necessary and Proper Clause. They regarded it as merely "declaratory of a truth" inherent in the Constitution – that any enumerated power granted to Congress includes the power to "pass all laws necessary and proper to carry it into effect." THE FEDERALIST NO. 33, at 2 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 44, at 6 (James Madison) (the Necessary and Proper Clause embodies the axiom that "wherever a general power to do a thing is given, every particular power necessary for doing it is included"). The Framers also anticipated, however, that Congress might "misconstrue" the broad language of the Necessary and Proper Clause, "and exercise powers not warranted by its true meaning." THE FEDERALIST NO. 44, at 6. In such cases, the Framers did not believe that the Court

should simply defer to Congress. Rather, they concluded that "the success of the *usurpation* will depend upon the executive and judiciary departments, which are to expound and give effect to the legislative acts." *Id.* at 7 (emphasis added). In other words, Congress cannot be permitted to determine the limits of its own powers, because Congress is capable of making policy choices that exceed those powers. *See, e.g.*, *United States* v. *Morrison*, 529 U.S. 598 (2000) (striking down federal legislation providing civil remedy for gender-motivated violence); *United States* v. *Lopez*, 514 U.S. 549 (1995) (striking down federal legislation prohibiting possession of firearms near public schools). The complete lack of precedent for the individual mandate suggests that this is one such case.

B. The Cases Cited By the Government Do Not Support the Sweeping New Power It Asserts in This Case.

Neither *Hodel* nor the string of cases cited in the footnote on which the Government relies support the conclusion that the commerce power permits Congress to enact any regulation it finds necessary to the viability of a larger scheme regulating interstate commerce. Instead, the footnote in *Hodel* refers to a line of cases "permitting the regulation of intrastate activities which in a substantial way *interfere with or obstruct the exercise of the granted power*" to regulate interstate commerce. *Gonzales*, 545 U.S. at 36 (Scalia, J. concurring) (emphasis added) (quoting *Wrightwood Dairy Co.*, 315 U.S at 119). In *Wrightwood Dairy*, for example, the Court upheld federal regulation of the price of milk produced and marketed exclusively within a single state, because competition from such milk would otherwise "tend seriously to break down

price regulation" of milk produced for the interstate market. *See Wrightwood Dairy Co.*, 315 U.S at 120. Because Congress could not effectively regulate the price of milk produced for the interstate market unless it also regulated the price of milk produced for intrastate markets, the commerce power permitted Congress to reach the purely intrastate activity. *See id.* The cases cited in the *Hodel* footnote follow the same reasoning.

In *Darby*, the Court upheld federal labor standards imposed on employees engaged in the production of goods for interstate commerce, even though the goods were manufactured intrastate. To prevent Congress from reaching such conduct, the Court recognized, would be to "deny the power of Congress to prohibit shipment in interstate commerce of [goods] produced for interstate commerce under the proscribed substandard labor conditions." *Darby*, 312 U.S. at 112. Because Congress had the power to enact such a prohibition, Congress also had the power to enact regulations necessary to ensure that its enforcement would not be frustrated. *See id.*

Similarly, in *Heart of Atlanta Motel*, the Court upheld Title II of the Civil Rights Act of 1964, which prohibited racial discrimination by hotels and motels engaged in interstate commerce. Because such discrimination "impedes interstate travel," and the commerce power includes the power to remove "obstruction[s] to interstate commerce," Congress could regulate the activity. *Heart of Atlanta Motel*, 379 U.S. at 253, 257. The Court applied the same reasoning in *Heart of Atlanta Motel's* companion case, *Katzenbach*, which upheld the same prohibition as applied to restaurants with substantial ties to

interstate commerce. *See Katzenbach*, 379 U.S. at 298-99. The only activities beyond the reach of Congress, the Court explained, are those that are "completely within a particular State, which do not affect other States, and with which *it is not necessary to interfere, for the purpose of executing some of the general powers of the government.*" *Id.* at 302 (quoting *Gibbons* v. *Ogden*, 9 Wheat. 1, 22 U. S. 195 (1824) (emphasis added)).

In *Perez*, the Court upheld a regulation prohibiting the practice of "loansharking," on the ground that the activity was one of the principal means by which organized crime "syphons funds from numerous localities to finance its national operations." *Perez*, 402 U.S. at 157. If Congress could not reach the activity, the Court reasoned, it could not effectively regulate "organized interstate crime." *Id.* Even *Wickard*, which is generally considered the Court's most expansive Commerce Clause holding, was expressly predicated on the conclusion that if Congress could not regulate the growing of wheat for home consumption, such activity "would have a substantial effect in *defeating and obstructing* its purpose to stimulate trade therein at increased prices." *Wickard*, 317 U.S. at 129.

Hodel itself is no different. In that case, the Court upheld provisions of the Surface Mining Control and Reclamation Act of 1977, which required that coal mining operations take measures to protect the environment in which they operate. *See Hodel*, 452 U.S. at 321-329. In order "to ensure that production of coal for interstate commerce would not be at the expense of agriculture, the environment, or public health and safety," the Court reasoned, Congress could

regulate the purely intrastate activities of coal mine operators. *Id.* at 329.

In sum, each of the foregoing cases upon which the Government relies upheld federal legislation regulating purely intrastate activity, as a valid exercise of the commerce power, on the ground that the power of Congress to regulate interstate commerce would be thwarted or obstructed if it could not reach the intrastate activity. By contrast, the activity regulated by the individual mandate does not in any way obstruct the power of Congress to regulate the national healthcare market. As Medicare and the VHA demonstrate, Congress not only can, but actually does regulate healthcare markets effectively, without requiring that citizens purchase health insurance from private insurance companies. Nothing prevents Congress from similarly regulating the national healthcare market. Consequently, the individual mandate cannot be sustained on the ground that it is necessary to the effective regulation by Congress of the national healthcare market.

II. The Success of Single Payer Systems Currently Operating in the United States Demonstrates That Congress Can Regulate Healthcare Markets Effectively Without Requiring That Citizens Purchase Health Insurance From Private Insurance Companies.

A. Medicare and the Veterans Health Administration Are Both Single Payer Systems That Achieve Universal Coverage of the Eligible Population While Controlling Costs.

The Government's contention that Congress cannot effectively regulate the national healthcare market unless it has power to require that citizens purchase health insurance from private insurance companies is belied by the fact that Congress already does effectively regulate healthcare markets by implementing single payer systems, which provide universal coverage to certain subsets of the population. Medicare and the VHA are both examples of such systems. Each one outperforms the system of private insurers on which the ACA builds and expands by achieving universal coverage of the eligible population while controlling costs.

Congress created Medicare by amending the Social Security Act of 1935. President Lyndon B. Johnson signed the amendments into law on July 30, 1965. Medicare provides public health insurance to all citizens and persons who have been legal residents of the United States for at least five years, aged 65 or older, and to others who are permanently disabled or have certain other conditions. *See Who Is Eligible for*

Medicare? (visited Feb. 7, 2012) <http://questions.medicare.gov/app/answers/detail/a_id/10>. Medicare is a single payer system because it relies on a single government entity to process all billing and administrative tasks, while relying on private sector hospitals, doctors and caregivers to provide healthcare services. *See* Fact Sheet, *The Case for an Improved Medicare for All*, PHYSICIANS FOR A NATIONAL HEALTH PROGRAM (visited Feb. 7, 2012) <http://www.pnhp.org/sites/default/files/docs/2011/Improved-Medicare-for-All-Fact-Sheet.pdf>. Medicare Part A provides hospital insurance, and Part B provides medical insurance. *See Who Is Eligible for Medicare?*, *supra*. Medicare Part A is provided to those eligible without premiums; Part B requires the payment of a premium. *See id.*

As of January 2008, Medicare provided coverage to 44 million Americans. *See* Lisa Potetz, *Financing Medicare: An Issue Brief*, KAISER FAMILY FOUNDATION, 1 (Jan. 2008) (visited Feb. 7, 2012) <http://www.kff.org/medicare/upload/7731.pdf>. It is the nation's largest single health insurance program, and finances approximately one-third of all hospital stays. *See id.* The federal government administers Medicare through a division of the Department of Health and Human Services. The program is primarily financed by a dedicated Medicare tax, premiums collected from beneficiaries, federal income taxes and a tax on Social Security benefits. *See id.* at 2. Beneficiaries also help finance the system by paying deductibles. *See id.*

While Medicare spending is increasing, the increase mainly reflects the overall increase in the nation's healthcare spending, which on average has grown 2.5 percentage points faster than the overall economy since the 1970s. *See id.* at 6. In fact, the increase in

Medicare spending per beneficiary was slightly less – 2.3 percentage points more than per capita GDP – than the increase in overall healthcare spending. *See D.W. Elmendorf, "Letter to Paul Ryan,"* CONGRESSIONAL BUDGET OFFICE, 10 (Jan. 27, 2010) (visited Feb. 7, 2012) <http://www.cbo.gov/ftpdocs/108xx/doc10851/01-27-Ryan-Roadmap-Letter.pdf>. The increase in Medicare spending therefore is not attributable to "failings in the program." *See* Potetz, *Financing Medicare*, *supra*, at 6. And while certain factors unique to Medicare, such as the aging population it serves, also contribute to the spending increase, administrative costs are "not a contributing factor." *Id.* at 8. Rather, Medicare's administrative costs have remained steadily low – about 2 percent of program expenditures, which covers "the cost of claims contractors and other costs incurred in the payment of benefits, collection of Medicare taxes, fraud and abuse control activities, various demonstration projects, and building costs associated with program administration." *Id.* By contrast, private insurance companies estimate that their administrative costs, including "commission, premium tax, and profit," range as high as 16.7 percent of overall spending. *See* Merrill Matthews, *Medicare's Hidden Administrative Costs: A Comparison of Medicare and the Private Sector*, 9, COUNCIL FOR AFFORDABLE HEALTH INSURANCE (visited Feb. 7, 2012) <http://www.cahi.org/cahi_contents/resources/pdf/CAHI_Medicare_Admin_Final_Publication.pdf. Perhaps most important, from the perspective of legislators faced with a choice between healthcare systems, overall Medicare spending only increased by 4.6 percent annually between 1997 and 2009, while private insurance premiums grew at a rate of 6.7 percent each year. *See National Health Expenditures Aggregate, Per Capita*

Amounts, Percent Distribution, and Average Annual Percent Change: Selected Calendar Years 1960-2010, CENTERS FOR MEDICARE AND MEDICAID SERVICES (visited Feb. 7, 2012) <https://www.cms.gov/nationalhealthexpenddata/downloads/tables.pdf>.

Finally, in addition to achieving universal coverage for Americans aged 65 and older and maintaining consistently low administrative costs, Medicare is also highly rated by senior citizens who are its primary beneficiaries – 51 percent of whom give their health insurance an "excellent" rating. *See* Blendon and Benson, *The Public's Views About Medicare and the Budget Deficit*, *supra*, at e8(1).

The Veterans Health Administration is a cabinet level federal agency that provides comprehensive healthcare services to veterans of the U.S. military who received qualifying discharges or deactivation. *See Quality Initiatives Undertaken By the Veterans Health Administration*, 4, CONGRESSIONAL BUDGET OFFICE (Aug. 2009) (visited Feb. 7, 2012) <http://www.cbo.gov/ftpdocs/104xx/doc10453/08-13-VHA.pdf>. The VHA system includes 153 medical centers, 931 ambulatory care and community-based outpatient clinics, 232 readjustment counseling and outreach centers, 134 nursing homes, 50 residential rehabilitation treatment programs, and 108 comprehensive home-based care programs. *See id.* It provides eligible veterans with inpatient hospital care, outpatient care, laboratory services, pharmaceuticals, rehabilitation for a variety of disabilities and conditions, mental health counseling, and custodial care. *See id.* As of 2008, the VHA covered almost 8 million veterans. *See id.* at 5.

The federal government has provided healthcare to military veterans in some form since the Civil War. In 1996, however, Congress substantially expanded access to the modern VHA by enacting the Veterans' Health Care Eligibility Reform Act. *See id.* at 7. Unlike Medicare, the VHA is not an insurer but a provider of care – enrolled veterans receive healthcare services directly from the VHA. *See id.* The VHA nonetheless qualifies as a single payer system because a single government entity handles all billing and administrative tasks. *See generally*, Phillip Longman, *The Best Care Anywhere*, THE WASHINGTON MONTHLY (Jan. 1, 2005) (visited Feb. 7, 2012) <http://newamerica.net/publications/articles/2004/the_best_care_anywhere>.

Although the VHA had a reputation for poor quality in the 1980s and 1990s, it undertook a system-wide reform effort in the mid-1990s, which was designed to improve the VHA's efficiency, accountability, responsiveness, and quality of care. *See id.*; *see also* Congressional Budget Office, *Quality Initiatives Undertaken By the Veterans Health Administration*, *supra*, at 13. Following the reform, one study found that VHA patients received significantly better healthcare than patients covered by the Medicare fee-for-service program according to nearly all quality-of-care indicators. *See* Congressional Budget Office, *Quality Initiatives Undertaken By the Veterans Health Administration*, *supra*, at 13 (citing Ashish K. Jha et al., *Effect of the Transformation of the Veterans Affairs Health Care System on the Quality of Care*, NEW ENG. J. OF MED., Vol. 348, No. 22, 2218-2227 (May 29, 2003). For some conditions, between 93 and 98 percent of VHA patients received "appropriate care" as defined by clinical guidelines, compared to a

high rating of 84 percent for Medicare. *See id.* Another study found that VHA patients in the late 1990s received healthcare that was "superior" to a nationally representative sample of the population. *See id.* (citing Steven M. Asch et al., *Comparison of Quality of Care for Patients in the Veterans Health Administration and Patients in a National Sample*, ANN. OF INT. MED., Vol. 141, No. 12, 938-945 (Dec. 21, 2004)). At the same time, the Congressional Budget Office has concluded that the VHA achieved a "substantial degree of cost control" compared with Medicare from 1999 to 2007. *See id.* at 33.

As with Medicare, the VHA is rated higher by the population it covers than are hospitals in the private sector. *See* Kristen Jensen, *Vets Loving Socialized Medicine Show*, BLOOMBERG (Oct. 2, 2009) (visited Feb. 7, 2009) <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aLIc5ABThjBk>. In a 2008 survey by the American Customer Satisfaction Index, the VHA received a satisfaction rating of 85 percent for inpatient care, compared with 77 percent for private hospitals. *See id.*

B. The System of Private Insurers on Which the ACA Builds and Expands Is More Expensive and Less Efficient Than Single Payer Systems.

Congress could have addressed the United States' healthcare crisis by choosing from among several legislative alternatives that would guarantee universal coverage while reducing and controlling costs. For example, Congress could have enacted legislation modeled on Medicare, which would establish a national, publicly-financed single payer insurance that

relies on private hospitals, doctors and caregivers to provide healthcare services. *See supra* Part II.A. Congress also could have enacted legislation modeled on the VHA, which would establish an integrated national healthcare system in which public entities handle both administration and provision of healthcare services. *See id.* Or Congress could have enacted legislation establishing a mixed public-private system, which would build and expand on the best aspects of the disparate healthcare systems currently operating in the United States. In fact, such bills have been introduced in Congress, including at least one that was pending in the Senate at the same time as the ACA. *See* S. 703 111th Cong. (2009) (the "American Health Security Act") (visited Feb. 6, 2012) <http://thomas.loc.gov/cgi-bin/query/D?c111:8:./temp/~mdbsElLnIw::>; H.R. 676 108th Cong. (2003-04) (the "Expanded and Improved Medicare for All Act") (visited Feb. 6, 2012) <http://thomas.loc.gov/cgi-bin/query/F?c108:3:./temp/~mdbshmY9r5:e1446>.

Studies conducted by the nonpartisan General Accounting Office and the nonpartisan Congressional Budget Office have consistently concluded that if a national single payer system were implemented in the United States, administrative cost-savings alone would be enough to guarantee universal coverage without increasing overall healthcare spending. *See, e.g.*, Charles A. Bowsher, *Canadian Health Insurance: Lessons for the United States*, GENERAL ACCOUNTING OFFICE (June 4, 1991) (visited Feb. 4, 2012) <http://www.gao.gov/assets/110/103905.pdf>; Robert D. Reischauer, et al., *Universal Health Insurance Coverage Using Medicare's Payment Rates*, CONGRESSIONAL BUDGET OFFICE (Dec. 1991) (visited Feb. 4, 2012) <http://www.cbo.gov/ftpdocs/76xx/doc

7652/91-CBO-039.pdf>; CBO Staff Memorandum, *Single-Payer and All-Payer Health Insurance Systems Using Medicare's Rates*, CONGRESSIONAL BUDGET OFFICE (April 1993) (visited Feb. 4, 2012) <http://www.cbo.gov/ftpdocs/64xx/doc6442/93doc171.pdf>. The Congressional Budget Office reached similar conclusions in its studies of specific single payer bills previously introduced before Congress. For example, a 1991 U.S. House bill modeled on the Canadian system, which would establish a single payer system to be implemented in 1993, was estimated to increase healthcare expenditures slightly at first, but to reduce overall spending 9 percent by 2000. *See* Paul Van de Water, *Estimates of Healthcare Proposals From the 102nd Congress*, 21-28, CONGRESSIONAL BUDGET OFFICE (July 1993) (visited Feb. 4, 2012) <http://www.cbo.gov/ftpdocs/64xx/doc6432/ 93doc159.pdf>; *see also* CBO Analysis, *American Health Security Act of 1993*, CONGRESSIONAL BUDGET OFFICE (analyzing Senate version of same bill) (visited Feb. 4, 2012) <http://www.cbo.gov/ftpdocs/79xx/doc7946/93doc07b.pdf>.

Rather than model the ACA on the proven success of single payer systems such as Medicare and the VHA, Congress instead chose to build and expand on the system of private insurers currently in place in the United States. This system is among the least efficient of any healthcare system currently operating in an OECD member nation. *See* David Carey, Bradley Herring and Patrick Lenain, *Healthcare Reform in the United States*, OECD Econ. Dept. Working Paper No. 665 (Feb. 6, 2009); Isabelle Joumard, Christophe André and Chantal Nicq, *Healthcare Systems: Efficiency and Institutions*, OECD Econ. Dept. Working Paper No. 769, 6 (May 19, 2010). In 2009,

healthcare expenditures accounted for 17.4 percent of GDP in the United States, compared with only 9.6 percent in the average OECD nation. *See* OECD, *Why Is Health Spending in the United States So High?*, 1 (visited Feb. 7, 2012) <http://www.oecd.org/dataoecd/12/16/49084355.pdf>. Measured per capita, healthcare expenditures in the United States "are by far the highest among OECD countries," and would be enough in most others "for government to provide universal primary health insurance." *See* David Carey, et al., *Healthcare Reform in the United States*, *supra*, at 11. Yet the United States is among the few OECD nations that fail to cover a large percentage of the population (Mexico and Turkey are the others). *See* Joumard, André and Nicq, *Healthcare Systems*, *supra*, at 6.

Several factors contribute to the inefficiency of the United States' healthcare system, but the most significant is spending on healthcare administration. *See* OECD, *Why Is Health Spending in the United States So High?*, *supra*, at 3 (reporting that administrative costs in the United States are more than two-and-a-half times the average for all OECD nations). This category not only includes "activities such as billing, denial of claims, supervision of copayments and deductibles," but also "scrutiny of preexisting conditions that disqualify people from care, and exorbitant salaries for executives (in some cases totaling between $10 million and $20 million per year)." Howard Waitzkin, *Selling the Obama Plan: Mistakes, Misunderstandings and Other Misdemeanors*, AM. J. OF PUBLIC HEALTH, Vol. 100, No. 3, 398 (March 2010). Thus, if a national single payer system were implemented in the United States, it could realize dramatic cost-savings both by streamlining administrative processes, and by

eliminating the profit incentive that drives many practices of the private insurance companies that the ACA entrenches by force of federal law. *See id.*; Oliver Fein, *Keep the Single Payer Vision*, MEDICAL CARE, Vol. 48, No. 9, 760 (Sept. 2010).

CONCLUSION

For the reasons stated above and in the brief of the respondent States, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Oliver B. Hall
Counsel of Record
1835 16th Street NW #5
Washington, DC 20009
(617) 953-0161
oliverbhall@gmail.com

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

No. 11-398

In the Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF ON BEHALF OF SMALL BUSINESS MAJORITY FOUNDATION, INC. ("SBM") AND THE MAIN STREET ALLIANCE ("MSA") AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS (MINIMUM COVERAGE PROVISION)

Douglas L. McSwain
Counsel of Record
STURGILL, TURNER, BARKER & MOLONEY, PLLC
333 W. Vine Street, Suite 1400
Lexington, KY 40507
(859) 255-8581
dmcswain@sturgillturner.com

Counsel for Amici Curiae

January 13, 2012

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

This brief will address the following question:

Whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision of the Patient Protection and Affordable Care Act, 26 U.S.C.A. § 5000A.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Patient Protection and Affordable Care Act redresses substantial burdens affecting interstate commerce. 5

II. The Patient Protection and Affordable Care Act is constitutional based on the Commerce Clause in conjunction with the Necessary and Proper Clause. 18

III. The Patient Protection and Affordable Care Act's regulatory model – in particular, requiring individuals to obtain and maintain minimum health insurance coverage – falls within constitutional boundaries. 24

CONCLUSION 32

TABLE OF AUTHORITIES

Cases

Florida ex rel. Atty. Gen. v. United States Dep't of Health & Human Servs.,
648 F.3d 1235 (11th Cir. 2011) 19

Gonzales v. Raich,
545 U.S. 1 (2005) ..... *passim*

Heart of Atlanta Motel, Inc. v. United States.,
379 U.S. 241 (1964) 25

Liberty Univ., Inc. v. Geithner,
No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011) 24

McCulloch v. Maryland,
17 U.S. 316 (1819) 31

N.L.R.B. v. Jones & Laughlin Steel Corp.,
301 U.S. 1 (1937) 21

Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) 24

United States v. Wrightwood Dairy Co.,
315 U.S. 110 (1942) 31

United States v. Comstock,
___ U.S. ___, 130 S. Ct. 1949 (2010) 23

United States v. Lopez,
514 U.S. 549 (1995) 4, 22, 23, 25

United States v. Morrison,
529 U.S. 598 (2000) 4, 22, 25

United States v. South-Eastern Underwriters Ass'n,
322 U.S. 533 (1944) 19

Wickard v. Filburn,
317 U.S. 111 (1942) 20, 21, 24, 26

Constitution

U.S. Const., Art. I i

U.S. Const., Art. I, § 8 . . . . . *passim*

U.S. Const., Art. I, § 8, cl. 3 . . . . . *passim*

Statutes

Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), Pub.L. No. 99–272, 100 Stat. 82 (1986) 19

Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd 15

Employee Retirement Income Security Act of 1974 (ERISA), Pub.L. No. 93–406, 88 Stat. 829 (1974) 12, 19

Federal Food, Drug, and Cosmetic Act, Pub.L. No. 75–717, 52 Stat. 1040 (1938) 19

Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub.L. No. 104–191, 110 Stat. 1936 (1996) 19

Protection and Affordable Care Act ("PPACA" or "Act") . . . . . *passim*
26 U.S.C.A. § 5000A i

Public Health Act 12
42 U.S.C.A. § 18091(a)(1) 9, 19
42 U.S.C.A. § 18091(a)(2) 12
42 U.S.C.A. § 18091(a)(2)(F) 19, 20, 21

Social Security Amendments of 1965, Pub.L. No. 89–97, 79 Stat. 286 (1965) 19

Other Authorities

Brigitte C. Madrian, *Health Insurance and Job Mobility: Is There Evidence of Job-Lock?*, 109 Q. J. of Econ. 27 (1994) 7

The Federalist Papers, edited by C. Rossiter, Intro. & Notes, C. Kesler (published by Signet Classic, Div. of Penguin Group (USA), Inc., 2003 edition) 27
Federalist No. 31 . . . . . 26, 27, 30
Federalist No. 42 . . . . . 27, 28
Federalist No. 44 . . . . . 29, 30

Investopedia, *The Impact of Recession on Businesses*, available at http://www.investopedia.com/articles/economics/08/recession-affecting-business.asp#axzz1ib1ApxSE 13

Jon Gabel, et al., *Generosity and Adjusted Premiums in Job-Based Insurance: Hawaii Is Up, Wyoming Is Down*, 25 Health Affairs 832 (2006) 6

Jonathan Gruber, et al., *The Economic Impact of Healthcare Reform on Small Businesses*, available at http://smallbusinessmajority.org /_pdf/SBM-economic_ impact_061009.pdf 8

Kaiser Family Foundation, *Employer Health Benefits: 2009 Annual Survey* (2009), available at http://ehbs.kff.org/ 7

Kaiser Family Foundation, *Kaiser Commission on Medicaid and the Uninsured* (November 2008), available at http://www.kff.org/uninsured/ upload/7840.pdf 6

Kevin T. Stroupe, et al., *Chronic Illness and Health Insurance Related-Job Lock*, 20 J. of Pol'y Analysis & Mgmt. 525 (2001) 8

Michelle M. Doty, et al., *Out of Options: Why So Many Workers in Small Businesses Lack Affordable Health Insurance, and How Health Care Reform Can Help*, The Commonwealth Fund, available at http://www.commonwealth fund.org/Content/Publications/IssueBriefs/ 2009/Sep/Out-of-Options.aspx (Sep. 9, 2007) . . 7

NFIB Releases Small Business Health-Care Survey Results (May 22, 2007), available at http://www.insurancenewsnet.com/article. aspx?a=top_lh&id=79862 18

NFIB's *Small Business Principles for Healthcare Reform*, available at http://www.nfib.com/ Portals/0/PDF/healthcare/New-Principles- %28FINAL%29.pdf 15, 17

Paul B. Ginsburg, Robert Wood Johnson Foundation, *High and Rising health care costs: Demystifying U.S. health care spending* (October 2008), available at http://www.rwjf.org/files/research/101508.policysynthesis.costdrivers.rpt.pdf 6

Toni Johnson, Council on Foreign Relations, *Healthcare Costs and U.S. Competitiveness*, (Mar. 23, 2010), available at http://www.cfr.org/health-science-and-technology/healthcare-costs-us-competitiveness/p13325 6

Wikipedia, "*The Commons*," available at: http://en.wikipedia.org/wiki/The_commons . . 14

WordiQ, "*Free rider problem – Definition*," available at: http://www.wordiq.com/definition/Free_rider_problem 14

STATEMENT OF INTEREST[1]

The Small Business Majority Foundation, Inc. ("SBM") is a national, nonpartisan organization founded and run by small business owners across the United States. SBM is a District of Columbia non-profit organization exempt from tax as an educational organization under section 501(c)(3) of the Internal Revenue Code. SBM represents the interests of small business owners as well as researches and disseminates policy proposals that address their special interests and needs. In recent years, SBM has focused on skyrocketing health care costs, the largest problem facing small businesses.

The Main Street Alliance ("MSA") is a national network of state-based small business coalitions. Led by Main Street small business owners, the MSA network formed in 2008 and now operates as a program of the Alliance for a Just Society, a Washington State non-profit charitable and educational organization exempt from tax under section 501(c)(3) of the Internal Revenue Code. MSA creates opportunities for small business owners to speak for themselves on issues that impact their businesses and their local economies. MSA members' top priority is advancing reforms that make health care work for small businesses.

---

[1] The parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or its counsel made a monetary contribution to its preparation or submission.

In this consolidated action, SBM and MSA address only one of the issues before the Court: whether federal law requiring individuals to obtain and maintain minimum health insurance coverage falls within Congress' power under the Commerce Clause in conjunction with the Necessary and Proper Clause. The requirement's constitutionality turns on many commercial and economic factors. Small businesses, representing 99.7% of all U.S. employer firms and 44% of total U.S. private payroll, are especially attuned to those commercial and economic considerations implicated by the federal health care reforms at issue. One of the parties before the Court, the National Federal of Independent Business ("NFIB"), is a business group, but NFIB does not represent the viewpoint of all small businesses. SBM and MSA accordingly submit this brief examining the Patient Protection and Affordable Care Act's constitutionality from the perspective of these small business owners not represented by the parties or other amici.

SUMMARY OF ARGUMENT

The Patient Protection and Affordable Care Act ("PPACA" or "Act") redresses growing health care and health insurance costs that are causing substantial burdens on interstate commerce. These burdens are felt widely, but small businesses have been especially hard hit. Small businesses pay on average 10 to 18% more than large employers to provide the same level of health benefits. These higher health care costs translate into substantial competitive disadvantages for small businesses. PPACA pursues broad-based reform, but the law's end result will help remedy those additional problems specifically hurting small business. Small and Main Street businesses

accordingly support Congress' reform effort. In this regard, NFIB does not represent the viewpoint of all small business owners, as illustrated by its own surveys. Part I of the Argument more specifically discusses these burdens on interstate commerce.

Part II establishes that PPACA is within Congress' Commerce Clause powers. It is not in question that health insurance and health care both involve interstate commerce subject to federal regulation. In addition, the Act's minimum health coverage requirement, which is specifically at issue here, targets cost-shifting forces by the uninsured that "substantially affect interstate commerce" consistent with one of the three categories of Commerce Clause regulation recognized by this Court. PPACA's legislative findings document these cost-shifting forces – where the uninsured consume health care but cannot pay for it with those uncompensated costs passing to the insured through higher premiums – and their substantial effects on interstate commerce. Although the Act's findings describe the problem generally and are not dispositive, "particularized findings" or accuracy "in fact" are unnecessary for this Court to sustain the law. Rather, the Act satisfies this Court's "modest" rational basis standard and is constitutional.

The Act's challengers propose a clear cut limit on Congress's reach under the Commerce Clause that contrasts inactive from active market participants. Such categorical line-drawing based on rigid terminology, however, is fundamentally incompatible with this Court's modern Commerce Clause rubric. In assessing Congress' interstate commerce powers, the standard is one of degree. A strict inactive/active distinction is accordingly misguided and should be

rejected. Opponents of the Act also object to Congress anticipating that all uninsured persons will inevitably consume health care without fully paying for it. Yet, this focus on individual circumstances is misplaced because Congress is permitted to regulate the entire class and total incidence of any practice that poses a threat to interstate commerce.

Based on *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), the Act's challengers further object to class-wide regulation of uninsured persons that aggregates their substantial effects on interstate commerce. Those cases, however, involved narrow federal statutes that concerned areas of traditional state regulation such as crime and that had only attenuated connections to interstate commerce. In contrast, PPACA is comprehensive legislation that regulates commercial and "economic" subject matter (health insurance and health care), and the Act's minimum coverage requirement redresses classic "economic" issues (cost-shifting and free riding). The limits on "aggregation" that constrain Congress' Commerce Clause authority, as defined by *Lopez* and *Morrison*, are therefore inapplicable here.

Moreover, the Necessary and Proper Clause further supplements Congress' Commerce Clause powers to regulate uninsured persons. Through this provision, Congress may regulate even noneconomic subject matter that is an essential component of a larger regulatory scheme concerning interstate commerce. The Necessary and Proper Clause provides additional support to uphold PPACA because the Act has a "legitimate end" under the Commerce Clause to remedy significant cost-shifting problems that are

burdening interstate health care and health insurance markets and because the Act's minimum coverage requirement is "reasonably adapted" to fix that economic drag.

Finally, Part III focuses on PPACA's regulatory model – in particular, requiring individuals to obtain and maintain minimum health insurance coverage. The Act's challengers complain that PPACA's form and sweep are unconstitutional, but the Act's structure is consistent with this Court's prior decisions and other valid federal legislation. Furthermore, the Constitution does not limit the manner or scope of Congress' Commerce Clause powers. The Act is simply a policy decision adopting a particular solution in response to a particular problem. This Court defers to Congress on policymaking matters, leaving the Act in the hands of the people – not the courts – to judge and decide. A close look at how the Framers viewed Congress, its Commerce Clause powers, and the popular constraints on that body further confirm that PPACA should begin and end with our elected representatives.

ARGUMENT

I. The Patient Protection and Affordable Care Act redresses substantial burdens affecting interstate commerce.

Health care desperately needs repair. The United States spends an estimated $2 trillion annually on health care, more than any other developed country

and roughly two-and-one-half times the average.[2] As a result of this country's dominate employment-based health insurance structure, higher health care expenditures hurt many U.S. businesses and their global competitiveness. *See id.* Analysis shows that U.S. industries having the highest levels of employer-sponsored health care also have slower growth than their international industry competitors. *See id.* The drag on employers by health care costs also is felt by their employees. Studies show that access to employer-sponsored health plans has steadily declined since 2000 while health insurance premiums for workers have increased and outpaced earnings over the past decade.[3]

Unsustainable health care costs have squeezed small businesses and their employees in particular. Small businesses with less bargaining power must pay on average 10 to 18% more than large employers to provide the same level of health benefits.[4] In luring

---

[2] *See* Toni Johnson, Council on Foreign Relations, *Healthcare Costs and U.S. Competitiveness*, (Mar. 23, 2010), available at http://www.cfr.org/health-science-and-technology/healthcare-costs-us-competitiveness/p13325.

[3] *See* Kaiser Family Foundation, *Kaiser Commission on Medicaid and the Uninsured* (November 2008), available at http://www.kff.org/uninsured/upload/7840.pdf; Paul B. Ginsburg, Robert Wood Johnson Foundation, High and Rising health care costs: Demystifying U.S. health care spending, 1 (October 2008), available at http://www.rwjf.org/files/research/101508.policysynthesis.costdrivers.rpt.pdf.

[4] *See* Jon Gabel, et al., *Generosity and Adjusted Premiums in Job-Based Insurance: Hawaii Is Up, Wyoming Is Down*, 25 Health Affairs 832, 840 (2006).

top job candidates, these higher health care costs are a substantial competitive disadvantage because most small business either cannot afford to provide the same level of health coverage as large companies or are more likely to offer no health benefits at all to their employees.

For example, 48% of all small business employees have health insurance policies that cap their total amount of care, compared to only 37% of all large firm employees.[5] Similarly, small business employees are three times more likely than large firm employees to have health plans with no prescription drug coverage. *Id.* And less than half of all small firms (those having 200 or fewer employees) even offer health benefits, dropping over 10% (from 57 to 46%) between 2000 and 2009.[6]

In addition to causing competitive disadvantages for small businesses in job markets, the gap in health coverage also causes "job lock" over the long term, where employees of companies offering health insurance are reluctant to switch to jobs not having those benefits, even if the job itself better suits that employee's particular skills. *See* Brigitte C. Madrian, *Health Insurance and Job Mobility: Is There Evidence*

---

[5] *See* Michelle M. Doty, et al., *Out of Options: Why So Many Workers in Small Businesses Lack Affordable Health Insurance, and How Health Care Reform Can Help*, 67 The Commonwealth Fund, available at http://www.commonwealthfund.org/Content/Publications/IssueBriefs/2009/Sep/Out-of-Options.aspx (Sep. 9, 2007).

[6] *See* Kaiser Family Foundation, *Employer Health Benefits: 2009 Annual Survey* 50 (2009), available at http://ehbs.kff.org/.

of Job-Lock?, 109 Q. J. of Econ. 27, 43 (1994) (determining that job lock "accounts for a 25–30 percent reduction in [job] mobility"); *see also* Kevin T. Stroupe, et al., *Chronic Illness and Health Insurance Related-Job Lock*, 20 J. of Pol'y Analysis & Mgmt. 525, 525 (2001) (finding that workers with chronic illnesses or a family member with chronic illness are 40 percent less likely to voluntarily leave a job which provides health benefits than a similarly-situated healthy worker with a healthy family). "Job lock" leads to economic inefficiencies by potentially trapping workers in undesirable jobs and preventing employers from attracting employees.

Through competitive disadvantages in job markets and job lock, health care is causing acute problems for small businesses on top of the burdens of higher premiums felt generally among all governments, businesses, and individuals. The Patient Protection and Affordable Care Act pursues broad-based reform, but the law's end result will also help redress those additional problems specifically hurting small business. Without reform, small businesses are projected to pay nearly $2.4 trillion over the next 10 years for health care costs, which in turn will reduce job growth, wages, and profitability.[7] For small businesses and their employees, reform on the scale of PPACA is expected to save significant costs and jobs, boost wages and profits, and ease or eliminate job lock.

---

[7] *See* Jonathan Gruber, et al., *The Economic Impact of Healthcare Reform on Small Businesses* at pp. 9, 11, 14, 17, available at http://smallbusinessmajority.org/_pdf/SBM-economic_impact_061009.pdf.

Reform that controls health care costs will also help overall U.S. business competitiveness abroad.

To accomplish broad-based reform, the Act's "individual responsibility requirement" (minimum coverage requirement) is a key component specifically at issue here. Congress made several findings regarding the Act's minimum coverage requirement and the "substantial" adverse effects on interstate commerce that the requirement was enacted to correct. 42 U.S.C.A. § 18091(a)(1). Those findings most relevant to small businesses and the Act's constitutionality are highlighted below:

> **(2) The effects on the national economy and interstate commerce**
>
> The effects described in this paragraph are the following:
>
> (A) The requirement regulates activity that is commercial and economic in nature: economic and financial decisions about how and when health care is paid for, and when health insurance is purchased. **In the absence of the requirement, some individuals would make economic and financial decision to forgo health insurance coverage and attempt to self-insure, which increases financial risks to households and medical providers.**
>
> * * *
>
> **(E) The economy loses up to $207,000,000,000 a year because of the poorer health and shorter lifespan of the uninsured.** By significantly reducing

the number of the uninsured, the requirement, together with the other provisions of this Act, will significantly reduce this economic cost.

(F) The cost of providing uncompensated care to the uninsured was $43,000,000,000 in 2008. To pay for this cost, health care providers pass on the cost to private insurers, which pass on the cost to families. **This cost-shifting increases family premiums by on average over $1,000 a year.** By significantly reducing the number of the uninsured, **the requirement,** together with the other provisions of this Act, **will lower health insurance premiums.**

(G) 62 percent of all personal bankruptcies are caused in part by medical expenses. By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will improve financial security for families.

(H) Under the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001, *et seq.*), the Public Health Service Act (42 U.S.C. 201, *et seq.*), and this Act, the Federal Government has a significant role in regulating health insurance. **The requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement**

would undercut Federal regulation of the health insurance market.

(I) Under sections 2704 and 2705 of the Public Service Act (as added by section 1201 of this Act), if there were no requirement, many individuals would wait to purchase health insurance until they needed care. **By significantly increasing health insurance coverage, the requirement, together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums.** The requirement is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.

(J) Administrative costs for private health insurance, which were $90,000,000,000 in 2006, are 26 to 30 percent of premiums in the current individual and small group markets. **By significantly increasing health insurance coverage and the size of purchasing pools, which will increase economies of scale, the requirement, together with the other provisions of this Act, will significantly reduce administrative costs and lower health insurance premiums.** The requirement is essential to creating effective health insurance markets that do not require

> underwriting and eliminate its associated administrative costs.

42 U.S.C.A. § 18091(a)(2)(emphasis added).

PPACA is part of an already "larger regulation" network. Subsections (2)(H), (I) and (J) specifically recognize this interconnected legal environment. Congress found adverse interstate commerce effects currently existing in health insurance and care delivery markets, the former primarily regulated through the employer-provided health insurance laws of the Employee Retirement Income Security Act (ERISA), and the latter significantly affected by the publicly financed health coverage system that exists under the Public Health Act. Together, these "larger regulation" environments constitute virtually all paid health care services provided in America. Congress enacted comprehensive legislation to fix these dysfunctional markets to make the entire health care system more affordable, both to private payers (employer-provided coverage) and public payers (the Federal, State and tribal Governments).

Subsections (2)(A), (E), (F) and (G) recognize the substantial financial risks to households and medical providers (many of whom are small businesses themselves) that occur when individuals attempt to "self-insure," later incur unexpectedly high medical treatment costs, and then cannot pay. These financial risks lead to increased lost productivity, excessive personal bankruptcies, and significant "cost-shifting" that all have substantial adverse effects on interstate commerce, particularly for small business.

Uninsured workers are more likely to delay medical treatment, which actually worsens their condition and results in more missed work. Since small businesses usually offer less or no health benefits, they suffer disproportionately from lost productivity.

In addition, medical costs are a factor in most bankruptcies, with uninsured persons being more at risk of becoming too indebted to pay for medical services. Excessive bankruptcies impair the collection of accounts receivable and critical revenue upon which small businesses rely to survive and compete. And excessive bankruptcies also squelch the entrepreneurial spirit, at least for a while, by discouraging the lending or investment of working capital from banks or venture capitalists.[8] Although bankruptcies burden companies of all sizes, they particularly impact small businesses that often have to extend credit to those without credit cards but have lesser ability to absorb bankrupted debts.

Finally, large amounts of uncompensated medical care by uninsureds, when aggregated, ultimately are cost-shifted to insureds in the form of higher premiums. Economic theory classifies the phenomenon of "cost-shifting" as a species of the "free rider" problem. Free riders are "actors who take more than their fair share of the benefits or do not shoulder

---

[8] *See* Investopedia, *The Impact of Recession on Businesses*, available at http://www.investopedia.com/articles/economics/08/recession-affecting-business.asp#axzz1ib1ApxSE (2008) (discussing the impact of bankruptcies on businesses).

their fair share of the costs of their use of a resource."[9] To deal with the "free rider problem," the policymaker must decide how to "prevent" it or "limit its effects." *Id.* The problem is economic in nature and "particularly important and troublesome when considering goods or resources to which access cannot be excluded." *Id.* Typical government policy tools to deal with it and avoid reliance on volunteer donations include "taxes" or "conscription" (*i.e.*, mandatory rules). *Id.*

PPACA's regulatory model is based on enhancing health insurance markets, but its "larger regulat[ory]" scheme is designed to redress the entire health care delivery system and the free riding that specifically occurs in that system. The free rider problem in health care markets is akin to the overuse of the "commons."[10] In the health care context, typical choices identified to deal with such overuse include "taxes on families or health insurance premiums" or "rules" to ensure the continued availability of health care, at affordable prices for all, in the future. *Id.* Congress clearly chose to deal with the significant economic problem of "cost-shifting" by imposing a minimum coverage requirement, which is consistent with those policy choices available to governments when addressing free rider problems and the need to protect public "commons."

---

[9] *See* WordiQ, "*Free rider problem – Definition*," available at: http://www.wordiq.com/definition/Free_rider_problem.

[10] *See* Wikipedia, "*The Commons*," available at: http://en.wikipedia.org/wiki/The_commons.

Furthermore, the reasons for health care free riding are complex. The Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd, is part of the equation, but health care free riding cannot be wholly attributed to EMTALA because many health care providers and hospital systems are bound by professional ethics, religious or charitable institutional requirements, or state law to provide health care for free or at a very reduced prices to those who cannot afford required medical treatment and are uninsured. Ultimately, the source of such free riding is unimportant; Congress recognized in PPACA's findings that the problem has grown so severe that health insurance and care delivery markets are overly distorted due to cost-shifting's heavy toll on private payers of health care (increased premiums in employer-based insurance policies) and the public payer system (increased costs to the Federal and State Governments through programs such as Medicaid and Medicare). Congress reacted accordingly. Small and Main Street businesses who also desire maintaining the "common" good of affordable health care in America fully support Congress' choice through PPACA to protect it.

Interestingly, NFIB once espoused exactly what SBM and MSA believe to be the reasons that small businesses need the reforms enacted by Congress. The following quotes from NFIB's *Small Business Principles for Healthcare Reform* reinforce the interests of small businesses in America:

> **Our current system of health insurance and healthcare is financially unsustainable and threatens the health and financial security of the American**

people. Small-business owners and their employees are especially vulnerable to the weaknesses of our current system. . . . The resulting healthcare system would be:

> **Universal**: All Americans should have access to quality care and protection against catastrophic costs. A government safety net should enable the neediest to obtain coverage.
>
> Several reasons underlie our support for universal access to care. First, **lack of insurance is especially problematic for small businesses and their employees**. Second, **having millions of uninsured Americans distracts us from focusing on affordability, quality and comprehensiveness of care and coverage**. Third, **laws already provide some level of insurance for everyone, but coverage is expensive, inefficient and often inadequate - guaranteed access to emergency rooms is one example. Under this piecemeal coverage, costs fall arbitrarily and inequitably on individuals, providers, governments and businesses**.
>
> * * *
>
> **Private**: To the greatest extent possible, Americans should receive their health insurance and healthcare through the private sector. Care must be taken to minimize the extent to which governmental safety nets crowd out private insurance and care.
>
> * * *

> **Affordable**: Healthcare costs to individuals, providers, governments and businesses must be reasonable, predictable and controllable.
>
> * * *
>
> **Portable**: Americans should be able to move throughout the United States and change jobs without losing their health insurance.
>
> Our current health-insurance system locks people into jobs and localities. . . . **This phenomenon of job lock is not only a tragedy for the locked-in worker. [sic] It harms the overall economy by preventing workers from discovering their own entrepreneurial talents or accepting more productive jobs**. It creates a significant impediment to those who wish to leave positions as employees and start small businesses of their own.
>
> * * *
>
> **Efficient**: Healthcare policy should encourage an appropriate level of spending on health care. Laws, regulations and insurance arrangements should direct health care spending to those goods and services that will maximize health. **Adequate risk pools throughout the health care system are vital to accomplishing these goals.**[11]

Furthermore, past surveys of NFIB members have found majority support for an individual coverage

---

[11] *See* NFIB's *Small Business Principles for Healthcare Reform*, available at http://www.nfib.com/Portals/0/PDF/healthcare/New-Principles-%28FINAL%29.pdf (emphasis added).

requirement similar to the one included in PPACA. For example, a health care survey of 1,654 NFIB members conducted by the NFIB Research Foundation in March/April 2007 and released in May 2007 found a majority of respondents supported an individual coverage requirement. A press release from NFIB dated May 22, 2007 about this survey included the following statement: "57 percent indicate a preference for individuals above a reasonable income level to be required to have health insurance or be able to prove financial responsibility."[12] Although NFIB challenges PPACA, the law addresses the concerns of small business owners. In addition, the law satisfies constitutional standards based on the reasons stated below.

II. The Patient Protection and Affordable Care Act is constitutional based on the Commerce Clause in conjunction with the Necessary and Proper Clause.

Congress possesses only those powers enumerated and delegated to it by the Constitution. *See* U.S. Const., Art. I, § 8. PPACA is based on Congress' power "[t]o regulate Commerce ... among the several States...." U.S. Const., Art. I, § 8, cl. 3. The Court groups Congress' Commerce Clause powers into three general categories of regulation that include: (1) the power to regulate the "channels of interstate commerce"; (2) the power to regulate and protect the "instrumentalities of interstate commerce"; and (3) the

---

[12] *See* NFIB Releases Small Business Health-Care Survey Results (May 22, 2007), available at http://www.insurance newsnet.com/article.aspx?a=top_lh&id=79862.

power to regulate "activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005). PPACA invokes the third kind of regulation. 42 U.S.C.A. § 18091(a)(1).

In this case, the Act's requirement that individuals obtain and maintain minimum health insurance coverage is specifically at issue. This provision is designed to redress, in part, large cost-shifting problems caused by uninsureds who inevitably consume health care services but frequently cannot fully pay for them. *See* 42 U.S.C.A. § 18091(a)(2)(F). The minimum coverage requirement should be upheld because it merely reflects a policy decision on how to regulate matters that plainly fall within Congress' purview under the Commerce Clause.

It is not in question that health insurance and health care both involve interstate commerce subject to federal regulation. This Court long ago recognized that insurance is within Congress' Commerce Clause authority. *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). In addition, PPACA is the latest law in a long line of expansive federal health care legislation based on the Commerce Clause. *See Florida ex rel. Atty. Gen. v. United States Dep't of Health & Human Servs.*, 648 F.3d 1235, 1302-03 (11th Cir. 2011)(citing Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub.L. No. 104–191, 110 Stat. 1936 (1996); Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), Pub.L. No. 99–272, 100 Stat. 82 (1986); Employee Retirement Income Security Act of 1974 (ERISA), Pub.L. No. 93–406, 88 Stat. 829 (1974); Social Security Amendments of 1965, Pub.L. No. 89–97, 79 Stat. 286 (1965) (establishing Medicare and Medicaid); Federal

Food, Drug, and Cosmetic Act, Pub.L. No. 75–717, 52 Stat. 1040 (1938)). The minimum coverage requirement, in particular, targets cost-shifting forces that "substantially affect interstate commerce" relating to health insurance and health care that is fully consistent with the third category of Commerce Clause regulation.

PPACA's legislative findings actually document the substantial interstate commerce effects of cost-shifting. Congress found that $43 billion of uncompensated health care for the uninsured was cost-shifted to the insured through higher premiums. *See* 42 U.S.C.A. § 18091(a)(2)(F). These findings, of course, describe the problem generally and are not dispositive, but "particularized findings" or accuracy "in fact" are unnecessary for this Court to sustain the law. *See Raich*, 545 U.S. at 21-22. Rather, the Act satisfies constitutional standards if Congress had a "rational basis" for its conclusion that cost-shifting by uninsureds was substantially affecting interstate commerce. *See id.* PPACA meets this Court's "modest" rational basis threshold. *See id.*

Opponents of the Act complain because individuals must have health coverage despite not presently wanting or even needing health care or health insurance. The Act's challengers thus propose a clear cut limit on Congress's reach under the Commerce Clause that contrasts inactive from active market participants. This Court, however, has abandoned tests that "give controlling force to nomenclature." *Wickard v. Filburn*, 317 U.S. 111, 120 (1942). A strict inactive/active distinction is similarly too neat.

Furthermore, categorical line-drawing is fundamentally incompatible with this Court's modern Commerce Clause rubric. In assessing Congress' interstate commerce powers, the "criterion is necessarily one of degree and must be so defined." *Id.* at 123. A more flexible assessment, in line with this Court's standards, reveals that PPACA actually regulates market activity. The Act is based, in part, on legislative findings that uninsured persons, as a class, actively consume but usually cannot fully pay for health care services resulting in significant cost-shifting to insureds in the form of higher premiums. *See* 42 U.S.C.A. § 18091(a)(2)(F). This legislative finding has a "rational basis" and is accordingly sufficient to sustain the law. *See Raich*, 545 U.S. at 22.

Opponents of the Act object to Congress anticipating that all uninsured persons will inevitably consume health care without fully paying for it. Congress, however, is "entitled to foresee and to exercise its protective power to forestall" any "future and like dangers to interstate commerce" pursuant to its Commerce Clause authority. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 (1937). Therefore, "recurring practices" that burden interstate commerce – such as cost-shifting by the uninsured – are plainly subject to regulation. *See id.* at 41.

Indeed, Congress is permitted to "regulate the entire class" when it "decides that the total incidence of a practice poses a threat to a national market." *See Raich*, 545 U.S. at 17. This concept applies here. Although *some* uninsured persons may never consume health care or may have the financial wherewithal to pay for it, these "individual instances" are of "no

consequence" because Congress has rationally determined that *most* uninsured persons consume health care without full compensation. *See id.* Congress is not required to legislate with "scientific exactitude" and the Court should not "excise" any "individual components" out of PPACA's larger regulatory scheme. *See id.* at 17, 21.

Based on *United States v. Lopez,* 514 U.S. 549 (1995) and *United States v. Morrison,* 529 U.S. 598 (2000), the Act's challengers further object to class-wide regulation of uninsured persons that aggregates their substantial effects on interstate commerce. Those cases, however, involved narrow federal statutes that concerned areas of "traditional state regulation" such as crime and that had only "attenuated" connections to interstate commerce. *Morrison*, 529 U.S. at 598. In contrast, PPACA plainly regulates commercial and "economic" subject matter – health insurance and health care – that is well within Congress' established Commerce Clause authority. And the minimum coverage requirement redresses classic "economic" issues – specifically cost-shifting, which is a species of the free-rider problem – as part of the Act's larger regulatory scheme. These features critically distinguish PPACA from the laws at issue in *Lopez* and *Morrison*. The touchstone is whether the subject matter being regulated is "quintessentially economic." *See Raich*, 545 U.S. at 25. In this case, the economic and commercial character of PPACA and its minimum coverage requirement are "visible to the naked eye." *See id.* at 28-29 (quoting *Lopez,* 514 U.S. at 563). Therefore, the limits on "aggregation" that constrain Congress' Commerce Clause authority, as defined by *Lopez* and *Morrison*, are inapplicable here.

Finally, the Necessary and Proper Clause further supplements Congress' Commerce Clause powers to regulate uninsured persons. Through this provision, Congress may regulate even "noneconomic" subject matter that is "a necessary part of a more general regulation of interstate commerce." *See Raich*, 545 U.S. at 37 (Scalia, J., concurring in judgment)(citing *Lopez*, 514 U.S. at 561). Enhancing Congress' regulatory capability under the Necessary and Proper Clause is valid so long as the "means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power." *United States v. Comstock*, ___ U.S. ___, 130 S. Ct. 1949, 1957 (2010)(quoting *Raich*, 545 U.S. at 37 (Scalia, J., concurring in judgment)).

PPACA's objective to redress significant cost-shifting problems that are burdening interstate health care and health insurance markets is plainly a "legitimate end under the commerce power," and the minimum coverage requirement is "reasonably adapted" – if not essential – to remedy that economic drag. Congress has pursued health care reform that "builds upon and strengthens" the existing private employer-based health insurance system instead of greater government intervention, but it is self-evident that Congress' attempt to fix economic breakdowns in this current regime and to enhance it going forward will be undercut unless individuals are required to have insurance.

In sum, the Commerce Clause in conjunction with the Necessary and Proper Clause are sufficient to uphold the Act.

III. The Patient Protection and Affordable Care Act's regulatory model – in particular, requiring individuals to obtain and maintain minimum health insurance coverage – falls within constitutional boundaries.

In addition to attacking PPACA's commercial or economic character, the Act's challengers also contest PPACA's regulatory form and sweep. The Act's structure, however, is consistent with this Court's prior decisions and other valid federal legislation. In *Wickard v. Filburn*, this Court sustained federal quotas on wheat production despite the quotas "forcing some farmers into the market to buy what they could provide for themselves." 317 U.S. at 129. The Court further recognized that "stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon." *Id.* at 128. Other federal laws based on the Commerce Clause also do more than solely restrict or forbid conduct. *See Liberty Univ., Inc. v. Geithner*, No. 10-2347, 2011 WL 3962915 (4th Cir. Sept. 8, 2011)(Davis, J. dissenting)(collecting statutes). With respect to the Act's goal of near-universal health coverage, *Gonzales v. Raich* upheld federal legislation on a similar scale intending universal market eradication of certain drugs.

Moreover, the Constitution does not limit Congress' Commerce Clause powers based on the form of regulation. Congress is empowered to "regulate" interstate commerce in general. From the time of our Framers to present, the term "regulate" has been defined as including the power to direct, which in turn has meant to order or command. *Seven-Sky v. Holder*, 661 F.3d 1, 16 (D.C. Cir. 2011). This terminology

fairly encompasses – not excludes – the power to require minimum health coverage. The Constitution's text also nowhere limits the scope of Congress' Commerce powers. Indeed, a categorical bar forbidding Congress from regulating everybody in a particular fashion has the perverse effect of shrinking Congress' powers when combatting truly nation-wide problems.

PPACA's regulatory model reflects both the nature of the problem and its solution, not constitutional infirmities. The health care industry embraces nearly everybody. Although other industries – such as food and energy – have similar breadth, those industries are not experiencing similar free-rider problems creating market affordability and accessibility issues for so many Americans. Congress responded to this nation-wide problem with reforms that were equally national in scope.

The Act's challengers complain that PPACA's regulatory model has no "limiting principles" and is tantamount to impermissible "general police powers." This critique is without merit. *Lopez* and *Morrison* define the limits of Congress' Commerce Clause powers; PPACA does not trespass the constitutional boundaries set out by those decisions. The Act is, instead, simply a policy decision adopting a particular solution in response to a particular problem. This Court defers to Congress on such policymaking matters. The Act is accordingly in the hands of the people – not the courts – to judge and decide. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255 (1964)("The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections,

are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."); *see also Wickard v. Filburn*, 317 U.S. at 120 ("[E]ffective restraints on its exercise must proceed from political rather than from judicial processes[.]").

That the wisdom of the Act lies in the hands of the people, is exactly how the Framers of the Constitution would interpret the enumerated powers of Article I, Section 8. In Federalist No. 31, speaking to Congress' delegated powers, Alexander Hamilton wrote:

> A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, **free from every other control but a regard to the public good and to the sense of the people**.
>
> * * *
>
> **The moment we launch into conjectures about the usurpations of the federal government, we get into an unfathomable abyss and fairly put ourselves out of the reach of all reasoning. . . . Whatever may be the limits or modifications of the powers of the Union, it is easy to imagine an endless train of possible dangers; and by indulging an excess of jealousy and timidity, we may bring ourselves to a state of absolute skepticism and irresolution.** I repeat here what I have observed in substance in another place, that all observations founded

> upon the danger of usurpation ought to be referred to the composition of and structure of the government, not to the nature or extent of its powers.
>
> * * *
>
> **[I]t is by far the safest course . . . to confine our attention wholly to the nature and extent of the powers as they are delineated in the Constitution. Everything beyond this must be left to the prudence and firmness of the people; who, as they will hold the scales in their own hands, it is to be hoped will always take care to preserve the constitutional equilibrium between the general and the State governments.**

Federalist No. 31, pp. 190, 192-193, *The Federalist Papers*, edited by C. Rossiter, Intro. & Notes, C. Kesler (published by Signet Classic, Div. of Penguin Group (USA), Inc., 2003 edition) (emphasis added) (hereafter "The Federalist Papers").

Hamilton clearly recognized that the final and best check on any alleged "usurpation" of a constitutionally delegated power lies in the people at the ballot box. He further recognized a slippery slope in conjecturing what may be the absolute limits of any delegated power, a slope that inexorably leads to a state of "skepticism and irresolution."

In Federalist No. 42, speaking to the Constitution's conferred powers, James Madison wrote:

> The powers included in [the regulation of intercourse with foreign nations] are those

which provide for the harmony and proper intercourse among the States.

. . . I shall confine myself to . . . the remaining powers . . ., to wit: **to regulate commerce among the several States** . . ..

The defect of power in the existing Confederacy to regulate the commerce between its several members is in the number of those which have been clearly pointed out by experience. . . . **A very material object of this power was the relief of the States which import and export through other States from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it would be foreseen that ways would be found to load the articles . . . during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former. We may be assured by past experience that such a practice would be introduced by future contrivances**; and both by that and a common knowledge of human affairs that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility. . . .

. . . **Nothing which tends to facilitate the intercourse between the States can be deemed unworthy of the public care**.

Federalist No. 42, pp. 263-264 & 267, *The Federalist Papers* (emphasis added).

Madison was prescient in foreseeing that Congress may someday need to deal with national problems such as those that exist with health care in America. While no state-imposed "levies" or "duties" are the source of problems with health care, Madison foresaw "future contrivances" to arise where "consumers" in one state would be adversely impacted by practices existent in another. That is what Congress found in PPACA, and is not, therefore, "unworthy of [Congress'] care." Insured individuals nationwide are negatively affected by the problem of free riding and cost-shifting which occurs in states all across the country. This erodes the affordability of health coverage for everyone. Congress clearly has the constitutional authority to chart a nationally oriented, corrective course.

In Federalist No. 44, speaking to Congress' necessary and proper powers,

Madison also wrote:

> Had the convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect, the attempt would have involved a complete digest of laws . . .; **for in every new application of a general power, the *particular powers*, which are the means of attaining the object of the general power, must always necessarily vary with that object, and be often properly varied whilst the object remains the same.**
>
> . . . **No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are**

> **authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.**
>
> . . . **If it be asked what is to be the consequence, in case the Congress shall misconstrue this part of the Constitution and exercise powers not warranted by its true meaning, I answer** . . .. In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; **and in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the ursurpers.**

Federalist No. 44, pp. 281-282, *The Federalist Papers* (emphasis added).

Madison's Federalist No. 44 reiterates the point made in Hamilton's Federalist No. 31: the "last resort" for an alleged "usurpation" of a delegated power is the "election of more faithful representatives." Of course, the judiciary must first construe and apply legislative acts, but where Congress has expressed specific legislative findings to support its nation-wide regulation of health care, its findings should not be set aside, but remedied, if at all, only by the electorate.

Federalist No. 44's axiom – "wherever the end is required, the means are authorized . . . [and] every particular power necessary for doing it is included" – predicts what the courts have long held: Congress possesses not only the authority to regulate interstate commerce, but the choice of "means" and "every

particular power necessary" to do it. *See McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."); *see also Gonzales v. Raich*, 545 U.S. at 37 (Scalia, J., concurring in judgment) ("where Congress has the authority to enact a regulation of interstate commerce, 'it possesses every power needed to make that regulation effective,'") (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118-119 (1942)).

Congress chose the minimum coverage requirement to effectuate an "end" of fixing an unaffordable and discriminatory nation-wide health insurance and care delivery system. Choosing the "means" of this requirement is not constitutionally infirm, despite the lack of precedent for employing such "means." As Madison stated, "the means of attaining [an] object . . . necessarily var[ies] with th[e] object." Congress properly required minimum coverage as a reasonably adapted and necessary method of regulating a uniquely national health care problem.

The minimum coverage provision in PPACA is, therefore, perfectly constitutional as it is not prohibited and is consistent with the letter and spirit of Congress' enumerated powers in Article I, Section 8 of the U.S. Constitution.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Douglas L. McSwain
Counsel of Record
Sturgill, Turner, Barker &
Moloney, PLLC
333 W. Vine Street, Ste. 1400
Lexington, KY 40507
(859) 255-8581
dmcswain@sturgillturner.com

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

No. 11-398

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For The Eleventh Circuit

BRIEF OF STATE CHAMBERS OF COMMERCE AND RELATED ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF THE RESPONDENTS ON THE ANTI-INJUNCTION ACT

WILLIAM V. CUSTER
BRYAN CAVE LLP
1201 W. Peachtree St.
Atlanta, GA 30312
(404) 572-6600
bill.custer@bryancave.com
Attorney for the Amici

February 13, 2012

TABLE OF CONTENTS

Page

INTEREST OF THE AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE ANTI-INJUNCTION ACT DOES NOT BAR CONSIDERATION OF THIS SUIT 4

A. The Respondents Only Seek To Challenge The ACA's Individual Insurance Mandate, Not The Collection Of Any Tax 4

B. A Penalty Is Not A Tax, Therefore The Anti-Injunction Act Does Not Apply 5

C. This Suit Does Not Have The Immediate Purpose Of Restraining The Collection Of A Tax, And Therefore Is Not Prohibited By The Anti-Injunction Act 8

II. THE UNCERTAINTY CREATED BY FURTHER DELAY IN RESOLVING THIS ISSUE WILL CREATE UNDUE HARDSHIP ON U.S. BUSINESSES 12

A. **The ACA Has Already Created Tremendous Uncertainty For Employer-Based Health Care Coverage, And A Delayed Ruling Would Exacerbate This Problem** 13

B. **The Uncertainty Created By A Delayed Ruling Will Also Harm Employers' Ability To Hire Workers** 18

C. **A Delayed Ruling Will Also Result In The Imposition Of Direct Costs On Employers That May Ultimately Be Unnecessary** 20

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

CASES

Bob Jones Univ. v. Simon,
416 U.S. 725 (1974) 4, 10, 12

Bob Jones Univ. v. Simon,
461 U.S. 574 (1983) 11

Enochs v. Williams Packing & Navigation Co.,
370 U.S. 1 (1962) 9, 11

Florida v. Dep't of Health & Human Servs.,
716 F. Supp. 2d 1120 (N.D. Fla. 2011) 6, 8

Helwig v. United States,
188 U.S. 605 (1903) 8

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 6

Rosenberger v. Rector and Visitors of Univ. of Virginia,
515 U.S. 819 (1995) 7

Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) 5

Thomas More Law Ctr. v. Obama,
651 F.3d 529 (6th Cir. 2011) 5

United States v. Butler,
297 U.S. 1 (1936) 7

STATUTORY PROVISIONS

26 U.S.C. § 4191 7

26 U.S.C. § 4980H 15

26 U.S.C. § 4980I 7

26 U.S.C. § 5000A(a) 4

26 U.S.C. § 5000A(b)(1) 6

26 U.S.C. § 5000A(g)(2)(B) 7

26 U.S.C. § 7421(a) 4, 5, 10

28 U.S.C. § 2201 (2006) 12

42 U.S.C. § 18091(a)(1) 7

OTHER AUTHORITIES

Congressional Budget Office Director's Blog, http://cboblog.cbo.gov/?p=1478 (Oct. 22, 2010, 12:35 EST) 19

CURTIS W. COPELAND, CONG. RESEARCH SERV., R41880, REGULATIONS PURSUANT TO THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (P.L. 111-148) (2010), *available at* http://assets.opencrs.com/rpts/R41180_20100413.pdf 13

Dennis Lockhart, Chair, Atlanta Federal Reserve Bank "Business Feedback on Today's Labor Market," Federal Reserve Bank of Atlanta (Nov. 11, 2010), *available at* http://www.frbatlanta.org/news/speeches/lockhart_111110.cfm 18

Douglas Holtz-Eakin, The Patient ACA: Labor Market Incentives, Economic Growth, and Budgetary Impacts (Jan. 26, 2011), *available at* http://waysandmeans.house.gov/UploadedFiles/HoltzEakin_Testimony_1_5.pdf 15

Douglas W. Elmendorf, *CBO's Analysis of the Major Health Care Legislation Enacted in March 2010* (Mar. 30, 2011), *available at* http://www.cbo.gov/ftpdocs/121xx/doc12119/03-30-HealthCareLegislation.pdf 20

H.R. Res. 3962, 111th Cong. § 307(c)(1)(A) 6

H.R. Res. 3962, 111th Cong. § 501 6

JAMES SHERK, THE HERITAGE FOUND., OBAMACARE WILL PRICE LESS SKILLED WORKERS OUT OF FULL-TIME JOBS (2011), http://www.heritage.org/research/reports/2011/10/obamacare-will-price-less-skilled-workers-out-of-full-time-jobs 19, 20

JAMES SHERK, THE HERITAGE FOUND., RECOVERY STALLED AFTER OBAMACARE PASSED (2011), http://www.heritage.org/research/reports/2011/07/economic-recovery-stalled-after-obamacare-passed 18

Kathyrn L. Moore, *The Future of Employment-Based Health Insurance After the Patient Protection and ACA*, 89 Neb. L. Rev. 885 (2010) 14

Letter from Douglas Elmendorf, Director, Congressional Budget Office, to Senator Olympia Snowe (Jan. 11, 2010), *available at* http://www.cbo.gov/ftpdocs/108xx/doc10884/01-11-Premiums_for_Bronze_Plan.pdf 16

Letter from Douglas W. Elmendorf, Director, Congressional Budget Office to House Speaker Nancy Pelosi (Mar. 20, 2010),

available at http://www.cbo.gov/ftpdocs/113xx/doc11379/AmendReconProp.pdf 15, 21

Michael C. Dorf & Neil S. Siegel, *"Early Bird Special" Indeed!: Why the Tax Anti-Injunction Act Permits the Present Challenges to the Minimum Coverage Provision*, 121 YALE L.J. ONLINE 389 (2012), http://yalelawjournal.org/images/pdfs/1042.pdf 10

OFFICE OF LEGISLATIVE COUNSEL, COMPILATION OF PATIENT PROTECTION AND AFFORDABLE CARE ACT (2010), *available at* http://housedocs.house.gov/energycommerce/ppacacon.pdf 13

S. Res. 1796, 111th Cong. § 1301 6

Shaun Tully, *Documents Reveal AT&T, Verizon, Others, Thought About Dropping Employer-Sponsored Benefits*, CNN, (May 6, 2010), http://money.cnn.com/2010/05/05/news/companies/dropping_benefits.fortune/ 17

Shubbam Singhal, Jeris Stueland, and Drew Ungerman, *How US Health Care Reform Will Affect Employee Benefits*, MCKINSEY QUARTERLY, June 2011, *available at* http://www.mckinseyquarterly.com/How_US_health_care_reform_will_affect_employee_benefits_2813 16

SMALL BUSINESS AND HEALTH INSURANCE: ONE YEAR AFTER ENACTMENT OF PPACA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS RESEARCH FOUNDATION (July

2011), *available at* http://www.nfib.com/Portals/0/PDF/AllUsers/research/studies/ppaca/NFIB-healthcare-study-201107.pdf 16

The Pressures of Rising Costs on Employer Provided Healthcare, Serial No. 112th Cong. 10 (2011), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=112_house_hearings&docid=f:64941.pdf 19

Towers Watson, *Health Care Form: Looming Fear Mask Unprecedented Employer Opportunities to Mitigate Costs, Risks and Reset Total Rewards* (2010) 14

U.S. Departments of Health and Human Services, Labor, and Treasury Issue Regulation on "Grandfathered" Health Plans Under The ACA (June 14, 2010), *available at* http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html 15

UNITED STATES CHAMBER OF COMMERCE Q4 SMALL BUSINESS STUDY (2012), *available at* http://www.uschambersmallbusinessnation.com/uploads/Chamber%20Q4_Summary%20Memo_Final%20.pdf 18

INTEREST OF THE AMICI[1]

Amici are an informal coalition of state chambers of commerce and related organizations, including the Arkansas State Chamber of Commerce and Associated Industries of Arkansas, the Florida Chamber of Commerce, the Georgia Chamber of Commerce, the Illinois Chamber of Commerce, the Indiana Chamber of Commerce, the Kentucky Chamber of Commerce, the Michigan Chamber of Commerce, the Ohio Chamber of Commerce, the State Chamber of Oklahoma, the Pennsylvania Chamber of Business and Industry, the South Carolina Chamber of Commerce, the Tennessee Chamber of Commerce and Industry, the Texas Association of Business, the Association of Washington Business, and the Wisconsin Manufacturers and Commerce. These organizations represent tens of thousands of businesses, and have advocated for the interests of businesses and employers across the country in relation to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 109 (2010) (collectively, the "Act" or the "ACA"). The businesses these organizations represent will bear tremendous

---

[1] The parties have consented to the filing of this brief in letters of consent on file with the Clerk. No counsel for any party had any role in authoring this brief, and no one other than the amici curiae provided any monetary contribution to its preparation or submission.

administrative and economic costs from the uncertainty that will be created if the Court does not rule on the constitutionality of the ACA until its penalty provisions go into effect in 2014. As representatives of businesses from across the country, the amici are uniquely positioned to describe how this uncertainty will negatively affect business.

SUMMARY OF ARGUMENT

The Anti-Injunction Act does not bar consideration of this suit because Respondents only seek to challenge the ACA's individual insurance mandate, and not the collection of any tax. Further, the penalty mandated by the ACA is not a tax. Therefore, the Anti-Injunction Act does not apply because, at most, Respondents' position can only be construed as one seeking to enjoin the ACA's penalties. Finally, the Anti-Injunction Act bars only suits that have the *immediate* purpose of barring the collection of a tax, and no such purpose is present in this case.

The amici believe that not hearing the current challenge to the ACA will have the following adverse effects on our nation's businesses.

First, a delayed ruling will affect employers' ability to provide health care coverage to their employees. Businesses face significant uncertainty over the ACA, and as many as two-thirds of businesses are expected to change their employee health care coverage in response to the Act. Any such changes will be impossible to plan with confidence, however, if the Court does not now rule

on the ACA's constitutionality. This uncertainty places a serious strain on the finances of the nation's employers, as they will be forced to guess what health care coverage may, or may not, be legally sufficient in the future.

Second, the uncertainty over a delayed ruling will affect the ability of businesses to hire and retain new workers. Approximately 30% of small business owners have cited uncertainties about the ACA as the reason they are not hiring new workers, and 74% have cited the ACA as making it more difficult to hire. A delayed ruling will only exacerbate this problem by preventing employers from accurately calculating the cost of labor and the number of workers they can afford to hire or retain.

Third, the federal government will collect over 500 billion dollars in revenue under the ACA over the next several years, including an estimated 52 billion dollars in penalties from employers who do not provide the required level of health care coverage, all of which the government may ultimately have to refund if the Act is found to be unconstitutional. This amount represents not only an enormous direct cost, but also an opportunity cost by limiting the amount that employers can invest in their businesses.

This Court has both strong legal grounds and policy reasons to address the constitutionality of the ACA in the present litigation. Therefore, the Court should hold that the Anti-Injunction Act is not a bar to this Court ruling on the constitutionality of the ACA.

ARGUMENT

I. THE ANTI-INJUNCTION ACT DOES NOT BAR CONSIDERATION OF THIS SUIT.

A. The Respondents Only Seek To Challenge The ACA's Individual Insurance Mandate, Not The Collection Of Any Tax.

The Anti-Injunction Act does not bar consideration of this suit because the Respondents only seek to challenge the ACA's individual insurance mandate, and not the collection of a "tax."

The Anti-Injunction Act prohibits any suit "for the purpose of restraining the assessment or collection of any *tax*." 26 U.S.C. § 7421(a) (emphasis added). The Anti-Injunction Act's purpose is to facilitate "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference," by "requir[ing] that the legal right to the disputed sums be determined in a suit for refund." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-37 (1974).

Unlike the usual situation where a party seeks to avoid paying some "disputed sum," Respondents' purpose in filing this suit is to challenge the ACA's mandate that every applicable individual purchase health insurance, which is a substantive legal requirement created by 26 U.S.C. § 5000A(a). The penalty imposed on individuals who fail to comply with this requirement is irrelevant, however, because Respondents do not challenge the resulting

sanction; Respondents only contest the mandate. Therefore, the suit is not at all one about "disputed sums" or a tax. Instead, this suit is about the federal government's power to force individuals to spend their financial resources.

This analysis has been adopted by lower courts addressing this issue and should be adopted here. *See Seven-Sky v. Holder*, 661 F.3d 1, 8-10, 12-13 (D.C. Cir. 2011) (noting that focus on substantive mandate rather than any tax rendered the Anti-Injunction Act inapplicable); *cf. Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 554 (6th Cir. 2011) (mandate is a "substantive provision").

Therefore, this Court should rule that the Anti-Injunction Act is no bar to its consideration of this lawsuit, as this suit only seeks to challenge the ACA's mandate, and Respondents do not seek to restrain the collection of a tax.

B. A Penalty Is Not A Tax, Therefore The Anti-Injunction Act Does Not Apply.

Even if this suit could be construed as an action primarily seeking to stop enforcement of the penalties of the ACA, the Anti-Injunction Act only bars suits seeking an injunction against a tax, and a penalty is not the same as a tax.

The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any *tax* shall be maintained in any court by any person . . . ." 26 U.S.C. § 7421(a) (emphasis added). The central issue, therefore, is whether the individual mandate imposed by the ACA constitutes

a tax or something altogether different. As Judge Vinson noted in the lower court's ruling, "[o]n the facts of this case, 'penalty' is not an ambiguous term, but rather was a carefully and intentionally selected word that has a specific meaning and carries a particular import." *Florida v. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1138-39 (N.D. Fla. 2011). There are several compelling reasons to hold that the penalty imposed by the ACA is not a tax.

First, Congress deliberately changed the language of the ACA from "tax" to "penalty" with regard to the individual mandate provision, thereby giving clear evidence of its intent on this issue. Early versions of the ACA used the term "tax" instead of penalty. *See* H.R. Res. 3962, 111th Cong. § 501 and 307(c)(1)(A) (as passed by House, November 7, 2009) (imposing a "tax" on any person who does not comply with an individual mandate); S. Res. 1796, 111th Cong. § 1301 ("[I]f an applicable individual fails to [obtain required insurance] there is hereby imposed a tax."). By contrast, the final version of the ACA imposes a "penalty" for failure to purchase insurance. *See* 26 U.S.C. § 5000A(b)(1) ("If an applicable individual fails to meet the requirement of subsection (a) . . . there is hereby imposed a penalty."). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier disregarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442 (1987). This change is particularly significant in that Congress retained the use of the term "tax" to describe

numerous other provisions in the final version of the ACA. *See, e.g.*, 26 U.S.C. §§ 4191 and 4980I. Therefore, Congress obviously intended that the individual mandate penalty should not be considered a tax.

Second, Congress specifically stated that it was acting under its authority pursuant to the Commerce Clause rather than its taxing authority. *See* 42 U.S.C. § 18091(a)(1) ("The [individual mandate] is commercial and economic in nature, and substantially affects interstate commerce."). Congress also prohibited the use of traditional enforcement and collection methods used by the Internal Revenue Service, such as tax liens, to enforce the individual penalty. *See* 26 U.S.C. § 5000A(g)(2)(B). By passing the legislation pursuant to its power under the Commerce Clause instead of its general taxing authority, and by eliminating traditional tax enforcement methods for the individual mandate penalty, Congress intended that the penalty provision should not be considered a tax.

Third, the penalty imposed by the ACA does not have a revenue generating purpose, and therefore should not be considered a tax. *See Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 841 (1995) ("'A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government.'" (quoting *United States v. Butler*, 297 U.S. 1, 61 (1936))). Here, although the ACA contains several revenue generating provisions and sections with names such as "Revenue Offset Provisions" and "Provisions Relating to Revenue,"

the individual mandate penalty is not included in any such provisions. Furthermore, Congress did not identify the amount of revenue that would be generated by the individual mandate penalty. By contrast, Congress did provide revenue amounts for numerous other provisions in the ACA which it explicitly described as taxes. Given the controversy over the ACA's potential costs and sources of revenue, *see Florida v. Dep't of Health & Human Servs.*, 716 F. Supp. 2d at 1137-38, Congress's intentional decision to avoid categorizing the individual mandate penalty as a revenue generating provision is significant and lends further weight to the conclusion that the penalty was never intended to be, nor is it in any respect, a tax.

Congress's decision to impose a "penalty" rather than a "tax" was deliberate. "If it clearly appears that it is the will of Congress that the provision shall not be regarded as in the nature of a penalty, the court must be governed by that will." *Helwig v. United States*, 188 U.S. 605, 613 (1903). Similarly, if Congress intended for the provisions to be a penalty rather than a tax, then the Court must accede to that expression of the will of Congress. *Id.*

C. This Suit Does Not Have The Immediate Purpose Of Restraining The Collection Of A Tax, And Therefore Is Not Prohibited By The Anti-Injunction Act.

The Anti-Injunction Act further does not apply here because it only bars suits that have the *immediate* purpose of restraining the collection of a

tax. While the statute itself does not include the word "immediate," cases interpreting the Anti-Injunction Act can only be read coherently if the element of immediacy is included. If the Anti-Injunction Act is read with this "immediacy" requirement, the present litigation is not barred because it does not have the "immediate" purpose of restraining the collection of a tax as the legal authority to assess and collect such a tax will not exist until 2014.

First, requiring an immediacy component does not upset the main purpose of the Anti-Injunction Act, which "is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for a refund." *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962). Nor does allowing the ACA to be reviewed here frustrate the Anti-Injunction Act's collateral purpose of protecting the "collecting officers [who] have made the assessment and claim that it is valid." *Id.* at 8. This is because there is no legal authority to assess and collect the penalty as yet, and there will be no such authority until 2014. Indeed, this appears to be an issue of first impression. In no previous Anti-Injunction Act case did the court have to decide the applicability of the Anti-Injunction Act when there was no taxing authority to assess and collect the challenged penalties at the time the courts were presented with the issue. The most sensible reading is that the Anti-Injunction Act cannot apply until the legal authority to collect a tax exists, just as the Anti-Injunction Act does not apply after the tax has been collected. *See* Michael C. Dorf & Neil S. Siegel,

"Early Bird Special" Indeed!: Why the Tax Anti-Injunction Act Permits the Present Challenges to the Minimum Coverage Provision, 121 YALE L.J. ONLINE 389 (2012), http://yalelawjournal.org/images/pdfs/1042.pdf.

Second, the Anti-Injunction Act must be read to include an element of "immediacy" because, without this implied term, it could bar actions for a refund. The Anti-Injunction Act states: "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). Courts have read this language as not applying to actions for a refund. *See Bob Jones Univ. v. Simon*, 416 U.S. 725, 748 n.22 (1974) ("It may be possible to conclude that a suit for a refund is not 'for the purpose of restraining the assessment or collection of any tax...,' and thus that neither the literal terms nor the principal purpose of § 7421(a) is applicable."). Permitting an action for a refund, however, is contrary to the literal language of the statute, because many refund actions have the "purpose of restraining the assessment or collection of any tax." Thus, the Anti-Injunction Act cannot be read literally without overturning established case law that refund actions are not barred by the statute.

Specifically, plaintiffs in a refund action suit are often more concerned about stopping future collections of the tax than about recouping a refund for that year's tax. For example, after the holding in *Bob Jones University v. Simon* barred the suit of Bob Jones University because it sought to stop the collection of a tax, the university paid a nominal amount of the tax that it was contesting and then immediately brought suit for a refund. *See* 461 U.S.

574, 581-82 (1983). Ostensibly, the ultimate goal of Bob Jones University in bringing the refund suit was to bar any future collections of the tax by judicial estoppel. Therefore, even a refund suit can be brought for "the purpose of restraining the assessment or collection of any tax."

Reading the Anti-Injunction Act to bar refund actions, however, does not comport with the statute's purpose, which "is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a judicial suit for a refund." *Enochs*, 370 U.S. at 7. Courts have avoided such an anomalous result by reading the Anti-Injunction Act as essentially barring suits with the "immediate" purpose of restraining the collection of any tax. Refund actions do not create such a restraint because the immediate purpose of a refund suit is to obtain a refund.

When the Anti-Injunction Act is read consistent with this line of reasoning, it cannot serve as a bar to the present suit because this pre-enforcement challenge does not have the "immediate" purpose of restraining the assessment or collection of the individual mandate penalty, as the legal authority to assess and collect the penalty will not exist until 2014. Instead, the present litigation has the immediate purpose of seeking clarification from the federal courts regarding the constitutionality of the ACA, including its mandate that individuals purchase costly health insurance.

While this reading of the suit's intent may implicate the Declaratory Judgment Act, 28 U.S.C. §

2201 (2006) (prohibiting declaratory judgment actions "with respect to federal taxes"), prior cases have interpreted the Declaratory Judgment Act as co-extensive with the Anti-Injunction Act with respect to tax litigation, except for certain enumerated exceptions. *See Bob Jones*, 416 U.S. at 732-33 n.7. Furthermore, the Declaratory Judgment Act issue can be avoided altogether if the purpose of the present suit is properly framed as a suit seeking to enjoin the mandate imposed by the ACA.

Because the Anti-Injunction Act can only be read coherently if it is interpreted as barring suits with the "immediate" purpose of restraining the assessment or collection of any tax, then the present litigation should not be barred because the penalty or tax at issue will not be levied until 2014. Therefore, for this additional reason, the Anti-Injunction Act should not apply as a bar to the present litigation.

II. THE UNCERTAINTY CREATED BY FURTHER DELAY IN RESOLVING THIS ISSUE WILL CREATE UNDUE HARDSHIP ON U.S. BUSINESSES.

If the Court delays ruling on the constitutionality of the ACA, employers across the country will face enormous administrative and financial costs in the next few years as they struggle with the uncertainty of how this Court may ultimately rule on the issues in the present litigation. The enormous costs of this uncertainty and the impact those costs will have on American businesses, large and small, weigh heavily in favor of the Court ruling on the constitutionality of the ACA now rather than later.

A. The ACA Has Already Created Tremendous Uncertainty For Employer-Based Health Care Coverage, And A Delayed Ruling Would Exacerbate This Problem.

The ACA is 976 pages long.[2] Additionally, the Act contains over forty provisions that require, permit, or contemplate rulemaking by federal agencies to implement the legislation,[3] which has already resulted in thousands of pages of additional regulations. Putting aside this litigation, the sheer scope of the ACA combined with the ongoing issuance of regulations has created great uncertainty among businesses about what type of health care coverage is mandated by the Act, if any, and what type of coverage they should provide to their employees. Businesses must both plan for and implement any changes that the ACA requires, for the moment, under the assumption that the constitutionality of the Act will ultimately be upheld. A delayed ruling from this Court, however, would further magnify this problem because boards of directors and companies are currently planning for multiple different outcomes depending upon whether the ACA is ultimately upheld.

---

[2] *See* OFFICE OF LEGISLATIVE COUNSEL, COMPILATION OF PATIENT PROTECTION AND AFFORDABLE CARE ACT (2010), *available at* http://housedocs.house.gov/energycommerce/ppacacon.pdf.

[3] CURTIS W. COPELAND, CONG. RESEARCH SERV., R41880, REGULATIONS PURSUANT TO THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (P.L. 111-148) 2 (2010), *available at* http://assets.opencrs.com/rpts/R41180_20100413.pdf.

To deal with the uncertainty created by the ACA's new mandates, many employers either plan to or already have performed modeling to determine the financial impact of health reform on their organization. For example, according to one survey of 650 mid-to senior-level benefit professionals, "79% of employers plan to model the financial impact of health care reform on their organization."[4] This modeling is necessary because the ACA will have a dramatic impact on the cost of labor by requiring employers to provide health care coverage for full-time employees or pay a penalty. Consequently, many businesses are attempting to achieve compliance with the ACA's mandates in the least expensive way possible. For many companies, this process requires a careful balancing of business needs with their corporate and fiduciary duties to investors. All businesses will face tremendous transactional and administrative costs in changing their health care plans as the ACA's mandates change.

The Department of Health and Human Services estimates that more than two-thirds of companies could change their current coverage for employees as a result of the ACA, and for small businesses, as many as 80% may change their current coverage.[5]

---

[4] Kathyrn L. Moore, *The Future of Employment-Based Health Insurance After the Patient Protection and ACA*, 89 Neb. L. Rev. 885, 909-910 (2010) (citing Towers Watson, *Health Care Form: Looming Fear Mask Unprecedented Employer Opportunities to Mitigate Costs, Risks and Reset Total Rewards* 3 (2010)).

[5] U.S. Departments of Health and Human Services, Labor, and Treasury Issue Regulation on "Grandfathered" Health Plans Under The ACA (June 14, 2010), *available at*

These changes will obviously impact employees as well as businesses since nearly two-thirds of the working population obtain their insurance coverage from their employer. Although difficult to predict, the Congressional Budget Office expects that as many as 3 million people are expected to lose employer-based coverage entirely as a result of the Act.[6] Others have estimated that the number of employees similarly affected will be much higher.[7]

The expected loss in employer based-coverage is largely due to the penalty provisions that employers face if they fail to provide health care coverage for full-time employees. The ACA's penalty provision for employers requires businesses with fifty or more full-time workers to provide "affordable" health care to their employees or pay a $2,000 penalty for each employee beyond the first thirty workers who qualify for subsidies and do not have employer coverage. *See* 26 U.S.C. § 4980H. The Congressional Budget

---

http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (estimating that as few as 20% of health care plans will remain grandfathered, i.e. unchanged, by 2013).

[6] *See* Letter from Douglas W. Elmendorf, Director, Congressional Budget Office to House Speaker Nancy Pelosi 10 (Mar. 20, 2010), *available at* http://www.cbo.gov/ftpdocs/113xx/doc11379/AmendReconProp.pdf.

[7] Douglas Holtz-Eakin, The Patient ACA: Labor Market Incentives, Economic Growth, and Budgetary Impacts (Jan. 26, 2011), *available at* http://waysandmeans.house.gov/UploadedFiles/HoltzEakin_Testimony_1_5.pdf (noting that perhaps as many as 43 million low wage employees will be dropped from coverage).

Office, however, estimates that the national cost of providing such coverage by employers will be $5,000 for single coverage per employee and $12,500 for family coverage.[8]

Because the penalty is lower than the cost to provide health care coverage, surveys of employers suggest that at least 30% of employers may decide to drop health care coverage as a result of the ACA's relatively low penalty.[9] For example, one large corporate employer reportedly has determined that if it eliminated its health care coverage and paid penalties, it could reduce its health care costs by 70%, while another large corporate employer reportedly has estimated that its 2.4 billion dollars in health care coverage costs would fall to just 600 million dollars if it simply paid the penalties imposed by legislation.[10] While most employers want to

---

[8] Letter from Douglas Elmendorf, Director, Congressional Budget Office, to Senator Olympia Snowe (Jan. 11, 2010), *available at* http://www.cbo.gov/ftpdocs/108xx/doc10884/01-11-Premiums_for_Bronze_Plan.pdf.

[9] *See* Shubbam Singhal, Jeris Stueland, and Drew Ungerman, *How US Health Care Reform Will Affect Employee Benefits*, MCKINSEY QUARTERLY, June 2011, *available at* http://www.mckinseyquarterly.com/How_US_health_care_reform_will_affect_employee_benefits_2813; *see also* SMALL BUSINESS AND HEALTH INSURANCE: ONE YEAR AFTER ENACTMENT OF PPACA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS RESEARCH FOUNDATION 10 (July 2011), *available at* http://www.nfib.com/Portals/0/PDF/AllUsers/research/studies/ppaca/NFIB-healthcare-study-201107.pdf (survey of NFIB members found that 57 percent are very or somewhat likely to drop coverage once the law takes effect).

[10] Shaun Tully, *Documents Reveal AT&T, Verizon, Others, Thought About Dropping Employer-Sponsored Benefits*, CNN,

provide health care coverage to their employees, because of exigent circumstances, some employers will no doubt be forced to drop their coverage and pay the penalty.

Without direction from the Court on the constitutionality of the ACA, employers will be unable to decide with any degree of certainty what health care coverage they should provide. Businesses will have to model not only how the ACA would impact their operations in its current form, but also the impact of a ruling striking the ACA down as unconstitutional.

If the Court rules the mandates unconstitutional, then many employers may reverse their plans to drop coverage. A ruling upholding part or all of the ACA's constitutionality, on the other hand, would cause many employers to consider dropping coverage—and the uncertainty will last for years.

A delayed ruling by this Court will only compound the uncertainty employers currently face and exacerbate their costs by drawing out the entire process further. The Court should reach the merits in order to provide businesses with clear direction on what scope of health care coverage will be required

---

(May 6, 2010), http://money.cnn.com/2010/05/05/news/companies/dropping_benefits.fortune/ (Caterpillar determined that if it eliminated its healthcare coverage and paid penalties, it could reduce its health care costs by 70%, while AT&T has estimated that its 2.4 billion dollars in health care coverage costs would fall to just 600 million dollars if it simply paid the penalties imposed by legislation.); Letter from Senator Orrin Hatch to President Barack Obama (June 14, 2010), *available at* 2010 WLR 12150669.

under the law and to avoid the impact a delayed ruling will have on both employers and employees.

B. The Uncertainty Created By A Delayed Ruling Will Also Harm Employers' Ability To Hire Workers.

Already, the general uncertainty created by the ACA has affected new hiring in a sluggish economy. In its most recent quarterly small business survey, the U.S. Chamber of Commerce found that 30% of small business owners cited uncertainties about the health law as the reason they are not hiring new workers, and 74% cited the ACA as making it more difficult to hire.[11] Other organizations have voiced similar concerns that the uncertainty created by the ACA has either slowed hiring or in some cases, stopped it altogether.[12]

---

[11] *See* UNITED STATES CHAMBER OF COMMERCE Q4 SMALL BUSINESS STUDY 3 (2012), *available at* http://www.uschambersmallbusinessnation.com/uploads/Chamber%20Q4_Summary%20Memo_Final%20.pdf.

[12] *See, e.g.*, Dennis Lockhart, Chair, Atlanta Federal Reserve Bank "Business Feedback on Today's Labor Market," Federal Reserve Bank of Atlanta (Nov. 11, 2010), *available at* http://www.frbatlanta.org/news/speeches/lockhart_111110.cfm ("We've frequently heard strong comments to the effect of 'My company won't hire a single additional worker until we know what health-insurance costs are going to be'."); JAMES SHERK, THE HERITAGE FOUND., RECOVERY STALLED AFTER OBAMACARE PASSED (2011), http://www.heritage.org/research/reports/2011/07/economic-recovery-stalled-after-obamacare-passed (review of monthly job creation statistics published by the Department of Labor shows that net private sector job creation stalled after passage of the ACA, dropping from an average of +67,000 jobs a month to just +6,500 jobs a month); *The Pressures of Rising Costs on Employer Provided Healthcare*, Serial No. 112th Cong. 10

In addition to the general uncertainty of the legislation and its enforceability, the costs imposed by the ACA may affect hiring as well. The ACA substantially increases the cost per worker that an employer must pay, particularly the cost of low wage and low skilled workers, by raising labor costs for such individuals between $1.79 to $5.51 per hour.[13] Any employers who rely primarily on minimum wage or low skill workers may find that they are unable to hire more workers or to justify their cost in light of the additional labor expense created by ACA's health care coverage requirement. As a result of such additional costs, the Congressional Budget Office estimates that the ACA will reduce labor in the U.S. by approximately .5 percent, primarily because it will affect some individuals' decisions about whether and how much to work, and employer decisions about hiring workers.[14]

(2011), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=112_house_hearings&docid=f:64941.pdf (testimony by Thomas Miller, Health Policy Research at the American Enterprise Institute, that "the unpredictability of what will be enforced under the regulatory domain of the ACA, and how its complex and often inconsistent provisions will be interpreted, leaves many employers frozen in uncertainty in their health benefits planning").

[13] JAMES SHERK, THE HERITAGE FOUND., OBAMACARE WILL PRICE LESS SKILLED WORKERS OUT OF FULL-TIME JOBS (2011), http://www.heritage.org/research/reports/2011/10/obamacare-will-price-less-skilled-workers-out-of-full-time-jobs (employer premiums will add $1.79 per hour to labor costs for single plan coverage, and $5.51 per hour for family plan coverage).

[14] *See* Congressional Budget Office Director's Blog, http://cboblog.cbo.gov/?p=1478 (Oct. 22, 2010, 12:35 EST).

Alternatively, because the penalty provisions for employers do not apply to part-time workers, many employers may replace existing full-time workers with part-time positions.[15] Additionally, many small businesses may consider not adding employees at all until they know whether the ACA, which only applies to businesses with more than fifty employees, will be upheld as constitutional.

C. A Delayed Ruling Will Also Result In The Imposition Of Direct Costs On Employers That May Ultimately Be Unnecessary.

A delayed ruling on the ACA's constitutionality will also impose many direct costs on businesses in the form of penalties and taxes that would otherwise not be levied if the legislation were struck down. Billions of dollars in taxes and penalties will be collected by the IRS which, if the ACA is found to be unconstitutional, will presumably be returned to the original taxpayers at further taxpayer expense.

The Congressional Budget Office estimates that the ACA will raise approximately 536 billion dollars in revenue over the next seven years through various taxes and penalties.[16] The requirement that employers provide a certain level of health care coverage to their employees is expected to cost

---

[15] *See* JAMES SHERK, *supra* note 13.

[16] Douglas W. Elmendorf, *CBO's Analysis of the Major Health Care Legislation Enacted in March 2010* (Mar. 30, 2011), *available at* http://www.cbo.gov/ftpdocs/121xx/doc12119/03-30-HealthCareLegislation.pdf (Table 1 showing estimate that ACA will raise 536 billion dollars in revenue between 2012-2019).

businesses 52 billion dollars in penalties alone from 2014 to 2019.[17] The collection of these funds represents a direct cost to employers, who will be forced to pay potentially unconstitutional taxes and penalties. The imposition of such taxes and penalties also results in lost opportunities for businesses, since those funds cannot be invested in the growth of their companies.

A ruling by this Court in the instant case would address the validity of these direct costs immediately by resolving whether the charges imposed by the ACA are constitutional. Instead of tying up billions of dollars of business capital in limbo for years, a resolution now will provide businesses with the certainty needed to properly allocate that capital and adequately plan for the future.

CONCLUSION

The uncertainty created by the ACA is already a burden on businesses which would only be exacerbated if this Court delays ruling on the constitutionality of this legislation. Any delay would force employers to waste several years making contingency plans while they anticipate this Court's ruling instead of growing their businesses, or in the alternative, planning for the realities of compliance with the Act. All parties to this litigation recognize the extraordinary cost of a delay in the resolution of the issues in this case. None seek to impose the Anti-Injunction Act's strictures on this unique set of

---

[17] Letter from Douglas W. Elmendorf, *supra* note 6 (Table 4 estimating that employers will pay 52 billion dollars in penalties between 2014 and 2019).

facts. Further, strong and undeniable policy reasons exist for addressing the issues in the case now.

Therefore, this Court should hold that the Anti-Injunction Act is not a bar to this Court ruling on the constitutionality of the ACA.

Respectfully submitted,

WILLIAM V. CUSTER
BRYAN CAVE LLP
1201 W. Peachtree St.
Atlanta, GA 30312
(404) 572-6600
bill.custer@bryancave.com
Attorney for the Amici

AMICUS CURIAE BRIEF

No. 11-398

In The
Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

FLORIDA, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF *AMICI CURIAE* OF STATE LEGISLATORS FROM ALL FIFTY STATES, THE DISTRICT OF COLUMBIA, AND PUERTO RICO SUPPORTING PETITIONERS
(Minimum Coverage Provision)

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
**Counsel of Record*
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th St., NW, Ste 1002
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND
SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Framers Wrote The Constitution To Give The Federal Government Broad Legislative Power To Address National Concerns, While Preserving State Authority Over Local Matters. 5

A. The Founding Generation Recognized The Great Need For A Federal Government Of Sufficient Power. 5

B. The Framers Drafted Congress's Enumerated Powers To Give The Federal Government Authority To Solve National Problems. 8

II. The Framers Included The Commerce Clause In The Constitution To Allow The Federal Government To Regulate Affairs Among The Several States That Require A Federal Response. 12

III. Under The Text And Original Meaning Of The Necessary And Proper Clause, Congress Has Broad Latitude To Employ Legislative Means Naturally Related To The Lawful Objects Or Ends Of The Federal Government. 17

IV. The Constitution's Text And History Support The Constitutionality Of The Affordable Care Act's Minimum Coverage Provision. 22

CONCLUSION 27

APPENDIX 1a

TABLE OF AUTHORITIES

Page

Cases

Florida et al. v. U.S. Dep't of Health & Human Servs., et al., No. 3:10-cv-00091-RV, Order Granting Summary Judgment, Jan. 31, 2011 8

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 12, 14, 16, 17

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 21, 25

Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011) 13, 14, 15

United States v. Comstock, 130 S. Ct. 1949 (2010) 21, 26

United States v. Lopez, 514 U.S. 549 (1995) 17

Wickard v. Filburn, 317 U.S. 111 (1942) 16

Constitutional Provisions and Legislative Materials

U.S. CONST.:

art. I, § 8 ..... *passim*
amend. X 21
amend. XIII 22
amend. XIV 22
amend. XV 22
amend. XVI 22
amend. XIX 22

TABLE OF AUTHORITIES (cont'd)

Page

ARTICLES OF CONFEDERATION 6

Books, Articles, and Other Materials

THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA (Jonathan Elliot ed., 2d ed. 1836) 10, 11

THE FEDERALIST PAPERS (Clinton Rossiter, ed. 1999) 5, 10, 12, 13, 18, 19

THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES (W.W. Abbot et al., eds. 1992) 15

THE PAPERS OF GEORGE WASHINGTON DIGITAL EDITION (Theodore J. Crackel, ed. 2008) 19, 20, 25, 26

THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES (W.W. Abbot et al., eds. 1987) 8, 15, 16, 20

THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand, ed., rev. ed. 1966) ..... *passim*

THE Writings OF GEORGE WASHINGTON (John C. Fitzpatrick, ed. 1931) 6

WASHINGTON: WRITINGS (John Rhodehamel, ed. 1997) 6, 7

TABLE OF AUTHORITIES (cont'd)

Page

AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005) ..... *passim*

Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010) ..... *passim*

RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) 11

SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773) 13, 14

Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987)... 5

Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL'Y 991 (2008) 11

INTEREST OF *AMICI CURIAE*

Amici Curiae, a group of 518 State Legislators from all 50 States, the District of Columbia, and Puerto Rico, believe that the Patient Protection and Affordable Care Act ("the Act") is constitutional and are working hard in their States to implement the Act in a timely, efficient, and effective manner. They have a substantial interest in having this matter resolved expeditiously and in favor of the constitutionality of the Act. A full list of *Amici* State Legislators is contained in the Appendix.

Amici State Legislators include legislators from every single one of the States represented by the Act's challengers. These legislators have a particular interest in this case in order to represent their constituents and many other residents and State leaders in the challengers' respective States who disagree with these legal challenges and support health care reform. All of the *Amici* State Legislators have an interest in presenting their view of the respective powers of the federal and State governments, given that the challengers have purported to represent the interests of the States generally in this lawsuit.[1]

---

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3,

INTRODUCTION AND SUMMARY OF ARGUMENT

Our Constitution establishes a vibrant system of federalism that gives broad power to the federal government to act in circumstances in which a national approach is necessary or preferable, while reserving a significant role for the States to craft innovative policy solutions reflecting the diversity of America's people, places, and ideas. The Patient Protection and Affordable Care Act respects this constitutional balance of power by providing federal mechanisms for achieving national health care reform—including the minimum coverage provision—while maintaining the States' ability to shape key reform measures.

Ignoring this carefully calibrated constitutional balance of power, the court below and the State officials challenging the Affordable Care Act have promoted a vision of a starkly limited federal government. According to this view, the federal government lacks the power to address national problems, such as the nationwide health care crisis, through rational and well-supported means, including the minimum coverage provision.

This deeply flawed vision has no basis in the Constitution's text and history. With the failed Articles of Confederation and its feeble central government fresh in their minds, George Washington, James Madison, and the other delegates to the

---

amici curiae state that all parties have consented to the filing of this brief; blanket letters of consent have been filed with the Clerk of the Court.

Constitutional Convention shared a conviction that the Constitution must establish a national government of substantial power. In considering how to grant such power to the national government, the delegates adopted Resolution VI, which declared that Congress should have authority "to legislate in all Cases for the general Interests of the Union, and also in those to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual legislation." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 131-32 (Max Farrand, ed., rev. ed. 1966). Stated simply, the framers of our founding charter came to the drafting table with the aim of giving the federal government power to provide national solutions to national problems.

Tasked with translating the principle of Resolution VI into specific provisions, the Convention's Committee of Detail drafted Article I to grant Congress the broad power to, among other things, "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art I, § 8, cl. 3. The text does not limit "commerce" to existing economic activity or trade, nor does the text's use of "regulate" imply a power to prohibit but not require certain conduct. The lower court's vision of a Commerce Clause power strictly curtailed by tests of self-initiated activity thus cannot be squared with the Clause's text or original meaning and purpose.

Similarly, the lower court's interpretation of the Necessary and Proper Clause is wholly unsupported by constitutional text and history. Far from the

cramped vision of the Clause suggested by the court below, which would permit Congress to regulate only by using means that are themselves covered by the Commerce Clause (effectively rendering the Necessary and Proper Clause a nullity), the grant of power to "make all Laws which shall be necessary and proper for carrying into execution" constitutionally granted powers was intended to be sweeping. U.S. CONST. art. I, §8, cl. 18. As recognized by our first President, the rest of the framers, and this Court from the Founding to the present, the Necessary and Proper Clause grants Congress the power to use *means* outside the enumerated list of Article I powers to achieve the *ends* contemplated in the Constitution. The general purpose of the Affordable Care Act falls within Congress's constitutionally granted powers, and the minimum coverage provision, which is part of the means of effecting reform of the national health care industry, does not infringe upon any constitutionally guaranteed rights. There is no constitutional right to freeload that is infringed by the individual responsibility aspect of the minimum coverage provision.

Under a faithful reading of the Constitution, the minimum coverage provision of the Affordable Care Act is a valid exercise of Congress's Commerce Clause and Necessary and Proper Clause powers. The Act's challengers may disagree with *Amici* State Legislators and other supporters of the Act about the merits of the law, but policy differences do not add up to constitutional violations. Congress's regulation of decisions on how and when to finance health care services is constitutional.

ARGUMENT

I. The Framers Wrote The Constitution To Give The Federal Government Broad Legislative Power To Address National Concerns, While Preserving State Authority Over Local Matters.

Our Constitution was drafted in 1787 "in Order to form a more perfect Union"—both more perfect than the British tyranny against which the founding generation had revolted and more perfect than the flawed Articles of Confederation under which Americans had lived for a decade since declaring independence. The result was a vibrant federalist system that empowers the federal government to provide national solutions to national problems, while preserving a significant role for State and local governments to exercise general police power and craft policies "adapted to local conditions and local tastes." Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987).

A. The Founding Generation Recognized The Great Need For A Federal Government Of Sufficient Power.

While some have portrayed the Constitution as a document that is primarily about limiting government, the historical context shows that the Founders were just as, if not more, concerned with creating an empowered, effective national government than with setting stark limits on federal power. *E.g.*, THE FEDERALIST PAPERS, No. 3, at 36 (Jay) (Clinton Rossiter, ed. 1999) (noting Americans' agreement on "the importance of their continuing firmly united under

one federal government, vested with sufficient powers for all general and national purposes").

By the time our Founders took up the task of drafting the Constitution in 1787, they had lived for nearly a decade under the dysfunctional Articles of Confederation. The Articles of Confederation, adopted by the Second Continental Congress in 1777 and ratified in 1781, established a confederacy built merely on a "firm league of friendship" among thirteen independent states. ARTICLES OF CONFEDERATION (1781), art. III. There was only a single branch of national government, the Congress, which was made up of state delegations. ARTICLES OF CONFEDERATION, art. V. Under the Articles, Congress had some powers, but was given no means to execute those powers. Congress could not directly tax individuals or legislate upon them; it had no express power to make laws that would be binding in the States' courts and no general power to establish national courts, and it could raise money only by making requests to the States.

This created such an ineffectual central government that, according to George Washington, it nearly cost Americans victory in the Revolutionary War. In the midst of several American setbacks during the war, Washington lamented that, "unless Congress speaks with a more decisive tone; unless they are vested with powers by the several States competent to the great purposes of War . . . our Cause is lost." 18 THE WRITINGS OF GEORGE WASHINGTON 453 (John C. Fitzpatrick, ed. 1931) (Letter to Joseph Jones, May 31, 1780). *See also* WASHINGTON: WRITINGS 393 (John Rhodehamel, ed. 1997) (Circular to State Governments, Oct. 18, 1780). Washington believed that the

inability of the central government to address common concerns such as the maintenance of an army could bring disaster: "The sufferings of a complaining army, on the one hand, and the inability of Congress and tardiness of the States on the other, are the forebodings of evil." *Id.* at 488 (Letter to Alexander Hamilton, March 4, 1783).

Washington favored strong federal power not just for military matters, but also in other general issues of national concern. Shortly after the Revolutionary War was won, Washington wrote to Alexander Hamilton stating plainly that "[n]o man in the United States is, or can be more deeply impressed with the necessity of a reform in our present Confederation than myself." *Id.* at 505 (Letter to Alexander Hamilton, March 31, 1783). Washington explained that, "unless Congress have powers competent to all *general* purposes, that the distresses we have encountered, the expences we have incurred, and the blood we have spilt in the course of an Eight years war, will avail us nothing." *Id.* at 490 (Letter to Alexander Hamilton, March 4, 1783) (emphasis in original).[2] *See also id.* at 519 (Circular to State Gov-

---

[2] Indeed, it is indicative of the shift from revolution to statecraft that the Constitution's first Article gives Congress the power to impose a broad range of "Taxes, Duties, Imposts and Excises." U.S. CONST. art. I, § 8, cl. 1. "Thus, only a decade after they revolted against imperial taxes, Americans were being asked to authorize a sweeping regime of continental taxes, with the decisive difference that these new taxes would be decided on by public servants chosen by the American people themselves—taxation *with* representation." AKHIL

ernments, June 8, 1783) ("[I]t is indispensible to the happiness of the individual States, that there should be lodged somewhere, a Supreme Power to regulate and govern the general concerns of the Confederated Republic, without which the Union cannot be of long duration.").

The difficulty Massachusetts had in quelling Shay's Rebellion in 1786 further convinced Washington of the great need for improving upon the Articles of Confederation: "What stronger evidence can be given of the want of energy in our governments than these disorders? If there exists not a power to check them, what security has a man of life, liberty, or property?" 4 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 332 (W.W. Abbot et al., eds. 1992) (Letter to James Madison, Nov. 5, 1786).

B. The Framers Drafted Congress's Enumerated Powers To Give The Federal Government Authority To Solve National Problems.

Our nation's Founders soon turned their focus on creating a new, better form of government with a sufficiently strong federal power. The delegates to the Constitutional Convention shared Washington's con-

---

REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107 (2005). Analogies between the legitimate complaints of the "Boston Tea Party" in 1775 and the motivations of the framers during the Constitutional Convention in 1787 are thus deeply flawed. *E.g.*, *Florida et al. v. U.S. Dep't of Health & Human Servs., et al.*, No. 3:10-cv-00091-RV, Order Granting Summary Judgment, Jan. 31, 2011.

viction that the Constitution must establish a government with ample "energy" to protect the Union and the rights and freedoms of its citizens.

In considering how to grant such power to the national government, the delegates adopted Resolution VI, which declared that Congress should have authority "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual legislation." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 131-32 (Max Farrand, ed., rev. ed. 1966). *See* AMAR, AMERICA'S CONSTITUTION, at 108; Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 8-12 (2010). The delegates then passed Resolution VI on to the Committee of Detail, which was responsible for drafting the enumerated powers of Congress in Article I, to transform this general principle into a list of powers enumerated in the Constitution. *Id.* at 10.

As constitutional scholar Jack Balkin explains, Resolution VI established a structural constitutional principle with "its focus on state competencies and the general interests of the Union." *Id.* Translating this principle into specific provisions, the Committee of Detail drafted Article I to grant Congress the broad power to, among other things, regulate interstate commerce and tax and spend to "provide for the . . . general Welfare of the United States." U.S. CONST. art I, § 8, cl. 1. These enumerated powers were intended to capture the idea that "whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to

the government of the United States." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA 424 (Jonathan Elliot ed., 2d ed. 1836) (hereinafter ELLIOT'S DEBATES) (Statement of James Wilson). *See also* THE FEDERALIST PAPERS No. 80, at 476 (Hamilton) ("Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal superintendence and control.")

The enumeration of federal powers in the Constitution's text was not intended to displace or supersede the general principle of Resolution VI that Congress should have the ability to legislate in matters of national concern. As James Wilson, a member of the Committee of Detail who was also "America's leading lawyer and one of only six men to have signed both the Declaration of Independence and the Constitution,"[3] explained:

> [T]hough this principle be sound and satisfactory, its application to particular cases would be accompanied with much difficulty, because, in its application, room must be allowed for great discretionary latitude of construction of the principle. In order to lessen or remove the difficulty arising from discretionary construction on this subject, *an enumeration of particular instances, in which the application of the principle ought to take place,* has been attempted with much industry and care.

---

[3] AMAR, AMERICA'S CONSTITUTION, at 7.

2 ELLIOT'S DEBATES 424-25 (emphasis added).

The drafters of the Constitution thus made clear that in each enumerated instance in Article I—whether regulating "commerce" or levying taxes—the understanding was that Congress would exercise the enumerated power while applying the general principle that Congress has power to regulate in cases of national concern.[4] This list of enumerated

---

[4] Some scholars have suggested that the Committee of Detail rejected Resolution VI or that the Convention repudiated it because the precise language of the Resolution was not written into the Constitution. *E.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004). But after the delegates passed Resolution VI, the Committee of Detail had no power to reject it, and there is every indication that the Committee embraced the Resolution's principle and attempted to implement it in Article I. *See* Balkin, *Commerce*, at 10-11. While some today may prefer not to have a government of such strength, a faithful reading of the Constitution's text and history, as even conservative scholars have acknowledged, leads to the conclusion that the national government has substantial power—even if the nation's voters may not always sanction the full exercise of that authority. Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J.L. & PUB. POL'Y 991, 992 (2008) (noting that even if one believes that, "politically, the full exercise of such powers might be unpopular or constitute bad public policy does not mean that the Constitution did not, in fact, confer such broad powers").

powers was not an attempt to limit the federal government for its own sake, but rather "[t]he list of enumerated powers was designed so that the new federal government would have power to pass laws on subjects and concerning problems that are federal by nature." Balkin, *Commerce*, at 12.

The specific powers given to the federal government under the Constitution are, of course, "few and defined," while the powers "which are to remain in the State governments are numerous and indefinite." THE FEDERALIST PAPERS No. 45, at 289 (Madison). But where the drafters of the Constitution saw fit to delegate power to the central government, the federal government has full power to exercise that authority to achieve the "objects of the Union." *Id.* at 285. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) ("[The commerce] power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.").

II. The Framers Included The Commerce Clause In The Constitution To Allow The Federal Government To Regulate Affairs Among The Several States That Require A Federal Response.

In drafting our enduring Constitution, the framers were keenly aware of "[t]he defect of power in the existing Confederacy to regulate the commerce between its several members." THE FEDERALIST PAPERS, No. 42, at 263. Correcting that defect, the Constitution's Commerce Clause provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the

several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. *See also* THE FEDERALIST PAPERS No. 45, at 290 (Madison) (noting that federal "regulation of commerce, it is true, is a new power").

Given that the Committee of Detail drafted the Commerce Clause to manifest the principle of Resolution VI that Congress should have power to regulate matters of national concern, as described above in Section I.B, the Commerce Clause's "text looks the way it does because a basic structural principle underlies the text, and in fact, the text was written precisely to articulate that general principle." Balkin, *Commerce*, at 7. In other words, "Congress's power to regulate commerce 'among the several states' is closely linked to the general structural purpose of Congress's enumerated powers as articulated by the Framers: to give Congress power to legislate in all cases where states are separately incompetent or where the interest of the nation might be undermined by unilateral or conflicting state action." *Id.* at 6.

The text itself does not contradict or contract this general principle. With respect to "regulate," as Judge Laurence Silberman has explained, "[a]t the time the Constitution was fashioned, to 'regulate' meant, as it does now, '[t]o adjust by rule or method,' as well as '[t]o *direct*.'" *Seven-Sky v. Holder*, 661 F.3d 1, 16 (D.C. Cir. 2011) (quoting 2 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE 1619 (4th ed. 1773) (reprinted 1978) (emphasis added by Judge Silberman). "To direct" was understood at the Founding to include the ability "[t]o prescribe certain measure[s]; to mark out a certain course," and "to command." *Id.* (quoting JOHNSON, at 514). The

drafters of the Constitution thus gave Congress the substantial power to direct, command, and adjust by rule—that is, to regulate—commerce among the several States.

With respect to "commerce," the original meaning at the time of the Founding carried "a broader meaning referring to all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets." AMAR, AMERICA'S CONSTITUTION, at 107. *See also* Balkin, *Commerce*, at 15-17.[5] As Chief Justice John Marshall observed in *Gibbons v. Ogden*, if the term "commerce" were limited merely to active trade of goods, Congress would not be able to regulate in areas of keen federal interest, such as navigation to and from foreign nations. 22 U.S. (9 Wheat.) at 194. Chief Justice Marshall explained that "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse." *Id.* And there is nothing in the text of the Constitution to suggest that the "commerce" or "intercourse" contemplated by the Commerce Clause was limited

---

[5] Indeed, scholars have noted that "[t]he concept of 'commerce' in the eighteenth century had strong social connotations which are almost the opposite of our modern focus on commodities." *Id.* at 16. To demonstrate, constitutional scholar Akhil Amar cites Bolingbroke's famous mid-eighteenth-century tract, *The Idea of a Patriot King*, which spoke of the "free and easy commerce of social life," and the Oxford English Dictionary, which referred to "our Lord's commerce with his disciples." AMAR, AMERICA'S CONSTITUTION, at 107.

"to only *existing* commerce," *Seven-Sky*, 661 F.3d at 16, as the court below suggests.

Reading the Constitution's grant of power to regulate interstate and international commerce broadly fits with "the framers' general goals by enabling Congress to regulate . . . interactions that, if improperly handled by a single state acting on its own, might lead to needless wars or otherwise compromise the interests of sister states." AMAR, AMERICA'S CONSTITUTION, at 107. Indeed, before the Constitutional Convention, George Washington noted the dangers of a lack of federal power to act uniformly in areas of commerce, predicting that if states tried to regulate trade, "a many-headed monster would be the issue." 3 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 423 (W.W. Abbot et al., eds. 1992) (Letter to David Stuart, Nov. 30, 1785).

After the Constitution's ratification, Washington demonstrated the importance he placed on federal authority to regulate commerce. On his way to his first inauguration as President, Washington stopped to declare to a Delaware crowd that, "[t]he promotion of domestic manufactures will, in my conception, be among the first consequences which may naturally be expected to flow from an energetic government." 2 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 78 (W.W. Abbot et al., eds. 1987). ("To the Delaware Soc'y for Promoting Domestic Manufacturers," April 19-20, 1789). Washington's Delaware speech indicates that he considered the "promotion" of commerce as an appropriate function of "an energetic government." 2 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 78. *Cf.*

Wickard v. Filburn, 317 U.S. 111, 128 (1942) ("The *stimulation* of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon.") (emphasis added).

While the meanings of "regulate" and "commerce" in the Constitution were certainly intended to be broad, the text of the Commerce Clause nonetheless places significant limits on federal regulation: Congress can only act if a given problem genuinely spills across state or national lines. As Chief Justice Marshall explained in *Gibbons*, the Commerce Clause uses the word "among" to mean "intermingled with" and that "commerce among the States" means "commerce which concerns more States than one." 22 U.S. (9 Wheat.) at 194. If commerce within a single State has external effects on other States or on the nation as a whole then it falls under Congress's constitutional regulatory authority; if commerce is "completely internal" to a State, then Congress has no power to regulate. *Id.* at 194. The "among" requirement of the Commerce Clause thus allows Congress to regulate interactions or affairs among the several States, including matters "that are mingled among the states or affect more than one state, because they cross state borders, because they produce collective action problems among the states, or because they involve activity in one state that has spillover effects in other states." Balkin, *Commerce*, at 23. *See also United States v. Lopez*, 514 U.S. 549 (1995). In other words, the Commerce Clause contains an important limiting principle—but it is derived more from the word "among" than from an improperly narrow reading of "regulate" or "commerce."

Reading the Commerce Clause with the understanding that "regulat[ions]" of "commerce" must address matters truly federal in nature—for example, matters that affect national interests or which the States cannot effectively address on their own—connects the text of the Clause to the principle in Resolution VI that animated the drafting of Congress's enumerated powers. As Chief Justice Marshall explained in interpreting the Commerce Clause:

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.

Gibbons, 22 U.S. (9 Wheat.) at 195.

III. Under The Text And Original Meaning Of The Necessary And Proper Clause, Congress Has Broad Latitude To Employ Legislative Means Naturally Related To The Lawful Objects Or Ends Of The Federal Government.

As discussed above, the drafters of the Constitution wrote Congress's enumerated powers to implement the basic idea that the federal government should be empowered to respond to matters of national concern. This animating

principle is reflected not only in the subjects and objects of Congress's enumerated powers, but in the way the Constitution grants Congress the broad authority to execute these powers. During ratification, Alexander Hamilton reminded the nation that

> we must bear in mind that we are not to confine our view to the present period, but to look forward to remote futurity. . . . Nothing, therefore, can be more fallacious than to infer the extent of any power, proper to be lodged in the national government from an estimate of its immediate necessities. There ought to be a *capacity* to provide for future exigencies as they may happen; and as these are illimitable in their nature, so it is impossible safely to limit that capacity.

THE FEDERALIST PAPERS No. 34, at 203 (emphasis in original). Perhaps nowhere in the Constitution is the goal to provide Congress with discretion to address matters both now and in the future more manifest than in the Necessary and Proper Clause.

The Necessary and Proper Clause gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. As Madison put it bluntly, "[w]ithout the *substance* of this power, the whole Constitution would be a dead letter." THE FEDERALIST PAPERS No. 44, at 280 (emphasis in original).

Our nation's Founders were faced with interpreting the scope of the Necessary and Proper Clause early in President Washington's administration. In considering how the Necessary and Proper Clause should interact with federal power, Treasury Secretary Hamilton explained to Washington that "[t]he means by which national exigencies are to be provided for, national inconveniences obviated, national prosperity promoted, are of such infinite variety, extent and complexity, that there must of necessity be great latitude of discretion in the selection and application of those means." THE PAPERS OF GEORGE WASHINGTON DIGITAL EDITION (Theodore J. Crackel, ed. 2008) (Letter from Alexander Hamilton to George Washington, Opinion on the Constitutionality of an Act to Establish a Bank, 1791). *See also* THE FEDERALIST PAPERS No. 44, at 282 (Madison) ("No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.").

As Hamilton explained to President Washington, "[t]he whole turn of the [Necessary and Proper Clause] indicates that it was the intent of the Convention, by that clause, to give a liberal latitude to the exercise of the specified powers." Letter from Hamilton to Washington, Opinion on the Constitutionality of an Act to Establish a Bank, 1791. The congressional powers written into the Constitution are therefore even stronger when coupled with Article I, section 8's sweeping grant of authority to Congress to make laws that are "necessary and proper" for carrying out the other

federal powers granted by the Constitution. While the government obviously has no right "to do merely what it pleases," Hamilton explained the broad discretion given to Congress under the Necessary and Proper Clause as follows: "If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution; it may safely be deemed to come within the compass of the national authority." *Id.*

President Washington agreed with Hamilton's exegesis of the constitutional powers of the federal government, approving the bill to establish a national bank over the objections of other members of his cabinet, including Secretary of State Thomas Jefferson, and hailing Hamilton's vision of federal power. 8 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 359 (Letter to David Humphreys, July 20, 1791).

This Court, from the Founding-era to the present, has also agreed with Hamilton's view of federal power under the Necessary and Proper Clause. Chief Justice Marshall explained in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819), that Congress should be shown significant deference regarding what laws it considers to be appropriate in carrying out its constitutional duties. In language very similar to Hamilton's, the Court in *McCulloch* explained, "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421.

Just last Term, the Court affirmed that so long as Congress does not run afoul of any other constitutional provision, the Necessary and Proper Clause affords Congress the power to use any "means that is rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010). As this Court has long held, "the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *Id.* (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 413, 418, 421).

To be sure, the powers of the federal government under our Constitution are not unlimited. As the Tenth Amendment affirms, U.S. CONST. amend. X, the Constitution establishes a central government of enumerated powers, and the States play a vital role in our federalist system. But the powers our charter *does* grant to the federal government are broad and substantial. And, since the Founding, the American people have amended the Constitution to ensure that Congress has all the tools it needs to address national problems and protect the rights and liberties of all Americans. *E.g.*, U.S. CONST. amends. XIII, XIV, XV, XVI, XIX. Through particular enumerated powers, as well as through sweeping enforcement clauses such as Article I's Necessary and Proper Clause, the Constitution realizes the framers' design for a federal government able "to legislate in all Cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of

individual legislation." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 131-32.

IV. The Constitution's Text And History Support The Constitutionality Of The Affordable Care Act's Minimum Coverage Provision.

Congress's authority to pass legislation to fix problems in the health care industry is firmly rooted in Congress's constitutional power to regulate interstate commerce and to enact laws that are necessary and proper to exercise that power.[6] Since the health care industry comprises nearly 20 percent of the U.S. economy, no one can seriously dispute that Congress has the authority to regulate health care and the health insurance industries under its Commerce Clause power. The question is therefore whether Congress has the power to enact the minimum coverage provision, which generally requires individuals who can afford it to purchase health insurance or pay a tax penalty if they refuse to do so. Through a fundamentally flawed reading of the Constitution, the court below held that Congress did not have the power to enact the minimum coverage provision.

The United States has demonstrated that Court precedent supports the constitutionality of the individual mandate. U.S. Br. at 41-43, 48-52. Looking at Congress's power under the text and

---

[6] This brief focuses on the constitutionality of the Affordable Care Act under the Commerce Clause and the Necessary and Proper Clause; it does not address other potential sources of constitutional power to enact the Act.

history of the Constitution, as detailed above, the constitutionality of the minimum coverage provision is also clear.

Under Resolution VI, the principle behind enumerated powers such as the Commerce Clause is to give Congress the ability "to legislate in all Cases for the general interests of the Union, and also in those to which the States are separately incompetent." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 131-32. After extensive review, Congress determined that the decision not to buy health insurance substantially affects interstate commerce. *See, e.g.*, U.S. Br. at 33-34. The spillover effects caused by the decisions of individuals to remain uninsured affect the nation as a whole. *See, e.g.*, U.S. Br. at 30; Balkin, *Commerce*, at 44.

In addition, the minimum coverage provision addresses collective action problems in the States: there is the distinct possibility that "[p]eople with health problems will have incentives to move to a state where they cannot be turned down [for health insurance], raising health care costs for everyone, while insurers will prefer to do business in states where they can avoid more expensive patients with pre-existing conditions, and younger and healthier people may leave for jurisdictions where they can avoid paying for health insurance." *Id.* at 46. The minimum coverage provision is within Congress's authority to regulate commerce "for the general interests of the Union," and also in those instances in "which the States are separately incompetent." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 131-32.

The Court could also uphold the minimum coverage provision as a law that is "necessary and proper for carrying into execution" Congress's power to regulate commerce among the several States. The Affordable Care Act is designed to make health care coverage affordable to all Americans and to prohibit certain insurance practices, such as the denial of coverage to individuals with pre-existing conditions. *See, e.g.*, U.S. Br. at 29-32. But if Americans could go uninsured until they got sick and then impose the consequent costs on those who already have health insurance policies, the ban on discrimination based on pre-existing conditions would be prohibitively expensive and the cost of insurance would increase across the board. Congress determined that the minimum coverage provision was an appropriate means of securing a workable ban on discriminating against individuals with pre-existing health conditions, in particular, and ensuring the efficient regulation of the national health care and insurance markets more generally. Since the Act does not run afoul of any other constitutional provision—there is no constitutional right to inflict uninsured health care costs on the American taxpayers—health care reform falls squarely within Congress's power to regulate commerce and enact necessary and proper legislation to carry out this power.

The court below appears to have read the Necessary and Proper Clause to allow only those means of execution that are absolutely indispensable to the power being executed. But this interpretation of the Clause was soundly rejected more than two hundred years ago. *McCulloch*, 17 U.S. (4 Wheat.) at 413 (rejecting the argument that the Necessary and Proper Clause allows Congress to pass only those

laws "such as are indispensable, and without which the power would be nugatory"). *See also id.* at 406, 408 (explaining that the framers of the Constitution did not intend to impede the exercise of enumerated powers "by withholding a choice of means," noting that, unlike the Articles of Confederation, the Constitution does not "require[] that everything granted shall be expressly and minutely described"). As Alexander Hamilton wrote to President Washington, the idea that the Clause allows only means of execution that are so necessary that without them "the grant of the power *would be nugatory*," is so potentially detrimental to constitutional government that "[i]t is essential to the *being* of the National Government that so erroneous a conception of the word *necessary*, shou'd be exploded." Letter from Alexander Hamilton to George Washington, Opinion on the Constitutionality of an Act to Establish a Bank, 1791 (emphasis in original).

"Necessary" in the Clause "means no more than *needful, requisite, incidental, useful*, or *conducive* to" the enumerated grant of power. *Id.* (emphasis in original). *See also Comstock*, 130 S. Ct. at 1956 (holding that the Necessary and Proper Clause affords Congress the power to use any "means that is rationally related to the implementation of a constitutionally enumerated power"). As Congress determined, the minimum coverage provision is a rational means of implementing health care regulations.

* * *

From the broad and substantial powers granted to Congress in the 1787 Constitution, to the sweeping enforcement powers added to the Constitution through the amendment process in the last two centuries, our Constitution establishes a federal government that is strong enough to act when the national interest requires a national solution. The idea that the federal government does not have the power to address a national problem such as the health care crisis has no basis in the Constitution's text and history.

Congress has the power to regulate the nearly 20 percent of the U.S. economy that is the health care industry, and, when faced with a national health care crisis in which millions are uninsured and cannot afford decent health care, is empowered to act to reform the health care industry. The Affordable Care Act's minimum coverage provision fits within Congress's Commerce Clause power and is also a necessary and proper means of effectuating Congress's regulation of the health care industry. Far from offending our Constitution's careful balance of Federal-State power, the Act reflects our system of vibrant federalism and allows the federal and State governments to better protect their citizens and resources.

CONCLUSION

Amici State Legislators support the steps toward effective health care reform undertaken in the Affordable Care Act and believe that the Act is fully constitutional. As State leaders who have taken an oath to be faithful to the U.S. Constitution and who

are actively working to implement and prepare for various requirements of the Act, *Amici* respectfully urge the Court to uphold the constitutionality of the minimum coverage provision and reverse the lower court's contrary holding.

Respectfully submitted,

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
**Counsel of Record*
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th St., NW, Suite 1002
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amici Curiae
State Legislators

January 12, 2012

APPENDIX

LIST OF *AMICI CURIAE* STATE LEGISLATORS

Abercrombie, Catherine, Assistant Majority Whip
Representative—Connecticut

Abinanti, Thomas J.
Assemblyperson—New York

Abrams, Stacey, Minority Leader
Representative—Georgia

Adams, Alma
Representative—North Carolina

Aguiar, James
Representative—New Hampshire

Albis, James
Representative—Connecticut

Alexander, Kelly
Representative—North Carolina

Alexander, Martha
Representative—North Carolina

Alfond, Justin, Assistant Senate Minority Leader
Senator—Maine

Allen, Alma
Representative—Texas

Almy, Susan
Representative—New Hampshire

Alonzo, Roberto
Representative—Texas

Alvarado, Carol
Representative—Texas

Anchia, Rafael
Representative—Texas

Antonio, Nickie
Senator—Ohio

Anzelc, Tom
Representative—Minnesota

Appleton, Sherry
Representative—Washington

Arce, Luz
Senator—Puerto Rico

Aresimowicz, Joe, Deputy Speaker of the House
Representative—Connecticut

Armstrong, Joe
Representative—Tennessee

Arora, Sam
Delegate—Maryland

Ashe, Kathy
Representative—Georgia

Atkins, Bert
Representative—Missouri

Austin, Terri
Representative—Indiana

BaCote, Mamye
Delegate—Virginia

Baker, Glenn
Representative—Georgia

Bakk, Tom, Minority Leader
Senator—Minnesota

Bartlett, Philip
Senator—Maine

Barve, Kumar
Delegate—Maryland

Beall, Daryl
Senator—Iowa

Beasley-Teague, Sharon
Representative—Georgia

Beavers, Roberta
Representative—Maine

Beck, Henry
Representative—Maine

Beliveau, Devin
Representative—Maine

Bell, Larry
Representative—North Carolina

Benedetto, Michael R.
Assemblyman—New York

Benn, Bernard
Representative—New Hampshire

Berry, Seth
Representative—Maine

Bobo, Elizabeth
Delegate—Maryland

Boland, Andrea
Representative—Maine

Bolkcom, Joe, Assistant Majority Leader
Senator—Iowa

Borsden, Alice
Representative—North Carolina

Botzow, Bill
Representative—Vermont

Brannigan, Joe
Senator—Maine

Brennan, James
Assemblyperson—New York

Briggs, Sheryl
Representative—Maine

Brown, Charlie
Representative—Indiana

Brown, Michael
Representative—Missouri

Brown, Lisa, Majority Leader
Senator—Washington

Brown, Bonnie
Delegate—West Virginia

Bryant, Angela
Representative—North Carolina

Brynaert, Kathy
Representative—Minnesota

Buckner, Debbie, Minority Caucus Chair
Representative—Georgia

Buhl, Angie
Senator—South Dakota

Bullard, Dwight
Representative—Florida

Burnam, Lon
Representative—Texas

Butler, Larry
Representative—Connecticut

Butler, Gloria
Senator—Georgia

Cain, Emily
Representative—Maine

Cafaro, Capri
Senator—Ohio

Cahhill, Kevin A.
Assemblyperson—New York

Camper, Karen
Representative—Tennessee

Carey, Mike
Representative—Maine

Carlson, Lyndon
Representative—Minnesota

Carlson, Susan
Representative—Missouri

Carlton, Maggie
Assemblyperson—Nevada

Carney, Becky
Representative—North Carolina

Carr, Al
Delegate—Maryland

Carr, Daniel
Representative—New Hampshire

Casavant, Alan
Representative—Maine

Carter, Jason
Senator—Georgia

Carter, Chris, Minority Caucus Vice-Chair
Representative—Missouri

Carter Peterson, Karen
Senator—Louisiana

Catania, David
Councilman—District of Columbia

Celeste, Ted
Representative—Ohio

Chapman, Ralph
Representative—Maine

Chase, Cynthia
Representative—New Hampshire

Chase, Maralyn
Senator—Washington

Chasey, Gail
Representative—New Mexico

Chavez, Eleanor
Representative—New Mexico

Chavez-Houck, Rebecca
Representative—Utah

Clark, Karen
Representative—Minnesota

Clibborn, Judy
Representative—Washington

Cobb Hunter, Gilda
Representative—South Carolina

Cody, Eileen
Representative—Washington

Coggs, Spence
Senator—Minnesota

Cohen, Richard
Senator—Minnesota

Cohen, Mark
Representative—Pennsylvania

Coleman, Merika
Representative—Alabama

Coleman, Mary H.
Representative—Mississippi

Coleman, Garnet
Representative—Texas

Colona, Mike, Minority Whip
Representative—Missouri

Conaway, Herb
Assemblyperson—New Jersey

Conrad, Danielle
Senator—Nebraska

Conway, Steve
Senator—Washington

Cook, Michelle
Representative—Connecticut

Copeland Hanzas, Sarah
Representative—Vermont

Cornell du Houx, Alex
Representative—Maine

Cote, David E.
Representative—New Hampshire

Cotham, Tricia
Representative—North Carolina

Council, Brenda
Senator—Nebraska

Court, Lois, Minority Caucus Chair
Representative—Colorado

Craven, Margaret
Senator—Maine

Crisco, Joseph
Senator—Connecticut

Danielson, Jeff, President Pro Tempore
Senator—Iowa

Dannelly, Charlie S.
Senator—North Carolina

Darneille, Jeannie
Representative—Washington

Davenport, Gail
Senator—Georgia

Davis, Bettye
Senator—Alaska

Davnie, Jim
Representative—Minnesota

Delgado, William
Senator—Illinois

Dembowski, Nancy
Representative—Indiana

DePentima, Rich
Representative—New Hampshire

Deshotel, Joe
Representative—Texas

Dibble, Scott
Senator—Minnesota

Dickerson, Pamela
Representative—Georgia

Dinowitz, Jeffery
Assemblyperson—New York

Dill, Cynthia
Senator—Maine

Dill, Jim
Representative—Maine

Dillon, Patricia
Representative—Connecticut

Dobbs, Elisabeth J.
Representative—Georgia

Donovan, Christopher G., Speaker of the House
Representative—Connecticut

Driscoll, Timothy
Representative—Maine

Duchesne, Bob
Representative—Maine

Dukes, Dawna
Representative—Texas

Dvorsky, Robert
Senator—Iowa

Earle, Beverly
Representative—North Carolina

Eaves, Mark
Representative—Maine

Ebbin, Adam
Senator—Virginia

Ellinger, Rory
Representative—Missouri

Ellington, Brandon
Representative—Missouri

Elliott, Joyce
Senator—Arkansas

Ellis, Rodney G.
Senator—Texas

Englin, David, Minority Caucus 2nd Vice Chair
Delegate—Virginia

Erpenbach, Jon
Senator—Wisconsin

Esquibel, Ken
Representative—Wyoming

Evans, Stacey
Representative—Georgia

Falk, Andrew
Representative—Minnesota

Farmer-Butterfield, Jean
Representative—North Carolina

Farrar, Jessica, House Democratic Leader
Representative—Texas

Favola, Barbara
Senator—Virginia

Feldman, Dede
Senator—New Mexico

Ferri, Frank
Representative—Rhode Island

Finney, Gail
Representative—Kansas

Fisher, Susan
Representative—North Carolina

Fisher, Michael
Representative—Vermont

Fitzgibbon, Joe
Representative—Washington

Fleischauer, Barbara
Delegate—West Virginia

Flexer, Mae
Representative—Connecticut

Flowers, Mary
Representative—Illinois

Fludd, Virgil
Representative—Georgia

Foley, Mike
Representative—Ohio

Foster, Joyce
Senator—Colorado

Foster, Daniel
Senator—West Virginia

Frankel, Dan, Democratic Caucus Chair
Representative—Pennsylvania

Fraser, Karen, Majority Caucus Chair
Senator—Washington

Frazier, Hillman
Senator—Mississippi

French, Patsy
Representative—Vermont

Fritz, Patti
Representative—Minnesota

Frockt, David, Majority Assistant Floor Leader
Senator—Washington

Frush, Barbara
Delegate—Maryland

Galef, Sandra R.
Assemblyperson—New York

Gallegos, Mario
Senator—Texas

Garcia, Mary Jane M., Senate Majority Whip
Senator—New Mexico

Garcia, Miguel
Representative—New Mexico

Gardner, Deborah
Representative—Colorado

Gardner, Pat
Representative—Georgia

Garland, Nancy
Representative—Ohio

Gauthier, Kerry
Representative—Minnesota

Genga, Henry
Representative—Connecticut

Gentile, Linda
Representative—Connecticut

Gerratana, Terry
Senator—Connecticut

Gibson, Vanessa L.
Assemblyperson—New York

Gilbert, Paul E.
Representative—Maine

Gill, Rosa
Representative—North Carolina

Giron, Angela
Senator—Colorado

Glassheim, Eliott
Representative—North Dakota

Glazier, Rick, House Minority Whip
Representative—North Carolina

Glick, Deborah
Assemblyperson—New York

Godfrey, Robert, Deputy Speaker of the House
Representative—Connecticut

Gonzales, Veronica
Representative—Texas

Goodall, Seth
Senator—Maine

Goode, Adam
Representative—Maine

Goodwin, Barb
Senator—Minnesota

Gordon, J. Craig
Representative—Georgia

Gottfried, Richard
Assemblyperson— New York

Graham, Anne
Representative—Maine

Graham, Charles
Representative—North Carolina

Green, Tami, Majority Floor Leader
Representative—Washington

Greene, Marion
Representative—Minnesota

Greiling, Mindy
Representative—Minnesota

Grogins, Audin
Representative—Connecticut

Gutierrez Kenney, Phyllis
Representative—Washington

Gutierrez, Roland
Representative—Texas

Haddad, Gregory
Representative—Connecticut

Hagan, Robert
Representative—Ohio

Haire, Phil
Representative—North Carolina

Hall, Laura
Representative—Alabama

Hall, Larry D., House Minority Whip
Representative—North Carolina

Hansen, Rick, Assistant Minority Leader
Representative—Minnesota

Hansen, Drew, Assistant Majority Whip
Representative—Washington

Harbison, Ed
Senator—Georgia

Harding, Laurie
Representative—New Hampshire

Harlow, Denise
Representative—Maine

Harrison, Pricey
Representative—North Carolina

Hatch, Jack
Senator—Iowa

Hayden, Jeff
Senator—Minnesota

Hayes, Terry, Assistant House Minority Floor Leader
Representative—Maine

Head, Helen
Representative—Vermont

Healey, Anne
Delegate—Maryland

Heinz, Matt
Representative—Arizona

Higgins, Linda
Senator—Minnesota

Hernandez Luna, Ana
Representative—Texas

Hinck, John
Representative—Maine

Hixson, Sheila
Delegate—Maryland

Hodges, Steve
Representative—Missouri

Holmes, Jr., Marvin E.
Delegate—Maryland

Hope, Patrick
Delegate—Virginia

Hornstein, Frank
Representative—Minnesota

Hosch, Larry, Minority Whip
Representative—Minnesota

Hovey-Wright, Marcia
Representative—Michigan

Howard, Donna
Representative—Texas

Hubbard, James W., Assistant Majority Leader
Delegate—Maryland

Hubbard, Penny
Representative—Missouri

Hucker, Tom
Delegate—Maryland

Hudgins, Zack
Representative—Washington

Hughes, Leonard
Representative—Missouri

Hummel, Jacob
Representative—Missouri

Hunt, Sam
Representative—Washington

Hunter, Bruce
Representative—Iowa

Huntley, Thomas
Representative—Minnesota

Hurlburt, Bryan, Assistant Majority Leader
Representative—Connecticut

Insko, Verla
Representative—North Carolina

Isenhart, Chuck
Representative—Iowa

Jackson, Lester G.
Senator—Georgia

Jackson, Robert L.
Senator—Mississippi

Jackson, Darren
Representative—North Carolina

Jacobs, Rhoda S.
Assemblyperson—New York

Jaffee, Ellen C.
Assemblyperson—New York

James, Donzella
Senator—Georgia

Jinkins, Laurie
Representative—Washington

Johnson, Susan
Representative—Connecticut

Johnson, Sheldon
Representative—Minnesota

Jones, Mia
Representative—Florida

Jones, Emmanuel
Senator—Georgia

Jones, Sheila
Representative—Georgia

Jones, Adrienne, Speaker Pro Tem
Delegate—Maryland

Jones, Tishaura, Assistant Minority Floor Leader
Representative—Missouri

Jones McClendon, Ruth
Representative—Texas

Jordan, Darryl
Representative—Georgia

Josephs, Babette
Representative—Pennsylvania

Joyner, Arthenia, Minority Leader Pro Tempore
Senator—Florida

Kahn, Phyllis
Representative—Minnesota

Kaiser, Anne, Chief Deputy Majority Whip
Delegate—Maryland

Keever, Patsy
Representative—North Carolina

Kefalas, John
Representative—Colorado

Keiser, Karen
Senator—Washington

Kelly, Ariana
Delegate—Maryland

Kent, Peter
Representative—Maine

King, Phylis
Representative—Idaho

Kinnaird, Ellie
Senator—North Carolina

Kirkley-Bey, Marie Lopez, Deputy Speaker
Representative—Connecticut

Kirkton, Jeanne
Representative—Missouri

Kirschman, Patrick
Representative—South Dakota

Kitzmiller, Warren
Representative—Vermont

Kline, Adam
Senator—Washington

Kloucek, Frank
Representative—South Dakota

Knuth, Kate
Representative—Minnesota

Koehler, David
Senator—Iowa

Kohl-Welles, Jeanne
Senator—Washington

Kramer, Benjamin F.
Delegate—Maryland

Kratky, Michele
Representative—Missouri

Kruger, Chuck
Representative—Maine

Kumiega, Walter
Representative—Maine

Laine, Carolyn
Representative—Minnesota

Langseth, Keith
Senator—Minnesota

Lavine, Charles D.
Assemblyperson—New York

Lee, Chris
Representative—Hawaii

Lemar, Roland
Representative—Connecticut

Lensing, Vicki
Representative—Iowa

Lesser, Matthew
Representative—Connecticut

Leubke, Paul
Representative—North Carolina

Levy, Claire
Representative—Colorado

Liebling, Tina
Representative—Minnesota

Lifton, Barbara
Assemblyperson—New York

Liias, Marko
Representative—Washington

Loeffler, Diane
Representative—Minnesota

Long, Patrick
Representative—New Hampshire

Longstaff, Thomas
Representative—Maine

Lopez, Linda
Senator—Arizona

Lorber, Jason
Representative—Vermont

Lourey, Tony
Senator—Minnesota

Lucas, Marvin
Representative—North Carolina

Lucio, Eddie
Senator—Texas

Luedtke, Eric
Delegate—Maryland

Luxenberg, Geoff
Representative—Connecticut

Lyddy, Christopher
Representative—Connecticut

Ma, Fiona
Assemblyperson—California

Maisel, Alan
Assemblyperson—New York

Malek, Sue
Representative—Montana

Maloney, Maeghan
Representative—Maine

Manno, Roger
Senator—Maryland

Marrero, Beverly
Senator—Tennessee

Marsh, III, Henry L.
Senator—Virginia

Marzian, Mary Lou
Representative—Kentucky

Masland, Jim
Representative—Vermont

Mathern, Tim
Senator—North Dakota

Maxwell, Marcie
Representative—Washington

May, Karla
Representative—Missouri

Mazurek, Ed
Representative—Maine

McCann, Beth
Representative—Colorado

McCann Beatty, Gail
Representative—Missouri

McCreary, Tracy
Representative—Missouri

McCullough, Jim
Representative—Vermont

McDonald, Tom
Representative—Missouri

McGeoghegan, Eileen
Representative—Missouri

McGill, Amanda
Senator—Nebraska

McGuire, Mary Jo
Senator—Minnesota

McGuirt, Frank
Representative—North Carolina

McLawhorn, Marian
Representative—North Carolina

McManus, Kevin
Representative—Missouri

McNeil, Margo
Representative—Missouri

McSorley, Cisco
Senator—New Mexico

McVitty Weber, Lucy
Representative—New Hampshire

Megna, Robert
Representative—Connecticut

Melin, Carly
Representative—Minnesota

Merrick, Evalyn
Representative—New Hampshire

Miller, Aruna
Delegate—Maryland

Miller, Joshua
Senator—Rhode Island

Millman, Joan L.
Assemblyperson—New York

Mobley, Annie
Representative—North Carolina

Moeller, Jim, Speaker Pro Tempore
Representative—Washington

Montecillo, Genise
Representative—Missouri

Moran, Rena
Representative—Minnesota

Morgan, Judy
Representative—Missouri

Morin, Russell
Representative—Connecticut

Morrison, Terry
Representative—Maine

Morrissey, Joseph
Delegate—Virginia

Morrow, Terry, Minority Whip
Representative—Minnesota

Mott Oxford, Jeanette
Representative—Missouri

Mullery, Joe
Representative—Minnesota

Murphy, Wm. Quincy
Representative—Georgia

Murphy, Patrick
Representative—Iowa

Murphy, Erin, Assistant Minority Leader
Representative—Minnesota

Murphy, Mary
Representative—Minnesota

Murray, Ed
Senator—Washington

Mushinsky, Mary, Assistant Majority Whip
Representative—Connecticut

Naishtat, Elliott
Representative—Texas

Nasheed, Jamilah
Representative—Missouri

Neal, Yasmin
Representative—Georgia

Nelson, Mary
Representative—Maine

Nelson, Mike
Representative—Minnesota

Nelson, Sharon
Senator—Washington

Newman, Stacey
Representative—Missouri

Nichols, Mary
Representative—Missouri

Niemann, Doyle
Delegate—Maryland

Nordquist, Jeremy
Senator—Nebraska

Norton, Kim, Assistant Minority Leader
Representative—Minnesota

O'Brien, Andrew
Representative—Maine

Oliver, Mary Margaret
Representative—Georgia

Orange, Linda
Representative—Connecticut

Orrock, Nan
Senator, Georgia

Ortiz, Felix
Assemblyperson—New York

Ortiz Y Pino, Jerry
Senator—New Mexico

Osienski, Edward
Representative—Delaware

Pace, Sharon
Representative—Missouri

Pappas, Sandy
Senator—Minnesota

Parfitt, Diane, Democratic Freshman Leader
Representative—North Carolina

Paris, Miriam
Senator—Georgia

Park, Al
Representative—New Mexico

Parmon, Earline
Representative—North Carolina

Partridge, Carolyn
Representative—Vermont

Pashinski, Eddie
Representative—Pennsylvania

Patterson, Daniel
Representative—Arizona

Payton, Jr., Tony
Representative—Pennsylvania

Pena, Richard Raymond
Representative—Texas

Pena-Melnyk, Joseline
Delegate—Maryland

Pendergrass, Shane
Delegate—Maryland

Peoples, Ann
Representative—Maine

Peoples-Stokes, Crystal D.
Assemblyperson—New York

Perone, Chris, Deputy Majority Leader
Representative—Connecticut

Perry, Nick N.
Assemblyperson—New York

Persell, John, Assistant Minority Leader
Representative—Minnesota

Peterson, Matt
Representative—Maine

Pichardo, Juan, Senate President Pro Tempore
Senator—Rhode Island

Pickett, Joe
Representative—Texas

Pierson, Tommie
Representative—Missouri

Plum, Kenneth
Delegate—Virginia

Pocan, Marc
Representative—Wisconsin

Pollet, J.D., Gerry
Representative—Washington

Prague, Edith
Senator—Connecticut

Prentice, Margarita
Senator—Washington

Pridemore, Craig
Senator—Washington

Priest, Charles R.
Representative—Maine

Purcell, William
Senator—North Carolina

Ram, Kesha
Representative—Vermont

Ramirez, Victor
Senator—Maryland

Ramos, Dan
Representative—Ohio

Rapp, Ray
Representative—North Carolina

Read, Robin
Representative—New Hampshire

Reinert, Roger
Senator—Minnesota

Rest, Ann
Senator—Minnesota

Reynolds, Ron
Representative—Texas

Reznik, Kirill
Delegate—Maryland

Riley, Melissa
Representative—Connecticut

Ritter, Betsy
Representative—Connecticut

Ritter, Matthew
Representative—Connecticut

Rivera, Gustavo
Senator—New York

Rivera, Peter M.
Assemblyperson—New York

Roberts, Mary Helen
Representative—Washington

Rochelo, Megan
Representative—Maine

Rodriguez, Robert J.
Assemblyperson—New York

Rodriguez, Jose
Senator—Texas

Roebuck, Johnnie J.
Representative—Arkansas

Rosenbaum, Diane, Senate Majority Leader
Senator—Oregon

Rosenberg, Samuel
Delegate—Maryland

Rosenthal, Linda
Assemblyperson—New York

Rosenwald, Cindy
Representative—New Hampshire

Ross, Deborah, House Minority Whip
Representative—North Carolina

Rotundo, Margaret
Representative—Maine

Roys, Kelda Helen, Democratic Caucus Chair
Representative—Wisconsin

Rukavina, Tom
Representative—Minnesota

Russell, Diane
Representative—Maine

Ryan, Kevin, Deputy Speaker of the House
Representative—Connecticut

Ryu, Cindy
Representative—Washington

Sanborn, Linda
Representative—Maine

Sanchez, Robert
Representative—Connecticut

Sawyer, Tom
Senator—Ohio

Saxhaug, Tom
Senator—Minnesota

Scalze, Bev
Representative—Minnesota

Schimel, Michelle
Assemblyperson—New York

Schupp, Jill
Representative—Missouri

Scott, Sandra
Representative—Georgia

Scott, Omeria
Representative—Mississippi

Seay, Valencia
Senator—Georgia

Sells, Mike
Representative—Washington

Sharkey, J. Brendan, House Majority Leader
Representative—Connecticut

Shelton, Mike, Assistant Minority Floor Leader
Representative—Oklahoma

Sheran, Kathy
Senator—Minnesota

Shinn, Paul
Senator—Washington

Sickles, Mark, Minority Caucus Chairman
Delegate—Virginia

Sieben, Katie
Senator—Minnesota

Sigdestad, David
Representative—South Dakota

Simmons, Derrick T.
Senator—Mississippi

Skindell, Michael
Senator—Ohio

Slawik, Nora
Representative—Minnesota

Slocum, Linda
Representative—Minnesota

Smith, Clem
Representative—Missouri

Sol-Gutierrez, Ana
Delegate—Maryland

Spreng, Churie
Representative—Missouri

Stanford, Derek
Representative—Washington

Steaman, Pat
Senator—Colorado

Steckman, Sharon
Representative—Iowa

Stevens, Mickey
Representative—Georgia

Stevenson, Eric
Assemblyperson—New York

Stewart, Mimi
Representative—New Mexico

Stillman, Andrea
Senator—Connecticut

Stuckey, Peter
Representative—Maine

Stuckey Benfield, Stephanie
Representative—Georgia

Surovell, Scott
Delegate—Virginia

Swaim, Kurt
Representative—Iowa

Swearinger, Jay
Representative—Missouri

Takumi, Roy
Representative—Hawaii

Talboy, Mike, Minority Floor Leader
Representative—Missouri

Tate, Horacena
Senator—Georgia

Tavares, Charletta
Senator—Ohio

Taylor, Sylvester
Representative—Missouri

Taylor, Kathleen
Representative—New Hampshire

Tercyak, Peter
Representative—Connecticut

Tharinger, Steve
Representative—Washington

Thissen, Paul, Minority Leader
Representative—Minnesota

Thomas, Brian, Minority Caucus Chair
Representative—Georgia

Thompson, John, Assistant Majority Whip
Representative—Connecticut

Thompson, Curt
Senator—Georgia

Till, George
Representative—Vermont

Tinsley-Talabi, Alberta
Representative—Michigan

Tlaib, Rashida
Representative—Michigan

Tolson, Joe
Representative—North Carolina

Tomassoni, David
Senator—Minnesota

Townsend, Charles
Representative—New Hampshire

Treat, Sharon
Representative—Maine

Turner, Veronica
Delegate—Maryland

Turner, Nina
Senator—Ohio

Turner, Sylvester
Representative—Texas

Upthegrove, Dave
Representative—Washington

Urban, Diana
Representative—Connecticut

Valderrama, Kriselda
Delegate—Maryland

Van de Putte, Leticia
Senator—Texas

Veasey, Mark
Representative—Texas

Wagenius, Jean
Representative—Minnesota

Waldstreicher, Jeff
Delegate—Maryland

Walker, Toni
Representative—Connecticut

Walle, Armando
Representative—Texas

Walsh Innes, Melissa
Representative—Maine

Walton Gray, Rochelle
Representative—Missouri

Ward, John
Representative—Minnesota

Watts, Vivian E.
Delegate—Virginia

Webb, Kathy
Representative—Arkansas

Webb, Steve
Representative—Missouri

Webster, David
Representative—Maine

Weed, Charles
Representative—New Hampshire

Weiss, Jennifer
Representative—North Carolina

Welsh, Joan
Representative—Maine

Weprin, David L.
Assemblyperson—New York

Wiger, Chuck
Senator—Minnesota

Wilkerson, David
Representative—Georgia

Williams, Alan
Representative—Florida

Williams, Robert W.
Representative—New Hampshire

Willis, Roberta
Representative—Connecticut

Winkler, Ryan
Representative—Minnesota

Wirth, Peter
Senator—New Mexico

Witt, Brad
Representative—Oregon

Wizowaty, Suzi
Representative—Vermont

Wolf, Alice
Representative—Massachusetts

Wooley, Jessica
Representative—Hawaii

Wright, Elissa
Representative—Connecticut

Yantachka, Michael
Representative—Vermont

Zalaski, Zeke
Representative—Connecticut

Zamarripa, JoCasta
Representative—Wisconsin

AMICUS CURIAE BRIEF

No. 11-398

IN THE

Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

**BRIEF OF THE TAX FOUNDATION
AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS
(Minimum Coverage Provision)**

JOSEPH D. HENCHMAN*
Vice President, Legal Projects
TAX FOUNDATION
529 14th Street, N.W.,
Suite 420
Washington, D.C. 20045
(202) 464-6200
henchman@taxfoundation.org
*Counsel of Record
Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Whether the minimum coverage provision of the Affordable Care Act exceeds Congress's powers under Article I of the Constitution.

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE INDIVIDUAL MANDATE OPERATES AS A PENALTY AND IS NOT A TAX. 4

A. A Tax is Widely Defined as an Exaction Imposed for the Primary Purpose of Raising Revenue for General Spending. 4

B. The Individual Mandate is a Penalty and Not a Tax Because Its Primary Purpose is Not to Raise Revenue but to Penalize 12

II. THE GOVERNMENT'S CONTENTION THAT THE INDIVIDUAL MANDATE IS A TAX DOES NOT ADDRESS THE FACT THAT IT WOULD BE AN UNCONSTITUTIONAL CAPITATION TAX UNAPPORTIONED BY STATE POPULATION. 16

III. HOLDING THAT THE INDIVIDUAL MANDATE IS A TAX WOULD LEAD TO SERIOUS NEGATIVE CONSEQUENCES FOR LEGAL JURISPRUDENCE. 18

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Apocada v. Wilson,
525 P.2d 876 (N.M. 1974).....12

Audubon Ins. Co. v. Bernard,
434 So.2d 1072 (La. 1983).....9

Auto. Club of Oregon v. State,
840 P.2d 674 (Or. 1992).....12

Bailey v. Drexel Furniture Co.,
259 U.S. 20 (1922).....15

Bd. of Overseers of the Bar v. Lee,
422 A.2d 998 (Me. 1990).....9

BHA Inv., Inc. v. State,
63 P.3d 474 (Idaho 2003).....9

Bidart Bros. v. California Apple Comm'n,
73 F.3d 925 (9th Cir. 1996).....8

Bolt v. City of Lansing,
587 N.W.2d 264 (Mich. 1998).....10

Brown v. County of Horry,
417 S.E.2d 565 (S.C. 1992).....11

Chicago & Nw. Transp. Co. v. Webster County Bd. of Supervisors,
71 F.3d 265 (8th Cir. 1995).....7

Citizens' Utility Ratepayer Bd. v. State Corp. Comm'n,
956 P.2d 685, (Kan. 1998) 9

City of Hawarden v. US W. Commc'ns, Inc.,
590 N.W.2d 504 (Iowa 1999) 9

City of Huntington v. Bacon,
473 S.E.2d 743 (W.Va. 1996) 12

City of North Little Rock v. Graham,
647 S.W.2d 452 (Ark. 1983) 8

City of Spokane v. Spokane Police Guild,
553 P.2d 1316 (Wash. 1976) 11

County Joe, Inc. v. City of Eagan,
560 N.W.2d 681 (Minn. 1997) 10

Crocker v. Finley,
459 N.E.2d 1346 (Ill. 1984) 9

Dep't of Rev. of Montana v. Kurth Ranch,
511 U.S. 767 (1994) 15

Douglas County Contractors Ass'n v. Douglas County,
929 P.2d 253 (Nev. 1996) 10

Eisner v. Macomber,
252 U.S. 189 (1920) 16

Emerson Coll. v. City of Boston,
462 N.E.2d 1098 (Mass. 1984) 9

Ennis v. State Highway Comm'n,
108 N.E.2d 687 (Ind. 1952) 9

Gunby v. Yates,
102 S.E.2d 548 (Ga. 1958) 8

Heatherly v. State,
678 S.E.2d 656 (N.C. 2009) 12

Hedgepeth v. Tennessee,
215 F.3d 608 (6th Cir. 2000) 7

Hill v. Kemp,
478 F.3d 1236 (10th Cir. 2007) 8

Horner v. Governor,
951 A.2d 180 (N.H. 2008) 10

Hurt v. Cooper,
110 S.W.2d 896 (Tex. 1937) 11

Krumpelman v. Louisville & Jefferson County Metro. Sewer Dist.,
314 S.W.2d 557 (Ky. 1958) 9

Leggett v. Missouri State Life Ins. Co.,
342 S.W.2d 833 (Mo. 1961) 10

Lightwave Tech., LLC v. Escambia County,
804 So.2d 176 (Ala. 2001) 8

Marshall v. Northern Virginia Transp. Authority,
657 S.E.2d 71 (Va. 2008) 11

May v. McNally,
55 P.3d 768 (Ariz. 2002) 8

Memphis Retail Liquor Dealers' Ass'n v. City of Memphis,
547 S.W.2d 244 (Tenn. 1977) 11

Millard v. Roberts,
202 U.S. 429 (1906) 7

Monarch Mining Co. v. State Highway Comm'n,
270 P.2d 738 (Mont. 1954) 10

Neinast v. Texas,
217 F.3d 275 (5th Cir. 2000) 7

Olustee Co-op Ass'n v. Oklahoma Wheat Utilization Research and Market Dev. Comm'n,
391 P.2d 216 (Okl. 1964) 10

Resolution Trust Corp. v. Lanzaro,
658 A.2d 282 (N.J. 1995) 10

RTC Commercial Assets Trust 1995-NP3-1 v. Phoenix Bond & Indem. Co.,
169 F.3d 448 (7th Cir. 1999) 7

Rural Tel. Coal. v. F.C.C.,
838 F.2d 1307 (D.C. Cir. 1988) 8

San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of Puerto Rico,
967 F.2d 683 (1st Cir. 1992) 6, 7, 8

Scott v. Donnelly,
133 N.W.2d 418 (N.D. 1965) 10

Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) 8

Sinclair Paint Co. v. State Bd. of Equalization,
937 P.2d 1350 (Cal. 1997) 8

State ex. rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow, 579 N.E.2d 705 (Ohio 1991) 12

State v. Foster, 46 A. 833 (R.I. 1900) 11

State v. Jackman, 211 N.W.2d 480 (Wis. 1973) 12

State v. Medeiros, 973 P.2d 736 (Haw. 1999) 9

Stuart v. Am. Sec. Bank, 494 A.2d 1333 (D.C. 1985) 8

United States v. La Franca, 282 U.S. 568 (1931) 6, 15

United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213 (1996) 15

United States v. State of New York, 315 U.S. 510 (1942) 6

V-1 Oil Co. v. Utah State Tax Comm'n, 942 P.2d 906 (Utah 1996), *vacated on other grounds*, 942 P.2d 915 (Utah 1997) 11

Valandra v. Viedt, 259 N.W.2d 510 (S.D. 1977) 11

Valero Terrestrial Corp. v. Caffrey, 205 F.3d 130 (4th Cir. 2000) 7

Woodward v. City of Philadelphia,
3 A.2d 167 (Pa. 1938) 10

Workmen's Comp. Comm'n v. Prop. & Cas. Ins. Guar. Corp.,
570 A.2d 323 (Md. 1990) 9

Zelinger v. City & County of Denver,
724 P.2d 1356 (Colo. 1986) 8

Constitutional Provisions

U.S. CONST. amend. XVI 16

U.S. CONST. art. I, § 9, cl. 4 ..... 16, 18

Statutes

26 U.S.C. § 5000A 14, 18

Other Authorities

1 Story Const. § 880 7

ALVIN RABUSHKA, TAXATION IN COLONIAL AMERICA (2008) 4

BLACK'S LAW DICTIONARY (9th ed. 2009) 7

BlueCross BlueShield of North Carolina, *In the Spotlight: ACA Insurance Reforms* (July 13, 2011), http://www.bcbsnc.com/assets/hcr/pdfs/spotlight_insurance_reforms.pdf 13

Bradley Herring, *An Economic Perspective on the Individual Mandate's Severability from the PPACA*, 364 NEW ENG. J. MED. 16e (Mar. 10, 2011) 13

Cooley, *The Law of Taxation*, ch. 29 (4th ed. 1924) 7

GEORGE MASON, VIRGINIA RATIFYING CONVENTION PAPERS (1788) 17

Guatham Nagesh, "IRS chief: Buy health insurance or lose your tax refund," DAILY CALLER (Apr. 6, 2010) 13

Igor Volsky, "On Whether the Individal [sic] Mandate Is A Tax," THINKPROGRESS.ORG (July 20, 2010) 13

Jacqueline Klingebiel, *Obama: Mandate is Not a Tax*, ABC NEWS (Sep. 20, 2009), http://abcnews.go.com/blogs/politics/2009/09/obama-mandate-is-not-a-tax 13

Joint Committee on Taxation, *Estimated Revenue Effects of the Amendment in the Nature of a Substitute to H.R. 4872, The "Reconciliation Act of 2010," As Amended, In Combination With the Revenue Effects of H.R. 3590, The "Patient Protection And Affordable Care Act ('PPACA')," As Passed by the Senate, And Scheduled For Consideration By The House Committee On Rules On March 20, 2010*, (Mar. 20, 2010), http://www.jct.gov/publications.html?func=startdown&id=3672 15

Joint Committee on Taxation, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," As Amended, in Combination with the "Patient Protection and Affordable Care Act"* (Mar. 21, 2010), http://www.jct.gov/publications.html?func=startdown&id=3673 14

Joseph D. Reid, Jr., *Tax Revolts in Historical Perspective*, 32 NAT'L TAX J. 67, 69 (1979) ("Tax revolts are as American as 1776.") 4

Joseph Henchman & Arushi Sharma, *Virginia Constitution Requires Uniform Distribution of the Metrorail Tax Burden in Fairfax County*, TAX FOUNDATION FISCAL FACT NO. 233 (June 2010) 5

Kirk J. Stark, *The Right to Vote on Taxes*, 96 NW. U.L. REV. 191 (2001) 4

THE FEDERALIST NO. 36 (1788) 17

No. 11-398

IN THE

Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

BRIEF OF THE TAX FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS (Minimum Coverage Provision)

INTEREST OF THE *AMICUS CURIAE*

Tax Foundation submits this brief as *amicus curiae* in support of Respondents in the above-captioned matter.[1]

[1] No counsel for a party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel for

The Tax Foundation is a non-partisan, non-profit research organization founded in 1937 to make information about government finance more understandable and accessible to the general public. Based in Washington, D.C., our analysis is guided by the principles of sound tax policy: simplicity, neutrality, transparency, and stability. The Tax Foundation's Center for Legal Reform furthers these goals by educating the legal community about economics and principled tax policy.

By addressing the definition of "tax" under Article I of the U.S. Constitution and the Anti-Injunction Act, this Court will consider a question that has been considered and will continue to be considered by nearly every federal court and state. Therefore, this decision and the rationale behind it will have a large impact upon the legality of certain taxes throughout the country. The Tax Foundation is in a unique position to aid this Court because of our extensive research in tax, fee, and penalty issues considered by courts, the academic community, and economists. Accordingly, the Tax Foundation has an institutional interest in this Court's ruling.

SUMMARY OF ARGUMENT

Long-standing American suspicion of taxes, which dates from colonial times, has led to numerous federal and state restrictions specific only to taxes, such as the federal Anti-Injunction Act, state-level supermajority or multiple reading requirements, and

---

Petitioner and Respondent were timely notified of *amicus curiae*'s intent to file and their written consent have been obtained and filed with the Clerk of the Court.

voter approval thresholds. These requirements in turn have necessitated a meaningful definition of "tax," particularly to contrast against other government actions that result in revenue, such as fees and penalties.

Federal and state courts have risen to meet that need, articulating a definition that is widely accepted today: (a) a tax is an exaction imposed for the primary purpose of raising revenue for general spending, (b) a fee is an exaction imposed for the primary purpose of recovering from the payor the cost of providing a particular service to the payor, and (c) a penalty is an exaction imposed for the primary purpose of punishing the payor for an unlawful act. This definitional construct has strong historical and economic underpinnings, is supported by this Court's precedents and the academic literature, and is widely used by numerous federal and state courts.

The individual mandate is thus properly considered a penalty and not a tax for purposes of the U.S. Constitution's Taxing Power and for purposes of the Anti-Injunction Act. Holding otherwise jeopardizes a widely-used, long-standing, working definitional construct, which would have severe implications for taxpayer protections and revenue statutes across the country.

ARGUMENT

I. THE INDIVIDUAL MANDATE OPERATES AS A PENALTY AND IS NOT A TAX.

A. A Tax is Widely Defined as an Exaction Imposed for the Primary Purpose of Raising Revenue for General Spending.

American antipathy to taxes is rooted deeply in our nation's history, from early colonial taxes to the Boston Tea Party to the Whiskey Rebellion to California's Proposition 13 to today. *See, e.g.*, ALVIN RABUSHKA, TAXATION IN COLONIAL AMERICA (2008) (describing "how the colonists strove to minimize, avoid, and evade British and local taxation . . . ."); Joseph D. Reid, Jr., *Tax Revolts in Historical Perspective*, 32 NAT'L TAX J. 67, 69 (1979) ("Tax revolts are as American as 1776."); Kirk J. Stark, *The Right to Vote on Taxes*, 96 NW. U.L. REV. 191, 191 (2001) ("Time and time again Americans have turned mutinous against taxes."). Policymakers therefore have a strong incentive to avoid raising taxes, or at least seek to raise revenue in ways that can avoid the "tax hiker" label.

Tax proposals consequently are usually subject to greater scrutiny than other policy proposals and, indeed, other revenue proposals. As one example, sixteen states require legislative supermajorities for tax increases.[2] Nearly every state requires

---

[2] Arizona (two-thirds requirement since 1992), Arkansas (three-fourths requirement since 1934), California (two-thirds requirement since 1979), Colorado (two-thirds requirement since 1992), Delaware (three-fifths requirement since 1980), Florida (three-fifths requirement for corporate income taxes since 1971), Kentucky (three-fifths

uniformity in taxation. *See, e.g.*, Joseph Henchman & Arushi Sharma, *Virginia Constitution Requires Uniform Distribution of the Metrorail Tax Burden in Fairfax County*, TAX FOUNDATION FISCAL FACT NO. 233 (June 2010) (reviewing state uniformity case law). Others include requirements that tax bills be passed multiple times, that tax bills be passed by a minimum quorum, or that tax bills not encompass any non-tax provisions. Many of these requirements are long-standing, with some reaffirmed by referendum in recent years. At the federal level, the Anti-Injunction Act insulates state tax collections from certain legal challenges to which they could otherwise be subject. *See* 28 U.S.C. § 2283.

A workable definition of "tax" is necessary to give meaning to these tax-specific procedural protections. Relying simply on the words used in the statute invites subterfuge and nullifies taxpayer protections. Too broad a definition threatens to take tax-related procedural protections beyond their intended scope. While some may equate a tax as any government action that results in costs, monetary or non-monetary, the general public and the courts have been careful to distinguish between different forms of government-collected exactions.

The distinction between taxes and other types of charges depends on the (1) entity that imposes the

---

requirement since 2000), Louisiana (two-thirds requirement since 1966), Michigan (three-fourths requirement for property taxes since 1994), Mississippi (three-fifths requirement since 1970), Missouri (two-thirds requirement since 1996), Nevada (two-thirds requirement since 1996), Oklahoma (three-fourths requirement since 1992), Oregon (three-fifths requirement since 1996), South Dakota (two-thirds requirement since 1996), Washington (two-thirds requirement since 1993).

assessment, (2) the parties upon whom the assessment is imposed, and (3) the use of the revenue. *See, e.g.*, *San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992). A tax is thus an exaction imposed by the government, on the public, for the purpose of raising revenue which is then spent on general (not particular) public purposes. A charge not imposed by government, or a charge collected from those receiving particularized benefits, or a charge collected for primary purpose other than raising revenue, is not a tax. *See also United States v. State of New York*, 315 U.S. 510, 515-16 (1942) ("But a tax for purposes of [the Bankruptcy Code] includes any pecuniary burden laid upon individuals or property for the purpose of supporting the government, by whatever name it may be called.") (internal citations omitted); *United States v. La Franca*, 282 U.S. 568, 572 (1931) ("A 'tax' is an enforced contribution to provide for the support of government; a 'penalty,' as the word is here used, is an exaction imposed by statute as punishment for an unlawful act."). The government is correct when it asserts that "the validity of an assessment under the Taxing Power does not depend on whether it is denominated a tax." Pet. Br. 56-59. It depends on the charge's purpose and effect.

This *San Juan Cellular* three-part test, while relatively recent, nicely encapsulates what is a long-running and enduring standard for defining taxes. *See, e.g.*, *Millard v. Roberts*, 202 U.S. 429, 436 (1906), *quoting* 1 Story Const. § 880 ("Revenue bills . . . are those that levy taxes in the strict sense of the word and are not bills for other purposes which may

incidentally create revenue."); 4 Cooley, *The Law of Taxation*, ch. 29 § 1784 (4th ed. 1924) ("If revenue is the primary purpose and regulation is merely incidental the imposition is a tax; while if regulation is the primary purpose the mere fact that incidentally a revenue is also obtained does not make the imposition a tax . . . ."); BLACK'S LAW DICTIONARY 1214 (9th ed. 2009) (defining tax as "[a] charge, usu. monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue.").

Variations of this formulation, including the *San Juan Cellular* test, have been adopted by the vast majority of federal appellate courts and state supreme courts. *See, e.g.*, *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000) (applying *San Juan Cellular* to determine if a charge "qualifies" as a tax); *Neinast v. Texas*, 217 F.3d 275, 278 (5th Cir. 2000) (applying *San Juan Cellular*); *Hedgepeth v. Tennessee*, 215 F.3d 608, 612 (6th Cir. 2000) (describing *San Juan Cellular* as the "leading decision" used for "the definition of the term 'tax'"); *RTC Commercial Assets Trust 1995-NP3-1 v. Phoenix Bond & Indem. Co.*, 169 F.3d 448, 457 (7th Cir. 1999) ("Penalties stand on a different footing. States do not assess penalties for the purpose of raising revenue. . . ."); *Chicago & Nw. Transp. Co. v. Webster County Bd. of Supervisors*, 71 F.3d 265, 267 (8th Cir. 1995) ("A government levy is a tax if it raises revenue to spend for the general public welfare."); *Bidart Bros. v. California Apple Comm'n*, 73 F.3d 925, 931 (9th Cir. 1996) (applying *San Juan Cellular* test to "determin[e] whether an assessment is a tax"); *Hill v. Kemp*, 478 F.3d 1236, 1244 (10th Cir. 2007)

(finding that a tax's "primary purpose . . . is revenue rather than regulation"); *Seven-Sky v. Holder*, 661 F.3d 1, 8 (D.C. Cir. 2011) ("It is well established that Congress used the term 'tax' in the Tax Injunction Act to mean assessments made for the purpose of raising revenues, not regulatory 'penalties' intended to encourage compliance with a law."); *Rural Tel. Coal. v. F.C.C.*, 838 F.2d 1307, 1314 (D.C. Cir. 1988) ("[A] regulation is a tax only when its primary purpose judged in legal context is raising revenue."); *Lightwave Tech., LLC v. Escambia County*, 804 So.2d 176, 178 (Ala. 2001) (finding that a charge "designed to generate revenue" for general spending is a tax); *May v. McNally*, 55 P.3d 768, 773-74 (Ariz. 2002) (adopting *San Juan Cellular*); *City of North Little Rock v. Graham*, 647 S.W.2d 452, 453 (Ark. 1983) (finding that a tax "is a means of raising revenue to pay additional money for services already in effect"); *Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350, 1354 (Cal. 1997) ("In general, taxes are imposed for revenue purposes, rather than in return for a special benefit conferred or privilege granted."); *Zelinger v. City & County of Denver*, 724 P.2d 1356, 1358 (Colo. 1986) ("A hallmark of such taxes is that they are intended to raise revenue to defray the general expenses of the taxing entity."); *Stuart v. Am. Sec. Bank*, 494 A.2d 1333, 1337 (D.C. 1985) (describing taxes as "for the purpose of raising revenue"); *Gunby v. Yates*, 102 S.E.2d 548, 550 (Ga. 1958) ("A tax is an enforced contribution exacted pursuant to legislative authority for the purpose of raising revenue to be used for public or governmental purposes . . . ."); *State v. Medeiros*, 973 P.2d 736, 742 (Haw. 1999) (holding that a tax does not apply to direct beneficiaries of a service, does not directly

defray the costs of a particular service, or is not necessarily proportionate to the benefit received); *BHA Inv., Inc. v. State*, 63 P.3d 474, 479 (Idaho 2003) ("[T]axes are solely for the purpose of raising revenue."); *Crocker v. Finley*, 459 N.E.2d 1346, 1350 (Ill. 1984) ("[A] charge having no relation to the services rendered, assessed to provide general revenue rather than compensation, is a tax."); *Ennis v. State Highway Comm'n*, 108 N.E.2d 687, 693 (Ind. 1952) ("Taxes are levied for the support of government . . . ."); *City of Hawarden v. US W. Commc'ns, Inc.*, 590 N.W.2d 504, 507 (Iowa 1999) (holding that an exaction intended to raise revenue is a tax); *Citizens' Util. Ratepayer Bd. v. State Corp. Comm'n*, 956 P.2d 685, 708 (Kan. 1998) ("The primary purpose of a tax is to raise money, not regulation."); *Krumpelman v. Louisville & Jefferson County Metro. Sewer Dist.*, 314 S.W.2d 557, 561 (Ky. 1958) ("[T]axes are generally held to be a rate or duty levied each year for purposes of general revenue . . . ."); *Audubon Ins. Co. v. Bernard*, 434 So.2d 1072, 1074 (La. 1983) (holding that "revenue is the primary purpose" of a tax); *Bd. of Overseers of the Bar v. Lee*, 422 A.2d 998, 1004 (Me. 1990) ("[T]axes are primarily intended to raise revenue . . . ."); *Workmen's Comp. Comm'n v. Prop. & Cas. Ins. Guar. Corp.*, 570 A.2d 323, 325 (Md. 1990) (finding that taxes "are intended to raise revenue for public purposes"); *Emerson Coll. v. City of Boston*, 462 N.E.2d 1098, 1105 (Mass. 1984) (finding that a charge "collected not to raise revenues" but for another purpose is not a tax); *Bolt v. City of Lansing*, 587 N.W.2d 264, 269 (Mich. 1998) (holding that a charge with "a revenue-raising purpose" is a tax); *County Joe, Inc. v. City of Eagan*, 560 N.W.2d 681,

686 (Minn. 1997) (holding that a charge "expressly intended to raise revenue" is a tax); *Leggett v. Missouri State Life Ins. Co.*, 342 S.W.2d 833, 875 (Mo. 1961) (finding that a charge is not a tax unless "the object of [it] is to raise revenue to be paid into the general fund of the government to defray customary governmental expenditures"); *Monarch Mining Co. v. State Highway Comm'n*, 270 P.2d 738, 740 (Mont. 1954) ("Taxes are levied for the support of government, and their amount is regulated by its necessities."); *Douglas County Contractors Ass'n v. Douglas County*, 929 P.2d 253, 257 (Nev. 1996) (holding that a charge with the "true purpose . . . to raise revenue" is a tax); *Horner v. Governor*, 951 A.2d 180, 183 (N.H. 2008) (finding that a tax must be "intended to raise additional revenue" not "solely to support a governmental regulatory activity made necessary by the actions of those who are required to pay the charge"); *Resolution Trust Corp. v. Lanzaro*, 658 A.2d 282, 290 (N.J. 1995) (finding that a tax "is intended primarily to raise revenue"); *Scott v. Donnelly*, 133 N.W.2d 418, 423 (N.D. 1965) ("If the primary purpose is revenue, it is a tax; on the other hand, if the primary purpose is regulation, it is not a tax."); *Olustee Co-op Ass'n v. Oklahoma Wheat Utilization Research and Market Dev. Comm'n*, 391 P.2d 216, 218 (Okl. 1964) (citing definition of tax in part including purpose "to provide public revenue"); *Woodward v. City of Philadelphia*, 3 A.2d 167, 170 (Pa. 1938) ("[T]axes are defined to be burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes, and to defray the necessary expenses of government."); *State v. Foster*, 46 A. 833, 835-36 (R.I. 1900) ("If the imposition of such a condition has for

its primary object the regulation of the business, trade, or calling to which it applies, its exercise is properly referable to the police power; but if the main object is the obtaining of revenue, it is properly referable to the taxing power."); *Brown v. County of Horry*, 417 S.E.2d 565, 568 (S.C. 1992) (citing with approval the standard that "a tax is an enforced contribution to provide for the support of government . . . ."); *Valandra v. Viedt*, 259 N.W.2d 510, 512 (S.D. 1977) ("[T]axes are imposed for the purpose of general revenue . . . ."); *Memphis Retail Liquor Dealers' Ass'n v. City of Memphis*, 547 S.W.2d 244, 245-46 (Tenn. 1977) ("If the imposition is primarily for the purpose of raising revenue, it is a tax . . . ."); *Hurt v. Cooper*, 110 S.W.2d 896, 899 (Tex. 1937) (finding that a tax is a charge with the "primary purpose" of "raising of revenue"); *V-1 Oil Co. v. Utah State Tax Comm'n*, 942 P.2d 906, 911 (Utah 1996), *vacated on other grounds*, 942 P.2d 915 (Utah 1997) ("Generally speaking, a tax raises revenue for general governmental purposes . . . ."); *Marshall v. Northern Virginia Transp. Authority*, 657 S.E.2d 71, 77-78 (Va. 2008) ("We consistently have held that when the primary purpose of an enactment is to raise revenue, the enactment will be considered a tax, regardless of the name attached to the act."); *City of Spokane v. Spokane Police Guild*, 553 P.2d 1316, 1319 (Wash. 1976) ("[I]f the primary purpose of legislation is regulation rather than raising revenue, the legislation cannot be classified as a tax even if a burden or charge is imposed."); *City of Huntington v. Bacon*, 473 S.E.2d 743, 752 (W.Va. 1996) ("The primary purpose of a tax is to obtain revenue for the government . . . ."); *State v. Jackman*, 211 N.W.2d 480, 485 (Wis. 1973) ("A tax is one whose

primary purpose is to obtain revenue . . . ."). *But see Apocada v. Wilson*, 525 P.2d 876, 884-85 (N.M. 1974) (holding that a charge that raises revenue beyond costs is not a tax); *Heatherly v. State*, 678 S.E.2d 656, 657 (N.C. 2009) (dividing equally on the question of definition of tax); *State ex. rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow*, 579 N.E.2d 705, 710 (Ohio 1991) ("It is not possible to come up with a single test that will correctly distinguish a tax from a fee in all situations where the words 'tax' and 'fee' arise."); *Auto. Club of Oregon v. State*, 840 P.2d 674, 678 (Or. 1992) (describing "tax" as any revenue collected by government, separate from "assessment").

B. The Individual Mandate's Charge is a Penalty and Not a Tax Because Its Primary Purpose is Not to Raise Revenue but to Penalize.

No evidence exists that the primary purpose of the individual mandate is to raise revenue, and for this reason, the individual mandate cannot be considered a tax for purposes of the U.S. Constitution or the Anti-Injunction Act. Of the various individuals and organizations opining on the purpose of the individual mandate, none have cited its ability to raise revenue.

The most common reason cited for the individual mandate's purpose is to regulate so-called "free riders," those who use health care services but do not bear the full cost themselves. President Obama, asked in a September 2009 ABC News interview whether the individual mandate is a tax, stated that he "absolutely reject[s] that notion," analogizing it to

state mandates to purchase auto insurance which "[n]obody considers . . . a tax increase." Jacqueline Klingebiel, *Obama: Mandate is Not a Tax*, ABC NEWS (Sep. 20, 2009), http://abcnews.go.com/blogs/politics/2009/09/obama-mandate-is-not-a-tax. "[F]or us to say that you've got to take a responsibility to get health insurance is absolutely not a tax increase." *Id. See also* Bradley Herring, *An Economic Perspective on the Individual Mandate's Severability from the PPACA*, 364 NEW ENG. J. MED. 16e (Mar. 10, 2011) ("The primary purpose of the individual mandate is to mitigate this adverse selection . . . ."); BlueCross BlueShield of North Carolina, *In the Spotlight: ACA Insurance Reforms* (July 13, 2011), https://www.bcbsnc.com/assets/hcr/pdfs/spotlight_insurance_reforms.pdf ("From a policy perspective, the primary purpose for the individual mandate is to enable Guarantee Issue and Community Rating to work by creating a risk pool with a relative mix of healthy and unhealthy individuals."); Guatham Nagesh, "IRS chief: Buy health insurance or lose your tax refund," DAILY CALLER (Apr. 6, 2010) (describing IRS Commissioner Doug Shulman's speech outlining options to "penalize" taxpayers who do not comply with the mandate); Igor Volsky, "On Whether the Individal [sic] Mandate Is A Tax," THINKPROGRESS.ORG (July 20, 2010) ("The mandate is not a 'tax' in the sense that its primary purpose is to raise revenue[,] even though it meets the legal definition . . . [which includes] nearly any provision that adds money to the federal treasury.").

The statute's references to the individual mandate also contradict any suggestion that it is considered a tax. The mandate appears under the

heading "Requirement to Maintain Minimum Essential Coverage." 26 U.S.C. § 5000A. The charge for not meeting this requirement is referred to as a "Shared Responsibility Payment." 26 U.S.C. § 5000A(b). The statute further refers to the mandate charge as a "penalty" twelve times and as a tax zero times. *See* 26 U.S.C. § 5000A *et seq.* The mandate also does not share the same enforcement provisions as taxes, with the IRS denied the use of liens or levies to enforce the provision. *See* 26 U.S.C. § 5000A(g)(2).

It is true that the Joint Committee on Taxation (JCT) technical explanation of the bill does refer to the individual mandate as an excise tax in its subheading on the individual mandate, but all other JCT references evidence the JCT's judgment that the mandate is not a tax. *See* Joint Committee on Taxation, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," As Amended, in Combination with the "Patient Protection and Affordable Care Act"* at 31 (Mar. 21, 2010), http://www.jct.gov/publications.html?func=startdown&id=3673. Aside from the reference in the subheading, the JCT never again refers to the mandate as a "tax" and instead invariably refers to it as a "penalty," doing so 24 times in its technical explanation of how the provision operates. *See id.* at 31-34. The explanation also falls under the policy and regulatory provisions of the Act, not under the "Revenue Provisions" heading. *See id.* at i-ii. JCT also left the mandate out of its revenue projections, where it estimated the financial impact of all provisions of the bill related to raising revenue. *See* Joint Committee on Taxation, *Estimated Revenue*

Effects of the Amendment in the Nature of a Substitute to H.R. 4872, The "Reconciliation Act of 2010," As Amended, In Combination With the Revenue Effects of H.R. 3590, The "Patient Protection And Affordable Care Act ('PPACA')," As Passed by the Senate, And Scheduled For Consideration By The House Committee On Rules On March 20, 2010, at 1-3 (Mar. 20, 2010), http://www.jct.gov/publications.html?func=startdown&id=3672.

This Court has repeatedly recognized a firm distinction between taxes and penalties, the latter of which are regulatory in nature, designed with the purpose of deterring and punishing people who are engaging in illegal activities. *See, e.g.*, *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996), quoting *La Franca*, 282 U.S. at 572 ("[A] 'penalty,' as the word is here used, is an exaction imposed by statute as punishment for an unlawful act."); *Dep't of Rev. of Montana v. Kurth Ranch*, 511 U.S. 767, 779-80 (1994) ("[W]hereas fines, penalties, and forfeitures are readily characterized as sanctions, taxes are typically different because they are usually motivated by revenue-raising, rather than punitive, purposes."); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922) ("Taxes are occasionally imposed in the discretion of the Legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty,

with the characteristics of regulation and punishment.").

The individual mandate is properly described as a penalty, not a tax, because these definitions describe the individual mandate quite well. Those who must make a payment must do so precisely because they have not adhered to the regulatory provisions of the Act. While incidental revenue may be generated, the undeniable purpose of the individual mandate is to punish, discourage, and reduce illegal behavior, as a penalty and not a tax.

II. THE GOVERNMENT'S CONTENTION THAT THE INDIVIDUAL MANDATE IS A TAX DOES NOT ADDRESS THE FACT THAT IT WOULD BE AN UNCONSTITUTIONAL CAPITATION TAX UNAPPORTIONED BY STATE POPULATION.

In asserting that the individual mandate is permissible under the Taxing Power, the Government does not address the fact that if this were true, this tax would be a capitation tax unapportioned by state population, in direct violation of the constitutional requirement that "No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." U.S. CONST. art. I, § 9, cl. 4. A direct tax is only permissible if it is apportioned among the states in proportion to population, or levied on incomes. *See* U.S. CONST. amend. XVI; *Eisner v. Macomber*, 252 U.S. 189, 206 (1920) ("A proper regard for its genesis, as well as its very clear language, requires also that this amendment shall not be extended by loose

construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts.").

The prohibition of unapportioned direct taxes exists for a strong purpose. Alexander Hamilton, conceding that a federal government with unlimited taxing power invited tyranny, explained that "[t]he proportion of these taxes is not to be left to the discretion of the national Legislature but is to be determined by the numbers of each State as described in the second section of the first article." THE FEDERALIST NO. 36, 226, 229-30 (1788). Hamilton characterized the provision as a compromise that ensured that the federal government could have recourse to direct taxation if needed, but not in a way that could invite abuse or partiality. *See id.* George Mason, who felt that the provision was not sufficiently restrictive on government direct taxation, nevertheless described it correctly as meaning "that the quantity to be raised of each state, should be in proportion to their numbers in the manner therein directed." GEORGE MASON, VIRGINIA RATIFYING CONVENTION PAPERS 3:1087 (June 17, 1788).

Assuming *arguendo* that the Government's characterization of the mandate as a tax is correct, it would operate as a levy on individuals and not their incomes. The mandate penalty in 2016, for example, is imposed either in the amount of $695 per uninsured adult, or at the rate of 2.5 percent of the

uninsured taxpayer's income in excess of the filing threshold (in 2010, $9,350), whichever is greater. *See* 26 U.S.C. § 5000A(c). Although the latter calculation could conceivably be considered a tax on income, the former direct amount cannot be. If it is a tax, it is a capitation tax, levied directly on the individual. Because its collection is not apportioned according to state population, its operation would violate U.S. CONST. art. I, § 9, cl. 4.

III. HOLDING THAT THE INDIVIDUAL MANDATE IS A TAX WOULD LEAD TO SERIOUS NEGATIVE CONSEQUENCES FOR LEGAL JURISPRUDENCE.

This Court should be reluctant to reject the widely-accepted definition of "tax" as an exaction imposed for the primary purpose of raising revenue for general spending, because to do so would jeopardize settled precedent and taxpayer protections at the federal level and in nearly every state. There has been no development in law that necessitates such a far-reaching change.

A meaningful distinction between "tax" and "penalty" is vital to give operation to numerous federal and state provisions relating to tax policy. If this Court held that a tax is any government collection of revenue, then government revenue collection efforts across the country would be imperiled, as many revenue sources are not subjected to the heightened restrictions that "taxes" are. To collect fees or impose criminal fines, states for the first time would see these charges subjected to supermajority, multiple reading, and other requirements. While some states may choose to

extend such procedural requirements to non-tax revenue sources, this should be done explicitly through the legislative process, not by announcing a new definition of "tax" not comprehended at the time these provisions were adopted.

This Court should therefore be cautious not to encourage treating penalties as taxes, as that would render many state powers, and potentially the Taxing Power's limitations, meaningless.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Tax Foundation respectfully requests that the decision below be affirmed as to their conclusion that the Minimum Coverage Provision exceeds Congress's Taxing Power under the U.S. Constitution.

Respectfully submitted,

JOSEPH D. HENCHMAN*
Vice President, Legal Projects
TAX FOUNDATION
529 14th Street, N.W.,
Suite 420
Washington, D.C. 20045
(202) 464-6200
henchman@taxfoundation.org

* *Counsel of Record*

February 13, 2012

AMICUS CURIAE BRIEF

No. 11-398

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

STATE OF FLORIDA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR *AMICI CURIAE* TAX LAW PROFESSORS SUPPORTING VACATUR (ANTI-INJUNCTION ACT)

MICHAEL B. DE LEEUW
Counsel of Record
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
One New York Plaza
New York, NY 10004
(212) 859-8000
michael.deleeuw@friedfrank.com

Attorney for Amici Curiae

January 13, 2012

240020

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. FEDERAL COURT JURISDICTION TURNS ON WHETHER THE 5000A PENALTY CONSTITUTES A "TAX" FOR PURPOSES OF SECTION 7421 6

II. A BRIEF OVERVIEW OF THE TAX ASSESSMENT AND COLLECTION PROCESS 7

A. The Process of Assessment: Tax Determination 8

B. The Process of Collection: Tax Enforcement 10

III. SECTION 5000A'S MODIFICATIONS TO THE TAX COLLECTION PROCESS FOR THE 5000A PENALTY ESTABLISH THAT THE 5000A PENALTY CONSTITUTES A TAX UNDER SECTION 7421 18

A. The Limitations on the IRS's Powers to Enforce the 5000A Penalty Show That Congress Intended for Those Powers to Be Otherwise Available, Implying That the Penalty Is a Tax Under Those Provisions 19

B. Congress Structured 5000A to Deny Taxpayers Any Opportunity to Challenge Their Liability for the 5000A Penalty, Which Suggests That

TABLE OF CONTENTS

Section 7421 Should Apply and Bar This Suit 21

C. **Section 7421 Should Bar Review of the 5000A Penalty Because the Limitations on the 5000A Penalty's Enforcement Render It Functionally Similar to a Reduction in Refundable Tax Credits** 25

CONCLUSION 32

TABLE OF AUTHORITIES

CASES PAGE(S)

Bob Jones Univ. v. Simon,
416 U.S. 725 (1974).....21, 31

Brafman v. United States,
384 F.2d 863 (5th Cir. 1967).....9

Bull v. United States,
295 U.S. 247 (1935).....9

Cheatham v. United States,
92 U.S. 85 (1875).....8

Citizen's State Bank of Barstow, Tex. v. Vidal,
114 F.2d 380 (10th Cir. 1940).....12

Enochs v. Williams Packing & Navigation Co.,
370 U.S. 1 (1962).....6

Estate of Bender v. Comm'r,
827 F.2d 884 (3d Cir. 1987).....16

Flora v. United States,
357 U.S. 63 (1958), *aff'd on rehearing*, 362
U.S. 145 (1960).....12

Flora v. United States,
362 U.S. 145 (1960).....8, 21

Florida v. U.S. Dep't of Health and Human Services,
716 F.Supp. 2d 1120 (N.D. Fla. 2010).....3, 18, 30

Hudgins v. IRS,
967 F.2d 973 (4th Cir. 1992).....12

Illinois Masonic Home v. Comm'r,
93 T.C. 145 (1989).....8

In re Leckie Smokeless Coal Co.,
99 F.3d 573 (4th Cir. 1996).....21

Jones v. Liberty Glass Co.,
332 U.S. 524 (1947).....15

Liberty Univ., Inc. v. Geithner,
2011 WL 3962915 (4th Cir. Sept. 8, 2011).....2

Middlesex Sav. Bank v. Johnson,
777 F. Supp. 1024 (D. Mass. 1991) 13

Pagonis v. United States,
575 F.3d 809 (8th Cir. 2009).....24

Pennsylvania v. New Jersey,
426 U.S. 660 (1976) (per curiam) 30

Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011).....2, 3, 18

South Carolina v. Regan,
465 U.S. 367 (1984).....21

Sunoco Inc. v. Comm'r,
663 F.3d 181 (3d Cir. 2011) 16, 24

United States v. Brosnan,
363 U.S. 237 (1960).....11

United States v. Hodes,
355 F.2d 746 (2d Cir. 1966) *cert. dismissed*,
386 U.S. 901 (1967) 17

United States v. Munsey Trust Co.,
332 U.S. 234 (1947) 15

United States v. Overman,
424 F.2d 1142 (9th Cir. 1970) 17

United States v. Rogers,
461 U.S. 677 (1983) 14

United States v. Sec. Trust & Sav. Bank,
340 U.S. 47 (1950) 12

United States v. Whiting Pools, Inc.,
462 U.S. 198 (1983) 14

STATUTES

28 U.S.C § 2201(a) 6

28 U.S.C. § 3201 17

I.R.C. § 32 30

I.R.C § 3402(m) 29

I.R.C. § 5000A(a) 6

I.R.C. § 5000A(g)(1) 2, 21

I.R.C. § 5000A(g)(2)(A) 25

I.R.C. § 5000A(g)(2)(B) 26

I.R.C. § 6201(a) 2, 3, 8

I.R.C. § 6203 ..... 7, 8

I.R.C. § 6320(c) 23

I.R.C. § 6321 ..... passim

I.R.C. § 6322 12

I.R.C. § 6323(a) 13

I.R.C. § 6330(c)(2)(A)(ii) 23

I.R.C. § 6330(c)(2)(B) 23, 24

I.R.C. § 6330(d)(1), (e) 24

I.R.C. § 6331 ..... 7, 14, 19

I.R.C. § 6331(a) 19, 26

I.R.C. § 6331(b) 14

I.R.C. § 6332 15

I.R.C. § 6334 14

I.R.C. § 6401(b) 15

I.R.C. §§ 6402 ..... 16, 20

I.R.C. § 6502 ..... 7, 12

I.R.C. § 6502(b) 16

I.R.C. § 6671(a) 2, 3

I.R.C. § 7401 17

I.R.C. § 7421 ..... passim

I.R.C. § 7701(c) 3

Patient Protection and Affordable Care Act, 26 U.S.C. § 5000A ..... passim

The Declaratory Judgment Act, 28 U.S.C. § 2201 6

OTHER AUTHORITIES

Bryan T. Camp, *The Failure of Adversary Process in the Administrative State*, 57 IND. L.J. 1 (2009) 23

Bryan T. Camp, *Tax Return Preparer Fraud and the Assessment Limitation Period*, 116 TAX NOTES 687 (2007) 8

Chris Rizo, *Obamacare Scofflaws to Have Tax Refunds Withheld*, LEGAL NEWS ONLINE 28

INTERNAL REVENUE SERVICE, DATA BOOK 2006, ... 11

INTERNAL REVENUE SERVICE, DATA BOOK 2010, ... 15

INTERNAL REVENUE SERVICE, DATA BOOK 2010, Table 16 (2011), *available at* http://www.irs.gov/pub/irs-soi/10databk.pdf 13, 17

NATIONAL TAXPAYER ADVOCATE, DEP'T OF THE TREASURY, 2010 ANNUAL REPORT TO CONGRESS, EXECUTIVE SUMMARY 17, 28

NATIONAL TAXPAYER ADVOCATE, DEP'T OF THE TREASURY, TAX YEAR 2008 CONGRESSIONAL DISTRICT STATISTICS 29

William D. Elliot, FEDERAL TAX COLLECTION, LIENS, AND LEVIES (2d ed. 2008) 8, 12

INTEREST OF AMICI CURIAE[1]

Amici curiae are professors of law who specialize in the area of tax procedure and administration. They have expertise in the statutory language and application of Subtitle F of the Internal Revenue Code as well as the related doctrines developed by the Supreme Court. Amici's interest in this case is that I.R.C. § 7421, the Anti-Injunction Act, be understood, in the proper perspective of tax enforcement generally, as a bar to the suit brought by Respondents to challenge the minimum coverage provision of the Patient Protection and Affordable Care Act, I.R.C. § 5000A.

Amici offer their view on the application of Section 7421 only. Amici provide their institutional affiliations for identification purposes only. Amici include:

- Jordan M. Barry, Associate Professor of Law, University of San Diego School of Law
- Patricia A. Cain, Inez Mabie Distinguished Professor of Law, Santa Clara University School of Law
- Bryan T. Camp, George H. Mahon Professor of Law, Texas Tech University School of Law
- T. Keith Fogg, Professor of Law, Villanova University School of Law

---

[1] No counsel for any party has authored this brief in whole or in part, and no person other than amici or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The parties have filed notices with this Court consenting to the filing of amicus curiae briefs.

SUMMARY OF ARGUMENT

Several judges in the various cases arising out of challenges to the Patient Protection and Affordable Care Act ("ACA") determined that the Anti-Injunction Act ("Section 7421") should bar lawsuits against the ACA's Section 5000A penalty. In particular, these courts have thought it significant that Section 5000A(g)(1) dictates that the 5000A penalty "be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68," subject to some additional collection rules discussed below. I.R.C. § 5000A(g)(1). Section 6671(a), which is contained in Subchapter B of Chapter 68 of the Code, states: "The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes." I.R.C. § 6671(a). Section 6201, which grants the IRS its tax assessment authority, expressly includes "assessable penalties" within its definition of "tax." I.R.C. § 6201(a). Both the Fourth Circuit and Judge Kavanaugh, of the D.C. Circuit, determined that these provisions compel the conclusion that the Section 5000A penalty is a tax for purposes of Section 7421: The ACA penalty is to be treated like an assessable penalty, and an assessable penalty is to be treated like a tax, to which Section 7421 applies. *See Liberty Univ., Inc. v. Geithner*, 2011 WL 3962915, at *18-20 (4th Cir. Sept. 8, 2011); *Seven-Sky v. Holder*, 661 F.3d 1, 31 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("[A]s we learn in logic class, when A=B and B=C, then A=C.").

In our view, this argument is correct. But even if this Court determines that Sections 6671 and 6201 are not dispositive and do not render the 5000A penalty a tax for purposes of Section 7421, that does not establish that the 5000A penalty is not a tax for purposes of Section 7421. Both Section 6671 and Section 6201 are inclusive provisions that, by their terms, do not operate to exclude anything from the definition of tax. I.R.C. § 6201(a); I.R.C. § 6671(a); *see also* I.R.C. § 7701(c) ("The terms 'includes' and 'including' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined.").

The Court would still need to evaluate whether the 5000A penalty constitutes a tax for Section 7421 purposes by looking at the relationship between the penalty and other federal tax laws.

Several judges who concluded that Section 7421 *does not* apply to the 5000A penalty reached that conclusion, in part, because they thought it significant that Congress limited the IRS's ability to collect the 5000A penalty. *See, e.g.*, *Seven-Sky v. Holder*, 661 F.3d 1, 6 (D.C. Cir. 2011) ("Though the shared responsibility payment penalty is codified as part of the Internal Revenue Code, Congress prohibited the IRS from using traditional criminal enforcement or levying powers to collect the payment."); *Florida v. U.S. Dep't of Health and Human Services*, 716 F. Supp. 2d 1120, 1141 (N.D. Fla. 2010). These courts determined that these restrictions on collection bolster the conclusion that the 5000A penalty is not a tax for purposes of Section 7421. *Id.* While this approach may make sense in the abstract, it is misguided in this particular case.

We submit that the limitations actually support the exact opposite result in three distinct ways.

First, the fact that Congress thought it important to include these limitations strongly implies Congressional understanding that the 5000A penalty operates as a tax for purposes of key tax administrative provisions. This in turn suggests that the 5000A penalty is a tax within the scope of Section 7421, since the purpose of Section 7421 is to protect federal tax administration.

Second, Section 5000A is structured to avoid every procedure that a taxpayer could use to challenge liability before paying it. Unlike myriad other taxes and penalties for which Congress has specifically provided relief from the general "pay first, litigate later" regime, the language used in Section 5000A demonstrates that Congress did not intend the 5000A penalty to be exempt from the general pay-first rule. In addition, the collection restrictions of Section 5000A(g)(2) also ensure that taxpayers will not be able to challenge the 5000A penalty through other avenues that the Code provides to allow taxpayers to dispute tax liabilities before paying them. Since Section 7421 is an integral part of the general pay-first regime, it follows that it applies to the 5000A penalty.

Last, when one considers which taxpayers can actually be forced to pay the 5000A penalty, given the effects of the specific limitations that Congress imposed on its collection, the 5000A penalty looks increasingly like a true tax measure, regardless of its label. As a practical matter, the 5000A penalty will largely operate like a reduction of refundable credits for taxpayers who fail to maintain minimum

coverage. Section 7421 would bar taxpayer attempts to contest determinations about refundable credits. Since the 5000A penalty is functionally very similar, the Section 7421 analysis should be the same.

ARGUMENT

I. FEDERAL COURT JURISDICTION TURNS ON WHETHER THE 5000A PENALTY CONSTITUTES A "TAX" FOR PURPOSES OF SECTION 7421

The ACA creates a new section in the Internal Revenue Code (the "Code"), that requires certain taxpayers to maintain minimum healthcare coverage for themselves and their dependents. I.R.C. § 5000A(a). Section 5000A(b) requires those taxpayers who fail to do so to pay an additional sum (the "5000A penalty") to the Internal Revenue Service (the "IRS") when they file their federal tax returns.

Section 7421, also known as the Anti-Injunction Act, provides that "[e]xcept as provided in [fourteen provisions that are not relevant here], no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." I.R.C. § 7421(a). This Court has previously held that, when it applies, Section 7421 strips federal courts of subject matter jurisdiction. *See Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5 (1962).

Similarly, the Declaratory Judgment Act, 28 U.S.C. § 2201, which governs how and under what circumstances federal courts can issue declaratory judgments, contains an explicit exception that prohibits federal courts from issuing declaratory judgments that pertain to tax laws. 28 U.S.C § 2201(a). This Court has stated that this exception is at least coterminous with, and may be even broader

than, Section 7421's prohibition. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 n.7 (1974). Accordingly, if Section 7421 bars challenges to the 5000A penalty, any challenges to Section 5000A(a)'s mandatory coverage provision would not be allowed under the Declaratory Judgment Act.

Thus, assuming that Section 7421's prohibition on lawsuits is jurisdictional, as this Court has previously held, federal courts' jurisdiction over the lawsuits that challenge the individual mandate and the 5000A penalty hinges on whether the 5000A penalty constitutes a tax for purposes of Section 7421. An analysis of the enforcement mechanisms of Section 5000A reveals that the 5000A penalty is in fact a tax under Section 7421, an analysis to which we now turn.

II. A BRIEF OVERVIEW OF THE TAX ASSESSMENT AND COLLECTION PROCESS

Tax administration divides into two functions: tax determination and tax collection. The first involves the IRS making a formal administrative determination of a taxpayer's liability. This process culminates in an assessment, a formal recording of the taxpayer's liability for a particular tax in the IRS's records. I.R.C. § 6203. The assessment also marks the beginning of the administrative collection process. A proper assessment enables the tax lien to arise. I.R.C. § 6321. It allows the IRS to begin seizing taxpayer property under its levy authority. I.R.C. § 6331. Finally, a proper assessment starts the running of a 10-year statute of limitations for collections. I.R.C. § 6502. In contrast, if no proper

assessment is made within the applicable assessment limitations period in Section 6501 (generally 3 years), the taxpayers' liabilities are extinguished. *See Illinois Masonic Home v. Comm'r*, 93 T.C. 145, 149-50 (1989) (expiration of the statute of limitations period for assessment extinguishes liability). *See generally* Bryan T. Camp, *Tax Return Preparer Fraud and the Assessment Limitation Period*, 116 TAX NOTES 687 (2007) (tracing the history of assessment limitation statutes from 1862 to show their operation as statutes of repose); William D. Elliot, FEDERAL TAX COLLECTION, LIENS, AND LEVIES 2-4 (2d ed. 2008) ("The tax assessment is a predicate to collection of the tax; tax collection follows assessment").

A. The Process of Assessment: Tax Determination

Since the Civil War, language now found in Section 6201 has authorized the IRS to make the inquiries, determinations, and assessments of all taxes. Currently, Section 6201 makes clear that the term "taxes" is defined broadly, and encompasses "interest, additional amounts, additions to the tax, and assessable penalties." I.R.C § 6201(a). Therefore, Section 6201 establishes that assessable penalties and taxes are essentially treated the same for purposes of tax administration.[2]

---

[2] Accordingly, as argued by the court-appointed amicus curiae, if the 5000A penalty constitutes either a tax or an assessable penalty under Section 6201 it should be treated as a tax under Section 7421. Brief for Court-Appointed Amicus Curiae Supporting Vacatur (Anti-Injunction Act) at 12-13, U.S. *Dep't of Health and Human Services v. Florida*, __ U.S. __ (2012).

At one level, an assessment is simply the formal recordation of a tax liability by the IRS. I.R.C. § 6203; *see also Brafman v. United States*, 384 F.2d 863, 865 n.4 (5th Cir. 1967). But assessments are not ministerial acts. They reflect the IRS's judgment of taxes due and, with only narrow exceptions, are contestable in court only after full payment. *Flora v. United States*, 362 U.S. 145 (1960) (full payment of tax required before federal court will have jurisdiction over refund suit); *Cheatham v. United States*, 92 U.S. 85, 89 (1875) ("payment of the tax claimed [is] a condition precedent to a resort to the courts by the party against whom the tax is assessed"). Justice Owen Roberts explained the strong pay-first rule in *Bull v. United States*, 295 U.S. 247, 260 (1935):

> The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt. * * * Thus the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer. The assessment supersedes the pleading, proof and judgment necessary in an action at law, and has the force of such a judgment. The ordinary defendant stands in judgment only after a hearing. The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for

unjust administrative action is the right to claim restitution.

Contrary to many taxpayers' beliefs, since the income tax was first introduced in 1862, federal income taxes have never been "self-assessed" by taxpayers as either a legal or practical matter. For the first fifty years of the income tax's existence, the IRS made assessments of income tax liabilities by recording its judgment of the amount due in its books and presenting taxpayers with a bill. The Anti-Injunction Act, now Section 7421, was enacted almost immediately after Congress first allowed for income tax refunds. Its language, largely unchanged since its enactment in 1867, requires taxpayers who disagree with their assessed tax liability to pay the tax and sue for a refund. The general rule has always been that taxpayers must pay first, litigate later.

In 1924, Congress created the "deficiency procedure," now codified in Sections 6211–6216, to allow taxpayers to obtain judicial review of their potential liability for a carefully limited set of taxes. When these procedures apply, they prevent the IRS from making an assessment until the taxpayer has had an opportunity to seek judicial review of the liability in the Tax Court. I.R.C. §§ 6211–6216. They are thus a specific exception to the longstanding rule that taxpayers must pay first and then litigate through the refund procedure.

B. The Process of Collection: Tax Enforcement

The completion of an assessment marks the end of the tax determination process and begins the collection process, in which the IRS attempts to

enforce the assessed liability. To collect taxes, the IRS first uses four administrative tools: notices, the federal tax lien, levies, and setoffs. In certain circumstances, if its administrative collection tools are insufficient, the IRS then turns to the courts for aid.

Notices

First, the IRS simply asks the taxpayer to pay the assessed liability. Section 6303 requires the IRS to send the taxpayer notice and demand for payment; the IRS generally sends multiple automatically generated notices of increasing intensity. Most of the time, the notice, combined with the threat of penalties for failure to pay, is sufficient to induce payment. *See* INTERNAL REVENUE SERVICE, DATA BOOK 2006, Table 16 (2006), *available at http://www.irs.gov/taxstats/article/0,,id=168610,00.html* (showing that the "Total amount collected" for FY2005 was $40.8 billion, of which $28.7 billion came from first and subsequent notices of balance due, and $12.1 billion came from other collection actions).

The Federal Tax Lien

The tax lien is an effective security device that protects the interest of the United States by securing the government's place in line among creditors. *United States v. Brosnan*, 363 U.S. 237, 241 (1960). Section 6321 creates the federal tax lien and provides that

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to

> tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

I.R.C. § 6321.

The statutory language of Section 6321 is intentionally broad, creating a single federal tax lien with an almost unlimited scope. *See id.* All of the taxpayer's property, the taxpayer's rights to property, and even property that the taxpayer receives during the existence of the lien are subject to the federal tax lien. *Id.* Therefore, the lien can attach to nearly all of the taxpayer's property, including, but not limited to, real property, monies in any bank or brokerage accounts, salaries and wages, rights to accounts receivable, commingled property, escrowed property, certain future interests (including reversions, remainders, and revocable interests) in property, and beneficial interests in trust. *See Citizen's State Bank of Barstow, Tex. v. Vidal*, 114 F.2d 380, 383 (10th Cir. 1940) ("The statute covering collection of taxes is broad and comprehensive and Congress intended to subject all of a taxpayer's property, except that specifically exempt to the payment of taxes."); William D. Elliot, FEDERAL TAX COLLECTION, LIENS, AND LEVIES 9-29 – 9-60 (2d ed. 2008). The lien arises automatically and is deemed perfected once a proper assessment is made, enabling the lien to relate back to the date of assessment. I.R.C. § 6321; I.R.C. § 6322; *Flora v. United States*, 357 U.S. 63 (1958), *aff'd on rehearing*, 362 U.S. 145 (1960). Once it arises, the lien remains in effect until either the tax liability is satisfied in

full or the statute of limitations expires. *Id.*; I.R.C. § 6502; *see also Hudgins v. IRS*, 967 F.2d 973 (4th Cir. 1992).

It is important to understand the relationship between the federal tax lien and a notice of federal tax lien. There is only one tax lien securing a given tax liability, and it arises automatically by operation of law. I.R.C. §6321. *See generally United States v. Sec. Trust & Sav. Bank*, 340 U.S. 47 (1950). At this stage, the tax lien is a "secret" lien because, although it is perfected when it first arises, there is no public record of its existence at that time.

Concerned with the potential unfairness that the invisible federal tax lien could cause to the taxpayer's other creditors, Congress provided a special rule for purchasers for value, mechanics lienors, holders of security interests, and judgment lien creditors. I.R.C. § 6323(a). The federal tax lien is only enforceable against these creditors if the IRS files a notice of federal tax lien before it perfects its interests. The notice of federal tax lien is a public document that makes the lien visible, thereby preventing unfair surprise. For example, if a taxpayer takes out a home equity loan and the bank properly files its security interest before the IRS files the notice of federal tax lien, the bank's lien takes priority over the tax lien. *See, e.g.*, *Middlesex Sav. Bank v. Johnson*, 777 F. Supp. 1024 (D. Mass. 1991) (applying lien rules to a variety of competing creditors).

The IRS generally files notices of federal tax lien when its computers detect sufficient assets to justify the cost of filing. In fiscal year 2010, the IRS filed over one million notices of federal tax lien with

respect to over nine million delinquent taxpayer accounts. INTERNAL REVENUE SERVICE, DATA BOOK 2010, Table 16 (2011), *available at* http://www.irs.gov/pub/irs-soi/10databk.pdf. While there is only a single federal tax lien that applies to all of a taxpayer's property, the IRS may file multiple public notices with respect to that lien, depending on how much property the taxpayer has and in what locations. The IRS never files a tax lien. It only files the notice of federal tax lien, which brings the already existing tax lien to light.

The Administrative Levy

Although they coexist independently of one another, the federal tax lien works closely with the IRS's levy power. I.R.C. § 6331. The levy power allows the IRS to seize and sell any property or rights to property held by the taxpayer. It provides the IRS with a "quick and relatively inexpensive" way to collect on its security interest in the taxpayer's property by "bring[ing] the property into the Service's legal custody." *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 211 (1983); *United States v. Rogers*, 461 U.S. 677, 699 (1983). After seizure, the IRS then sells the property in order to satisfy the taxpayer's liability. I.R.C. § 6331(b).

The levy power is available independently of the federal tax lien, so the IRS may still levy to satisfy an assessed liability even if it has released its lien. I.R.C. § 6331. But any property or right to property subject to the federal tax lien may be seized and sold by the IRS pursuant to its levy power. I.R.C. § 6331.

Like the federal tax lien, the levy power is a potent collection tool. The IRS's levy power has an

expansive scope and is easy for the IRS to wield; in practice, the levy power is mostly automated. The only substantive limitations on the levy power are a few very specific and narrow limitations intended to protect the taxpayer and minor children from extreme poverty. I.R.C. §§ 6334(a) - (e). The IRS can easily levy against the taxpayer's property or rights to property even if the property is in the possession of a third party. In practice, nearly all IRS levies are made against taxpayer property in the possession of third parties, such as bank accounts and wages. I.R.C. § 6332; *see also* INTERNAL REVENUE SERVICE, DATA BOOK 2010, Table 16 (2011), *available at* http://www.irs.gov/pub/irs-soi/10databk.pdf (indicating that, in 2010, the IRS served over 3.6 million notice of levies on third parties and enforced only 605 "seizures," which is the term the IRS uses for levies against property that is to be sold at auction).

The Setoff Power

The IRS also has a setoff power under both Section 6402 and common law. *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947). This power allows the IRS to setoff a taxpayer's "overpayments" of certain tax liabilities against the taxpayer's other outstanding tax liabilities. This Court has defined the term "overpayment" as "any payment in excess of that which is properly due," regardless of the manner in which the overpayment arose. *Jones v. Liberty Glass Co.*, 332 U.S. 524, 531 (1947). The Code reinforces this broad definition, specifically noting that it encompasses payments for any tax liabilities assessed or collected after the expiration of the applicable statute of limitations and

any refundable credits that exceed a taxpayer's tax liability. I.R.C. § 6401(b).

Section 6402 enables the IRS to employ its setoff power with great administrative and logistical ease. If the IRS computers find any assessed but unpaid liabilities attributed to the taxpayer, the computers automatically setoff the overpayment against the liability. Generally, the IRS need not inform the taxpayer of how it will employ its setoff power prior to doing so and need only inform the taxpayer of the setoff after the fact. I.R.C. §§ 6402(c), (d)(1)(C), (f)(1)(C). Since taxpayers will generally have no way of knowing of a pending setoff, they will not be able to take steps to prevent it from happening. Once made, taxpayers have no recourse to contest a setoff except by filing a claim for refund. *Sunoco Inc. v. Comm'r*, 663 F.3d 181 (3d Cir. 2011) (IRS's decision to setoff cannot be challenged in the Tax Court). *See generally Estate of Bender v. Comm'r*, 827 F.2d 884 (3d Cir. 1987). Not even the National Taxpayer Advocate can force the IRS to reverse a setoff. Treas. Reg. §301.7811-1(c)(3) (describing limits of Taxpayer Advocate Orders).

Judicial Enforcement of Tax Collection: Section 7403

Although the IRS's administrative enforcement tools are at the heart of federal tax collection, the IRS can seek judicial assistance to enforce a tax liability through a federal lawsuit under Section 7403. The IRS has proved reluctant to use Section 7403. It generally requires its agents to fully pursue administrative remedies before turning to judicial action. *See* Internal Revenue Manual §§ 5.17.4.7, 25.3.2.3.

The IRS most often uses Section 7403 when it needs to extend the ten-year statute of limitations for collecting assessed liabilities. A levy's timeliness is measured with respect to the date that the levy is made, but an action under Section 7403 is timely so long as the action is commenced within the limitations period. I.R.C. § 6502(b); Internal Revenue Manual § 5.17.4.7. Also, if the IRS succeeds, it secures a judgment lien against the taxpayer's property. This judgment lien has its own additional independent and lengthy statute of limitations and also extends the life of the federal tax lien, which continues its independent existence. 28 U.S.C. § 3201 (providing that the judgment lien is effective, unless satisfied, for 20 years and may be renewed for one additional period of 20 years by filing a notice of renewal); *United States v. Overman*, 424 F.2d 1142 (9th Cir. 1970); *United States v. Hodes*, 355 F.2d 746 (2d Cir. 1966), *cert. dismissed*, 386 U.S. 901 (1967).

Because the IRS only employs Section 7403 in limited circumstances, a taxpayer is unlikely to be subject to a Section 7403 action. For example, in 2010, the IRS filed roughly 1.1 million notices of federal tax lien and filed 3.6 million notices of levy on third parties, but civil actions under Section 7403 produced only 46 judicial opinions. INTERNAL REVENUE SERVICE, DATA BOOK 2010, Table 16 (2011), *available at* http://www.irs.gov/pub/irs-soi/10databk.pdf; NATIONAL TAXPAYER ADVOCATE, DEP'T OF THE TREASURY, 2010 ANNUAL REPORT TO CONGRESS, EXECUTIVE SUMMARY, at 43, *available at* http://www.irs.gov/pub/irs-pdf/p2104c.pdf. There are two chief reasons why the IRS only uses Section 7403 after it exhausts its statutory methods of

administrative collection. First, as Section 7421 recognizes, a federal lawsuit to enforce a lien can be a potentially long and drawn out adversarial process. Second, the IRS cannot, itself, bring an action in federal court to enforce the lien through foreclosure. I.R.C. § 7401. Instead, the IRS must persuade the Department of Justice, which has its own priorities and demands on its resources, to commence the action on behalf of the United States. *Id.*

III. SECTION 5000A'S MODIFICATIONS TO THE TAX COLLECTION PROCESS FOR THE 5000A PENALTY ESTABLISH THAT THE 5000A PENALTY CONSTITUTES A TAX UNDER SECTION 7421

In considering the applicability of Section 7421, several courts below have argued that the ACA's modifications to the traditional IRS enforcement scheme show that the 5000A penalty is not a tax. *See, e.g.*, *Seven-Sky v. Holder*, 661 F.3d 1, 6 (D.C. Cir. 2011) (distinguishing the 5000A penalty from a tax because "Congress prohibited the IRS from using traditional criminal enforcement or levying powers to collect the payment"); *Florida v. U.S. Dep't of Health and Human Services*, 716 F.Supp. 2d 1120, 1141 (N.D. Fla. 2010) ("[T]he penalty is obviously not to be collected and treated 'in the same manner as taxes' in light of the fact that Congress specifically divorced the penalty from the tax code's traditional collection and enforcement mechanisms."). The court-appointed amicus has taken a more agnostic view. Brief for Court-Appointed Amicus Curiae Supporting Vacatur (Anti-Injunction Act) at 32, U.S. *Dep't of Health and Human Services v. Florida*, __

U.S. __ (2012). ("No intent to allow pre-enforcement challenges to the Affordable Care Act can be inferred from Congress's decisions to prohibit criminal prosecutions, notice of liens with respect to any property of a taxpayer, or levying any property of a taxpayer for failing to pay the Section 5000A penalty.").

In our view, Congress's changes to the traditional enforcement mechanisms—rather than suggesting that the 5000A penalty is not a tax—support the opposite conclusion. We submit that these limitations show that Congress intended the penalty to be a tax within the meaning of Section 7421 for three distinct reasons discussed below.

A. The Limitations on the IRS's Powers to Enforce the 5000A Penalty Show That Congress Intended for Those Powers to Be Otherwise Available, Implying That the Penalty Is a Tax Under Those Provisions

Section 5000A(g)(2) imposes specific limitations on the use of the IRS's levy power and the federal tax lien to collect the 5000A penalty. These limitations strongly imply that both of these collection tools would otherwise be available to enforce the 5000A penalty.

It takes a tax to trigger the levy power. Section 6331(a) allows the IRS to use its levy power when "any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand." If the 5000A penalty did not constitute a tax for purposes of Section 6331, the IRS would not be authorized to levy to collect it. The fact that Congress took deliberate steps to prevent the

IRS from using its levy power indicates that the IRS's levy power would otherwise be available to enforce the 5000A penalty. Accordingly, Section 5000A(g)(2)'s prohibition on the use of levies to enforce the 5000A penalty indicates that the 5000A penalty constitutes a tax for purposes of Section 6331.

It also takes a tax to trigger the federal tax lien. Section 6321 provides that the lien only arises "[i]f any person liable to pay any tax neglects or refuses to pay the same after demand." If the 5000A penalty did not constitute a tax for purposes of Section 6321, failure to pay the 5000A penalty would not give rise to a federal tax lien and there would be no need to restrict the IRS's ability to file notice of lien with respect to taxpayer's assessed 5000A penalty liability. The fact that Congress took deliberate steps to prevent the IRS from filing notice of lien with respect to an unpaid 5000A penalty liability indicates that failure to pay the 5000A penalty gives rise to a federal tax lien. Accordingly, Section 5000A(g)(2)'s restriction on the IRS's ability to use the federal tax lien to enforce the 5000A penalty indicates that the 5000A penalty constitutes a tax for purposes of Section 6321.

It is also worth noting that, in the past, Congress has made specific provisions to allow the setoff power to be used to help collect specific non-tax liabilities, such as child support. *See* I.R.C. §§ 6402(c)–(f). However, Section 6402 sets out separate provisions for each of these liabilities and specifically excludes them from the definition of tax. *See id.*; §§ 6402(c)–(g). Nor are they treated as taxes for purposes of other Code provisions. In stark contrast, there is no separate provision in Section 6402 for the

5000A penalty, and it constitutes a tax for several other provisions of the Code. This lends additional strong support to the conclusion that the 5000A penalty is an "internal revenue tax" within the meaning of Section 6402(a).

Section 5000A(g)(2)'s proscriptions on collection therefore indicate that the 5000A penalty is a "tax" for purposes of both the federal tax lien and the federal tax levy, two of the IRS's chief collection tools. Since the purpose of Section 7421 is to prevent interference with the process of federal tax collection, the fact that the 5000A penalty constitutes a tax for both of these collection provisions strongly favors treating the 5000A penalty as a tax for purposes of Section 7421.

B. Congress Structured 5000A to Deny Taxpayers Any Opportunity to Challenge Their Liability for the 5000A Penalty, Which Suggests That Section 7421 Should Apply and Bar This Suit

Federal tax administration is fundamentally a "pay first, litigate later" regime. Section 7421 is an integral part of that regime. Section 7421 has two principal purposes: "[1] to allow the federal government to assess and collect allegedly due taxes without judicial interference and [2] to compel taxpayers to raise their objections to collected taxes in suits for refunds." *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 584 (4th Cir. 1996); *accord South Carolina v. Regan*, 465 U.S. 367, 376 (1984); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974). The strong "pay first, litigate later" regime allows the IRS to more efficiently administer a hugely complex tax apparatus. *Flora v. Comm'r*, 362 U.S. 145 (1960)

(holding that full payment of a liability is required before federal court will have jurisdiction over a refund suit).

Two features of the language Congress employed in §5000A(g) explicitly invoke this fundamental rule, and nothing Congress wrote in Section 5000A suggests to the contrary. First, as to assessment, Congress instructed the IRS to assess the Section 5000A penalty "in the same manner as an assessable penalty." I.R.C. § 5000A(g)(1). Second, as to collection, Congress limited how the IRS could collect the tax by forbidding the use of criminal penalties and of two (of its four) administrative collection tools. Section 7421 itself speaks in those terms, forbidding suits either for the purpose of restraining the "assessment" or "collection" of any tax.

By codifying Section 5000A in subtitle D, chapter 48 of the Code, and providing that the 5000A penalty is to be assessed and collected "in the same manner as an assessable penalty under subchapter B of chapter 68," Congress chose to place the 5000A penalty outside the scope of the Code's deficiency procedures. By doing so, it precluded taxpayers from being able to challenge their liability for the 5000A penalty before the IRS makes an assessment. Taxpayers must instead follow the pay-first rule.

Congress accomplished a similar result through the limitations it imposed on the collection of the 5000A penalty. Section 5000A(g)(2) forbids the IRS from levying and from filing notices of federal tax lien with respect to unpaid 5000A penalty liability. At the same time, however, Congress left the other major administrative collection tools—the

notices and the setoff power—untouched. As with Congress's choice on assessment, this choice about collection has a similar consequence: taxpayers will not be able to obtain judicial review of IRS collection decisions before payment. If Congress had allowed the IRS to file notices of lien or to levy, taxpayers would be able to use the Collection Due Process ("CDP") provisions of the Code to contest those collection decisions pre-payment. Congress added the CDP procedures in 1998 to ensure that taxpayers had the ability to challenge certain IRS collection decisions before payment. *See generally* Bryan T. Camp, *The Failure of Adversary Process in the Administrative State*, 57 IND. L.J. 1 (2009) (reviewing the history and purpose of CDP enactment).

Whenever the IRS files the first notice of lien with respect to any federal tax lien, Section 6320 provides the taxpayer with an opportunity to request a CDP hearing. At the CDP hearing, the taxpayer can try to persuade the IRS to remove the notice of lien. I.R.C. § 6320(c) (citing to Section 6330(c)(2)(A), which indicates that "challenges to the appropriateness of collection actions" is one of the possible issues for discussion at the hearing). Generally, a taxpayer may not contest the merits of a tax assessment at a CDP hearing. However, if the taxpayer did not have a statutory opportunity to contest the underlying tax liability pre-assessment—as is the case with the 5000A penalty—the taxpayer may challenge the assessed liability. I.R.C. § 6320(c) (citing to Section 6330(c)(2)(B)). If the IRS refuses to withdraw the notice of federal tax lien, the taxpayer may obtain judicial review of that decision in Tax Court. Thus, the CDP procedure provides a

special exception to the "pay first, litigate later" structure of tax collection, and Congress's restrictions on the enforcement of the 5000A penalty ensure that this exception will not be available. I.R.C. § 6320(c).

Similarly, before the IRS attempts to make its first levy with respect to an outstanding tax liability, Section 6330 provides the taxpayer with an opportunity to request a CDP hearing. At the CDP hearing, the taxpayer can try to persuade the IRS to refrain from using its levy power. I.R.C. § 6330(c)(2)(A)(ii). Generally, a taxpayer may not contest the merits of a tax assessment at a CDP hearing. However, if the taxpayer did not have a statutory opportunity to contest the underlying tax liability pre-assessment—as is the case with the 5000A penalty—the taxpayer may challenge the assessed liability. I.R.C. § 6330(c)(2)(B). If the IRS decides to continue with the levy, the taxpayer may obtain judicial review of that decision in Tax Court and the IRS may not proceed with the levy until that review is concluded. I.R.C. § 6330(d)(1), (e).

Section 5000A imposes no restrictions on the IRS's use of its notice and setoff powers. But, unlike the lien and levy powers, taxpayers generally cannot stop the IRS from making setoffs or sending notices without first paying the tax liability at issue. *See, e.g.*, *Sunoco Inc. v. Comm'r*, 663 F.3d 181 (3d Cir. 2011) (as to setoffs); *Pagonis v. United States*, 575 F.3d 809 (8th Cir. 2009) (as to notices). Similarly, the IRS need not inform the taxpayer of how it will employ its setoff power prior to doing so and taxpayers have little recourse to contest a setoff once made except to file a claim for overpayment. Not even the National Taxpayer Advocate can force the

reversal of a setoff. Treas. Reg. § 301.7811-1(c)(3) (describing the limits of Taxpayer Advocate Orders).

By prohibiting the IRS from engaging in these particular collection actions with respect to the 5000A penalty, Section 5000A(g)(2) prevents taxpayers from challenging their 5000A penalties until after they have paid. The logical consequence of the alterations Congress made to the assessment and collection structure, combined with the general policy of forcing taxpayers to pay taxes before challenging them that Section 7421 embodies, supports holding that Section 7421 bars this suit.

C. Section 7421 Should Bar Review of the 5000A Penalty Because the Limitations on the 5000A Penalty's Enforcement Render It Functionally Similar to a Reduction in Refundable Tax Credits

Section 5000A(g)(2)'s limitations on the enforcement mechanisms that can be used to collect the 5000A penalty, particularly its restrictions on the use of liens and levies, will shift IRS collection efforts to the setoff power. As explained below, this reliance on setoff makes the 5000A penalty function very much like a reduction on refundable credits. Since Section 7421 would bar a suit challenging a provision that reduced refundable credits before such a provision has gone into effect, it should also bar suits challenging the 5000A penalty.

Careful consideration of the enforcement tools available to the IRS with respect to the 5000A penalty reveals that there are surprisingly few instances in which the IRS can compel taxpayer compliance with the 5000A penalty. First, note that Section 5000A(g)(2)(A) clearly and unequivocally

provides that no taxpayer may be subjected to criminal penalties for failure or refusal to pay the 5000A penalty. I.R.C. § 5000A(g)(2)(A) ("In the case of any failure by a taxpayer to timely pay any penalty imposed by this section, such taxpayer shall not be subject to any criminal prosecution or penalty with respect to such failure."). Thus, the most severe penalties that noncompliant taxpayers can face are explicitly eliminated with respect to the 5000A penalty. The IRS is thus relegated to its civil enforcement powers.

Similarly, the IRS cannot use its levy power to enforce the 5000A penalty. I.R.C. § 5000A(g)(2)(B) ("The Secretary shall not ... levy on any [taxpayer] property with respect to such failure [to pay the penalty]."). This means that a taxpayer who refuses to pay the 5000A penalty will never face a seizure of property as a result of refusing to pay the penalty. For the taxpayer, the second most severe penalty that one can face for not paying taxes—the seizure of that taxpayer's property—is also not a possibility under the 5000A penalty scheme.

Section 5000A does not prevent the federal tax lien from arising with respect to a taxpayer who refuses to pay a properly assessed 5000A penalty after notice and demand. To the contrary, Section 5000A implies that the federal tax lien would arise in such a scenario. Nonetheless, as a practical matter, the lien will typically prove to be of little value in enforcing the 5000A penalty. As noted above, the IRS generally uses the federal tax lien in conjunction with the levy power: The federal tax lien supports the levy power because, with a few small exceptions, all property subject to the federal tax lien automatically becomes subject to levy by the IRS

simply by virtue of the federal tax lien attaching to that property. I.R.C. § 6331(a). In addition, it is the IRS's power to levy property touched by the federal tax lien that allows the government to vindicate its security interest. But without the ability to levy on a particular taxpayer's property, this system breaks down. A claim on another's property is worth less if that property can never be seized. Thus, the ACA's restrictions on levy severely limit the importance of the federal tax lien.

It might be possible to enforce a particular federal tax lien by bringing a Section 7403 action. It is unlikely that this option will prove a useful tool in many cases involving the 5000A penalty unless significant policy changes occur. The IRS currently uses Section 7403 chiefly to prevent the statute of limitations from lapsing when administrative collection efforts have not proven successful. Internal Revenue Manual § 5.17.4.7. Since the statute of limitations for collecting an assessed liability is ten years, and the earliest an assessment could be made is 2015, one would not expect to see actions filed under Section 7403 until approximately the year 2025. Also, recall that the IRS cannot itself bring suit, but must persuade the Department of Justice to do so. The IRS currently has a policy of not requesting the Department of Justice to file suit, and the Department of Justice has a policy of not filing such suits, unless the federal tax liability in question exceeds a threshold amount. Although the exact amount is not public knowledge, it is widely agreed that this threshold is significantly larger than the maximum penalty that may be imposed on a taxpayer who fails to obtain minimum essential coverage under the ACA. Admittedly, a taxpayer

who did not have insurance for a sufficiently large number of years, or who had significant unrelated outstanding federal income tax liabilities, could meet this threshold, or the IRS and Department of Justice could change their policies. But, given the rarity with which the IRS currently invokes judicial process to collect taxes and the administrative costs of filing a large number of lawsuits to enforce small liabilities, this seems unlikely.

That leaves only two weapons in the IRS's collection arsenal: notices and the setoff power. While notices are generally quite effective at inducing taxpayers to pay their outstanding liabilities, this success must be evaluated in light of the government's ability to compel payment (through levy, potential criminal penalties, etc.) if taxpayers continue to refuse to pay their taxes. Since these consequences do not apply to the 5000A penalty, notices would likely be a far less effective enforcement tool.

Thus, the IRS is left to rely primarily on the final arrow in its quiver, the setoff power. If a taxpayer has overpaid other federal taxes for a given year, the IRS can reduce the amount of the refund that the taxpayer would otherwise receive by the amount of the 5000A penalty liability. The IRS has already publicly indicated that it intends to use the setoff power to enforce the 5000A penalty. *See, e.g.*, Chris Rizo, *Obamacare Scofflaws to Have Tax Refunds Withheld*, LEGAL NEWS ONLINE (Apr.15, 2010, 7:00 PM), http://www.legalnewsline.com/news/226663-obamacare-scofflaws-to-have-tax-refunds-withheld; NATIONAL TAXPAYER ADVOCATE, DEP'T OF THE TREASURY, 2010 ANNUAL REPORT TO CONGRESS, TAX

RESEARCH AND RELATED STUDIES at 26, *available at* http://www.irs.gov/pub/irs-utl/vol_2_tasresearchandrelatedstudies2010arc.pdf.

There are two groups of taxpayers against whom the IRS will be able to use its setoff power to enforce the 5000A penalty. The first group consists of those taxpayers who have an affirmative tax liability in a given year but who have paid more to the IRS than they owe. The second group consists of those who are entitled to refundable credits, such as the earned income tax credit, that exceed their federal income tax liability for a given year, so that, on net, they are entitled to receive a payment from the federal government instead of owing a tax liability.

The overwhelming majority of taxpayers who fall into the first group do so because of employer withholding on wages. NATIONAL TAXPAYER ADVOCATE, DEP'T OF THE TREASURY, TAX YEAR 2008 CONGRESSIONAL DISTRICT STATISTICS, *available at* http://www.irs.gov/advocate/article/0,,id=97404,00.html (documenting that in 2008, more than 122 million taxpayers had employer withholdings, while 24 million were entitled to the Earned Income Tax Credit). There are several reasons why taxpayers may choose to have more withheld from their paychecks than their actual federal income tax liability. For example, they may wish to avoid having to write large checks when filing their federal income tax returns, or they may wish to use withholding as a tool to force them to save money. Taxpayers could, of course, easily avoid this outcome by asking employers to withhold less money from their paychecks. *See* I.R.C § 3402(m) (entitling an employee to decrease the amount withheld by

employers to reflect anticipated federal income tax liability). Thus, individuals who place themselves in the position of having significant withholding against which the 5000A penalty can be setoff are in that position because of an affirmative choice they have made, raising the question of whether they actually have standing to contest the 5000A penalty.[3]

In contrast, the second group of taxpayers subject to the setoff power does not have the ability to avoid paying the 5000A penalty. Even if such taxpayers were to make no payments to the government in a given year, they would still be forced to pay the 5000A penalty because the IRS would reduce the amount of the refundable credit that they receive. For example, taxpayers who are entitled to the Earned Income Tax Credit and are required to buy health insurance but fail to do so would have their Earned Income Tax Credit reduced

---

[3] This Court's Article III jurisprudence makes clear that an individual cannot claim standing based on a self-inflicted injury. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam) (denying a plaintiff standing based on "damage inflicted by its own hand"). The individual respondents in this case claim standing based on the fact that they are modifying their behavior in anticipation of having to pay the 5000A penalty. *See Florida v. U.S. Dep't of Health and Human Services*, 716 F.Supp. 2d 1120, 1145 (N.D. Fla. 2010). While changing one's behavior to comply with a future law can constitute an injury under standing doctrine, our analysis suggests that such a behavioral change might be an unreasonable one, particularly if the individual respondents are not entitled to refundable tax credits. This case therefore raises the question as to whether a person who modifies one's behavior based on a misunderstanding of a future law actually has standing to challenge that law.

for failure to pay the penalty. *See* I.R.C. § 32 (providing for certain low-income individuals to receive the earned income tax credit). However, to the extent that the 5000A penalty is merely a reduction of or limitation on refundable credits, a lawsuit challenging it at this point would constitute a restraint of the collection and assessment of the federal taxes against which the refundable credit was applicable.

More generally, the central role of refund calculations in the 5000A penalty scheme suggests that Section 7421 should apply, regardless of whether the taxpayer is entitled to refundable credits. The IRS's calculation of refunds is a central facet of the nation's tax scheme, and a lawsuit seeking to challenge the amount of that refund before the refund is even calculated violates the central purpose of Section 7421. *See, e.g.*, *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974) ("The Court has interpreted the principal purpose of [Section 7421] to be the protection of the Government's need to assess and collect taxes as expeditiously as possible."). Accordingly, challenges to the 5000A penalty should be barred by Section 7421's broad umbrella of protection until a taxpayer has paid the tax and sued for a refund.

CONCLUSION

For the foregoing reasons, the Court should find that Section 7421 applies and should, therefore, dismiss the Respondents' suit for lack of jurisdiction.

Respectfully submitted,

Michael B. de Leeuw
(Counsel of Record)

FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON LLP
One New York Plaza
New York, New York 10004
(212) 859-8000
michael.deleeuw@friedfrank.com

Attorney for Amici Curiae

AMICUS CURIAE BRIEF

No. 11-398

In the Supreme Court of the United States

U.S. DEPT. OF HEALTH & HUMAN SVCS., ET AL.
Petitioners.
v.
STATE OF FLORIDA, ET AL.,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* TEXAS PUBLIC POLICY FOUNDATION SUPPORTING RESPONDENTS ON THE INDIVIDUAL MANDATE

Richard A. Epstein
800 N. Mich. Ave, #3502
Chicago, IL 60611
(773) 450-4476
richard.epstein@nyu.edu

Mario Loyola
Counsel of Record
Josiah Neeley
TEXAS PUBLIC POLICY FOUNDATION
900 Congress Ave.
Austin, TX 78701
(512) 472-2700
mloyola@texaspolicy.com

QUESTION PRESENTED

Whether Congress has the power under Article I of the U.S. Constitution to require individuals to purchase health insurance.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. This Court Should Decline to Extend the Deeply Flawed Rule of *Wickard V. Filburn* to the ACA's Individual Mandate 6

A. The Text, Origins, and Traditional Understanding of the Commerce Clause 6

B. The Nineteenth and Early Twentieth Century Cases Respected These Well-Established Limits on the Commerce Power. 14

C. The New Deal Expansion of the Commerce Clause Was Both Inconsistent With the Original Structure and Ill-Adapted to a Dynamic Economy 23

D. The Difficulties of the Modern Cases Reaffirm the Vital Importance of Imposing Strict Limits on the Commerce Power. 29

E. *Stare Decisis* Does Not Require an Extension of *Wickard v. Filburn* in this Case 32

II. This Court Has a Vital Role as Guardian of the Constitutional Constraints on Government Power 38

CONCLUSION 42

TABLE OF AUTHORITIES

Cases

A.L.A Schechter Poultry Corp. v. United States,
259 U.S. 495 (1935) ..... *passim*

Addyston Pipe & Steel Co. v. United States,
175 U.S. 211 (1899) 14

Champion v. Ames,
188 U.S. 321 (1903) ..... *passim*

Child Labor Tax Cases,
259 U.S. 20 (1922) 19

Dean Milk v. Madison,
340 U.S. 349 (1951) 25

Garcia v. San Antonio Metro. Transit Auth.,
469 U.S. 528 (1985) 23

Gibbons v. Ogden,
22 U.S. 1 (1824) ..... *passim*

Hammer v. Dagenhart,
247 U.S. 251 (1918) 19

Kidd v. Pearson,
128 U.S. 1 (1888) ..... *passim*

McCulloch v. Maryland,
17 U.S. 159 (1819) 38

New State Ice v. Liebmann,
285 U.S. 262 (1932) 38

NLRB v. Jones & Laughlin Steel,
301 U.S. 1 (1937) ..... *passim*

Perez v. United States,
402 U.S. 146 (1971) 30

Printz v. United States,
521 U.S. 898 (1997) 22

Seven-Sky v. Holder,
661 F.3d 1 (2011) ..... *passim*

Shreveport Rate Cases,
243 U.S. 342 (1914) 17, 21, 22

United States v. Darby,
312 U.S. 100 (1941) 25-26

United States v. E.C. Knight,
156 U.S. 1 (1895) ..... *passim*

United States v. Lopez,
514 U.S. 549 (1995) ..... *passim*

United States v. Wrightwood Dairy,
315 U.S. 100 (1942) 2, 4, 27

Wickard v. Filburn,
317 U.S. 111 (1942) ..... *passim*

Statutes and Constitutional Provisions

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) ..... *passim*

21 U.S.C. §§ 1-15 ..... 4, 18

U.S. Const. art. I, § 8, cl. 3 ..... *passim*

U.S. Const. art. I, § 9, cl. 1 7

U.S. Const. amend. XVIII 20

U.S. Const. amend. XXI 20

Other Materials

The Federalist (Clinton Rossiter ed., 1961).....*passim*

Dale Heien & Cathy Roheim Wessells, *The Nutritional Impact of the Dairy Price Support Program*, 22 J. CONSUMER AFF. (1988)..... 29

John Locke, *Second Treatise on Government* (C.B. Machperson ed., 1980) (1698)..... 9, 10

James Madison, *General Defense of the Constitution*, Speech at the Virginia Ratifying Convention (June 6, 1788) 40

Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996) ... 8

Jeff Shesol, *Supreme Power: Franklin Roosevelt v. The Supreme Court* (2010)..... 39

Alexis de Tocqueville, 1 *Democracy in America* (Harvey C. Mansfield & Delba Winthrop eds. & trans. 2000) (1935)..... 40

INTEREST OF *AMICUS CURIAE*[1]

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (collectively, the "ACA")[2] contains minimum insurance coverage provisions (the "individual mandate") that, if upheld, would constitute an unprecedented expansion of federal power. Such a concentration of government power at the national level would be incompatible with federalism, with the Constitution, and with our basic liberties. It would be another step towards the complete centralization of government power.

The mission of the Texas Public Policy Foundation (TPPF) is to defend liberty, personal responsibility, free enterprise, and limited government in Texas and in the nation as a whole. Because these goals would be substantially undermined by the individual mandate of the ACA, TPPF has an interest in this Court's determination of the mandate's validity, and urges this Court to invalidate the mandate under the United States Constitution.

---

[1] Pursuant to this Court's Rule 37.2(a), *amicus* states that all parties have lodged blanket consents. Pursuant to Rule 37.6, *amicus* states that no part of this brief was authored by any party's counsel, and that no person or entity other than *amicus* funded its preparation or submission.

[2] Citations herein are to the "consolidated print" of the ACA, P.L. 111-148 as amended by P.L. 111-149.

SUMMARY OF THE ARGUMENT

Sec. 1501 of the ACA contains a mandate that all individuals must obtain health insurance or pay a tax penalty, subject to a variety of exceptions and exemptions. That "individual mandate" finds no home under the Commerce Clause of the United States, which gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The current interpretation of that clause, which allows Congress to regulate any local activity that has a "substantial effect" on interstate commerce, is fatally flawed for reasons of text, structure, history and economic rationality.

Perhaps the precedents of the last 70 years cannot be undone. But by the same token, they are not a legitimate basis for the further extension of Congress's power into the wholly unprecedented arena of forcing individuals to engage in certain activities in order to conscript them into the service of some ambitious federal scheme. Decisions such as *NLRB v. Jones & Laughlin*, 301 U.S. 1 (1937); *United States v. Wrightwood Dairy*, 315 U.S. 100 (1942); and *Wickard v. Filburn*, 317 U.S. 111 (1942) went far beyond the scope of the original constitutional plan. But even those cases do not come close to suggesting that the Commerce Clause gives Congress the power to force individuals to enter into intrastate transactions in order to

regulate their aggregate effect on interstate commerce.

Writing in *Gibbons v. Ogden,* 22 U.S. 1 (1824), Chief Justice Marshall was careful to limit the power of Congress so that it did not cover agriculture, manufacture or mining, which took place before goods entered into commerce, or their use and consumption once they left commerce. Indeed, even the "purely internal" commerce within a given State was beyond the federal power to regulate.

In *Gibbons,* Chief Justice Marshall set the stage for a uniform interpretation of the commerce power that survived through 1937. These cases uniformly rejected the proposition that Congress could regulate agriculture, mining or manufacture because a change in the quantity or prices of the goods produced through these activities could "indirectly" influence the quantity of goods that moved in interstate commerce. *See, United States* v. *E.C. Knight* 156 U.S. 1 (1895); *Kidd v. Pearson,* 128 U.S. 1 (1888). That tripartite division, which looked at the phases before, during and after interstate commerce as distinct, held firm through *A.L.A. Schechter Poultry Corp. v. United States,* 259 U.S. 495 (1935), notwithstanding major transformation in the national economy.

Given this ironclad constraint, Congress also sought to regulate the activities of the States by

imposing restrictions on the types of goods that could move in interstate commerce. In *Champion v. Ames,* 188 U.S. 321 (1903), this Court allowed the federal government to prohibit the movement of lottery tickets through interstate commerce even when they were legal in the States at both ends of the transaction. *Champion* implied that Congress could leverage its control of interstate commerce in order to shape internal State policies. But in 1918 this Court brought that process to a halt by refusing to allow Congress to ban the shipment of goods in interstate commerce by any firm that had used child-labor under the age of 14 anywhere in its plant. *Hammer v. Dagenhart* 247 U.S. 251 (1918).

These limitations on the use of the commerce power were well understood in Congress. The Pure Food and Drug Act of 1906, 21 U.S.C. §§ 1-15, forbade the shipment of certain drugs in interstate commerce, and allowed Congress to regulate their manufacture in the territories, but *not* in the States. The repeal of prohibition in the 21st Amendment also made it clear that, as in the pre-prohibition era, Congress had no power to regulate either the production or consumption of intoxicating liquors in the several States.

This entire system was undone in the key New Deal decisions of *Jones & Laughlin, Wrightwood,* and *Wickard,* which in combination resurrected the theory of substantial indirect effects that had been explicitly rejected in the earlier precedents. This

Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995) did puncture the common perception after *Wickard* that Congress could enact whatever legislation it wanted. But *Lopez* placed its unfortunate imprimatur on *Wickard*, and thus did little to restore the pre-New Deal balance.

The modern Commerce Clause cases are not only flawed textually, they have wrecked the sound economic arrangements created under the original system. The earlier rules had two signal virtues. First, they allowed the federal government to organize interstate commerce that could otherwise be vulnerable to disruption by individual States. Second, by blocking the federal government from regulating local activities, they fostered a healthy competition among States, which served as an effective curb against government abuse and reinforced the essentially free society contemplated under the Constitution.

Far from solving any "national problem," the modern, expansive view of the Commerce Clause has become a breeding ground for all sorts of monopoly and cartel activities, most notably in labor and agriculture, that the States acting on their own could have never implemented. This unworthy tradition may be so entrenched that it cannot be uprooted. But this Court should indicate its determination to limit the dangerous aggrandizement of federal power by striking down the unprecedented individual mandate in the ACA.

The cause of individual liberty requires reaffirming the need for reliable limits on the federal commerce power.

ARGUMENT

I. This Court Should Decline to Extend the Deeply Flawed Rule of *Wickard v. Filburn* to the Individual Mandate.

A. The Text, Origins, and Traditional Understanding of the Commerce Clause.

The Commerce Clause of the U.S. Constitution provides that Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. As this Court has long recognized, the words "among the several States" were words of limitation, meant to be read in parallel with the words "with foreign Nations" and "with the Indian tribes." See *Gibbons,* 22 U.S. at 193-94. There are two implicit limitations in the carefully crafted words. The first is that those economic activities that were not commerce were not subject to any regulation by Congress at all. That includes all the routine manufacture, mining and agriculture that precede commerce, and all the uses of various products after they leave commerce. Second, even within the class of commercial activities—understood as a combination of transportation, communication, sales and similar mercantile transactions, Congress could only deal

with cross-border transactions. It could not deal with the purely internal commercial transactions within States, such as that which is provided by a local carriage or taxi service.

Congress was not granted the power to regulate the national economy generally, because it is abundantly clear that the Constitution would not have been ratified if it *had* granted the Congress such a sweeping power. The Constitution before the Civil War contains many repugnant provisions that protect slavery within the States. If commerce covered agriculture, manufacture and mining, Congress could have done what no one in the ante-bellum period ever thought possible: abolish by national legislation slavery in the States. Article I, § 9, cl. 1 of the Constitution makes it clear that Congress could not control the "Migration and Importation of such persons as any of the States now existing shall think proper to admit"—e.g. slaves—before 1808, but had the power to regulate those activities after that date. If the Commerce Clause had the scope routinely contended for it now, it would have meant that Congress in 1787 was free to abolish slavery within the States, even though it was powerless to prevent the admission of slaves into the States, which is manifestly absurd.

The main public opposition to the proposed constitution came from those who thought that its limits, even under the restricted reading that best conforms to ordinary usage, still left the federal

government with too much power. During Virginia's ratification debates, Patrick Henry railed against the proposed constitution: "To all common purposes of Legislation it is a great consolidation of Government." Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making Of the Constitution* 162 (1996). Federalists such as James Madison agreed that such a consolidation of power might lead to tyranny or civil strife. They counted on strictly delineated enumeration of powers for the federal government, and on the diffusion of power among different levels of government, to protect against those possibilities. In *The Federalist* No. 10, James Madison wrote, "The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures." *The Federalist* No. 10 (Madison). Ratification of the Constitution in the State conventions was predicated on the acceptance of this limited vision of federal power—enough power to overcome the limitations of the Articles of Confederation, but limited enough to secure the States' highly evolved democratic institutions, indispensable to both liberty and self-government, from federal control.

On the need to protect the constraints on Congress's enumerated powers there was unanimity of opinion on all sides of the ratification debates. Neither the federalists nor anti-federalists ever imagined that the federal government would be

other than one of limited powers. As James Madison wrote, "the States will retain, under the proposed Constitution, a very extensive portion of active sovereignty," chiefly through the strict delineation of the federal government's powers, and the preservation of the remainder to the States or the people:

> The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45 (Madison).

Safeguarding the "lives, liberties, and properties" of the people was, that to that generation, the most fundamental function of government, and reflects the contemporaneous understanding that the State governments, each of which already had a long history, would remain the principle "government" in society. John Locke's *Second Treatise of Government*, one of the canonical texts of the Enlightenment,

which influenced both the Declaration of Independence and the Constitution, explained that people unite "for the mutual preservation of their lives, liberties and estates, which I call by the general name, property." Locke, *Second Treatise of Government*, Ch. 9, ¶ 123 (C.B. Machperson ed., 1980) (1698). Madison chose his words wisely when he suggested that the States' authority would *continue to cover* all the legitimate ends of government along Lockean lines. That reading decisively bars the federal government from any role in the provision of health care.

Throughout the 19th century and well into the 20th, the commerce power was read in a limited fashion consistent with both the basic text and the philosophical tradition of limited government that underlay its adoption. To be sure no case read the clause so narrowly that Congress was helpless to deal with interstate commerce. At the same time, both Congress and the Court were constantly mindful that there were many activities where the federal government could not enter because they were reserved for the exclusive operation of the States. *See, Kidd v. Pearson,* 122 U.S. 1 (1888). The idea was that States were "preempted" from regulating within areas of exclusive federal regulatory power, such as interstate commerce, but the federal government was blocked from dealing with matters of primary concern to the States. Areas

of overlap did exist, but they were narrowly confined.

This Court's initial foray into the Commerce clause took place in 1824, in the seminal case of *Gibbons v. Ogden*, 22 U.S. 1 (1824). At issue was whether the Gibbons, operator of two steamboats from New Jersey to New York had to respect the exclusive franchise to operate steamboats in New York State waters now claimed by Ogden. Chief Justice Marshall held that these voyages were within interstate commerce, and that federal law therefore trumped the local police regulation under which Robert Fulton and Robert Livingston had received a state franchise for the operation of a steam vessel. In upholding the supremacy of the federal government in this conflict, Marshall made clear the limits of the federal power. State inspections laws, he wrote,

> act upon the subject before it becomes an article of foreign commerce, or of commerce among the States . . . . Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.
>
> No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.

Id. at 203.

New York's monopoly, therefore, was not disturbed with respect to boats that started and ended their journeys in New York's waters.

Gibbons stands for the principle that "the sovereignty of Congress, though limited to specific objects, is plenary as to those objects." *Id.* at 197. But the word "plenary" presupposed the Madisonian vision of a limited federal power:

> The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the Nation and to those internal concerns which affect the States generally; but not to those which are completely within a particular state, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

Id. at 195.

It was only because he was so certain of the "restricted" nature of the federal commerce power, that Marshall felt so confident asserting the supremacy of federal law within its domain. Marshall could not have been clearer:

> Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. The phrase

> is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State.

Id. at 194-95.

No trace of Marshall's careful description of the strict limits on the commerce power appears in the judgments upholding the individual mandate as a valid exercise of that power. In *Seven-Sky v. Holder*, 661 F.3d 1 (2011), for example, Judge Silberman sees virtually no limit to the commerce power, framing the constitutional question in terms of whether individuals are "engaging in an *activity* involving, or substantially affecting, interstate commerce." *Id.* at 16. He notes, "[T]he Framers, in using the term 'commerce among the states,' *obviously* intended to make a distinction between interstate and local commerce, but Supreme Court jurisprudence over the last century has largely eroded that distinction." *Id.* (emphasis added)

B. The Nineteenth and Early Twentieth Century Cases Respected These Well-Established Limits on the Commerce Power.

Perhaps the most prominent of the 19th century's post-*Gibbons* decisions is *United States v. E.C. Knight*, 156 U.S. 1 (1895). That case rightly read *Gibbons* to hold that manufacture preceded commerce and was not part of it. The decision strikingly treated the enforcement of the Sherman Antitrust Act against nationwide cartels as though it were a local matter—a stance that did not last long. *See, Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). The key point is that even with this antitrust qualification it was universally understood before the New Deal period that local manufacturing, agriculture, mining, and the provision of any kind of service from retail to health care were subject to the exclusive regulation of the States.

To hammer that point home *E.C. Knight* relied, 156 U.S. at 14, on the Court's then-recent decision in *Kidd v. Pearson*, 128 U.S. 1 (1888), which held that there was no difference between a State's prohibition of a particular manufacture for export (which had been long sustained) and its prohibition of transactions in the same item after importation into the State. Neither prohibition had a "direct" effect on interstate commerce, because one preceded and the other followed it, and was therefore not in conflict

with the plenary grant of interstate commerce authority to Congress. *Kidd* tells a consistent tale:

> As has been often said, legislation [by a State] may in a great variety of ways affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution, unless, under the guise of police regulations, it imposes a direct burden upon interstate commerce, or interferes directly with its freedom."

Kidd, 128 U.S. at 21-23 (quotations and citations omitted).

The distinction between "direct" and "indirect" effects depended upon a clear distinction between economic activity that was "interstate commerce" properly so-called, and all other economic activity, which was the province of the States. Although by controlling, e.g., manufactures, the State police power might "result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture and is not a part of it." *E.C. Knight*, 156 U.S. at 12. The Court in *E.C. Knight* went on to note:

> It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be

> recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government . . . ."

Id. at 13. Anticipating serious problems to come, the Court quoted *Kidd*:

> If it be held that the term [commerce] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining -- in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market?

Id. at 14 (quoting *Kidd*, 128 U.S. at 21) (quotations omitted). The decision in *E.C. Knight* faithfully built on both *Gibbons* and *Kidd* to forge a vision of federalism which was faithful to the original plan.

The pre-New Deal cases thus stood consistently and clearly for a principle that is the utter antithesis of *Wickard*. No one ever thought that local

manufacturing, agriculture, mining, or the provision of any kind of service from retail to health care was not subject to the exclusive regulation of the States. One significant deviation from that vision of federalism occurred in the *Shreveport Rate Cases*, 243 U.S. 342 (1914), which explicitly acknowledged the continuing authority of *E.C. Knight*. Thus the Court held that Congress could regulate intrastate carriers along with interstate carriers. Congress could control the operations of intrastate carriers "in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate" to federal regulation of that traffic. *Id.* at 351. But, the Court cautioned, "this is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such." *Id.* at 353. The Hughes opinion restricts its "substantial relation" test to interstate *traffic* and the "instrumentalities" of interstate commerce. The decision departs from prior law because it allows some regulation of internal commerce within the State. But it did so only in connection with transportation by rail, leaving agriculture, mining and manufacture totally untouched.

Another development in Commerce Clause cases focused not on those limited activities that "affected" the instrumentalities of interstate commerce, but rather on the direct regulation of interstate commerce in order to shape State regulation of intrastate activity then though to lie

within their exclusive domain. The key case in this progression is *Champion v. Ames*, 188 U.S. 321 (1903), which by a narrow five-to-four vote held that the federal government could prohibit the shipment of lottery tickets in interstate commerce, even when their sale was legal in the States at both ends of the journey. In effect, federal officials used their monopoly power over interstate commerce as leverage to control local activities. Thus, in a classic case of monopoly extension, Congress could achieve indirectly what it admittedly could not achieve directly—namely the elimination of intrastate lotteries that were, in Madison's original vision, exclusively subject to State regulation.

Champion was clearly wrong as a matter of principle because, left unchecked, it spells the end of federalism. Under that case, the federal chokehold on interstate commerce would allow Congress to put the following hard choice to all merchants: either bend to the federal will or abandon the national market. One can only imagine the astonishment it would have caused if, in 1840, Congress had passed a statute forbidding the shipment of cotton from slave plantations into either the national or the foreign market.

Champion created the opening for the passage of Theodore Roosevelt's Pure Food and Drug Act of 1906, 21 U.S.C. §§ 1-15, to put some teeth into drug regulation without running afoul of the clear

limitations of *E.C. Knight*. The act made it "unlawful for any person to manufacture within any Territory or the District of Columbia any article of food or drug which is adulterated or misbranded." It outlawed the "introduction" or "shipment" of misbranded foods and drugs into the States—but, conspicuously and self-consciously—it refrained from regulating the manufacture of drugs within the States. The reason was clear enough. Everyone realized that *Champion* had not overruled *E.C. Knight* or any other case on the proposition that manufacture preceded commerce and was not part of it.

The expansionist effort to use the federal commerce power to gain control over purely intrastate commerce came to a temporary halt in *Hammer v. Dagenhart*, 243 U.S. 342 (1918), where the Court, again by a five-to-four vote refused to extend *Champion*. *Hammer* barred Congress from enacting a child labor law that prohibited the shipment in interstate commerce of any goods made in factories that did not conform to the 14-year-old federal minimum age standard for child labor. Once again, it was clear that Congress could not use its power over interstate commerce to control activities that were reserved to the States under the original constitutional scheme. Moreover, as direct regulation was off-limits to the federal government, so too was taxation. Four years later, the *Child Labor Tax Cases*, 259 U.S. 20 (1922), held that

Congress could not seek to pressure the States by taxing interstate trade in goods made in factories that employed child labor. The basic constitutional structure held firm.

The continued dominance of *E.C. Knight* well into the 20th century is also evident in the text of the 18th and 21st Amendments. The 18th Amendment (1920) prohibited the manufacture, sale, or transportation of intoxicating liquor, and thus covered the full gamut of activities at the federal and State level. U.S. Const. amend. XVIII. But when the 21st Amendment repealed prohibition (1933), its text made it clear that Congress, consistent with *E.C. Knight*, had no power to regulate the manufacture of intoxicating liquors within the States. U.S. Const. amend. XXI. Instead, section 2 provides, "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

This amendment explicitly does not apply to all activities, but only to the transportation or importation of intoxicating liquors, and only with respect to those States that chose to remain dry. The way the provision was drafted presupposed that, without the just-repealed constitutional amendment, the federal government could neither prohibit nor authorize the manufacture or sale of intoxicating

liquor, both of which remained matters of exclusively local jurisdiction. But once those options were exercised to keep a State dry, then Congress was duty-bound to prohibit transportation or importation, which were of course the only powers that it had under the Commerce Clause to begin with. Indeed, the power given here is narrower than that which Congress asserted in *Champion*, because it only let the Congress regulate the flow of intoxicating liquor between States that had banned its use.

Finally, as late 1935, *A.L.A. Schechter Poultry Corp. v. United States*, 259 U.S. 495 (1935), struck down parts of a federal fair competition law on the ground that sick chickens were no longer in interstate commerce when they were off-loaded from interstate railroads onto local trucks. In extending federal power over "intrastate transactions on the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects." *Id.* at 546. The *Shreveport Rate Cases*, explained the Court, was an example of intrastate activity with a "direct effect" on interstate commerce, because controlling the intrastate activity was essential to promoting the efficiency of interstate rail service and protecting it from unjust discrimination. *Id.* at 544-46. But if the effect on interstate commerce was merely indirect, intrastate transactions could not be reached by the federal commerce power. *Id.* at 546. In line with the

use of this term in *Kidd*, the condition of chickens which had come to rest within a State had at most an indirect effect on interstate commerce, because they were no longer in interstate commerce. If the Commerce Clause were construed to reach transactions with merely an "indirect effect on interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government." *Id.*

Despite the creeping expansion of *Shreveport*'s "substantial relation" test from interstate *traffic* to interstate *commerce*, the decision shows the continued effectiveness of hard boundaries in demarcating the division of federal and State power on all matters of State economic activity that did not concern the instrumentalities of interstate commerce. The structure involved in those cases is far superior to that which replaced it after *Wickard*. Clear boundaries are essential to preserving the States' "independen[ce] and autonom[y] within their proper sphere[s] of authority," *Printz v. United States*, 521 U.S. 898, 928 (1997), otherwise that independence and autonomy "would exist only by sufferance of the federal government." *Schechter Poultry*, 259 U.S. at 546.

Dichotomous decisions such as jurisdiction and determinations of liability require clear yes/no tests.

The occasional borderline case is not an argument for abandoning for the local/national line in favor of an approach that answers any and all questions by expanding federal power. Quite the opposite, the Tenth Amendment clearly contemplates that residual powers are reserved to the State. Why put it into the Constitution if in effect the extent of federal power depends entirely on the will of Congress? *Wickard* stands in practical effect for the proposition that *Garcia v. San Antonio*, 469 U.S. 528 (1985), later tried to enshrine, namely that the all powers not specifically delegated to the States are reserved for the federal government, to use at its discretion.

C. The New Deal Expansion of the Commerce Clause Was Both Inconsistent With the Original Structure and Ill-Adapted to a Dynamic Economy

The constitutional structure of 1789 was not rejected because it somehow became inappropriate or ineffective in a changing economy. The principles that applied wisely to interstate stagecoaches and steamships apply just as well to telegraphs, railroads, automobiles, and airplanes. Indeed, the Framers could see easily enough that the great economic expansion during their own lifetimes carried with it the prospect of vast territorial expansion and technological change. They formulated a Constitution that would stand the test

of the time for a growing nation of bustling towns and busy commerce. Well into the 20th century, through world war, depression, and recovery, their framework served the nation well.

When the Constitution was ratified, there was already plenty of commerce "with foreign Nations, and among the several States, and with the Indian tribes," to which the text of the Constitution refers. Manufactures and agricultural products were indeed local, but they routinely crossed State lines in a country marked by increasingly frenetic commercial activity. It was their movement across State lines that Congress was meant to regulate under the Commerce Power, not the manufacture and agricultural production itself.

That result gets the economics just right. Allow these localized activities to be regulated by the States, and a form of interjurisdictional competition will go a long way to restrain State abuses, by the ability to purchase goods and services elsewhere. But network industries like railroads and communication can, in the absence of federal oversight, easily be cut by any State that may want to extract some payment from its neighbors. Putting those activities under centralized control helps avoid that risk, as does the dormant commerce clause which this Court has strongly embraced in the name of the same competitive federalism that New Deal

decisions like *Wickard* fatally undermined. *See, e.g. Dean Milk v. Madison*, 340 U.S. 349 (1951).

Nonetheless the dam broke in the economic uncertainty of the 1930s. In *National Labor Relations Board v. Jones & Laughlin Steel*, 301 U.S. 1 (1937), a closely divided Supreme Court expanded the scope of the commerce power to allow the federal government to impose a system of collective bargaining in factories and shops across the nation. In a stunning reversal from *Schechter*, this Court held that Congress can regulate those intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions." *Id.* at 37. Still, the Court counseled,

> [T]he scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

Id.

Those cautionary words proved idle. Four years later, in *U.S. v. Darby*, 312 U.S. 100 (1941), the

Court struck down *Hammer*'s limitations on the power of Congress to regulate manufacturing within the States, sustaining the Fair Labor Standards Act of 1938, which prohibited the interstate transport of goods produced in contravention of certain labor standards. *Darby* held that Congress's power "extends to those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." Id. at 118. In just a few decisions, the Court had transformed *Shreveport*'s extension of federal power over operations of *intrastate carriers* in matters with a "substantial relation" to *interstate traffic*, into a general federal power over all *activities* with a "substantial relation" to *interstate commerce*, demonstrating the slippery slope of the "substantial relation" test. *Kidd* had made it clear that local efforts that altered the quantity and price of goods that were shipped in interstate commerce were not subject to federal power. It drew no distinction between substantial indirect effects and trivial or remote ones. It did not care whether transactions were looked at in isolation or in the aggregate. *Darby* turned *Kidd* upside-down by holding that substantial indirect effects were always caught by the Commerce clause. The set of insubstantial indirect effects was vanishingly small. But by this wave of the semantic wand, this Court in *Darby* transformed the constitutional order without

offering a single substantive explanation as to why the earlier system had failed. The ability of the federal government to regulate employment contracts nationwide creates the risk of massive capture of the federal government. In contrast, leaving this issue to the States imposes an effective check on the abuse of government power.

From *Darby*, the next wrong step was taken in *United States v. Wrightwood Dairy*, 315 U.S. 110 (1942), where the Court applied the logic of the *Shreveport Rate Cases* to local agricultural sales that were made in competition with interstate sales. Chief Justice Stone stated that "'the reach of that [commerce] power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power." *Id.* at 119. This oft quoted redaction of *Gibbons* reverses its meaning, for Chief Justice Marshall had said "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one." *Gibbons*, 22 U.S. at 194. It takes a novel theory of language to treat "extend" and "restricted" as synonyms.

But once that novel move was made, it was but a short step to *Wickard v. Filburn*, 317 U.S. 111 (1942), in which the Court held that a farmer was subject to federal regulation when he harvested wheat for feeding his family and farm animals. The effect of his activity on aggregate demand, "taken

together with that of many others similarly situated, is far more trivial." *Id.* at 128. This was true, said the Court, "whatever [the] nature" of the activity, even if it did not constitute commerce. *Id.* at 125. Hence the Court's answer to the critical question of how far Congress could go to reach activities with a "substantial relation" to interstate commerce was both simple and absolute: Congress could regulate virtually every class of activity, no matter how local, if that kind of activity might affect the supply or demand for something in interstate commerce.

These cases have been justified on the basis that the increasingly interstate nature of commerce has blurred the distinction between local and national economic activities. But the level of commercial interpenetration solemnly noted in *Wickard* had been extensive since the beginning of the Republic. *Wickard* legitimatized a system of agricultural cartelization that only the federal government could enforce. The sound and long-held conviction that agriculture cartels were socially undesirable was thrown under the bus in the service of an unwise extension of federal power.

Despite its revolutionary consequences, *Wickard* characterized its decision as "a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden.*" *Id.* at 122. In fact, *Wickard* was a complete and conscious repudiation of *Gibbons*. In *Gibbons*, Chief Justice Marshall had

insisted that "No direct general power ... is granted to Congress" over an article "before it becomes an article ... of commerce among the States." *Gibbons*, 22 U.S. at 203. "[T]he exclusively internal commerce of a State" was categorically outside the commerce power. *Id.* at 195. But under *Wickard*, the exclusively internal commerce of a State disappeared into a void, because every transaction, no matter how internal to one State, affects, by definition, supply and demand in the aggregate across the country, and indeed across the whole economy. After all, the family farms that feed their own grain to their own cows no longer have to purchase grain in interstate commerce. Nothing more is needed to subject them to regulation (for socially destructive purposes) even though these activities are completely internal to their *farms*. This tortured result is no trivial matter for human welfare, for much evidence suggest the price controls reduce social welfare. *See, e.g.*, Dale Heien & Cathy Roheim Wessells, *The Nutritional Impact of the Dairy Price Support Program*, 22 J. Consumer Aff. 201 (1988) (price controls reduce the level of calcium available to families on welfare below the recommended daily allowances).

D. The Difficulties in the Modern Caw Law Reaffirm the Vital Importance of Imposing Strict Limits on the Commerce Power.

Wickard seemed to give Congress a carte blanche under the Commerce Clause, and for decades the federal government grew dramatically in its scope and intrusiveness. Chief Justice Hughes's prescient warning in *Schechter Poultry* that, if the distinction between direct and indirect effects were abandoned, "the federal authority would embrace practically all the activities of the people," 295 U.S. at 546, materialized with vertiginous speed and no end in sight.

Eventually this Court became more wary of sanctioning new expansions of dubious constitutionality. That wariness finally produced a check for federal power, however nominal, in *United States v. Lopez*, 514 U.S. 549 (1995).

Lopez struck down the Federal Gun-Free School Zones Act, which forbade carrying a gun within 1,000 feet of a school. Chief Justice Rehnquist, writing for a narrow five-to-four majority, tried to find *some* limitation on congressional power even though the Court's doctrine that aggregates small transactions for their substantial effects, *see, e.g. Perez v. United States*, 402 U.S. 146 (1971), is virtually impossible to square with any meaningful distinction between commercial and non-commercial activity, or between national and local activity.

The majority's conclusion is telling: Although it was not willing to overturn *Wickard*, it could not avoid the implication of the New Deal cases: "The

broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further." 514 U.S. at 567. Without ever confronting the inconsistencies in the past case law, and without explaining how *Wickard*'s expansive "substantial effect" test fit into the original scheme of enumerated powers, the Court simply refused to proceed further.

Justice Thomas was right to reject this ingenious effort to salvage *Wickard*: "In an appropriate case [this Court] must further reconsider [its] "substantial effects" test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting [its] more recent Commerce Clause jurisprudence." *Id.* at 585 (Thomas, J., concurring). He then notes, "[O]ur cases are quite clear that there are real limits to federal power" and "[t]he Federal government has nothing approaching a police power." *Id.* at 585-86. And yet, what does *Wickard* stands for if not for a general federal police power?

In his concurrence, Justice Anthony Kennedy rejected the Court's old "content-based or subject-matter distinctions, [which had defined] by semantic or formalistic categories those activities that were commerce and those that were not." *Id.* at 569 (Kennedy, J., concurring). But the expansion of the commerce power in the New Deal was not the function of any supposed "imprecision of content-

based boundaries." *Id.* at 574. It was a conscious effort to abandon the Framers' vision of federalism for the newly minted New Deal substitute. Both formulations are clear. The difference is that *Wickard* is indefensible on textual and structural grounds.

Justice Kennedy is on far firmer ground, however, when he attempts to save *Wickard* on the ground that it is too difficult to overturn it, that courts should leave well enough alone:

> [T]he Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. *Stare decisis* operates with great force in counseling us not to call in question the essential principles now in place respecting the essential power to regulate transactions of a commercial nature.

Id. at 574.

E. *Stare Decisis* Does Not Require an Extension of *Wickard v. Filburn* in this Case.

In dealing with this case, *stare decisis* highlights the risk of great institutional instability in overruling *Wickard* and its progeny, no matter how flawed its constitutional pedigree. But *stare decisis* does not require that an unsound decision like *Wickard* be extended to unprecedented and

constitutionally troubling expansions of federal power. Indeed one reason why courts have been so determined to reconcile *Wickard* and *Gibbons* is that the indefensible nature of the ruling in *Wickard* may one day be acknowledged, and without the distorting filter of *Wickard*, *Gibbons* would leave would leave legislation like the ACA and much else besides on constitutionally fatal ground.

Just that issue comes up with the ACA now that the issue is framed as whether the Congress may "regulate" forms of economic *inactivity* under its commerce power. In making its claim the government argues that individuals without health insurance will one day consume health care, and this justifies the federal government forcing them to buy insurance now. In one sense the claim is overwrought for in the next breath the government insists that these same individuals must be forced to buy insurance (albeit at low rates) in order to subsidize other individuals with higher expected costs. The first of these goals does not require dragooning everyone in to the ACA. It is met by asking them to buy insurance to cover their own future losses, and which point the government's undue paternalism becomes apparent. Yet by the same token, the correct way to run any subsidy scheme is to raise the needed revenues through a general tax, which the Congress refused to do.

The unsatisfactory case for both these rationales evades the prior question of constitutional authority,

which asks this unprecedented question: May the government force persons to enter into commercial transactions under its commerce power?

In *Seven-Sky*, Judge Silberman concluded cautiously that Congress can regulate inactivity under such circumstances. 661 F.3d at 1. He dutifully treated *Wickard* as the lodestar against which the issue should be decided. But he candidly noted that this case lies in *terra incognita* where *Wickard* gives no particular guidance on the novel question of whether individual inaction can be regulated, given that Congress has never attempted to follow this course. He concludes therefore that the question is open and that as a lower court judge, he is entitled to kick the case upstairs, because the Court has never grappled with the issue.

For all its ambition, *Wickard* does not touch the question, for it only decided that if someone wanted to engage in farming, the government could limit the level of his activity. *Wickard* did not decide that the government could force a farmer to produce a minimum amount of grain or lose his farm, as that would presumably have been barred by the Thirteenth Amendment. Judge Silberman was wrong to conclude that the present case is governed by *Wickard*. But so long as this question is open, this Court has no obligation to *extend Wickard*, given its illegitimate constitutional pedigree, in ways that make it a genuine threat to the liberty of the person.

This Court must give a candid answer to this question: "If the government can force us to buy health insurance, what can't it force us to do?" To that question it is not an acceptable answer to say that in the name of protecting and advancing health, the commerce power allows the federal government to prescribe what individuals may eat, how they must exercise, and what medicines they may take. Without judicially enforceable limits on the power of Congress, only the self-restraint of transient congressional majorities can limit the reach of the federal government. History teaches, and Madison knew all too well, that in any constitutional republic, the transition to unrestrained majority rule is often an irrevocable step on the road to tyranny.

Both the majority in *Lopez* and the concurrence of Justice Anthony Kennedy (in which Justice Sandra Day O'Connor joined) recognized that risk and understood in the abstract the imperative of preserving the boundary between federal and State authority as a limitation on the federal commerce power. The majority noted that under the government's theories, "it is difficult to perceive any limitation on federal power, even in areas ... where the States historically have been sovereign." *Id.* at 564. Invoking both *Gibbons*, with a nod toward *Jones & Laughlin Steel*, it refused to admit that "the Constitution's enumeration of powers does not presuppose something not enumerated, and that

there never will be a distinction between what is truly national and what is truly local." *Id.* at 567-68.

In his *Lopez* concurrence, Justice Kennedy went further, asserting the need for careful judicial scrutiny of federal power where it might impact the separation of federal and State authority. "This case requires us to consider our place in the design of the Government and to appreciate the significance of federalism in the whole structure of the Constitution." *Id.* at 575. "The theory that two governments accord more liberty than one requires for its realization two distinct and discernible lines of political accountability: one between the citizens and the Federal Government; the second, between the citizens and the States." *Id.* at 576. That is the reason why political accountability matters: "Were the Federal Government to take over the regulation of entire areas of traditional State concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Id.* at 577.

The time has now come to turn these principles into reality. It is wholly wrong to assert uncritically, as does Judge Silberman, that "Congress be free to forge national solutions to national problems, no matter how local–or seemingly passive–their individual origins." 661 F.3d at 20. That argument

does nothing to deal with the situation when the "national problem" is Congress itself, who by its vice-like control over the economy stifles innovation by the imposition of national cartels driven by special interest politics. The Framers on this issue were far wiser for they understood that while it was important to energize Congress in some cases, it was vital to chain that Leviathan to the mast in others. The dangers of excessive Congressional action are manifest not only in the individual mandate, but in the full complex of the ACA's misguided regulation of every detail of standard health insurance contracts from guaranteed issue and renewal, to the medical loss ratio, to its weird systems of indirect price controls, none of which are before the Court in this challenge. It is equally apparent in the growing tendency of Congress to condition its spending in Medicaid on the willingness of the States to surrender their internal budgetary priorities to the federal government. One does not have to worship at the altar of "States' rights" to see massive imbalances in constitutional structure that are ingrained by deferring thoughtlessly to Congress on matters where State competition is both possible and desirable. Why trust Congress to "forge" national solutions, when its enactments bring a wrecking ball to State governments and local economic structures?

Put in its simplest form the system of competitive federalism, wherein the States vie with each other

for the loyalty and affections of its citizens cannot survive when subjected to the all-powerful hand of the federal government. In 1932, before the 1937 constitutional revolution, Justice Louis Brandeis could say with a straight face that one of the virtues of the American federalist system was that a single courageous State can serve as a "laboratory" for "novel social and economic experiments." *New State Ice v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Those days may be over, but the constitutional clause that gives Congress the power to regulate commerce "among the several States" should not be twisted to give Congress the power to destroy all forms of business within the several States. Chief Justice Marshall recognized in *McCulloch v. Maryland*, that "[T]he power to tax involves the power to destroy." 17 US. 159, 210 (1819). The time has now come to recognize that the power to regulate is also the power to destroy.

II. This Court Has A Vital Role As Guardian Of The Constitutional Constraints On Government Power

For the Founders, the Constitution's framework of dual sovereignty was important not only as a means of protecting State prerogatives, but also as a means of preserving individual liberty. *The Federalist* No. 51 (Madison) ("In the compound republic of America, the power surrendered by the

people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.")

As Justice Kennedy noted in his concurrence in *Lopez*, "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the federal courts] to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Lopez*, 514 U.S. 578 (Kennedy, J., concurring).

This Court has not been called on frequently to restore the balance between State and federal power set forth in the Constitution, but when it has it has often played a pivotal role. In *Schechter Poultry*, 295 U.S. at 495, this Court defended the limited nature of federal power even though it meant invalidating the centerpiece of a progressive president's legislative agenda. After the decision, Justice Louis Brandeis is reputed to have told aides to President Roosevelt, "I want you to go back and tell the president that we're not going to let this government centralize everything." Jeff Shesol, *Supreme Power: Franklin Roosevelt v. The Supreme Court* 137 (2010). *Schechter* drew transient political fire, but is now considered an example of proper judicial review.

Grave consequences could follow this Court abdication of its role as guardian of the Constitution's federal system. Without judicially enforceable limits on the power of Congress, the extent of those limits will depend only on the self-restraint of the majority, which is an insufficient safeguard for individual liberty. As Tocqueville famously noted, an unconstrained majoritarian democracy can turn into a tyranny of the majority. Tocqueville, 1 *Democracy in America* 241 (Harvey C. Mansfield & Delba Winthrop eds. & trans. 2000) (1835) ("I am not so much alarmed at the excessive liberty which reigns in that country as at the inadequate securities which one finds there against tyranny. An individual or a party is wronged in the United States, to whom can he apply for redress? If to public opinion, public opinion constitutes the majority; if to the legislature, it represents the majority and implicitly obeys it; if to the executive power, it is appointed by the majority and serves as a passive tool in its hands.") As Madison rightly noted at the Virginia Ratifying Convention, "there are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations." James Madison, *General Defense of the Constitution*, Speech at the Virginia Convention (June 6, 1788). Subsequent events have only continued to vindicate Madison's insight.

Amicus Curiae urges this Court to consider how much is at stake. This Court will surely hear a question posed in stark terms: "If the government can force us to buy health insurance, what can't it force us to do?" As an incremental expansion in government regulation, however, Judge Silberman's conclusion is easy enough to accept. The roof of enumerated powers constraints has been leaking since the 1930s and nobody can say whether it will provide any protection from a flood of new government regulation in the future. Compared with the overall condition of the roof, what's the point of arguing over one new leak?

But there is more at stake than meets the eye. It is not merely that the prospect of a federal government regulating every single aspect of our lives is wholly incompatible with our constitutional notions of liberty and limited government. More worrisome, this Court, and the Constitution which it is sworn to uphold, are the only things that can ultimately protect our constitutional Republic from the tyrannical caprices of some future transient.

The ACA poses a serious threat to the dual purposes of individual liberty and limited government that our Constitution was created to preserve. This Court should reaffirm its commitment to that text, and the values it embodies.

CONCLUSION

This Court should rule that the individual mandate of the ACA exceeds the power of Congress to regulate commerce among the several States.

Respectfully submitted,

Richard A. Epstein
800 N. Michigan Avenue
Apartment #3502
Chicago, IL 60611
(773) 450-4476
richard.epstein@nyu.edu

Mario Loyola
Counsel of Record
Josiah Neeley
TEXAS PUBLIC POLICY FOUNDATION
900 Congress Ave.,
Suite 400
Austin, TX 78701
(512) 472-2700
mloyola@texaspolicy.com

Counsel for Amicus Curiae

February 13, 2012

AMICUS CURIAE BRIEF

FEB - 8 2012

No. 11-398

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THOMAS MORE LAW CENTER, JANN DEMARS, JOHN CECI, STEVEN HYDER, AND SALINA HYDER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS (MINIMUM COVERAGE PROVISION)

ROBERT J. MUISE
Counsel of Record
AMERICAN FREEDOM LAW CENTER
P.O. BOX 131098
ANN ARBOR, MI 48113
(855) 835-2352
rmuise@americanfreedomlawcenter.org

RICHARD THOMPSON
THOMAS MORE LAW CENTER
24 FRANK LLOYD WRIGHT DR.
P.O. BOX 393
ANN ARBOR, MI 48106
(734) 827-2001

DAVID YERUSHALMI
AMERICAN FREEDOM LAW CENTER
1901 PENNSYLVANIA AVE. NW
WASHINGTON, D.C. 20006
(855) 835-2352

Counsel for Amici Curiae

February 8, 2012

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

is case challenges Congress's authority to e private citizens to purchase and maintain mum essential" healthcare insurance coverage penalty of federal law (hereinafter "individual ate" or "minimum coverage provision") pursuant Patient Protection and Affordable Care Act.*

Curiae, who are subject to the individual ate, request that the Court hold that Congress led its constitutional authority by enacting the ate. Moreover, in addition to the facial challenge ited, *Amici* request that the Court decide ier the mandate is unconstitutional as applied to duals who reside in States without state-ated healthcare insurance, who do not have icare insurance, and who do not want to ase healthcare insurance.

e ultimate question before the Court and ssed in this brief is whether Congress had the under Article I of the Constitution to enact the ium coverage provision.

L. No. 111-148, 124 Stat. 119 (2010), *amended by* care and Education Reconciliation Act of 2010, Pub. L. No. 2, 124 Stat. 1029 (2010) (hereinafter "Affordable Care Act" ").

TABLE OF CONTENTS

Question Presented i

Table of Authorities iii

Statement of Identity and
Interests of *Amici Curiae* 1

Statement 3

Argument 5

Conclusion 27

TABLE OF AUTHORITIES

S

v. Planned Parenthood of N. New Eng.,
U.S. 320 (2006) 26

. United States,
S. Ct. 2355 (2011) 21

Chicago v. Morales,
U.S. 41 (1999) 24

onwealth of Va. v. Sebelius,
F. Supp. 2d 768 (E.D. Va. 2010) 25

s v. Ogden,
J.S. 1 (1824) 8

es v. Raich,
U.S. 1 (2005) . . . . . *passim*

of Atlanta Motel, Inc. v. United States,
U.S. 241 (1964) 10, 12, 18, 20

v. Va. Surface Mining &
lamation Assn., Inc.,
U.S. 264 (1981) 9

bach v. McClung,
U.S. 294 (1964) 10, 18, 20

. United States,
U.S. 146 (1971) 9

Thomas More Law Ctr. v. Obama,
651 F.3d 529 (6th Cir. 2011) . . . . . *passim*

United States v. Evans,
928 F.2d 858 (9th Cir. 1991) 12

United States v. Lopez,
514 U.S. 549 (1995) . . . . . *passim*

United States v. Morrison,
529 U.S. 598 (2000) . . . . . *passim*

United States v. Salerno,
481 U.S. 739 (1987) 24, 25

Wickard v. Filburn,
317 U.S. 111 (1942) . . . . . *passim*

STATUTORY MATERIALS

Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Healthcare and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) . . . . . *passim*

26 U.S.C. § 5000A(a) 3, 4

26 U.S.C. § 5000A(b) 4

26 U.S.C. § 5000A(b)(1) 3, 5

26 U.S.C. § 5000A(d)(2), (3), & (4) 4

42 U.S.C. § 18022(b)(1) 5

42 U.S.C. § 18091(1) 19

J.S.C. § 18091(2) 19

J.S.C. § 18091(C) 26

NSTITUTIONAL PROVISIONS

. Const. art. I, § 8, cl. 3 . . . . . *passim*

. Const. art. VI, cl. 2 6

LE

reme Court Rule 37 1

HER AUTHORITIES

Federalist No. 78 (A. Hamilton) 4

er Wendell Holmes, *The Path of the Law*,
10 Harv. L. Rev. 457 (1897) 4

STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE*

·suant to Supreme Court Rule 37, *Amici Curiae* .s More Law Center, Jann DeMars, John Ceci, Hyder, and Salina Hyder respectfully submit ·ief requesting that the Court hold that the .ual mandate provision of the Act is ·titutional.[1]

ici were all parties to the constitutional ıge to the individual mandate that was ted to the United States Court of Appeals for :th Circuit. That case is reported as *Thomas aw Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011).

ici also filed a petition for a writ of certiorari to ɔurt, requesting review of the Sixth Circuit's l opinion, which upheld the individual mandate t a facial challenge but declined to address ɜr it was constitutional as applied to an .ual without healthcare insurance. That ɔ, which was filed as No. 11-117, remains g with this Court.

ici Thomas More Law Center ("TMLC") is a ɜl public interest law firm based in Ann Arbor,

---

rties have consented to the filing of this brief. Letters ng such consent have been filed with the Clerk of the 4*mici* further state that no counsel for any party authored :f in whole or in part, and no counsel or party made a ·y contribution intended to fund the preparation or ion of this brief. No person other than *Amici*, their s, or their counsel made a monetary contribution to its tion or submission.

Michigan. TMLC's employees receive healthcare through an employer healthcare plan sponsored and contributed to by TMLC. TMLC's healthcare plan is subject to the provisions and regulations of the Act. TMLC objects, through its members, which include *Amici* DeMars and Steven Hyder, to being forced to purchase and maintain "minimum essential" healthcare insurance coverage under penalty of federal law.

Amici DeMars, Ceci, Steven Hyder, and Salina Hyder are United States citizens, Michigan residents, and federal taxpayers. *Amici* Ceci, Steven Hyder, and Salina Hyder do not have private healthcare insurance, and they object to being compelled by the federal government to purchase and maintain "minimum essential" healthcare coverage pursuant to the Act.

Amici have arranged their personal affairs such that it will be a hardship for them to have to either pay for health insurance that is not necessary or desirable or face penalties under the Act.

STATEMENT

This case challenges the constitutionality of the vidual mandate provision of the Affordable Care , which requires private citizens, including *Amici*, purchase and maintain "minimum essential" lthcare insurance coverage under penalty of federal .[2] *Amici* contend that Congress exceeded its hority under the Constitution by enacting this ıdate.[3]

At its core, this case is about the constitutional ts of the federal government.[4] When Congress acts ond those limits, as here, the judicial branch should rcise its authority as the guardian of our stitution and enjoin the *ultra vires* acts.[5]

---

e Affordable Care Act at § 1501 (codified at 26 U.S.C. 00A(a)). Individuals who fail to satisfy the "individual onsibility requirement" must pay a monetary penalty. *See* 26 C. § 5000A(b)(1).

e Sixth Circuit correctly held that the Act was not an exercise ngress's taxing power and thus could not be upheld on that s. *Thomas More Law Center*, 651 F.3d at 550-54.

uling that the individual mandate is unconstitutional does mean that Congress is without power to "fix" the national thcare system. Such a ruling would simply reaffirm the amental notion that when the government acts, it must do so istent with the Constitution.

: Senior District Judge Graham, sitting by designation, rved in his dissenting opinion in *Thomas More Law Ctr. v. na*:

To the fatalistic view that Congress will always prevail and courts should step back and let the people, if offended, speak through their political representatives, I say that

Amici request that the Court strike down the individual mandate to "prove" that a meaningful limit on Congress's commerce powers exists. *See Thomas More Law Ctr.*, 651 F.3d at 573 (dissent).

President Obama signed the Affordable Care Act into law on March 23, 2010. An essential provision of the Act requires private citizens, including *Amici*, to purchase and maintain "minimum essential" healthcare coverage under penalty of federal law.[6] 26 U.S.C. § 5000A(a). What is considered an acceptable or "minimum essential" level of healthcare coverage is

---

> "courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." *The Federalist* No. 78 (A. Hamilton). In this arena, the "public force" is entrusted to the courts. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 457 (1897). "[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." *The Federalist* No. 78.

Thomas More Law Ctr., 651 F.3d at 572.

[6] The individual mandate provision requires each "applicable individual" to purchase health insurance or be subject to what the Act calls appropriately a "penalty," and at times euphemistically a "Shared Responsibility Payment." 26 U.S.C. § 5000A(b). The definition of an "applicable individual," which triggers this exercise of Congress's Commerce Clause power, is mere existence because the definition begins with any "individual" and then provides three exclusions: (1) religious objectors who oppose health insurance in principle; (2) non-residents or illegal residents; and (3) incarcerated individuals. 26 U.S.C. § 5000A(d)(2), (3), & (4).

ined by the federal government.[7] *See* 42 U.S.C. 2(b)(1). If a private citizen chooses not to se and maintain an acceptable level of :are coverage, the Act imposes monetary es. 26 U.S.C. § 5000A(b)(1).

ARGUMENT

; Court should strike down the individual te and establish a meaningful limitation on ssional power under the Commerce Clause.

'*homas More Law Ctr. v. Obama*, 651 F.3d 529 ir. 2011), Circuit Judge Sutton and Senior t Judge Graham, sitting by designation, both n their respective opinions the need for this :o address the limits of Congress's Commerce authority in the context of this constitutional ge to the Act—a challenge which has national ance.

is concurring opinion, Judge Sutton made the ıg relevant observation:

ıne level, past is precedent, and one tilts at eless causes in proposing new categorical ts on the commerce power. But there is

---

having insurance is not enough. To avoid a penalty, the ısurance plan must include, at a minimum, ambulatory ervices, emergency services, hospitalization, maternity born care, mental health and substance abuse treatment, tion drugs, rehabilitative and habilitative services and laboratory services, preventative services, wellness chronic disease management, pediatric services, and nd vision care for children. *See* 42 U.S.C. § 18022(b)(1).

> another way to look at these precedents—that the Court either should stop saying that a meaningful limit on Congress's commerce powers exists or prove that it is so. The stakes of identifying such a limit are high because the congressional power to regulate is the power to preempt, a power not just to regulate a subject co-extensively with the States but also to wipe out any contrary state laws on the subject. U.S. Const. art. VI, cl. 2. The plaintiffs present a plausible limiting principle, claiming that a mandate to buy medical insurance crosses a line between regulating action and inaction, between regulating those who have entered a market and those who have not, one that the Court and Congress have never crossed before.[8]

Thomas More Law Ctr., 651 F.3d at 555.

In his dissenting opinion, Judge Graham stated,

> Notwithstanding *Raich*, I believe the Court remains committed to the path laid down by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas to establish a framework of meaningful limitations on congressional power under the Commerce Clause. The current case is an opportunity to prove it so.

Thomas More Law Ctr., 651 F.3d at 573 (dissent).

---

[8] In his opinion, Circuit Judge Martin stated that "the Constitution imposes no categorical bar on regulating inactivity." *Thomas More Law Ctr.*, 651 F.3d at 549.

ge Graham concluded his dissenting opinion cogent explanation for why the Court should lown the individual mandate:

he exercise of power is allowed and the ıdate upheld, it is difficult to see what the ts on Congress's Commerce Clause ıority would be. What aspect of human vity would escape federal power? The mate issue in this case is this: Does the on of federalism still have vitality? To rove the exercise of power would arm gress with the authority to force individuals ɔ whatever it sees fit (within boundaries like First Amendment and Due Process Clause), ɔng as the regulation concerns an activity or sion that, when aggregated, can be said to e some loose, but-for-type of economic ıection, which nearly all human activity ɜ. . . . Such a power feels very much like the eral police power that the Tenth ɜndment reserves to the States and the ɔle. A structural shift of that magnitude can accomplished legitimately only through stitutional amendment.

sent).

ɜed, this Court has referred to the principles stablish the fundamental structure of our ment embodied in the Constitution, which he powers of the federal government to those ly enumerated, as "first principles":

start with first principles. The Constitution tes a Federal Government of enumerated

> powers. As James Madison wrote, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." This constitutionally mandated division of authority was "adopted by the Framers to ensure protection of our fundamental liberties." Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

United States v. Lopez, 514 U.S. 549, 552 (1995) (internal citations and quotations omitted).

The first of the discreet enumerated powers of the federal government are set out in Article I, section 8 of the Constitution. The third of this first grouping of powers is the Commerce Clause, which grants Congress the power "[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

From the early days of our Republic until the present, the Court has confronted and grappled with the meaning and scope of the phrase "commerce . . . among the several States." In the first of these cases, *Gibbons v. Ogden*, 22 U.S. 1 (1824), the Court held that "commerce" included more than just the "traffic" of goods from one state to another; it also included the regulation of commercial "intercourse," such as navigation on the country's waterways. *Id.* at 189-90.

r the course of the Commerce Clause's long and .ed jurisprudence, the Court has mapped out a e-prong analysis to determine if a federal law (or ;gulatory regime promulgated pursuant to it) ›erly falls within this enumerated grant of ıority. *See Lopez*, 514 U.S. at 552-57, 568-74, 583 ınedy, J., concurring); *id.* at 593-99 (Thomas, J., urring) (reviewing the history of Commerce Clause ;prudence).

Beginning with *Perez v. United States*, 402 U.S. 146 1), every important Commerce Clause opinion has 'essly adopted a three-prong analysis to test ther legislation falls within the bounds of nissibly regulated activities.[9] *Id.* at 150. This :iry presumes that Congress may regulate: (1) "the of the channels of interstate commerce," such as ılations covering the interstate shipment of stolen ls; (2) to protect "the instrumentalities of interstate merce, or persons or things in interstate merce," such as legislation criminalizing the ruction of aircraft and theft from interstate merce; and (3) "those activities that substantially :t interstate commerce." *Lopez*, 514 at 558-59; *see Perez*, 402 U.S. at 150.

Vhile the first two categories are rather ightforward because they touch upon interstate merce directly, it is the last category that has so :d the Court. Notwithstanding the vexation

---

also Gonzales v. Raich, 545 U.S. 1, 16-17 (2005); *United s v. Morrison*, 529 U.S. 598, 608-09 (2000); *United S'ıtes v. :*, 514 U.S. 549, 558-59 (1995); *Hodel v. Va. Surface Mining clamation Assn., Inc.*, 452 U.S. 264, 276-77 (1981).

quotient of this prong, its rationale is manifestly plausible. That is, while there are some local commercial activities that in themselves do not participate whatsoever in interstate commerce, they are nonetheless quite obviously commercial activities that "substantially affect" interstate commerce.

Two civil rights era cases of this sort are *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and its companion case, *Katzenbach v. McClung*, 379 U.S. 294 (1964). These cases involved a challenge to the then-recently enacted civil rights legislation, which prevented motel-hotel owners and restaurateurs, respectively, from discriminating against their minority consumers. The Court in those cases made clear that a purely local activity that substantially affects interstate commerce, such as providing lodging accommodations or food to customers traveling interstate and dealing in and consuming goods that were very much a part of interstate commerce, is properly within the reach of the Commerce Clause because the local activity substantially and directly affects interstate commerce. Thus, in both cases, the plaintiffs had made an affirmative choice to engage in commercial activity—activity that Congress could regulate.[10]

This third prong begins to vex, however, when the Court expands its reach to include a purely local, non-commercial activity, which may or may not ever affect interstate commerce, simply because it is an integral

---

[10] Similarly, the plaintiffs in *Heart of Atlanta Motel* and *Katzenbach* could opt out of the motel and restaurant markets and thus place themselves beyond the reach of Congress.

a broader statutory scheme that permissibly
:s interstate commerce. The two model cases
sort—bookends separated by more than 60
are *Wickard v. Filburn*, 317 U.S. 111 (1942),
zales v. Raich, 545 U.S. 1 (2005).

Vickard, the Court held that a regulatory
permissibly regulating commercial, interstate
ural activity could properly capture the non-
cial, economic activity of individual wheat
growing wheat for their own personal
ption precisely because this activity could have
:rse affect on the regulatory scheme's price
mechanisms. Similarly, in *Raich*, the Court
:d, relying in large part on *Wickard*, that non-
cial, home-grown, medicinal marijuana was
ibly captured by the legislative regulatory
because Congress could rationally conclude
ne of this marijuana would leak into the illegal
te commercial market, which was the central
f the statutory scheme.

.tion is inescapable, however, because nestled
:en *Wickard* and *Raich* are two modern cases
re widely understood to cabin the Commerce
: reach by prohibiting the federal regulation of
ocal, non-commercial activity. Both *United*
Lopez, 514 U.S. 549 (1995), and *United States*
son, 529 U.S. 598 (2000), invalidated federal
which sought to impermissibly regulate
ocal, non-commercial activity—activity that
s had concluded quite rationally could affect
te commerce. Specifically, in *Lopez*, the Court
ed the Gun-Free School Zone Act of 1990,
:riminalized possession of a gun within a
ily defined school zone. It is worth a moment's

pause here to follow the Court's reasoning in rejecting the Commerce Clause's reach into this domain of non-commercial activity:

> The Government's essential contention, *in fine*, is that we may determine here that § 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, *through the mechanism of insurance*, those costs are spread throughout the population. [*United States v. Evans*, 928 F.2d 858, 862 (9th Cir. 1991)]. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. [*Cf. Heart of Atlanta Motel, Inc.*, 379 U.S. at 253]. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could *rationally* have concluded that § 922(q) substantially affects interstate commerce.
>
> We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning,

.at Congress could regulate not only all violent ime, but all activities that might lead to olent crime, regardless of how tenuously they late to interstate commerce. Similarly, under e Government's "national productivity" asoning, Congress could regulate any activity at it found was related to the economic oductivity of individual citizens: family law cluding marriage, divorce, and child custody), r example. Under the theories that the overnment presents in support of § 922(q), it difficult to perceive any limitation on federal wer, even in areas such as criminal law forcement or education where States storically have been sovereign. Thus, if we ere to accept the Government's arguments, we e hard pressed to posit any activity by an dividual that Congress is without power to gulate.

, 514 U.S. at 563-64 (1995) (internal citations eferences omitted) (emphasis added).

hat is striking about *Lopez* is that it can hardly gued that it was irrational for Congress to have uded that possessing guns near schools would interstate commerce. It is no less of an "effect" the possible leakage of private, homegrown, cinal marijuana fully regulated by California. vhat is apparent from the lengthy quote above is the *Lopez* Court understood that if the multi- l inference required to move from gun possession n "effect" on interstate commerce was an priate nexus for upholding the constitutionality regulation, that inference would obliterate the titution's enumeration of powers.

Morrison's result was similar and no less vexatious for the older *Wickard* and the yet to be rendered *Raich*. This is especially true because in *Morrison*, unlike in *Lopez*, Congress had made a host of explicit findings supporting its legislation allowing a federal private right of action for a woman violently assaulted in a "gender-based" crime. There the Court held:

> In contrast with the lack of congressional findings that we faced in *Lopez*, § 13981 *is* supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." Rather, "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."
>
> In these cases, Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. Congress found that gender-motivated violence affects interstate commerce "by deterring potential victims from traveling interstate, from engaging in employment in

ıterstate business, and from transacting with usiness, and in places involved in interstate ›mmerce; . . . by diminishing national roductivity, increasing medical and other costs, nd decreasing the supply of and the demand ·r interstate products." Given these findings nd Petitioners arguments, the concern that we xpressed in *Lopez* that Congress might use the ommerce Clause to completely obliterate the onstitution's distinction between national and ·cal authority seems well founded. The ›asoning that Petitioners advance seeks to ·llow the but-for causal chain from the initial :currence of violent crime (the suppression of hich has always been the prime object of the tates' police power) to every attenuated effect pon interstate commerce. If accepted, etitioners' reasoning would allow Congress to ›gulate any crime as long as the nationwide, ggregated impact of that crime has substantial fects on employment, production, transit, or ›nsumption. Indeed, if Congress may regulate ›nder-motivated violence, it would be able to ›gulate murder or any other type of violence nce gender-motivated violence, as a subset of .l violent crime, is certain to have lesser :onomic impacts than the larger class of which is a part.

ison, 529 U.S. at 614-15 (internal quotations and .ons omitted).

ltimately, the majority opinion in *Raich* struggled tily with the third prong of the Commerce Clause. struggle was necessitated by the incongruity and ısistency of the Court's own jurisprudence. One

version of the Commerce Clause forbade federal regulation to reach non-economic, local activity even if that activity in the aggregate might very well materially impact interstate commerce (per *Lopez* and *Morrison*). The other version of the Commerce Clause was understood to reach wholly private, non-commercial activity, like growing your own wheat or cultivating your own personal marijuana for medicinal purposes, neither of which might ever actually affect interstate commerce (per *Wickard* and *Raich*). But, thankfully, *Raich* does not leave the vexing problem unattended.

The Court in *Raich* suggested how to reconcile the differences between these two pairs of Commerce Clause decisions. This reconciliation rests in the distinction between *economic activities* and *non-economic activities*. The legislation at issue in *Lopez* and *Morrison* impermissibly dealt with local criminal behavior that was rooted in violence, but which had no necessary economic nexus as an activity. That is, the carrying of a gun or violence against a woman is not economic activity in any generic way. *Wickard* and *Raich*, however, permissibly regulated local, non-commercial activity because the cultivation of an agricultural product and a regulated drug were intrinsically *economic* activities. In the Court's own words:

> Despite congressional findings that such crimes [violence against women in *Morrison*] had an adverse impact on interstate commerce, we held the statute unconstitutional because, like the statute in *Lopez*, it did not regulate economic activity. We concluded that "the noneconomic, criminal nature of the conduct at issue was

ntral to our decision" in *Lopez*, and that our ior cases had identified a clear pattern of alysis: "Where economic activity substantially fects interstate commerce, legislation gulating that activity will be sustained." *Morrison*, 529 U.S. at 610].

nlike those at issue in *Lopez* and *Morrison*, e activities regulated by the [Controlled ubstances Act ("CSA"), which criminalized en private, medicinal marijuana,] are intessentially economic. "Economics" refers "the production, distribution, and nsumption of commodities." *Webster's Third ew International Dictionary* 720 (1966). The SA is a statute that regulates the *production, stribution,* and *consumption* of commodities r which there is an established, and lucrative, terstate market. Prohibiting the intrastate ssession or manufacture of an article of mmerce is a rational (and commonly utilized) eans of regulating commerce in that product. uch prohibitions include specific decisions quiring that a drug be withdrawn from the arket as a result of the failure to comply with gulatory requirements as well as decisions cluding Schedule I drugs entirely from the arket. Because the CSA is a statute that rectly regulates economic, commercial tivity, our opinion in *Morrison* casts no doubt its constitutionality.

, 545 U.S. at 25-26 (emphasis added).

he point of this Commerce Clause analysis, her in the expansive rulings of *Wickard* and *Raich*

or the more careful federalism-sensitive rulings of *Lopez* and *Morrison*, is that these cases and every single other Commerce Clause decision since this Nation's founding unanimously and explicitly hold that congressional power under this clause is strictly and absolutely limited to some kind of affirmative behavior or activity. Whether it's the "economic activity" of the non-commercial growing of wheat (*Wickard*) or marijuana (*Raich*) within the broad permissible legislative scheme or the commercial activity of providing lodging and food services to interstate travelers in *Heart of Atlanta Motel* or *Katzenbach*, before Congress can impose regulations upon an individual's activity through the Commerce Clause, the individual must be engaged in some activity.

Moreover, as confirmed by *Lopez, Morrison*, and *Raich*, activity alone (like possessing a gun or assaulting a woman)—even if it will affect interstate commerce in the aggregate over time—is not enough to cross the Commerce Clause Rubicon. The activity must be *economic*. But this means, at the very least, that there must be *some activity* to apply the Commerce Clause analysis. And, as *Lopez, Morrison*, and *Raich* make clear, that activity must in and of itself be economic even if it need not be commercial.

Here, the Act does not regulate economic *activity*, but rather the *decision* to not engage in commercial or economic activity. Consequently, the Act does not even pretend to fit within any of the Court's previous Commerce Clause rulings. The individual mandate attaches to a legal resident of the United States who chooses to sit at home and do nothing. This resident, quite literally, merely exists. He or she is neither

ged in economic activity nor in any other activity would bring him or her within the reach of even .timate regulatory scheme. *Lopez*, 514 U.S. at 561 ing that the non-commercial *activity* must be an *ntial* part of a larger regulation of economic ity, in which the regulatory scheme could be rcut unless the intrastate activity were lated") (emphasis added). In this case, we have ıer economics nor activities.

he Act purports to provide legislative findings to ort Congress's authority to enact the individual late under the Commerce Clause. According to Act: "The individual responsibility requirement .ded for in this section . . . is commercial and omic in nature, and substantially affects state commerce, as a result of the effects ibed in paragraph (2)." 42 U.S.C. § 18091(1). graph (2) sets forth various "[e]ffects on the nal economy and interstate commerce" to support lating the "individual responsibility requirement." e findings make statements about the general omic and commercial impact healthcare and hcare insurance has on the national economy and much of that impact is harmful to healthcare rally and to the individual specifically. The lative findings conclude by suggesting that the osed legislation ameliorates these deleterious ts of the current system. *See* 42 U.S.C. § 18091(2).

ut none of these legislative findings are at all ant to the issue this lawsuit raises as a matter of whether the federal government has authority r the Commerce Clause *to force Amici* and other arly situated persons *to purchase* and maintain a

required level of insurance coverage or suffer the consequences of a federally-imposed penalty.

Indisputably, individuals without healthcare insurance, such as the individual *amicus*—as volitionally uninsured legal residents of the United States—are not now engaged in any commercial or economic activity that affects in any way interstate commerce. This is because, unlike *Wickard* and *Raich*, or *Heart of Atlanta Motel* and *Katzenbach*, these *amici* are not engaged in any economic activity whatsoever relative to the legislative findings of the Act or the regulatory scheme of the Act—essential or otherwise.

As the Court forcefully pointed out in both *Lopez* and *Morrison*, the national government is restrained and constrained by federalism not to go beyond its discreet and enumerated powers. This fundamental requirement of our federal government, which is and remains the law of the land, was described by the Court as a "first principle." Under the Commerce Clause, Congress is limited to regulating *at the far reaches of its authority* only local *economic* activity that it rationally determines is an "essential part of a larger regulation of *economic* activity, in which the regulatory scheme could be undercut unless the intrastate *activity* were regulated." *See Lopez*, 514 U.S. at 561 (emphasis added).

But these *far reaches* of congressional authority fall *far short* of this case because the regulatory scheme of the Act seeks to reach not just economic activity, but mere existence and inactivity. Thus, the Act seeks to mandate that *Amici* and other private citizens cease their inactivity, and it further designs a penalty scheme to deprive these citizens of their liberty to

ıse *not* to engage in a private commercial saction.[11]

f the Act is understood to fall within Congress's ımerce Clause authority, the federal government have the absolute and unfettered power to create plex regulatory schemes to fix every perceived ılem imaginable and to do so by ordering private ens to engage in affirmative acts, under penalty of

---

Bond v. United States, 131 S. Ct. 2355 (2011), the Court fully reemphasized the important role federalism plays in cting the integrity of government and the freedom of iduals. The Court stated as follows:

'he Framers concluded that allocation of powers between he National Government and the States enhances reedom, first by protecting the integrity of the overnments themselves, and second by protecting the eople, from whom all governmental powers are erived. . . .

'ederalism secures the freedom of the individual. It llows States to respond, through the enactment of ositive law, to the initiative of those who seek a voice in haping the destiny of their own times without having to ely solely upon the political processes that control a emote central power. . . .

'ederalism also protects the liberty of all persons within State by ensuring that laws enacted in excess of elegated governmental power cannot direct or control heir actions. . . . By denying any one government omplete jurisdiction over all the concerns of public life, ederalism protects the liberty of the individual from rbitrary power. When government acts in excess of its awful powers, that liberty is at stake.

t 2364; *see also id.* at 2368 (Ginsburg, J., concurring) ("In , a law beyond the power of Congress, for any reason, is no t all.") (quotations and citation omitted).

law, such as eating certain foods, taking vitamins, losing weight, joining health clubs, buying a GMC truck, or purchasing an AIG insurance policy,[12] among others. Consequently, Congress will be incentivized to create intrusive regulatory schemes as constitutional cover for naked power grabs, thereby turning the Constitution on its head.

Moreover, it is a mistake to conclude that Congress had Commerce Clause authority to enact the individual mandate because the healthcare market is unlike other markets. The government repeatedly argued throughout this litigation that the Act properly regulates the economic activity of healthcare because, according to the argument, everyone will at some point in their lives engage the healthcare market with economic activity; therefore, decisions made today could have future economic effects. Thus, the government's argument is that the Act properly creates a regulatory scheme and penalty based on presumed future economic activity—activity that has not yet occurred and, indeed, may never occur. But this effort to make "healthcare" a kind of *sui generis* economic activity based on presumed future behavior is not justified by the Court's Commerce Clause jurisprudence nor does it provide a cogent brake to or principled limitation upon the federal government's claim of unrestrained plenary power to mandate all sorts of behavior, present and future, to curb

---

[12] If Congress has the power to force private citizens to purchase healthcare insurance, then it would certainly have the power to mandate the purchase of "minimum essential" life insurance. Everyone is going to die, and death certainly has economic consequences that affect interstate commerce, such as loss of earning power of the deceased, burial costs, etc.

lthcare costs. Simply because a particular market ght be unique in some fashion can't be a basis for nding Congress's Commerce Clause authority to ude regulating *decisions* (and even *indecision*) cting that market. Indeed, the same could be said ut the "food" market since every living, breathing son must participate in that market at some level else they would perish. Does the Constitution mit Congress to force private citizens to purchase alth" foods which they wouldn't otherwise purchase ler penalty of federal law? Moreover, precisely ause the healthcare market is *unlike* any other rket in that a person's health is arguably affected almost every *decision* made on a daily basis, uding whether to take vitamins, to exercise, to intain a certain body weight, etc., permitting igress to regulate *decisions* affecting a person's lth gives Congress unbridled power and thus terates the very structure of our constitutional public.

Aside from the facial invalidity of the individual ndate, the mandate is unconstitutional *as applied* *Amici* and other private citizens who do not have nimum essential" healthcare coverage. Indeed, this challenges the *authority* of Congress to enact the ividual mandate provision. It challenges igress's authority to force *Amici* and other similarly ated individuals—private citizens who are not by measure engaged in any relevant commerce—to chase "minimum essential" healthcare insurance erage as a matter of federal law. While this llenge could properly be viewed as an "as-applied" llenge, by their very nature, almost all challenges he specific exercise of an enumerated power, such he Commerce Clause, are facial challenges. Thus,

if Congress lacked the authority to enact certain legislation, such as the individual mandate, that legislation adversely affects everyone in every application. In light of this reality, it does not appear that the "no set of circumstances" language of *United States v. Salerno*, 481 U.S. 739, 745 (1987), has any practical impact on the resolution of this case. As the Court stated in *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999), "To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself."

In *United States v. Salerno*, 481 U.S. 739, 745 (1987), the Court stated,

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

As *Salerno* itself suggests, if Congress lacked enumerated authority to pass legislation at its inception, as in this case, then there would be "no set of circumstances . . . under which the Act would be valid." Thus, there would be no "conceivable set of circumstances" under which the Act could be enforced because there was no authority to enact the legislation in the first instance—the law is "legally stillborn." *See*

monwealth of Va. v. Sebelius, 728 F. Supp. 2d 768, 74 (E.D. Va. 2010). *See also Thomas More Law* 651 at 566 (dissent).

ıdeed, the Court did not cite *Salerno*, let alone y it, in either *United States v. Lopez*, 514 U.S. 549 5), or *United States v. Morrison*, 529 U.S. 598 0), cases in which the Court held that Congress ɜded its Commerce Clause authority by enacting ıin legislation. Nor did the Court cite to *Salerno* e more recent Commerce Clause case of *Gonzales ıich*, 545 U.S. 1 (2005).

ı his concurring opinion, which provided the ɔwest grounds for upholding the individual date in the Sixth Circuit, Judge Sutton held that challenge to the individual mandate was ıtially "undone by *United States v. Salerno*, 481 739, 745 (1987)." *Thomas More Law Ctr*, 651 at (dissent). That is, Judge Sutton viewed the titutional question of Congress's authority to force ıte citizens to purchase and maintain minimum ıtial healthcare insurance coverage through the set of circumstances" prism of *Salerno*—a view "favor[ed] the government." *Id.* at 556. In doing udge Sutton essentially rewrote the individual date by placing limits on the challenged authority ngress that Congress itself did not impose under hallenged Act. *See id.* at 559-64 (concluding that ndividual mandate was constitutional as applied individuals who voluntarily purchased insurance wanted to maintain it, but not at the "minimum ıtial" coverage limits, (2) individuals who ıtarily purchased insurance, but who did not want forced to maintain it at any level of coverage, ıdividuals living in States that already required

them to purchase insurance, and (4) individuals under 30 who can satisfy the requirement by purchasing catastrophic-care coverage). Indeed, Congress granted itself much greater authority to regulate private citizens because that was its intent: to increase the pool of insured by requiring those with no insurance to purchase "minimum essential" coverage or pay a penalty. *See* 42 U.S.C. § 18091(C) (finding that the individual mandate "will add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services, and will increase the number and share of Americans who are insured"). Aside from Judge Sutton's fourth example of "catastrophic-care coverage" not yet purchased, every application of Congress's Commerce Clause power cited by him involved a hypothetical in which the citizen was actually engaged in commerce (*i.e.*, the citizen purchased insurance and/or was covered by an existing insurance plan). Consequently, Judge Sutton's opinion should carry little weight.

In sum, as demonstrated here, this Court should not permit Congress to aggrandize its own power under the Constitution. Consequently, the Court should hold that Congress lacked authority to pass the individual mandate. Moreover, because the mandate is an essential component of the Act, it cannot be severed. *See Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006) ("After finding an application or portion of a statute unconstitutional, [the court] must next ask: Would the legislature have preferred what is left of its statute to no statute at all?"). Therefore, the entire statute must be struck down.

CONCLUSION

'he Court should hold that Congress lacked the ɜr under Article I of the Constitution to enact the mum coverage provision and strike down the ɜe Act.

Respectfully submitted,

ROBERT JOSEPH MUISE
Counsel of Record
American Freedom Law Center
P.O. Box 131098
Ann Arbor, Michigan 48113
(855) 835-2352
rmuise@americanfreedomlawcenter.org

DAVID YERUSHALMI
American Freedom Law Center
1901 Pennsylvania Avenue NW
Suite 201
Washington, D.C. 20006
(855) 835-2352

RICHARD THOMPSON
Thomas More Law Center
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106
(734) 827-2001

Counsel for Amici

AMICUS CURIAE BRIEF

No. 11-398

In The
Supreme Court of the United States

DEPARTMENT OF HEALTH AND
HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

**BRIEF OF *AMICUS CURIAE*
STEPHEN M. TRATTNER IN
SUPPORT OF RESPONDENTS
(Minimum Coverage Provision)**

STEPHEN M. TRATTNER
Counsel of Record
4626 Wisconsin Avenue, N.W.
Suite 300
Washington, DC 20016
(410) 353-0446
steve@trattnerlaw.com

Counsel for Amicus Curiae

QUESTION PRESENTED

The question presented is whether the minimum coverage provision is a valid exercise of Congress's powers under Article I of the Constitution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 7

THE INDIVIDUAL MANDATE INFRINGES ON POWERS RETAINED BY THE PEOPLE UNDER THE TENTH AMENDMENT 7

A. The Tenth Amendment Protects Both State Sovereignty And The Rights Of Sovereignty Retained In The People 9

B. This Court's Determination Of Whether The Individual Mandate Is Constitutional Requires An Independent Tenth Amendment Analysis That Is Distinct From An Analysis Based Solely On Article I Doctrines 11

1. This Court Must Conduct An Independent Analysis Under The Tenth Amendment 11

2. The Required Tenth Amendment Analysis Is Distinctly Different From This Court's Analysis Of The Federal Government's Article I Powers 15

TABLE OF CONTENTS – Continued

Page

3. Neither The Government's Brief Here, Nor Any Of Its Arguments In The Courts Below, Nor The Lower Courts' Opinions Themselves Analyze The Tenth Amendment Claim In This Case As Required In *Printz* And *New York*.... 18

C. The Individual Mandate Is Unconstitutional Under An Independent Tenth Amendment Analysis Because It Is At Odds With Historical Practice, Historical Understanding, And The Structure Of The Constitution, And A Holding That It Is Unconstitutional Is Consistent With The Jurisprudence Of This Court..... 20

1. The Individual Mandate Is At Odds With Historical Congressional Practice..... 21

2. The Individual Mandate Is At Odds With Historical Understanding Of Congress's Power..... 23

3. The Individual Mandate Is At Odds With The Structure Of The Constitution..... 26

4. A Holding That The Individual Mandate Is Unconstitutional Is Consistent With This Court's Existing Jurisprudence..... 29

CONCLUSION..... 32

TABLE OF AUTHORITIES

Page

CASES

Bond v. United States, 131 S. Ct. 2355 (2011).....10, 31

Chisholm v. Georgia, 2 U.S. (Dall.) 419 (1793).....9

Commonwealth of Va. v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010).....7, 21

Coyle v. Smith, 221 U.S. 559 (1911).....28

Florida v. HHS, 648 F.3d 1235 (11th Cir. 2011).....18, 27, 28, 31

Florida v. HHS, 780 F. Supp. 2d 1256 (N.D. Fla. 2011).....8, 22, 24

New York v. United States, 505 U.S. 144 (1992)....*passim*

Printz v. United States, 521 U.S. 898 (1997).....*passim*

Reno v. Condon, 528 U.S. 141 (2000).....3, 12, 14, 15

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974).....9

Selective Draft Law Cases, 245 U.S. 366 (1918).....27

Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011).....8, 19, 21

Tafflin v. Levitt, 493 U.S. 455 (1990).....10

Thomas More Law Center v. Obama, 651 F.3d 529 (6th Cir. 2011).....28

United States v. Comstock, 130 S. Ct. 1949 (2010).....17

TABLE OF AUTHORITIES – Continued

Page

W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624 (1943) 11

Yick Wo v. Hopkins, 118 U.S. 356 (1896) 9

CONSTITUTIONAL PROVISIONS

The Declaration of Independence Para. 2 (U.S. 1776) 10

U.S. Const. art. I ..... *passim*

U.S. Const. art. I, § 2 27

U.S. Const. art. I, § 8, cl. 1 ..... 8, 16, 27

U.S. Const. art. I, § 8, cl. 3 ..... *passim*

U.S. Const. art. I, § 8, cl. 12 27

U.S. Const. art. I, § 8, cl. 18 ..... *passim*

U.S. Const. art. III, § 2 27

U.S. Const. amend I 11

U.S. Const. amend III 26

U.S. Const. amend IV 26

U.S. Const. amend V 11, 27

U.S. Const. amend IX 30

U.S. Const. amend X ..... *passim*

U.S. Const. amend XIII 27

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. § 5000A(a)-(e) 7

42 U.S.C. § 18091(a)(1) 7

OTHER AUTHORITIES

Associated Press-National Constitution Center, Poll of 1,000 Adults (August 18-22, 2011), available at http://www.constitutioncenter.org/NewsWire.aspx?title=Poll%3A+Americans+Feel+Safe%2C+But+Congress+Shouldn't. (last visited November 9, 20111). Reported at http://www.charlotteobserver.com/2011/10/07/2670209/obamacare-holding-back-the-economy.html (last visited January 31, 2012). file:///C:/Corporate/Documents/obama%20care/80%20%25%20of%20public%20do%20not%20think%20gov%20can%20require%20mandate.htm (last visited January 31, 2012) 25

Causes of the English Civil War, available at http://www.historylearningsite.co.uk/english_civil-war.htm 23, 24

Congressional Budget Office Memorandum, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, August 1994 7

Friedrich August von Hayek, *The Constitution of Liberty* (University of Chicago Free Press 1960) 25

TABLE OF AUTHORITIES – Continued

Page

Mathew Spalding, *We Still Hold These Truths* (ISI Books 2009) 25

Stephen H, *The Causes of the English Civil War (1642-1651)*, available at http://www.helium.com/items/302608-the-causes-of-the-english-civil-war-1642-1651 23

The Federalist (Clinton Rossiter ed. 1961) ... 15, 16, 24, 30

Thomas Jefferson's Opinion on the Constitutionality of a National Bank (1791) (on file at the Yale Avalon Project, available at http://avalon.law.yale.edu/subject_menus/jeffpap.asp), and available at http://www.u-s-history.com/pages/h389.html 32

INTEREST OF *AMICUS CURIAE*[1]

Stephen M. Trattner has practiced law for over forty years and is a student of the Constitution. He is a member of this Court's bar, and has filed briefs in this Court in the course of his representation of parties in litigation. Today, for the first time, he is submitting a brief on his own behalf as an *amicus*.

Over the last sixteen months, *amicus* has devoted a substantial amount of his professional practice to a study of the constitutional issues raised by the Individual Mandate, including the challenges based on the People prong of the Tenth Amendment. He has reviewed carefully the several decisions of the lower courts that have addressed the Individual Mandate's constitutionality, as well as the briefs of the parties and some *amici*.

From his study, he has concluded that this case presents the most important constitutional issue to be decided in his lifetime. In his view, the first and most important argument against the Individual Mandate is that it violates rights reserved to the

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae* and his counsel, made any monetary contribution toward the preparation or submission of this brief. On November 15, 16, and 22, 2011, all parties filed letters with the Clerk of Court giving their blanket consent to the filing of *amicus curiae* briefs.

People under the Tenth Amendment. He is filing this brief to advance this argument.

SUMMARY OF ARGUMENT

This Court has consistently recognized that the States enjoy sovereignty in their own sphere, which sovereignty Congress cannot compromise. Likewise, this Court has consistently recognized that the People are the "ultimate sovereigns" because all governmental powers are derived from them. Moreover, while the People have delegated through the Constitution sovereign powers to the States and to the Federal Government, the Tenth Amendment reveals that the People retain a core sovereignty not delegated to the States or to the Federal Government.

This Court has said of the Tenth Amendment that it "'states but a truism that all is retained which has not been surrendered.'" *New York v. United States*, 505 U.S. 144, 156 (1992) (citation omitted). This means, for example, that if Congress has a particular power under the Commerce Clause then that power was not reserved to the People or the States; conversely, "[i]f a power is . . . reserved by the Tenth Amendment [to the People or the States], it is necessarily a power the Constitution has not conferred on Congress." *Id.*

However, in *New York* this Court held that proper analysis of a challenge under the Tenth Amendment cannot be done on the basis of the Article I half of

that "truism" alone; in other words, simply considering whether Congress has a power under the Commerce Clause to enact the challenged statute is insufficient to conclude that there is no basis for finding that the statute violates the Tenth Amendment. The reason, this Court explained, is that the Tenth Amendment "limits" the enumerated powers the People granted to the Federal Government in Article I of the Constitution and requires a distinctively different test to determine whether a particular exercise of power is precluded by the Tenth Amendment.

For example, in *New York*, this Court held that even though the Commerce Clause gave Congress power to regulate the interstate market at issue in that case, the Tenth Amendment prohibited Congress from regulating in the way it had chosen. In *Printz v. United States*, 521 U.S. 898, 905 (1997), the Court did not even consider Congress's claim of power under the Commerce Clause and under the Commerce Clause as augmented by the Necessary and Proper Clause before holding, based on that distinctly different test, that Congress's method of regulation in that case was unconstitutional under the Tenth Amendment. In *Reno v. Condon*, 528 U.S. 141, 149 (2000), the Court reaffirmed that under *Printz* and *New York* even if an initial Commerce Clause analysis suggests that a particular regulation falls within Congress's powers under the Commerce Clause, a Tenth Amendment inquiry, which is distinctly different from Commerce Clause analysis, is still necessary.

Not only do this Court's opinions in *New York* and *Printz* demonstrate that an independent Tenth Amendment analysis is necessary when Congressional action arguably infringes on sovereignty under the Tenth Amendment, they also identify specific arguments that are irrelevant and unavailing in the Tenth Amendment context. Notably, every argument the Government has advanced here in support of a conclusion that Congress has power to impose the Individual Mandate under the Commerce Clause or under the Commerce Clause as augmented by the Necessary and Proper Clause was among those expressly rejected by this Court in either *Printz* or *New York* or both. Specifically, this Court in those cases expressly rejected the arguments raised again by the Government here that Congress's action is constitutional because it addresses an issue of national importance, that Congress's action is constitutional because it is needed to address a "unique" circumstance, and that Congress's action is constitutional because the challenged statutory provision is an integral part of a comprehensive legislative scheme.

Here, *Amicus* asserts that the Government's claimed Article I power to enact the Individual Mandate – a power that even the Government has acknowledged would allow Congress to impose a "command economy" – impermissibly encroaches on the residuary sovereignty of the People that is protected by the Tenth Amendment. An analysis based on the test that this Court required under *Printz* and *New York* supports this conclusion.

This Court in *New York* noted that the Tenth Amendment does not catalog the powers retained to the People and the States. Therefore, the answer to whether a particular congressional regulation infringes on sovereignty rights reserved under the Tenth Amendment must be sought through an examination of the historical understanding of those powers at the time the Constitution was ratified, the actions by Congress from ratification to the present, the structure of the Constitution, and the jurisprudence of this Court.

Application in this case of the *Printz* and *New York* test is straightforward and yields the same result as in those cases, where this Court held that the challenged congressional action was unconstitutional under the Tenth Amendment in each case. As in those cases, for over 200 years Congress never asserted that it had the power it now claims that it has. Nor is there any evidence here, as there was not in *New York* and *Printz*, to support a finding that that the Framers thought that Congress would have the power it now seeks to wield. As in those cases, here the historical record supports the opposite finding.

Further, just as it was significant in *New York* and *Printz* that the Constitution contains several references outside the Tenth Amendment in support of a finding that it was understood that the Constitution was preserving the States' sovereignty, here it is significant that the Constitution contains several references outside the Tenth Amendment that directly preserve the People's sovereignty. Moreover,

this Court in *New York* explained that the Tenth Amendment not only requires the protection of the States' sovereignty for themselves, but also for the protection of the "liberties" of the People. 505 U.S. at 181.

Finally, as demonstrated by the foregoing analysis, the conclusion that Congress lacks the power to require the People to purchase goods or services from a private company is consistent with the Tenth Amendment jurisprudence of this Court in *Printz* and *New York*.

Thus, just as the Tenth Amendment inquiry in those cases led to the conclusion that Congress had infringed upon the sovereignty of the States thereby also on the "liberty interests" of the People, an examination in this case of historical understanding and practice, the structure of the Constitution, and the jurisprudence of this Court leads to the conclusion that the Individual Mandate is a direct infringement on the sovereignty retained in the People. This Court should so hold to protect the ultimate sovereignty of the People, which deserves at least as much protection as that afforded to State sovereignty in *Printz* and *New York*.

Finally, if this Court does here as it did in *Printz* and conducts the required Tenth Amendment analysis first (instead of waiting until after it analyzes Congress's Article I powers) and holds that the Individual Mandate violates rights reserved under the

Tenth Amendment, it will have no need to plow new Article I ground.

ARGUMENT

THE INDIVIDUAL MANDATE INFRINGES ON POWERS RETAINED BY THE PEOPLE UNDER THE TENTH AMENDMENT.

The Patient Protection and Affordable Care Act (the "Act") mandates that each person in the United States purchase and maintain a specified minimum level of health insurance. 42 U.S.C. §§ 5000A(a)-(e), 18091(a)(1). Congress called this mandated purchase each person's "personal responsibility." *Id.* If any non-exempt person fails to purchase and maintain that minimum level of health insurance, they are subject to a penalty. *Id.* This portion of the Act has been referred to as the "Individual Mandate."

"Never before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive and residing in the United States." *Commonwealth of Va. v. Sebelius*, 728 F. Supp. 2d 768, 781-82 (E.D. Va. 2010). Congress was well aware of that fact prior to passage of the Act, having been advised by the nonpartisan Congressional Budget Office ("CBO") that "[a] mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action." Congressional Budget Office, *The Budgetary Treatment of an*

Individual Mandate to Buy Health Insurance, at 1-2 (1994) ("CBO Analysis").

Petitioners (the "Government") admit that if the Individual Mandate is constitutional, then Congress could hereafter require the People, solely by virtue of their being alive, to also purchase other goods if it found that the public's purchase of those goods would benefit the Nation's economy. *Florida v. HHS*, 780 F. Supp. 2d 1256, 1289 (N.D. Fla. 2011). Indeed, as the CBO affirms, if the Individual Mandate is constitutional, it could lead to "a *command economy*, in which the President and the Congress dictate[ ] how much each individual and family spen[d] on all goods and services." CBO Analysis, at 7 (emphasis added). Moreover, the Government has also admitted that if the Individual Mandate is deemed constitutional, then Congress "could impose imprisonment or other criminal punishment on the People who do not have health insurance." *Seven-Sky v. Holder*, 661 F.3d 1, 14-15 (D.C. Cir. 2011).

The specter of Congress wielding a power to compel the People to purchase a particular good or service from a private company (and, as in this case, to never go without that good or service from birth until death) upon pain of criminal punishment for non-compliance is both breathtaking and alarming.

However, Congress does not have that power – not under the Commerce Clause standing alone, not under the Commerce Clause as augmented by the Necessary and Proper Clause, and not under the Taxing and Spending Clause. Rather, under the Tenth

Amendment the People retained to themselves the liberty interest in deciding whether it was in their own and their families' best interests to purchase particular goods and services. Because the Individual Mandate is a facial violation of the Tenth Amendment, the Court must strike it down.

A. The Tenth Amendment Protects Both State Sovereignty And The Sovereignty Retained In The People.

From its early decisions to the present, this Court consistently has held that under the Constitution, sovereignty originates, and ultimately remains, in the People. *Chisholm v. Georgia*, 2 U.S. (Dall.) 419, 471 (1793) ("[T]he sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each state. . . . [The People] are truly the sovereigns of the country. . . ."); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts."); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 232-33 (1974) ("We tend to overlook the basic political and legal reality that the people, not the bureaucracy, are sovereign. . . . Executives, lawmakers, and members of the Judiciary are inferior in the sense that they are in the office only to carry out and execute the constitutional

regime."); *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (stating that "all governmental powers are derived [from the People]"). The Court's holdings are in accord with the Founders' statement of the same principle in the Declaration of Independence; namely, that "[g]overnments . . . deriv[e] their just powers from the consent of the governed." The Declaration of Independence para. 2 (U.S. 1776).

Through the Constitution, the People have delegated both to the States and to the Federal Government authority to exercise certain sovereign powers on their behalf. Through receipt of those delegated powers, the States and the Federal Government each are sovereign in their own respective spheres, "the States possess[ing] sovereignty concurrent with that of the Federal Government." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). This "allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the People, from whom all governmental powers are derived." *Bond*, 131 S. Ct. at 2364. Thus, this system of "'federalism secures to citizens the [individual] liberties that derive from the diffusion of sovereign power.'" *New York v. United States*, 505 U.S. 144, 181 (1992) (citation omitted).

Significantly, however, the People's liberties are not secured through federalism alone. Notwithstanding their delegation of certain powers to the States and to the Federal Government, the People retain a core sovereignty not delegated to any government.

See, e.g., U.S. Const. amend. I (powers of free speech, assembly, and religion retained in the People); U.S. Const. amend. V (power of self-incrimination retained in the People). The People's rights to "life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights" are reserved to be beyond "the vicissitudes of political controversy" and "beyond the reach of . . . [government] officials." *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943).

The Framers made explicit in the Tenth Amendment both the independent sovereignty of the States vis-à-vis the Federal Government and the truth that the People retain rights of sovereignty not delegated to any government. U.S. Const. amend. X. This is so even though the Tenth Amendment does not expressly catalog the rights that it protects. *New York,* 505 U.S. at 156 ("The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself. . . .").

B. This Court's Determination Of Whether The Individual Mandate Is Constitutional Requires An Independent Tenth Amendment Analysis That Is Distinct From An Analysis Based Solely On Article I Doctrines.

1. This Court Must Conduct An Independent Analysis Under The Tenth Amendment.

This Court's determination of whether the Individual Mandate is constitutional requires an independent

Tenth Amendment analysis that is distinct from an analysis based solely on existing Article I doctrines. When Congress has enacted mandates that arguably infringe on the sovereignty granted the States under the Tenth Amendment, this Court has expressly rejected the Federal Government's argument that an analysis based solely on existing Article I doctrines is sufficient to answer the Tenth Amendment challenge. *See New York*, 505 U.S. at 156-57, 159-60. *Accord Printz v. United States*, 521 U.S. 898, 905 (1997); *Reno v. Condon*, 528 U.S. 141, 149 (2000). In *New York*, this Court explained why:

> Congress exercises its conferred powers subject to the limitations contained in the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States [or to the People]. *The Tenth Amendment thus directs us to [separately] determine . . . whether an incident of state [or popular] sovereignty is protected by a limitation on Article I power.*

505 U.S. at 156-57 (emphasis added).

In *New York*, the Court applied this principle to the issue of whether Congress could require States to take title to low-level radioactive waste produced by private parties. *Id.* at 174-76. Although the Court first concluded that "[r]egulation of the . . . interstate market in [low-level radioactive] waste disposal [was] . . . well within Congress' authority under the Commerce Clause," *id.* at 159-60, it held that conclusion insufficient to resolve the issue because "the Tenth Amendment limit[ed] the power of Congress to regulate in the way it ha[d] chosen," *see id.* at 160, 174-76. The Court separately conducted a Tenth Amendment analysis of the "take title provision" and held that even though Congress had power to regulate the disposal of low-level radioactive waste, the Tenth Amendment prohibited it from requiring States to take title to the waste. *Id.* at 174-76.

In *Printz*, the Court addressed a Tenth Amendment challenge to a congressional statute that "purport[ed] to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme" governing the distribution of firearms. 521 U.S. at 902, 904. Notably, unlike it did in *New York*, this Court in *Printz* did not engage in *any* Commerce Clause or Necessary and Proper Clause analysis. *Id.* at 904-35. Instead, it proceeded immediately to consider the Tenth Amendment challenge. In analyzing whether the statute violated the Tenth Amendment, the Court observed that because "no constitutional text sp[oke] to th[e] precise question" of whether

Congress can constitutionally "compel[ ] state officers to execute federal laws," the answer to that question must "be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court." *Id.* at 905. Then, after reviewing the relevant historical understanding and practice, the structure of the Constitution, and the jurisprudence of the Court – and still without engaging in any Commerce Clause or Necessary and Proper Clause analysis – this Court concluded "categorically" that under the Tenth Amendment "'[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.'" *Id.* at 933 (citation omitted).

Finally, in *Condon*, the Court addressed a Tenth Amendment challenge to a federal statute that "regulate[d] the disclosure and resale of personal information contained in the records of state [motor vehicle departments]." 528 U.S. at 143. The Court first concluded that "[b]ecause drivers' information [was] . . . an article of commerce, its sale or release into the interstate stream of business [was] sufficient to support congressional regulation" under the Commerce Clause. *Id.* at 148. Again, though, the Court did not end its analysis there. *Id.* at 148-51. It explained that "*[i]n* New York *and* Printz, *[it had] held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment.*" *Id.* at 149. Thus, "the fact that drivers' personal information [was], in

the context of [*Condon*], an article in interstate commerce [simply did] not conclusively resolve the constitutionality of the [act]." *Id.* at 148-49. Instead, this Court held that it must examine whether Congress's Commerce Clause power was limited by the Tenth Amendment. *Id.* at 149-51.

2. The Required Tenth Amendment Analysis Is Distinctly Different From This Court's Analysis Of The Federal Government's Article I Powers.

This Court's opinions in both *New York* and *Printz* demonstrate that "the answer to [whether an act of Congress violates one of the rights protected by, but not expressly enumerated in, the Tenth Amendment] must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court," *Printz*, 521 U.S. at 905. *See id.* at 905-33; *New York*, 505 U.S. at 161-69.

Thus, in *New York* the Court looked to the history of the colonies, the problems with the Articles of Confederation, the plans submitted for consideration at the Constitutional Convention, the arguments for and against those plans, explanations in The Federalist (Clinton Rossiter ed. 1961), the statutes passed by Congress subsequent to ratification of the Constitution, the text of the Constitution itself, and relevant jurisprudence of the Court. 505 U.S. at 161-69, 177-79.

Similarly, in *Printz*, this Court examined The Federalists' responses to relevant anti-federalist concerns, congressional practice from the time of the founding of the Nation through the present, the constitutional structure as revealed by specific constitutional text, and relevant jurisprudence of the Court. 521 U.S. at 905-33.

Thus, this Court's Tenth Amendment analysis is fundamentally different from the Article I arguments advanced by the Government. *See generally* Brief for Petitioners (focusing nearly exclusively on Commerce Clause and Taxing and Spending Clause powers and doctrines). Nor is there any doubt that the Government's Article I arguments are unavailing in the face of a conclusion that under the Tenth Amendment Congress lacks power to regulate in the way it has chosen. Specifically, in *New York* this Court rejected the federal government's argument that the mandate at issue was an essential part of a comprehensive federal scheme that was necessary to address a national crisis. 505 U.S. at 146, 156, 159, 166, 170, 177. In so doing, this Court did not consider whether the factual claims of necessity and crisis were correct, but simply rejected the argument outright because even the need to address an important national issue does not permit Congress to pass a statute that violates a right preserved by the Tenth Amendment. *Id.* at 155-59, 177-78, 188.

Likewise, this Court in *Printz* rejected similar Commerce Clause and Necessary and Proper Clause arguments as not being availing to overcome a Tenth

Amendment conclusion that Congress lacked the power it had asserted. There the federal government argued that because of the "national importance" of the mandate this Court should "balance" the rights of the States under the Tenth Amendment with the powers of Congress under the Commerce Clause. 521 U.S. at 931-32. But this Court rejected that argument because the protection of rights reserved under the Tenth Amendment cannot be compromised, and it reaffirmed that if a federal statute violates rights reserved under the Tenth Amendment, the Court has no power under the Constitution to enforce it. *Id.* at 932. For the same reason, this Court rejected the federal government's argument that the "unique" circumstances that Congress faced should alter its Tenth Amendment analysis or its holding based on that analysis. *Id.* at 963.

Finally, this Court summarily dismissed the federal government's reliance on the Necessary and Proper Clause in *Printz*, precisely because if Congress did not have power to mandate the States, which power the Court had found Congress did not have, then the mandate could not possibly be "proper." *Id.* at 923-24 ("When a 'la[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in [other provisions of the Constitution, including the Tenth Amendment], it is not a 'La[w] *proper* for carrying into execution the Commerce Clause.'" *Id.* (quoting U.S. Const. Art. I, § 8, cl. 18) (emphasis added); *accord United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (stating that

even if a statute appears to be an exercise of power within the Commerce Clause it still must "not [be] prohibited" by the Constitution).

3. Neither The Government's Brief Here, Nor Any Of Its Arguments In The Courts Below, Nor The Lower Court Opinions Themselves Analyze The Tenth Amendment Claim In This Case As Required In *Printz* And *New York*.

Although the Government's merits brief filed in this Court makes no reference to the People prong of the Tenth Amendment, the Government successfully asserted below that the People prong of the Tenth Amendment does not prevent Congress's imposition of the Individual Mandate. However, the Government's Tenth Amendment arguments in the lower courts below, like the only argument in its Certiorari brief (Petitioners' Cert. Brief at 12) (*Printz* only applies to States), was not accompanied by the Tenth Amendment analysis required by *Printz* and *New York*. Nor did the court opinions below that sided with the Government engage in the required Tenth Amendment analysis.

For example, while the dissenting opinion from the Eleventh Circuit acknowledges a Tenth Amendment challenge to the Individual Mandate, and even gives a nod to *New York* and *Printz*, it does not engage in an independent Tenth Amendment analysis of the Individual Mandate as required by the holdings in those cases. *Florida v. HHS*, 648 F.3d 1235,

1364-65 (11th Cir. 2011) (Marcus, J., dissenting). Rather, Judge Marcus simply identified the congressional mandates to States that were struck down on Tenth Amendment grounds in *New York* and *Printz*; distinguished them from the congressional mandate here on the ground that it imposes a mandate on the People; noted "the utter lack of Supreme Court (or any other court) precedent [on] the [Tenth Amendment's 'people' prong"; and then reverted back to traditional Commerce Clause doctrines as the sole basis for his dissent. *Id.* at 1365.

The D.C. Circuit's majority opinion that sides with the Government is even more telling because it found that the regulation imposed by the Individual Mandate "certainly is an encroachment on individual liberty," *Seven-Sky*, 661 F.3d at 16. Nevertheless, the D.C. Circuit held that "[t]he right to be free from federal regulation is not absolute, and yields to the imperative that Congress be free to forge national solutions to national problems, no matter how local – or seemingly passive – their individual origins." *Seven-Sky*, 661 F.3d at 16. This amounts to an adoption of the same "national importance," "uniqueness," and "balancing" arguments that this Court expressly rejected in *New York* and *Printz,* and turning the holdings in those cases on their head because there this Court held that Article I powers granted to the Federal Government yield to the limitations of the Tenth Amendment.

Again, the Government, the dissent in the Eleventh Circuit, and the majority in the D.C. Circuit did

not engage in the Tenth Amendment inquiry required by *Printz* and *New York*. However, as shown below, the Tenth Amendment inquiry demonstrates that the Individual Mandate infringes on the sovereignty reserved by the People.

C. The Individual Mandate Is Unconstitutional Under An Independent Tenth Amendment Analysis Because It Is At Odds With Historical Practice, Historical Understanding, And The Structure Of The Constitution, And A Holding That It Is Unconstitutional Is Consistent With The Jurisprudence Of This Court.

As noted above, the answer to a Tenth Amendment challenge to Congressional action "must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court." *Printz*, 521 U.S. at 905. The Individual Mandate is unconstitutional under this Court's required Tenth Amendment analysis because it is at odds with historical congressional practice, with historical understanding of congressional power when the Constitution was ratified, with the structure of the Constitution, and with the jurisprudence with this Court.

1. The Individual Mandate Is At Odds With Historical Congressional Practice.

This Court in *Printz* explained:

> [E]arly congressional enactments provid[e] contemporaneous and weighty evidence of the Constitution's meaning. Indeed, such contemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions. Conversely *if . . . earlier Congresses avoided use of [a] highly attractive power, [the Court] would have reason to believe that the power was thought not to exist.*

521 U.S. at 905 (internal quotations and citations omitted; emphasis added).

Here, the CBO expressly advised Congress that "[a] mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action." CBO Analysis, at 1-2. The Government does not dispute that this form of regulation – a mandate that the People purchase and maintain ownership from cradle to grave of a consumer product from a private company – is unprecedented. *See Seven-Sky*, 661 F.3d at 14 ("The Government concedes the novelty of the mandate. . . ."). There is simply no dispute that "[n]ever before has Congress required that everyone buy a product from a private company (essentially for life) just for being alive and residing in the United States." *Commonwealth of Va.*, 728 F. Supp. 2d at 781-82.

Nor can there be any doubt that the power to impose such a mandate is a "highly attractive" one. The Government admits that if this Individual Mandate is constitutional, then Congress could require the People to also purchase other goods, including broccoli or General Motors cars. *Florida,* 780 F. Supp. 2d at 1289. Surely the Federal Government would find highly attractive the power, as the CBO describes it, to impose "a *command economy*, in which the President and the Congress dictate[ ] how much each individual and family spen[d] on all goods and services." CBO Analysis at 7 (emphasis added). The fact that Congress has never before attempted to wield such a power provides compelling reason to conclude that there was no understanding when the Constitution was ratified that Congress had any such power granted to it by the People in Article I of the Constitution. *See Printz*, 521 U.S. at 905.

Moreover, any argument that the current national health care crisis is "unique" and of sufficient "importance" to justify the recognition of Congressional power where none has previously existed is unavailing. As noted above, this Court has expressly rejected the argument that if "the federal interest is sufficiently important," then the sovereign States must submit to Congress's violation of rights reserved to them. *New York,* 505 U.S. at 177-78. To the contrary, "[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States [to submit to a violation of a right reserved to them by the Tenth

Amendment]." *Id.* at 178; *see also Printz*, 521 U.S. at 931-33 (rejecting the idea that a congressional statute that strikes at "the very *principle* of separate state sovereignty" could be upheld because it "serve[d] a very important purpose").

2. The Individual Mandate Is At Odds With Historical Understanding Of Congress's Power.

Not only is congressional exercise of the power inherent in the Individual Mandate unprecedented, but there is no evidence that the Framers understood that Congress was granted such power. In fact, the history points to an opposite conclusion.

Long before our Nation declared independence from England, the idea that government could command its people to purchase something was rejected by the people in England. King Charles I, faced with budget problems and political obstacles to raising funds through Parliament, used his Court of Star Chamber to "persuade" affluent subjects to purchase titles or pay a fine equivalent to the cost of the title. Stephen H, *The Causes of the English Civil War (1642-1651)*;[2] *Causes of the English Civil War*.[3] His

---

[2] Available at http://www.helium.com/items/302608-the-causes-of-the-english-civil-war-1642-1651 (last visited January 31, 2012).

[3] Available at http://www.historylearningsite.co.uk/english_civil-war.htm (last visited January 31, 2012).

subjects found the practice offensive, and it contributed to the outbreak of the English civil war beginning in 1642 and ending with the public execution of the king. *Id.*

The People's aversion to a government that could mandate consumer purchases was evident immediately prior to the signing of the Declaration of Independence. As the district court below observed:

> It is difficult to imagine that a nation which began, at least in part, as the result of opposition to a British mandate giving the East India company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place.

Florida, 780 F. Supp. 2d at 1286.

In both *New York* and *Printz*, this Court looked to The Federalist for an indication of the Framers' understanding of congressional power granted by Article I. *New York*, 505 U.S. at 158; *Printz*, 521 U.S. at 910. The Federalist said nothing about the potential for Congress to mandate consumer purchases. In light of Publius' comprehensive identification and explanation of both real and perceived federal powers and checks on those powers under the new Constitution, the Federalist's loud silence on Congress's ability impose a "command economy" on the People can be understood only as reflective of a universal

understanding at the time that the Constitution did not give the Federal Government this power.

At the time the Declaration of Independence was signed, "the essence of liberty" was understood to be "the freedom to develop one's talents, pursue opportunity, and generally take responsibility for one's own life and well-being." Mathew Spalding, *We Still Hold These Truths* 71-73 (ISI Books 2009); *see also* Friedrich August von Hayek, The Constitution of Liberty 133 (University of Chicago Free Press 1960) (explaining that "liberty" and "personal responsibility" are "inseparable," that "[l]iberty not only means that the individual has both the opportunity and burden of choice" but also "that he must bear the responsibility of his actions"). And that original understanding was so ingrained at this Nation's founding that over 200 years later it remains near universal today, as though passed through the People's blood stream: recent polling data shows that over 80% of Americans still believe that the Federal Government should not have the power to require individuals to purchase health insurance. *See* Associated Press-National Constitution Center, Poll of 1,000 Adults (August 18-22, 2011).[4] Because the idea that Congress has the power

---

[4] http://www.constitutioncenter.org/NewsWire.aspx?title=Poll%3A+Americans+Feel+Safe%2C+But+Congress+Shouldn't (last visited November 9, 2011). Reported at http://www.charlotteobserver.com/2011/10/07/2670209/obamacare-holding-back-the-economy.html (last visited January 31, 2012). file:///C:/Corporate/Documents/obama%20care/80%20%25%20of%20public%20do%20not%20think%

(Continued on following page)

to mandate consumer purchases is antithetical to the understanding of the Founders, this Court should conclude that the People did not include that power within the Article I powers that they granted to the Federal Government.

3. The Individual Mandate Is At Odds With The Structure Of The Constitution.

"It is incontestible that the Constitution established a system of dual sovereignty. Although the States surrendered many of their powers to the new Federal Government, they retained a residuary and inviolable sovereignty." *Printz*, 521 U.S. at 918-19 (internal quotations and citations omitted). In *Printz*, this Court demonstrated the reality of this "residuary and inviolable sovereignty" in the States in part by identifying textual evidences in the Constitution and examining their implications. *Id.* at 919. A similar examination of textual evidence reveals the existence and character of a residuary and inviolable sovereignty in the People as well.

For example, the Constitution's text preserves the People's right to maintain their homes and effects free from unreasonable seizure. U.S. Const. amend. IV. It preserves the People's right not to open their homes for the quartering of soldiers, except in time of war. U.S. Const. amend. III. It preserves the People's right

---

20gov%20can%20require%20mandate.htm(last visited January 31, 2012).

not to be in servitude one to another. U.S. Const. amend. XIII. And it preserves the People's right to hold private property unless "taken for public use," and then only for "just compensation." U.S. Const. amend. V. These expressly retained powers are of a character to evidence a residuary sovereignty in the People to make fundamental decisions about their property and commerce without mandate from the Federal Government. *Cf. Printz*, 521 U.S. at 918-19.

The character of the foregoing expressly reserved rights is in sharp contrast to that of the "limited set of personal mandates" that Congress has imposed on the People since the outset of the Nation. *Florida*, 648 F.3d at 1290. There are but four: the mandates to serve on juries, register for the draft, file tax returns, and respond to the census. *Id.* "These mandates are in the nature of duties owed to the government attendant to citizenship, and they contain clear foundations in the constitutional text." *Id.* (citing U.S. Const. art. I, § 2; U.S. Const. art. I, § 8, cl. 1; U.S. Const. art. I, § 8, cl. 12; U.S. Const. art. III, § 2, *Selective Draft Law Cases,* 245 U.S. 366, 378, 382-87 (1918)).

There is a distinct contrast between the expressly reserved rights of self-determination and autonomy and the obligations implicit to citizenship reflected in the Constitution's textual support for congressional mandates regarding jury duty, military service, taxes, and the census. This dichotomy suggests that while the Constitution gives Congress the right to issue mandates to the People to "directly interact[] with

the government" to fulfill obligations that are inherent in citizenship, it does not give Congress the power to compel "an individual to enter into a compulsory contract with a private company." *Florida*, 648 F.3d at 1290. As Judge Sutton stated in his concurring opinion, any attempt to equate the power to require the People to purchase health insurance with the power to impose these other mandates "gives analogy a bad name." *Thomas More Law Center v. Obama*, 651 F.3d 529, 541 (6th Cir. 2011). The structure of the Constitution, with all of its checks and balances on federal power, simply does not support the notion that the People carry with it a constitutional obligation to submit to a centrally dictated, command economy.

In *Coyle v. Smith*, 221 U.S. 559 (1911), Congress sought to impose on Oklahoma, as a condition to its entrance into the Union, an obligation that it not move its capital for five years or spend any money in anticipation of a later move of the state capital. *Id.* at 564. There this Court struck down as violative of State sovereignty Congress's attempt to mandate where, when, and how any one State could "appropriate its own public funds." *Id.* at 565. Similarly here, the Court should strike down as violative of the Tenth Amendment Congress's current attempt to mandate where, when, and how the People appropriate their own private funds in deciding what goods or services they should buy in their own and families' best interests.

4. A Holding That The Individual Mandate Is Unconstitutional Is Consistent With This Court's Existing Jurisprudence.

As demonstrated in part B above, when Congress has arguably infringed upon another sovereign's retained rights, this Court repeatedly has engaged in an independent Tenth Amendment inquiry to determine, based on historical practice, historical understanding, and constitutional structure, whether Congress has the power it seeks to wield. Hence, to do so here, where congressional infringement on the People's sovereignty is alleged, is required by this Court's existing jurisprudence.

Moreover, although the Individual Mandate is unprecedented, the Government's arguments in support of it are not. Specifically, the arguments that the national health care situation presents a unique problem, that a national solution to it is particularly important, and that the challenged provision is an integral part of a comprehensive economic scheme permeate the Government's brief. However, as explained in Part B.2 above, this Court has previously and expressly rejected each of those arguments in the face of Tenth Amendment analysis confirming that Congress's action infringes on a right left to the States.

A straightforward Tenth Amendment analysis like that conducted in *Printz* and *New York* but applied to the Individual Mandate plainly supports a holding that the Individual Mandate is an unconstitutional

exercise of congressional power. Specifically, just as in those cases, here Congress seeks to assert an unprecedented power. Likewise, just as with the congressional mandates in *New York* and *Printz*, there is nothing in the historical record leading up to ratification of the Constitution, including in The Federalist, that would support the congressional power the Government claims here. Rather, the record here leading up to ratification of the Constitution points decidedly to the opposite conclusion, as it did in *Printz* and *New York*.

Furthermore, just as the Constitution contains explicit evidence even outside the Tenth Amendment for State sovereignty, which evidence the Court considered in *Printz* and *New York*, here the Constitution also contains several evidences outside the Tenth Amendment for the People's residuary sovereignty, including also the Ninth Amendment, which makes clear that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," U.S. Const. amend. IX.

Finally, it is telling that just as Congress had for over 200 years never "compelled enlistment of state executive officers for the administration of federal programs," *Printz*, 521 U.S. at 905, for over 200 years Congress never compelled the People to make specific consumer purchases from a private company. Instead, each of Congress's previous four mandates to the People were all clearly grounded in constitutional

text and premised on the implicit obligations of citizenship.

In *New York* and *Printz* this Court acted under the State prong of the Tenth Amendment to preserve the sovereignty of the States from unprecedented assertions of federal power. Yet this Court's protection of State sovereignty in *Printz* and *New York* ultimately amounted, in a derivative way, to a protection of the People's "individual liberty secured by federalism." *Bond*, 131 S. Ct. at 2364. Here the Court is being asked to protect individual liberty directly under the People prong of the Tenth Amendment from an unprecedented assertion of federal power. In other words, it is being asked to preserve the ultimate sovereignty of the People by protecting rights that the People never delegated to the States or the Federal Government.

Although this Court has not previously "breathe[d] practical life into the Tenth Amendment's reservation of power [directly] to the [P]eople," *Florida*, 648 F.3d at 1365 (Marcus, J., dissenting), that is so *only* because never before has the Federal Government issued a mandate to the People that directly infringed on their residuary sovereignty as the Individual Mandate plainly does. This Court must now breathe practical life into the Tenth Amendment's People prong because the People's liberty interests that are at stake here under the People prong of the Tenth Amendment are no less important than the People's liberties that this Court acted to protect under the

State prong of the Tenth Amendment in *New York* and *Printz*. We the People deserve no less.

CONCLUSION

Thomas Jefferson described the Tenth Amendment as "the foundation of the Constitution" and said that "[t]o take a single step beyond the boundaries . . . specially drawn [by it] around the powers of Congress is to take possession of a boundless field of power, no longer susceptible of any definition." *Thomas Jefferson's Opinion on the Constitutionality of a National Bank (1791).*[5] The Individual Mandate is a step beyond the boundaries of the power the People granted to Congress under the Constitution.

Accordingly, this Court should affirm on Tenth Amendment grounds the Eleventh Circuit's holding

[5] Available on file at the Yale Avalon Project, http://avalon.law.yale.edu/18th_century/bank-tj.asp) (last visited on January 31, 2012). The 12th Amendment referenced in that letter became the 10th Amendment, when two proposed amendments were deleted. *See* http://www.u-s-history.com/pages/h389.html (last visited on January 31, 2012.)

that the Individual Mandate is not a valid exercise of Congress's powers under Article I of the Constitution.

Respectfully submitted,

STEPHEN M. TRATTNER
LAW OFFICES OF STEPHEN TRATTNER
4626 Wisconsin Avenue, N.W.
Suite 300
Washington, DC 20016
(410) 353-0446
steve@trattnerlaw.com

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

No. 11-398

In the
Supreme Court of the United States

DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS,

v.

STATE OF FLORIDA, ET AL.,

On Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE COMMONEALTH OF VIRGINIA EX REL. ATTORNEY GENERAL KENNETH T. CUCCINELLI, II, IN SUPPORT OF APPELLEES ON THE ISSUE OF THE UNCONSTITUTIONALITY OF THE MANDATE AND PENALTY IN WHICH VIRGINIA GOVERNOR ROBERT F. MCDONNELL AND THE REPUBLICAN GOVERNORS PUBLIC POLICY COMMITTEE JOIN

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.
Solicitor General of Virginia
dgetchell@oag.state.va.us
Counsel of Record

CHARLES E. JAMES, JR.
Chief Deputy Attorney General

WESLEY G. RUSSELL, JR.
Deputy Attorney General
wrussell@oag.state.va.us

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-7240
Facsimile: (804) 371-0200

Counsel for the Commonwealth of Virginia

February 13, 2012

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI AND BASIS OF AUTHORITY TO FILE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE PRESUMPTION OF CONSTITUTIONALITY ATTACHING TO PPACA IS WEAK OWING TO THE PARLIAMENTARY PROCESS EMPLOYED IN ITS ENACTMENT 4

II. THE FACT THAT CONGRESS HERETOFORE HAS NEVER CLAIMED THE POWER TO REQUIRE A CITIZEN TO PURCHASE A GOOD OR SERVICE FROM ANOTHER CITIZEN TENDS TO NEGATE THE EXISTENCE OF THAT POWER. 9

III. THE MANDATE AND PENALTY ARE CONTRARY TO THE TEXT OF THE COMMERCE CLAUSE AND FOUNDATIONAL UNDERSTANDINGS 10

A. The Mandate and Penalty are Not Supported by the Text of the Commerce Clause. 10

B. The Historical Context in which the Commerce Clause was Drafted Makes it Highly Unlikely that it Included a Power to Command a Citizen to Purchase Goods or Services From Another Citizen. 13

C. There is No Tradition of Using the Commerce Clause to Require a Citizen to Purchase Goods or Services from Another Citizen. 16

D. The Mandate and Penalty are Outside the Existing Outer Limits of the Commerce Clause and Associated Necessary and Proper Clause as Measured by Supreme Court Precedent. 18

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Cases

Alden v. Maine, 527 U.S. 706 (1999) 24

Calder v. Bull, 3 U.S. (Dallas) 386 (1798) 4

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 12, 16, 17, 19, 20

Gonzales v. Oregon, 546 U.S. 243 (2006) 22

Gonzales v. Raich, 545 U.S. 1 (2005) 12, 19, 20, 21, 22, 23

Hylton v. United States, 3 U.S. (Dallas) 171 (1796) 4

Katzenbach v. McClung, 379 U.S. 294 (1964) 22

Kinsella v. Singleton, 361 U.S. 234 (1960) 22

Lochner v. New York, 198 U.S. 45 (1905) 18

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 4

R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) 18

United States v. Comstock, 130 S. Ct. 1949 (2010) 23, 24

United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942) 22

Ware v. Hylton, 3 U.S. (Dallas) 199 (1796) 4

Wickard v. Filburn, 317 U.S. 111 (1942) 12, 16, 17, 18, 19, 20, 21

Statutes

Kansas Nebraska Act of 1854, 10 Stat. 277 5

Patient Protection and Affordance Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (PPACA) 1, 6, 10

PPACA § 1501 10

Other Authorities

A Pocket Dictionary (3d ed. London 1765) 11

Adam Littleton, Dr. Adam Littleton's Latin dictionary, in four Parts: I. An English-Latin, II. A Latin-classical, III. A Latin-Proper, IV. A Latin-barbarous, Part II (no pagination) (6th ed. London 1735) 11

Adam Smith, Wealth of Nations (Prometheus Brooks Amherst N.Y. 1991) 13

Albany New York Evening Journal, May 23, 1854 6

Black's Law Dictionary at 304 (West 9th ed. 2008) 12

Bleeding Kansas: A Narrative Guide to the Sources, http://www.assumption.edu/ahc/Kansas/default.html 6

David P. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789-1888 (University of Chicago Press 1985) 4, 17, 19

George Bancroft, History of the United States, Vol. III (New York D. Appleton & Company 1896) 14

John Mair, The Tyro's Dictionary, Latin and English (2d ed. Edinburgh 1763) 11

John William Burgess, The Middle Period, 1817-58 (New York Charles Scribner's Sons 1897) (Google Books) 6

Michael F. Holt, The Rise and Fall of the American Whig Party, (Oxford University Press, paperback edition 2003) (© 1999 by Michael F. Holt) 5, 6

N. Baily, Dictionarium Britannicum or a more complete Universal Etymological English Dictionary than any Extant (London 1730) 11

Noah Webster, An American Dictionary of the English Language at 42 (S. Converse New York 1828) 11, 12

Stephen Breyer, Active Liberty: Interpreting our Democratic Constitution (Vintage Books 2006) 5

The Declaration and Resolves of the First Continental Congress, October 14, 177414

The Weekly Standard, http://www.weeklystandard.com/blogs/political-consequences-obamacare_537735.html (January 31, 2011) 5

Rules

SCR 37.4 1

Constitutional Provisions

Article I, § 8 11

16

Charles C. Tansill, Documents Illustrative of the Formation of the Union of the American States Library of Congress Legislative Reference Service, No. 398 (Government Printing Office 1927), available at http://avalon.law-yale.edu/18th_century/resolves.asp. 14

Cong. Rec. H1307 (March 10, 2010) 8

Cong. Rec. S12263 (Dec. 3, 2009) 7

Cong. Rec. S12487 (Dec. 5, 2009) 7

Cong. Rec. S12981 (Dec. 11, 2009) 7

Cong. Rec. S13144 (Dec. 14, 2009) 7

Cong. Rec. S13344 (Dec. 17, 2009) 7

Cong. Rec. S13756 (Dec. 22, 2009) 7

INTEREST OF THE AMICI AND BASIS OF AUTHORITY TO FILE

The parties to this brief *amicus curiae* are the Commonwealth of Virginia, by and through its Attorney General, the Governor of Virginia, and the Republican Governors Public Policy Committee. This brief is authorized to be filed pursuant to Rule 37.4, Rules of the United States Supreme Court and the blanket consents filed in No. 11-398. In addition to the interest asserted by Virginia in support of standing in No. 11-420, governors have an interest in not having to elect between administering an unconstitutional regime or submitting to federal administration of the health care law in their states. As chief executive officers of their states, governors must submit and live within balanced budgets while carrying out the daily execution of laws imposed upon them by their state and the federal government. The administrative and financial mandates imposed on the states through the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (PPACA), will unreasonably burden governors in carrying out the duties of their office as imposed by their respective state constitutions.

Furthermore, PPACA burdens states directly by eliminating traditional powers and increasing costs of administration. For example, Section 1321 abolishes the states' traditional authority to regulate health insurance. A responsibility that states have taken seriously and are best situated to handle given they know best the particular needs of, and are more directly accountable to, their citizens. Additionally, Section 2001(a) requires states to increase Medicaid eligibility. This will result in as many as 425,000 new enrollees in Virginia alone at the cost of 2.2

billion between now and 2022. The State of Utah estimates that up to 250,000 cases will be added to their roles as a result of PPACA at an initial cost of up to $26,215,150.00, simply for systems and case maintenance. During fiscal year 2011, Utah accounted for over 5,700 hours of personnel time related to PPACA, equating to approximately $182,000 in personnel costs.

On February 1, 2012, the actuarial consulting firm Milliman, Inc., released a report commissioned by Medicaid Health Plans of America. The report concluded that the PPACA health insurer fee will act as a tax on both the United States and the states. This will further exacerbate the very difficult fiscal problems of the states by providing less flexibility with Medicaid funding and ultimately resulting in fewer choices and services for the poor.

The Republican Governors Public Policy Committee ("RGPPC") is a Section 501(c)(4) social welfare organization incorporated in the District of Columbia. Its members are the Republican governors of the U.S. states and territories. The RGPPC's mission includes promoting social welfare and efficient and responsible government practices; advocating public policies that reduce the tax burdens on U.S. citizens, strengthen families, promote economic growth and prosperity, and improve education; and encouraging citizen participation in shaping laws and regulations relating to such policies.

SUMMARY OF ARGUMENT

Competing presumptions respecting constitutionality are implicated in this suit. The affirmative presumption of constitutionality should be at its weakest because PPACA was adopted outside of regular order and because Congress took no hard look at its own authority. As a consequence, PPACA has a common fame of irregularity. On the other hand, the sheer novelty of Congress's claim to a power, unlimited in principle, to require a citizen to purchase a good or service from another gives rise to a negative presumption that no such power exists.

Recourse to the usual tools of constitutional interpretation - text, historical context, tradition, and precedent - clearly establish that the mandate and penalty of PPACA are beyond the affirmative and negative limits of the Commerce Clause even as aided by the Necessary and Proper Clause.

ARGUMENT

I. THE PRESUMPTION OF CONSTITUTIONALITY ATTACHING TO PPACA IS WEAK OWING TO THE IRREGULAR PARLIAMENTARY PROCESS EMPLOYED IN ITS ENACTMENT

Even before actually exercising the power of judicial review to strike down an act of Congress in *Marbury v.* Madison, 5 U.S. (1 Cranch) 137 (1803), this Court assumed the existence of the power by reviewing and upholding an act of Congress in *Hylton v. United States*, 3 U.S. (Dallas) 171 (1796). Justice Chase, however, remarked in his opinion: "As I do not think the tax on carriages is a direct tax, it is unnecessary, at this time, for me to determine whether this court, constitutionally possesses the power to declare an act of Congress void, on the ground of its being made contrary to, and in violation of, the constitution; but if the court have such power, I am free to declare, that I will never exercise it, but in a very clear case." *Id.* at 175. He repeated this formula with respect to treaties in *Ware v. Hylton*, 3 U.S. (Dallas) 199, 237 (1796), and again in *Calder v. Bull*, 3 U.S. (Dallas) 386, 395 (1798), with respect to a challenge to a state law under the *ex post facto* clause. These statements have been viewed as the foundation for a presumption of constitutionality, David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789-1888*, at 33 (University of Chicago Press 1985), although the same author notes uncertainty about "its consistency with *Marbury's* conclusion that the judges are oath-bound to disregard a law that offends the Constitution." *Id*).

There is doctrinal and philosophical support for such a presumption resting upon notions of separation of powers, particularly when it appears that Congress

has taken a 'hard look' at its own powers. *See* Stephen Breyer, *Active Liberty: Interpreting our Democratic Constitution*, at 64-65 (Vintage Books 2006). But the force of any presumption should be at its weakest when legislation has a common fame of irregularity such as that which attached to the Kansas Nebraska Act of 1854, repealing the Missouri Compromise. 10 Stat. 277. As reported by *The Weekly Standard* on January 31, 2011, pollsters Patrick Caddell and Douglas Schoen have written: "it could even be that no such piece of major legislation has created the continued, vehement public opposition that health care has provoked since the Kansas-Nebraska Act of 1854 . . . " http://www.weeklystandard.com/blogs/political-consequences-obamacare_537735.html, page 1 of 3.

Aside from substance, a serious problem with the Kansas-Nebraska Act was that it passed the House with the aid of those who purported to oppose it on the merits. On May 15, 1854, there "was a roll call . . . in the House, not the Committee of the Whole, that required a two-thirds vote to postpone consideration of a Pacific railroad bill from May 16 to May 24 in order to allow continued action on the Nebraska bill in committee." Michael F. Holt, *The Rise and Fall of the American Whig Party*, at 820 (Oxford University Press (paperback edition 2003) (© 1999 by Michael F. Holt). "Had that procedural roll call been defeated, it is likely that the Nebraska bill would have been permanently buried, but it passed by a margin of 123-53, 16 more than the necessary two-thirds majority." *Id.* There were also resorts to unusual parliamentary maneuvers. The House manager Alexander H.

Stephens would also discover or remember an obscure procedural rule by which the Nebraska bill was finally removed from the Committee of the Whole without the possibility of further amendment on the House Floor and forced a vote on final passage." *Id.* The vote was 113-110 on accepting the Senate bill as a substitute. *Id.* at 821. The Senate bill itself had passed the Senate a few minutes before five in the morning of March 4, following a session of seventeen hours. John William Burgess, *The Middle Period, 1817-58* at 398 (New York Charles Scribner's Sons 1897) (Google Books). The Albany, New York *Evening Journal*, in its May 23, 1854 edition, opined: "It was fitting that the Law should be passed as it was. It was in accordance with its spirit that it should be concerned in treachery, sprung upon the House by a fraud and forced through it by a parliamentary lie." Bleeding Kansas: A Narrative Guide to the Sources, http://www.assumption.edu/ahc/Kansas/default.html, pages 2-3 of 14. That this reflected mass opinion is suggested by the fact that the Northern Democrats who passed the law "suffered a massive rebuke at the hands of the electorate." Holt at 838.

Similarly, PPACA was not passed through any process resembling regular order. The United States Senate passed PPACA late on Christmas Eve 2009 as a floor substitute on a straight party line vote. The legislative vehicle was a House tax bill chosen to satisfy the Originating Clause for the taxes in PPACA. See Const. Art. I, § 7; PPACA § § 9001; 9004; 9015; 9017; 10907 (taxes). PPACA was passed, without committee hearing or report, employing such florid deal-making as to

generate scornful popular terms like "the Louisiana Purchase" and "the Cornhusker Kick-back."

PPACA passed the Senate on cloture with considerable minority protest. *See, e.g.*, Cong. Rec. Nov. 2, 2009 S10965 (no bill); *id.*, S10973 (bill being drafted behind closed doors); *id.*, Nov. 17, 2009 S11397 ("The majority leader has had in his office a secret bill that he is working on that we have not seen yet."); *id.*, S11401 (No Child Left Behind got 7 weeks on the floor – "We don't even have a bill yet"); *id.*, Nov. 19, 2009 S11819 (bill is a shell, not a real one); *id.*, Nov. 30, 2009 S11982 (official debate begins); *id.*, Dec. 3, 2009 S12263 (bill has been on floor for 3 days and never has been in committee); *id.*, Dec. 5, 2009 S12487 (majority will not slow down); *id.*, Dec. 11, 2009 S12981 ("We are going to have three Democratic amendments and one Republican amendment voted on, and the Democrats wrote the bill"); *id.*, S12977 (votes on amendments blocked; "In the meantime, this backroom deal that is being cut, which we haven't seen – supposedly it has been sent to the CBO to see what it would cost"); *id.*, Dec. 14, 2009 S13144 ("There is somewhere in this building a hidden bill, known as the manager's amendment, which is being drafted by one or two or three people . . ."); *id.*, Dec. 17, 2009 S13344 (bill is not being given the legislative time it deserves because the polls show a majority of Americans are against it and thus it has become a political nightmare for the majority who now simply want to ram it through before Christmas even though "no one outside the majority leader's conference room has seen it yet"); *id.*, Dec. 22, 2009 S13756

(Nebraska deal); *Id.*, Mar. 10, 2010 H1307 (reconciliation being used because bill could not re-pass the Senate).

PPACA has roiled America. In the 2010 midterm election, the party that unanimously opposed PPACA in the House of Representatives saw its largest electoral gains in over seventy years. With the intervention of six additional states in the Florida suit on January 19, 2011, it became possible for the first time in American history to count a clear majority of states in litigation with the federal government, each claiming that the federal government has exceeded its enumerated powers. That same day the House of Representatives voted to repeal PPACA on a vote of 245 to 189. On January 21, 2011, Oklahoma filed suit in the Eastern District of Oklahoma to vindicate a recently enacted constitutional amendment which conflicts with PPACA.

To the extent that a presumption of constitutionality arises from regular order and a hard look by Congress at the limits of its own power, those conditions are simply not present with PPACA. On October 22, 2009, the then Speaker of the House captured a certain prevailing mood when she famously replied "Are you serious? Are you serious?" when asked where the Constitution conferred the power on Congress to require a citizen to purchase a good or a service from another citizen. Flashback: Pelosi on Obamacare's Constitutionality: 'Are You Serious?,' Matt Cover and Michael W. Chapman, http://cnsnews.com/news/article/flashback-pelosi-obamacares-constitutionality-are-you-serious

II. THE FACT THAT CONGRESS HERETOFORE HAS NEVER CLAIMED THE POWER TO REQUIRE A CITIZEN TO PURCHASE A GOOD OR SERVICE FROM ANOTHER CITIZEN TENDS TO NEGATE THE EXISTENCE OF THAT POWER.

The Attorney General of Virginia has previously noted that:

> This is an odd moment in American history for Congress to claim the power to require one citizen to purchase a good or service from another. It has been asserted only recently without judicial foreshadowing or doctrinal preparation. Because of its sheer novelty, it arrives in the courts with a presumption of invalidity.

Cuccinelli, et al, *Why the Debate Over the Constitutionality of the Federal Health Care Law is About Much More Than Healthcare*, 15 Texas Review of Law & Politics, 334-35 (2011) (citing *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010); *Prinz v. United States*, 521 U.S. 898, 918 (1997)).

This Court in *Free Enterprise Fund*, 130 S. Ct. at 3159, quoted Judge Kavanaugh's dissent in the Court of Appeals:

> "Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity. Neither the majority opinion nor the PCAOB nor the United States as intervenor has located any historical analogues for this novel structure. They have not identified any independent agency other than the PCAOB that is appointed by and removable only for cause by another independent agency."

In *Printz*, 521 U.S. at 918, the Court said the fact that Congress had not asserted a particular power for 200 years "tends to negate the existence of that power." *See also*, *Virginia Office for Protection and Advocacy v. Stewart*, 131 S. Ct. 1632, 1641 (2011) ("Lack of historical precedent can indicate a constitutional infirmity").

In the case of PPACA, the lack of historical precedent was well known to Congress before it acted. At the heart of PPACA is § 1501, which generally requires American citizens to purchase a good or service from other citizens, namely, a health insurance policy. Although Congress purported to be exercising Commerce Clause powers in enacting PPACA, this claim was known to be problematical. When the Senate Finance Committee asked the Congressional Research Service whether a mandate supported by a penalty would be constitutional, the response was equivocal: "Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service." Jennifer Stahan and Cynthia Brougher, Cong. Research Serv., *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* 3 (2009). *See also*, Congressional Budget Office Memorandum, *The Budgetary Treatment of an Individual Mandate to Buy Health Insurance*, August 1994 ("A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action.") Because an intervening election in Massachusetts removed the availability of cloture in the Senate, PPACA was necessarily passed by the House of Representatives unaltered. Pub. L. No. 111-152, 124 Stat. 1029).

III. THE MANDATE AND PENALTY ARE CONTRARY TO THE TEXT OF THE COMMERCE CLAUSE AND FOUNDATIONAL UNDERSTANDINGS.

A. The Mandate and Penalty are Not Supported by the Text of the Commerce Clause.

Article I, § 8 of the Constitution provides that "The Congress shall have Power . . . To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes." Our classically educated Founders would have known that the word "commerce" is derived from the Latin *commercium*. *See* N. Baily, *Dictionarium Britannicum or a more complete Universal Etymological English Dictionary than any Extant* (London 1730); *A Pocket Dictionary* (3d ed. London 1765) (both available at The Library of Virginia Special Collections). Thus, they would have understood commerce as comprehending "traffick, dealing, merchandise, buying and selling, bartering of wares; also an intercourse or correspondence of dealing . . . ". Adam Littleton, *Dr. Adam Littleton's Latin dictionary, in four Parts: I. An English-Latin, II. A Latin-classical, III. A Latin-Proper, IV. A Latin-barbarous*, Part II (no pagination) (6th ed. London 1735) (Library of Va.). Had they consulted John Mair, *The Tyro's Dictionary, Latin and English* at 96 (2d ed. Edinburgh 1763) (Library of Virginia with autograph of P. Henry and of Patrick Henry Fontaine), they would have seen *commercium* rendered as "trade, traffic, commerce, intercourse." Those who stopped with an English dictionary might have seen commerce defined as "trade or traffick in buying or selling." N. Baily, *supra*. This collection of terms is the way that the word has been historically understood both in language and law. Noah Webster in 1828 defined commerce as "an interchange or mutual change of goods, wares, productions, or property of any kind, between nations or individuals, either by barter, or by purchase and sale; trade; traffick." Noah Webster, *An American Dictionary of the*

English Language at 42 (S. Converse New York 1828) (facsimile). These terms echo in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824) ("Commerce, undoubtedly is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."). *See also Black's Law Dictionary* at 304 (West 9th ed. 2008) ("The exchange of goods and services, especially on a large scale involving transportation between cities, states and nations.").

As Justice Thomas has noted, the founding generation distinguished between commerce on the one hand, and manufacturing or agriculture on the other, as distinct things. *United States v. Lopez*, 514 U.S. 549, 586 (Thomas, J., concurring). However, there is nothing illogical about the Supreme Court's inclusion of manufacturing and agriculture within the modern understanding of commerce because they are similar and related things in a continuum of commercial activities. Although expansive when measured by what had gone before, it was not economically illogical to hold that commerce consists of the whole of voluntary commercial activity in a certain commodity. *Wickard v. Filburn*, 317 U.S. 111, 114, 118-19 (1942). Even when an agricultural product is raised for home consumption, it is still part of the total stock which in the aggregate regulates and controls price through the law of supply and demand. *Id.*; *Gonzales v. Raich*, 545 U.S. 1 (2005).

In this respect, even *Wickard* and *Raich* fall short of doing violence to the understanding of the founding generation that commerce, industry, labor,

agriculture, trade and navigation were all constituents of "a certain propensity in human nature . . . to truck, barter, and exchange one thing for another"; the end result of which was that mankind brought "the different produces of their respective talent . . . , as it were, into a common stock, where every man may purchase whatever part of the produce of other men's talents he has occasion for." Adam Smith, *Wealth of Nations*, at 9-10, 19, 22-23, 26, 81 (Prometheus Brooks Amherst N.Y. 1991) (facsimile). This is commerce. Its hallmarks are spontaneity and voluntary activity; not a command to buy something. The claim that commerce means not commercial activity but mere passivity is violently discordant with any normal use of the word commerce at the Founding or at any subsequent time. Only in the world of post-modernism are words infinitely plastic. Any claim that the word commerce is sufficiently elastic to support the PPACA mandate and penalty treats the text of the Constitution with post-modernist disrespect.

B. The Historical Context in which the Commerce Clause was Drafted Makes it Highly Unlikely that it Included a Power to Command a Citizen to Purchase Goods or Services From Another Citizen.

The American Revolution and national independence resulted from parliament's claimed right to legislate for America. First, parliament passed the Stamp Act, only to see it repealed in the face of furious opposition. Then came the Townshend Acts, placing a duty on paper, glass, lead, paint and tea. As the struggle continued, all of the taxes except those on tea were repealed. That remaining tax, however, led to the Boston Tea Party, the Intolerable Acts, and the First Continental Congress. Throughout this period, from the Stamp Act forward,

Americans responded with boycotts under the name of non-importation and non-consumption agreements.

The Declaration and Resolves of the First Continental Congress of October 14, 1774 "cheerfully consent[ed] to the operation of such acts of the British Parliament, as are bona fide, restrained for the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother-country, and the commercial benefits of its respective members." However, the Continental Congress at the same time and in the same document promised "[t]o enter into a non-importation, non-consumption, and non-exportation agreement or association." Charles C. Tansill, *Documents Illustrative of the Formation of the Union of the American States Library of Congress Legislative Reference Service*, No. 398 (Government Printing Office 1927), *available at* http://avalon.law-yale.edu/18th_century/resolves.asp. Such boycott agreements were generally considered lawful even by the royal colonial governments. For example "[a]t New York the merchants held a meeting to join with the inhabitants of Boston; and against the opinion of the governor, the royal council decided that the meetings were legal; that the people did but establish among themselves certain rules of economy, and had a right to dispose of their own fortune as they pleased." George Bancroft, *History of the United States*, Vol. III at 287 (New York D. Appleton & Company 1896). Later, in New York, in the same colony "where the agreement of non-importation originated, every one, without so much as dissentient, approved it

as wise and legal; men in high station declared against the revenue acts; and the governor wished their repeal." *Id.* at 359. In Massachusetts, Governor Hutchinson

> looked to his council; and they would take no part in breaking up the system of non-importation. He called in all the justices who lived within fifteen miles; and they thought it not incumbent to interrupt the proceedings. He sent the sheriff into the adjourned meeting of the merchants with a letter to the moderator, requiring them in his majesty's name to disperse; and the meeting of which justices of peace, selectmen, representatives, constables, and other officers made a part, sent him an answer that their assembly was warranted by law.

Id. at 369. Even where legislatures were dissolved to prevent the adoption of resolutions, the non-importation movement flourished. In Virginia, upon dissolution of the General Assembly, the burgesses met by themselves and "adopted the resolves which Washington had brought with him from Mount Vernon, and which formed a well digested, stringent, and practical scheme of non-importation." *Id.* at 348. "The assembly of Delaware adopted the Virginia resolutions word for word: and every colony south of Virginia followed the example." *Id.* In light of this experience, the founding generation would have regarded as preposterous any suggestion that Great Britain could have solved its colonial problems by commanding Americans to purchase tea under the generally conceded power of parliament to regulate commerce.

Additional historical arguments against the power of Congress to enact the mandate and penalty can be almost endlessly adduced. For example, Alexander Hamilton at the New York convention "not[ed] that there would be just cause for rejecting the Constitution if it would enable the Federal Government to 'penetrate the recesses of domestic life, and control, in all respects, the private conduct of

individuals.'" *Lopez*, 514 U.S. at 592. What cannot be adduced is a countervailing historical example under the Commerce Clause in favor of the mandate and penalty.

C. There is No Tradition of Using the Commerce Clause to Require a Citizen to Purchase Goods or Services from Another Citizen.

"For nearly a century" after *Gibbons v. Ogden*, the Court's first Commerce Clause case, its "decisions . . . under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause, and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce." *Wickard*, 317 U.S. at 121. Whatever else might be said about these dormant or negative Commerce Clause cases, they seem to have advanced the core intent of the Commerce Clause.

Writing in January 1788 in No. 42 of *The Federalist*, Madison addressed the regulation of foreign and Indian commerce without clearly differentiating them from interstate commerce. *The Founder's Constitution*, Vol. 2, Art. 1, § 8, Clause 3 (Commerce), Doc. 9, *available at* http://press-pubs.uchicago.edu/Founders/a1_8_3_commerces9.html. (Univ. of Chicago Press 2010). Years later he explained why in a letter dated February 13, 1829 to Joseph C. Cabel.

> For a like reason, I made no reference to the "power to regulate commerce among the several States." I always foresaw that difficulties might be started in relation to that power which could not be fully explained without recurring to views of it,

> which, however just, might give birth to specious though unsound objections. Being in the same terms with the power over foreign commerce, the same extent, if taken literally, would belong to it. Yet it is very certain that it grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged.

Id.

There is a sense in which *Gibbons v. Ogden* can be viewed as a negative Commerce Clause case voiding a state transportation barrier. Currie at 173 ("This was the beginning of incessant litigation over the extent to which state legislation is precluded by the commerce clause"). As a consequence, it would be just to conclude that the Commerce Clause functioned just as Madison had expected for the first hundred years of national existence. However, beginning with the Interstate Commerce Act in 1887, the Sherman Antitrust Act in 1890, and many other enactments after the beginning of the twentieth century, Congress began asserting its positive power under the Commerce Clause. In doing so, it was met at first with significant checks from the Supreme Court. *Wickard*, 317 U.S. at 121-22, 122, n.20 (collecting cases striking down congressional enactments). In general, the Court protected state authority over intrastate commerce by excluding from it "activities such as 'production,' 'manufacturing,' and 'mining,'" and by removing from its definition activities that merely affected interstate commerce, unless the effect was "direct" rather than indirect. *Id.* at 119-20. With respect to citizens, the reach of the Commerce Clause was limited by the Fifth Amendment which, prior to the late 1930's, was held to protect economic liberty through substantive due process. *R.R.*

Ret. Bd. v. Alton R.R. Co., 295 U.S. 330 (1935); *see also Lopez*, 514 U.S. at 606 (Souter, J. dissenting). Because this regime viewed the regulation even of economic activity as illegitimate unless that activity harmed or threatened harm to someone else, *Lochner v. New York*, 198 U.S. 45 (1905), it is inconceivable that the Commerce Clause prior to 1938 would have been deemed to validly reach inactivity. The question thus becomes, has the Supreme Court decided any case in the post-*Lochner* era that has extended the Commerce Clause far enough to cover the mandate and penalty?

D. The Mandate and Penalty are Outside the Existing Outer Limits of the Commerce Clause and Associated Necessary and Proper Clause as Measured by Supreme Court Precedent.

Although *Wickard* has been described as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, 514 U.S. at 560, it still involved the voluntary activity of raising a commodity which, in the aggregate, was capable of affecting the common stock of wheat. Some of Mr. Filburn's commodities, as a matter of past practice, had been placed into commerce, and homegrown wheat in the aggregate would affect the total common stock, with a resulting effect on price. The Agricultural Adjustment Act of 1938 contained "a definition of 'market' and its derivatives, so that as related to wheat, in addition to its conventional meaning, it also mean[t] to dispose of 'by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of.'" *Wickard*, 317 U.S. at 118-19. It was Filburn's practice to sell milk, poultry and eggs from animals fed with his home grown wheat.

Id. at 114. The parties stipulated that the use of home grown wheat was the largest variable (greater than 20 per cent) in the domestic consumption of wheat. *Id.* at 125, 127. This, in turn, permitted the Supreme Court to hold that "even if [an] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Id.* at 125 (emphasis added). This marks the affirmative outer limits of the Commerce Clause.

What *Wickard* stands for, as *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), make clear, is not the proposition that the case "expand[s] the commerce power to cover virtually everything," as used to be said. *See* Currie, at 170, n. 89. Instead, *Wickard* establishes the principle that, when activity has a substantial aggregate impact on interstate commerce, there is no as-applied, *de minimis* constitutional defense to regulation under the Commerce Clause. *See Raich*, 545 U.S. at 47-48 (O'Connor dissenting) ("The task is to identify a mode of analysis that allows Congress to regulate more than nothing (by declining to reduce each case to its litigants) and less than everything (by declining to let Congress set the terms of analysis.")).

Wickard represented itself as a return to the pure and sweeping doctrine established by *Gibbons* thereby correcting the Supreme Court's excursion into Lochneriam. *Wickard*, 317 U.S. at 119-25. However, the *dictum* of the *Wickard* Court that Chief Justice Marshall had made statements in *Gibbons* with respect to

the Commerce Clause "warning that effective restraints on its exercise must proceed from political rather than from judicial processes" is a tautology that conceals more than it reveals. *Wickard*, 317 U.S. at 120. It is a tautology because it is true of any enumerated power that, when Congress is validly acting under the power, the only effective restraints are political unless some other positive prohibition applies. *See Morrison*, 529 U.S. at 616, n. 7 (The "assertion that from *Gibbons* on, public opinion has been the only restraint on the congressional exercise of the commerce power is true only insofar as it contends that political accountability is and has been the only limit on Congress' exercise of the commerce power *within that power's outer bounds* . . . *Gibbons* did not remove from this Court the authority to define that boundary.") (emphasis in original). What the *Wickard* tautology also conceals is Marshall's actual holding in *Gibbons* that the terms "to regulate" and "Commerce . . . among the several States" are bounded, with judicially ascertainable meaning, and his further holding that the Commerce Clause does not reach transactions that affect only intrastate commerce. *Gibbons*, 22 U.S. (9 Wheat.) at 189-90, 196.

Since *Wickard*, the Supreme Court has proceeded no further than to hold that Congress can regulate three things under the Commerce Clause: (1) "use of the channels of interstate commerce" (2) "the instrumentalities of interstate commerce," and (3) "**activities** that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59 (emphasis added). The majority in *Raich* went no further than to display a willingness to accept congressional findings that home-grown marijuana in the

aggregate has a substantial effect on interstate commerce. *Raich*, 545 U.S. at 18-19. The challenge in *Raich* was not facial, but involved an atomized, as-applied challenge of the sort foreclosed by *Wickard*. *Id.* at 15, 23.

In addition to the affirmative, tripartite definition of the commerce power, the Supreme Court has developed a workable negative rule for determining when the outer limits of the Commerce Clause have been exceeded: a facial challenge will succeed when Congress seeks to regulate non-economic activities, particularly where the claimed power has no principled limits, requiring the Court "to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated and that there never will be a distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68. (Chief Justice Rehnquist for the Court, joined by Justices O'Connor, Scalia, Kennedy, and Thomas) (citations omitted). As Justice Kennedy stated in his concurrence in *Lopez*: "Although it is the obligation of all officers of the Government to respect the constitutional design, the Federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Id.* at 578 (citations omitted).

That principle was found applicable in *Morrison* because the federal government was attempting to exercise police powers denied to it by the Constitution. *Morrison*, 529 U.S. at 618-19 ("We *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to

exercise a police power.'") (emphasis in original) (citations omitted). Not only are the mandate and its penalty provision a part of the police power conceptually, but historically, commands to act, such as vaccination and school attendance laws, have been justified under the state police power. *See Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) ("protection of the lives, limbs, health, comfort and quiet of all persons" falls within state police power).

None of this is changed by an appeal to the Necessary and Proper Clause. Each enumerated power of Congress is modified by this statement: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." However, that provision "is not itself a grant of power." *Kinsella v. Singleton*, 361 U.S. 234, 247-48 (1960). Furthermore, the affirmative outer limit of the Commerce Clause relevant to this case – activities substantially affecting interstate commerce – itself depends upon the Necessary and Proper Clause. *Katzenbach v. McClung*, 379 U.S. 294, 301-02 (1964); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942). It would be wrong to assume that such power is part of the Commerce Clause itself, which can then be infinitely extended by the Necessary and Proper Clause. *See Raich*, 545 U.S. at 34 (Scalia, J., concurring in the judgment) ("Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."). Taken together, these cases recognize

that Congress can regulate intrastate activity where such regulation is connected with and appropriate to Congress's power to regulate the interstate market.

In this way, Congress's power remains tethered to the text of the Commerce Clause. It may reach interstate commerce directly. It may reach economic intrastate activities substantially affecting interstate commerce even before they ripen into "commerce" through trade, barter or sale, if they affect the common stock of a commodity. *Raich*; *Wickard*. Regulation may reach many things under the Necessary and Proper Clause. However, the mode of regulation must fit the enumerated power by executing it – not by altering its character. And the question of fit is irrelevant unless the thing being regulated is proper. Textually and according to precedent, there is a proper prong to the Necessary and Proper Clause:

> When a "Law . . . for carrying into Execution" the Commerce Clause violates the principle of State sovereignty reflected in the various constitutional provisions . . . , it is not a "Law . . . proper for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] act of usurpation" which "deserves to be treated as such."

Printz v. United States, 521 U.S. 898, 923-24 (1997) (emphasis in original). The "various constitutional provisions" referred to by the Court are those that underlie structural federalism, including the limitation of federal power to enumerated, delegated powers. Hence, any application of the Necessary and Proper Clause that renders the concept of enumerated powers superfluous, and is tantamount to the creation of a national police power, fails under the proper prong.

Nor does *United States v. Comstock*, 130 S. Ct. 1949 (2010), alter this analysis. Instead it recognizes that *Morrison's* negative outer limit denying the

national government a police power applies to the Necessary and Proper Clause. *Comstock*, 130 S. Ct. at 1964 ("Nor need we fear that our holding today confers on Congress a general 'police power, which the Founders denied the National Government and reposed in the States.'") (citing *Morrison*). Justice Kennedy in his concurrence in the judgment in *Comstock* expressly stated: "It is of fundamental importance to consider whether essential attributes of State sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power." *Id.* at 1967.

Furthermore, this Court elsewhere has emphatically held that the Necessary and Proper Clause is limited by general principles of federalism independent of any direct prohibition. *Alden v. Maine*, 527 U.S. 706 (1999) ("When a 'Law . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions . . . it is not a 'Law . . . *proper* for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] act of usurpation' which 'deserves to be treated as such.'") (citing *Printz*, 521 U.S. at 923-24). Not only are there clear federalism limits on the Necessary and Proper Clause, but those limits compel the conclusion that any attempt to exercise an unenumerated power, such as regulating the status of being uninsured, for the purpose of making the regulation of an enumerated power more efficient, is improper because the unenumerated power is, by definition, reserved to the States. Once it is determined that an enactment is improper in this

sense, there is nothing further to consider under the Necessary and Proper Clause. That is why the majority opinions in *Morrison* and *Lopez* find it unnecessary to engage the Clause. It simply does not matter how "necessary" the mandate and penalty might be to the congressional scheme if the end being pursued is improper under the Necessary and Proper Clause. That is the end of it.

CONCLUSION

This Court should affirm the holding of the United States Court of Appeals for the Eleventh Circuit that the mandate and penalty of PPACA exceed the enumerated powers of Congress and that the mandate and penalty cannot be sustained under the Commerce Clause even as aided by the Necessary and Proper Clause.

Respectfully submitted,

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.
Solicitor General of Virginia
dgetchell@oag.state.va.us
Counsel of Record

CHARLES E. JAMES, JR.
Chief Deputy Attorney General

WESLEY G. RUSSELL, JR.
Deputy Attorney General
wrussell@oag.state.va.us

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-7240
Facsimile: (804) 371-0200

February 13, 2012

Counsel for the Commonwealth of Virginia

AMICUS CURIAE BRIEF

No. 11-398

IN THE

Supreme Court of the United States

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.,

Petitioners,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DANIEL J. POPEO
CORY L. ANDREWS
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave., NW
Washington, DC 20036
(202) 599-0302
candrews@wlf.org

ILYA SOMIN
Counsel of Record
GEORGE MASON UNIVERSITY SCHOOL OF LAW
3301 Fairfax Drive
Arlington, VA 22201
(703) 993-8069
isomin@gmu.edu

February 13, 2012

QUESTION PRESENTED

Amici curiae address the following issue only:

Whether the minimum coverage provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, as amended by the Health Care and Education Reconciliations Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, is a valid exercise of Congress's power under the Necessary and Proper Clause.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES vi

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. PROPRIETY AND NECESSITY ARE WHOLLY SEPARATE AND DISTINCT REQUIREMENTS, BOTH OF WHICH MUST BE MET BY THE INDIVIDUAL MANDATE 7

A. The Text Of The Necessary And Proper Clause Imposes A Distinct Requirement of Propriety 7

B. The Clause's Original Meaning Also Supports The Enforcement Of A Distinct Requirement Of Propriety 8

C. This Court's Precedents Further Support Enforcing A Distinct Requirement Of Propriety 11

II. THE INDIVIDUAL MANDATE IS "IMPROPER" BECAUSE UPHOLDING IT WOULD GIVE

CONGRESS VIRTUALLY UNLIMITED POWER 15

A. The Propriety Requirement Protects The States Against Limitless Assertions Of Federal Power 15

B. Petitioners' Rationales For The Mandate Would Give Congress Unconstrained Authority To Impose Other Mandates 18

1. Petitioners' interpretation of the Necessary and Proper Clause lacks meaningful constraints and reads the word "proper" out of the Constitution 18

2. Petitioners' position cannot be salvaged by claiming that health insurance presents a special case 22

III. THE INDIVIDUAL MANDATE IS "IMPROPER" BECAUSE UPHOLDING IT WOULD RENDER MANY OF CONGRESS'S OTHER ARTICLE I POWERS REDUNDANT 28

IV. THE INDIVIDUAL MANDATE FAILS THE TEST APPLIED BY THIS COURT IN *UNITED STATES V. COMSTOCK* 30

A. The *Comstock* Factors Are Elements Of Propriety 31

B. The Individual Mandate Runs Afoul Of At Least Three Of The *Comstock* Criteria 32

1. The individual mandate is not backed by a long history of federal involvement 32

2. The individual mandate does not accommodate state interests 33

3. The individual mandate is extremely broad in scope 35

CONCLUSION 36

TABLE OF AUTHORITIES

Page(s)

CASES:

Alden v. Maine,
527 U.S. 706 (1999) 14, 17

Bond v. United States,
131 S. Ct. 2355 (2011) 12, 21

Dep't of Rev. v. Ass'n of Wash. Stevedoring Companies,
435 U.S. 734 (1978) 8

District of Columbia v. Heller,
554 U.S. 570 (2008) 11

Gonzales v. Raich,
554 U.S. 1 (2005) 13, 20, 28, 29

Holmes v. Jennison,
39 U.S. 614 (1840) 8

Knowlton v. Moore,
178 U.S. 41 (1900) 5, 8, 21

Liberty Univ. v. Geithner, 753 F. Supp. 2d 611 (W.D. Va., 2010), *vacated* __ F.3d __, 2011 WL 3962915 (4th Cir. Sep. 8, 2011) 23

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) .....*passim*

Page(s)

Mead v. Holder,
766 F. Supp. 2d 16 (D.D.C. 2011), *aff'd Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011)..... 23, 25

New York v. United States,
505 U.S. 144 (1992) 11

NLRB v. Jones & Laughlin Steel Co.,
301 U.S. 1 (1937) 16

Powell v. Alabama,
287 U.S. 45 (1932) 8

Printz v. United States,
521 U.S. 898 (1997) 4, 11, 12, 13, 14, 17

Pruitt v. Sebelius,
No. 6:11cv30RAW (E.D. Okla. Jan. 21, 2011) 34

Seven-Sky v. Holder,
661 F.3d 1 (D.C. Cir. 2011) 18, 23, 24

Thomas More Law Ctr. v. Obama,
651 F.3d 529 (6th Cir. 2011) 23

Thomas More Law Ctr. v. Obama,
720 F. Supp. 2d 882 (E.D. Mich. 2010), *aff'd*
651 F.3d 529 (6th Cir. 2011) 23

United States v. Comstock,
130 S. Ct. 1949 (2010) .....*passim*

United States v. Lopez,
514 U.S. 549 (1995) 3, 22

Page(s)

United States v. Morrison,
529 U.S. 598 (2000) 16, 28

United States v. Sabri,
326 F.3d 937 (8th Cir. 2003), *aff'd* 541 U.S. 200 (2000) 14

United States v. S.E. Underwriters Ass'n,
322 U.S. 533 (1944) 33

Virginia v. Sebelius,
656 F.3d 253 (4th Cir. 2011) 24, 34

Virginia v. Sebelius,
728 F. Supp. 2d 768, 781 (E.D. Va. 2010), *vacated on other grounds*, 656 F.3d 253 (4th Cir. 2011) 24

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. I 6

U.S. Const. art. I, § 8, cl. 1 8

U.S. Const. art. I, § 8, cl. 3 ..... 6, 29

U.S. Const. art. I, § 8, cl. 12 19

U.S. Const. art. I, § 8, cl. 14 ..... 6, 29

U.S. Const. art. I, § 8, cl. 16 ..... 6, 29

U.S. Const. art. I, § 8, cl. 18 ..... *passim*

Page(s)

STATUTES & REGULATIONS:

Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 4248 (2006) 30, 34, 35

National Organ Transplant Act 42 U.S.C. § 274e 19

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (PPACA) ..... i, 2

PPACA § 1501 ..... *passim*

MISCELLANEOUS :

Barnett, Randy E., *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional,* 5 NYU J.L. & Liberty 581 (2010) 17

Barnett, Randy E., *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183 (2003) 9, 15

Beck, J. Randy, *The New Jurisprudence of the Necessary and Proper Clause,* 2002 U. Ill. L. Rev. 581 (2002) 17

Calabresi, Steven G. & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives From Law,* Nomos (forthcoming) 20

Page(s)

Cochrane, John H., *What to Do About Preexisting Conditions*, Wall St. J., Aug. 14, 2009 35

The Federalist (Clinton Rossiter ed., 1961).....*passim*

Hamilton, Alexander, *Opinion on the Constitutionality of the Bank*, Feb. 23, 1791, in 3 *The Founders' Constitution* 247-49 (Philip B. Kurland & Ralph Lerner, eds.) (1987) 10

Kronenfeld, Jennie Jacobs, *The Changing Federal Role in U.S. Health Care Policy* (1997) 33

Lash, Kurt T., *A Textual-Historical Theory of the Ninth Amendment*, 60 Stan. L. Rev. 895 (2008) 16

Lawson, Gary, et al., *The Origins of the Necessary and Proper Clause* (2010)..... 9

Lawson, Gary & Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267 (1993) 10, 11, 15, 16

Madison, James, *Speech on the Bank Bill*, House of Representatives, Feb. 2, 1791, in James Madison, *Writings* 480 (Jack N. Rakove, ed. 1999) 5, 19

Natelson, Robert G., *The Framing and Adoption of the Necessary and Proper Clause, in* Gary Lawson, *et al.*, *The Origins of the Necessary and Proper Clause*, 84-119 (2010)..... 9

Page(s)

Somin, Ilya, *A Mandate for Mandates: Is the Individual Health Insurance Mandate Case a Slippery Slope,* Law & Contemporary Problems (forthcoming) 23, 27

Somin, Ilya, *Taking Stock of* Comstock: *The Necessary and Proper Clause and the Limits of Federal Power,* 2009-10 Cato Sup. Ct. Rev. 239 31

Webster's Third New International Dictionary (1966) 20, 29

INTERESTS OF *AMICI CURIAE*[1]

The Washington Legal Foundation (WLF) is a public-interest, law and policy center with supporters in all 50 states. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government. WLF routinely litigates in support of efforts to ensure a strict separation of powers—both among the three branches of the federal government and between federal and state governments—as a means of preventing too much power from being concentrated within a single governmental body.

The remaining *amici* are all legal scholars specializing in constitutional law and related fields. Based on their substantial legal expertise, they believe that Section 1501 of the Patient Protection and Affordable Care Act exceeds the bounds of Congress's constitutional authority. *Amici* include Jonathan H. Adler, Johan Verheij Memorial Professor of Law and Director of the Center for Business Law & Regulation, Case Western Reserve University School of Law; Steven G. Calabresi, George C. Dix Professor of Constitutional Law, Northwestern University School of Law; James W. Ely, Jr., Milton R. Underwood Professor of Law

---

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief, and standing letters of consent have been lodged with the Court.

Emeritus, Vanderbilt University Law School; Elizabeth Price Foley, Institute for Justice Chair in Constitutional Litigation and Professor of Law, Florida International University College of Law; David N. Mayer, Professor of Law and History, Capital University Law School; Andrew Morriss, D. Paul Jones, Jr. & Charlene Angelich Jones Chairholder of Law, University of Alabama Law School; Leonard J. Nelson III, Professor of Law, Samford University's Cumberland School of Law; Stephen B. Presser, Raoul Berger Professor of Legal History, Northwestern University School of Law; Robert J. Pushaw, James Wilson Endowed Professor of Law, Pepperdine University School of Law; Ronald J. Rychlak, Associate Dean for Academic Affairs and MDLA Professor of Law, University of Mississippi School of Law; and Todd J. Zywicki, Foundation Professor of Law, George Mason University School of Law.

Amici are concerned that Section 1501 of the Patient Protection and Affordable Care Act, which seeks to compel most Americans to purchase health insurance by 2014, goes beyond the bounds of Congress's power under the Necessary and Proper Clause. *See* §1501(b), 10106, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliations Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("PPACA"). Simply put, the Necessary and Proper Clause does not give Congress the authority to force Americans to purchase a product they do not want. Such a law is unconstitutional because it is not "proper."

SUMMARY OF ARGUMENT

In asking this Court to reverse the Eleventh Circuit's invalidation of the individual mandate, Petitioners rely in part on the Necessary and Proper Clause, which gives Congress the authority to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. *Amici* contend here that even if the mandate may be "necessary," it is not a "proper" exercise of federal authority. *Id.*[2]

The "first principles" of the Constitution are that it "creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting *The Federalist* No. 45). As James Madison observed, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Id.* The federal government, Madison emphasized, is not granted "an indefinite supremacy over all persons and things." *The Federalist* No. 39.

---

[2] We agree with Respondents that the mandate is not authorized by either the Commerce Clause or the Tax Clause, the two other bases of authority claimed by Petitioners. We will not repeat those arguments here, though we addressed the Commerce Clause issue at length in our *amicus curiae* brief in the appeals court below. *See* Br. of the Wash. Legal Found. and Constitutional Law Scholars as *Amici Curiae* in Support of Appellees, Urging Affirmance, *Florida ex rel. Atty. Gen. v. U.S. Dep't of Health & Human Servs.*, Nos. 11-11021 & 11-11067, 2011 WL 2530501 (11th Cir. May 11, 2011).

Unfortunately, the Necessary and Proper Clause has become "the last, best hope of those who defend *ultra vires* congressional action." *Printz v. United States*, 521 U.S. 898, 923 (1997). To prevent the Clause from becoming a back door to unconstrained federal power, it is essential for this Court to enforce its precedents establishing that legislation authorized by the Necessary and Proper Clause must meet the requirements of both necessity *and* propriety. *See id.* at 923-24 (holding that a law that is not "proper" exceeds the scope of Congress's power under the Necessary and Proper Clause, even if necessary).

This Court's Necessary and Proper Clause jurisprudence gives Congress wide latitude to determine what kinds of regulations are "necessary" to the implementation of Congress's other enumerated powers. *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413-15 (1819) (ruling that such measures need not be "absolutely necessary," but merely "useful" or "convenient" to the execution of other powers). But even if the individual mandate somehow satisfies the requirements of necessity,[3] it still fails the test of propriety.

The rule that propriety is a separate and distinct requirement from necessity is deeply rooted in the text and original meaning of the Constitution, as well as this Court's precedents going back to *McCulloch v. Maryland*. *See id.* It is also required

---

[3] For purposes of this brief, *amici* take no position on whether the individual mandate is "necessary" for the congressional exercise of an enumerated power.

by the longstanding "elementary canon of construction which requires that effect be given to each word of the Constitution." *Knowlton v. Moore*, 178 U.S. 41, 87 (1900). If any federal statute that is "necessary" is automatically also "proper," then the latter word would be rendered completely superfluous.

Although this Court has never provided a definitive statement of the meaning of "proper" as used in the Necessary and Proper Clause, the Constitution's text and original meaning, as well as this Court's precedents, show that the individual mandate violates the requirements of propriety in at least three ways. First, a statute is "improper" if it can only be supported by a logic that would give Congress virtually unlimited power. As James Madison emphasized in a 1791 speech on the Necessary and Proper Clause, "[w]hatever meaning this clause may have, none can be admitted that would give an unlimited discretion to Congress." James Madison, *Speech on the Bank Bill*, House of Representatives, Feb. 2, 1791, in James Madison, *Writings* 480, 484 (Jack N. Rakove, ed. 1999).

Petitioners' various arguments for the mandate do exactly that. As the Eleventh Circuit panel below recognized, "[t]he government's position amounts to an argument that the mere fact of an individual's existence substantially affects interstate commerce" and is therefore subject to federal regulation under the Commerce Clause and Necessary and Proper Clause. Pet. App. at 119a.

The mandate is also "improper" because Petitioners' argument supporting it would render

many of Congress's other Article I powers completely redundant, including the power to regulate foreign commerce, the power to regulate the militia, and even the power to "make rules for the Government and regulation of the land and naval Forces." U.S. Const. Art. I, § 8, cl. 3, 14, 16. All of these powers become superfluous under Petitioners' interpretation of the Necessary and Proper Clause. Such an approach violates the longstanding requirement that a statute authorized by the Clause must "consist with the letter and spirit of the constitution," *McCulloch*, 17 U.S. at 421, a rule that is best understood as an element of propriety rather than of necessity.

Finally, the individual mandate runs afoul of at least three of the five criteria for evaluating claims of authority under the Necessary and Proper Clause, as recently utilized by this Court in *United States v. Comstock*, 130 S. Ct. 1949 (2010). In justifying its decision to uphold a claim of congressional power under the Necessary and Proper Clause, *Comstock* cited five factors: "(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope." *Id.* at 1965. In this case, a majority of these criteria weigh against the individual mandate. Although the Court did not specify whether these criteria are elements of necessity or propriety, they are more logically understood as the latter.

Because the individual mandate is inconsistent with a limited federal government of enumerated powers, it is not a "proper" exercise of congressional power and cannot possibly be authorized by the Necessary and Proper Clause. The holding of the Eleventh Circuit declaring the individual mandate unconstitutional should be affirmed.

ARGUMENT

I. PROPRIETY AND NECESSITY ARE WHOLLY SEPARATE AND DISTINCT REQUIREMENTS, BOTH OF WHICH MUST BE MET BY THE INDIVIDUAL MANDATE

A federal law authorized by the Necessary and Proper Clause must meet two distinct requirements—it has to be both "necessary" *and* "proper." Both of these requirements are essential under the text and original meaning of the Clause, as well as this Court's precedents.

A. The Text of the Necessary and Proper Clause Imposes a Distinct Requirement of Propriety.

The text of the Necessary and Proper Clause clearly authorizes only laws that are "necessary *and* proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18 (emphasis added). To reduce this to a simple requirement of necessity would be to read the word "proper" out of the

Constitution, rendering it completely superfluous.

Such a result conflicts with both a common sense reading of the text and this Court's longstanding insistence that "[i]n expounding the Constitution of the United States, every word must have its due force, and appropriate meaning" and that "[n]o word in the instrument . . . can be rejected as superfluous or unmeaning." *Holmes v. Jennison*, 39 U.S. 540, 570-71 (1840). The Court has described this rule as an "elementary canon of construction which requires that effect be given to each word of the Constitution." *Knowlton*, 178 U.S. at 87; *see also Dep't of Revenue v. Ass'n of Wash. Stevedoring Companies*, 435 U.S. 734, 759 (1978) (rejecting the claim that "'Imposts or Duties' encompasses all taxes [because it] makes superfluous several of the terms of Art. I, § 8, cl. 1 of the Constitution, which grants Congress the 'Power To lay and collect Taxes, Duties, Imposts and Excises'"); *Powell v. Alabama*, 287 U.S. 45, 66 (1932) (holding that "no part of this important amendment [the Fifth Amendment] could be regarded as superfluous").

The text of the Constitution, coupled with this Court's longstanding canon of construction, requires that "proper" be given a meaning that is separate and distinct from "necessary." Otherwise, the Necessary and Proper Clause would be transformed into a mere "Necessary Clause."

B. The Clause's Original Meaning Also Supports the Enforcement of a Distinct Requirement of Propriety.

The original meaning of the Necessary and

Proper Clause requires a rule of propriety distinct from necessity. At the 1787 Constitutional Convention, the Committee of Detail deliberately inserted the word "proper" into a previous draft of the Clause that included only the word "necessary." *See* Robert G. Natelson, *The Framing and Adoption of the Necessary and Proper Clause, in* Gary Lawson, *et al.*, *The Origins of the Necessary and Proper Clause,* 84, 88-90 (2010); *cf.* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause,* 6 U. Pa. J. Const. L. 183, 215 (2003) ("One thing that stands out from the records of the Constitutional Convention is how frequently the term 'necessary' was paired with 'proper' (or 'unnecessary' with 'improper') in contexts suggesting that each term has a distinct meaning."). This suggests a deliberate effort on the part of the Framers to insert the term "proper" in order to change the meaning the Clause would otherwise have had.

In *Federalist* 33, Alexander Hamilton, one of the strongest supporters of federal power among the Framers, insists that we "judge of the *necessity* and *propriety* of the laws to be passed for executing the powers of the Union." *The Federalist* No. 33. This clearly implies that "necessity" and "propriety" are two separate requirements. Hamilton goes on to state that "[t]he propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded," and then gives several examples of improper federal legislation, including an "attempt to vary the law of descent in any State" and a statute that

"undertake[s] to abrogate a land tax imposed by the authority of a State." *Id.*[4] Obviously, federal laws that alter state inheritance laws or abrogate state land taxes may be necessary (in the broad sense of "useful" or "convenient") for the execution of other enumerated powers. *See McCulloch*, 17 U.S. at 413-15. For example, both inheritance laws and state land taxes surely have an impact on interstate commerce. A federal law overriding or altering them therefore could be a "useful" or "convenient" means for changing patterns of interstate commerce, just as Petitioners claim that the individual mandate is a useful or convenient means for regulating the health insurance market. But such a law, as Hamilton rightly explains, would undoubtedly be *improper*.

Many other Framers, political leaders, and legal commentators of the Founding era also recognized that propriety and necessity are separate and distinct requirements. For example, the first U.S. Attorney General, Edmund Randolph, argued that "no power is to be assumed under the [Necessary and Proper] clause, but such as is not only necessary, but proper, or perhaps expedient also." Opinion of Edmund Randolph (Feb. 12, 1791), *quoted in* Gary Lawson & Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause,* 43 Duke L.J.

---

[4] Alexander Hamilton was probably the originator of this broad interpretation of necessity. *See* Alexander Hamilton, *Opinion on the Constitutionality of the Bank*, Feb. 23, 1791, in 3 *The Founders' Constitution* 247-49 (Philip B. Kurland & Ralph Lerner, eds.) (1987) (arguing that "necessary" should be interpreted to mean "no more *than needful, requisite, incidental, useful,* or *conducive to*").

267, 290 (1993). Numerous others have held similar views. *See id.* at 290-308 (citing many examples).

The Clause's original meaning therefore requires a standard of propriety distinct from necessity. And this Court follows the text and original meaning of a constitutional provision in cases where, as here, "nothing in our precedents forecloses . . . adoption of the original understanding." *Dist. of Columbia v. Heller*, 554 U.S. 570, 625 (2008).

C. This Court's Precedents Further Support Enforcing A Distinct Requirement of Propriety.

Like the text and original meaning of the Constitution, this Court's precedents support enforcement of a requirement of propriety distinct from that of necessity. In *Printz v. United States*, the Court held that "[w]hen a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in . . . various constitutional provisions . . .[,] it is not a 'La[w] . . . *proper* for carrying into Execution the Commerce Clause,' and is thus, in the words of *The Federalist*, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'" *Printz*, 521 U.S. at 923-24 (quoting *The Federalist* No. 33); *cf. New York v. United States*, 505 U.S. 144, 166 (1992) ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."). The law invalidated in *Printz*, requiring "state and local law enforcement officers to conduct background checks

on prospective handgun purchasers," was quite clearly "useful" or "convenient" to carrying into execution Congress's power to regulate commerce in handguns. *Printz,* 521 U.S. at 902. Yet this Court concluded that it exceeded the bounds of congressional power because it was improper, not because it violated the requirement of necessity. And while *Printz*'s holding relied in part on the concept of "state sovereignty" embedded in the Tenth Amendment, *id.* at 923-24, it emphasized that "[w]hat destroys the dissent's Necessary and Proper Clause argument . . . is not the Tenth Amendment but the Necessary and Proper Clause itself." *Id.* at 923.

Because "States are not the sole intended beneficiaries of federalism," *Bond v. United States,* 131 S. Ct. 2355, 2364 (2011), the propriety restriction does not protect state governments alone. Rather, constitutional limitations on federal power also "protect . . . the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.*

Other precedents also support the notion that necessity and propriety are separate requirements. In its famous ruling in *McCulloch v. Maryland,* this Court outlined several limitations on Congress's power under the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch,* 17 U.S. at 421. This passage lists four constraints on

the range of statutes authorized by the Necessary and Proper Clause: (1) the "end" pursued must be "legitimate" and "within the scope of the constitution"; (2) the means must be "appropriate" and "plainly adapted to that end"; (3) the means must "not [be] prohibited" elsewhere in the Constitution; and, finally (4) the means must be "consist[ent] with the letter and spirit of the Constitution." While the first and second of these requirements might potentially be considered elements of necessity, the third and fourth clearly cannot. A statute "prohibited" elsewhere in the Constitution, or one that is inconsistent "with the letter and spirit of the Constitution," might still be a "useful" or "convenient" means of enforcing one of Congress's enumerated powers. *Id.* at 413-15. Accordingly, if a statute exceeds the scope of the Necessary and Proper Clause for either of these reasons, it must be because it is not "proper."

As Justice Scalia has explained, "there are other restraints upon the Necessary and Proper Clause authority," besides merely the requirement of a necessary connection to an enumerated power. "[E]ven when the end is constitutional and legitimate, the means must be 'appropriate' and 'plainly adapted' to that end. Moreover, they may not be otherwise 'prohibited' and must be 'consistent with the letter and spirit of the constitution.'" *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring) (quoting *McCulloch*, 17 U.S. at 421)). As an example of these additional "restraints," Justice Scalia cites "cases such as *Printz v. United States* . . ., [which] affirm that a law is not '*proper* for carrying into Execution the Commerce Clause' '[w]hen [it] violates [a constitutional] principle of state

sovereignty.'" *Id.* (quoting *Printz,* 517 U.S. at 923-924). The "other restraints" in question obviously include those mandated by "propriety."

This Court would later rely on *Printz*'s definition of proper in deciding *Alden v. Maine,* 527 U.S. 706, 733 (1999). In *Alden,* the Court concluded that states enjoy a constitutionally protected immunity from suit that is not limited by the express terms of the Eleventh Amendment, but applies in state court as well as federal court. *Alden* held that the Necessary and Proper Clause does not give Congress "the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers," because such authority is not "proper." *Id.*[5]

This Court's most recent Necessary and Proper Clause case, *United States v. Comstock,* 130 S. Ct. 1949 (2010), reiterates the rule that Congress has broad discretion in determining necessity. *See id.* at 1956 (holding that necessity only requires "a means that is rationally related to the implementation of a constitutionally enumerated power"). But it also based its decision on five other considerations, most of which are best understood as interpretations of "proper" rather than "necessary" (even though the Court did not clearly specify this distinction). *See* Part IV, *infra.*

---

[5] At least one federal circuit court has also concluded that "proper" and "necessary" are separate requirements. *See United States v. Sabri* 326 F.3d 937, 949n. 6 (2003), *aff'd* 541 U.S. 600 (2004) (holding that a statute is "proper" for reasons independent of its necessity).

II. THE INDIVIDUAL MANDATE IS "IMPROPER" BECAUSE UPHOLDING IT WOULD GIVE CONGRESS VIRTUALLY UNLIMITED POWER.

Perhaps the most basic element of "propriety" under the Necessary and Proper Clause is that it excludes arguments that would give Congress virtually unlimited power. In this case, the various rationales offered by the federal government in support of the individual mandate all would require that result.

A. The Propriety Requirement Protects the States Against Limitless Assertions of Federal Power.

One of the main functions of the propriety requirement is to prevent the Necessary and Proper Clause from becoming a back door to unconstrained federal power. Evidence from the Founding era suggests that a proper statute must, at the very least, not depend on a constitutional rationale that would give Congress virtually unlimited power to legislate in areas traditionally reserved to the states.[6] As James Madison explained in *Federalist*

---

[6] *See, e.g.*, Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 215-20 (2003) (discussing the relevant evidence); Gary Lawson & Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 297 (1993) (explaining that the evidence shows that "proper" means that laws "must be consistent with principles of separation of powers, principles of federalism, and individual rights"); Kurt T. Lash, *A Textual-Historical Theory of the Ninth*

39, the Constitution does not give the federal government "an indefinite supremacy over all persons and things." *The Federalist* No. 39. Indeed, "[t]he Constitution requires a distinction between what is truly national and what is truly local," and the propriety requirement under the Necessary and Proper Clause helps to enforce that line. *United States v. Morrison*, 529 U.S. 598, 617-18 (2000); *cf. NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 29 (1937) (noting "[t]hat the distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system").

Founding-era jurists and other commentators in the nineteenth century concluded that the word "proper" prevented the federal government from using the Necessary and Proper Clause from intruding on the powers of the states. Chief Justice John Marshall, St. George Tucker, and Andrew Jackson were all among those who interpreted the term in that way. *See* Lawson & Granger, *supra*, at 301-08. In *Federalist* 33, Alexander Hamilton wrote that the propriety restriction would serve to protect such state prerogatives as the power to establish inheritance laws and taxes on land from federal interference, a clear indication that the term "proper" was intended to protect the states. *The Federalist* No. 33; *see also* § I.B, *supra* (discussing Hamilton's argument).

Amendment, 60 Stan. L. Rev. 895, 921 (2008) (citing evidence that the original meaning of the Constitution precludes any reading of the Necessary and Proper Clause that has "the effect of completely obliterating the people's retained right to local self-government").

While the Court has never expounded on the exact scope of the reserved state authority that is protected from federal interference by the requirement of propriety, it is safe to say that a virtually unlimited federal power to impose a mandate goes beyond what is permissible. This is particularly so in light of the fact that the power to impose a mandate on the general public is traditionally a prerogative of the state governments and the people themselves. Before the instant case, the federal government imposed mandates on the general population only for narrowly specified purposes related to traditional obligations of citizenship, such as service in the militia. *See* Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional,* 5 NYU J.L. & Liberty 581, 627-34 (2010).

Some have argued that the word "proper" does not protect principles of federalism, but merely requires an "appropriate relationship between congressional ends and means" under the Necessary and Proper Clause. *See* J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause,* 2002 U. Ill. L. Rev. 581, 581 (2002). But this approach would interpret "proper" as serving much the same purpose as "necessary," thereby requiring this Court to overrule its interpretation of the meaning of proper in cases such as *Printz* and *Alden*. *See id.* (claiming that these cases interpreted the Necessary and Proper Clause incorrectly); § I.C, *supra* (discussing these cases).

B. Petitioners' Rationales for the Mandate Would Give Congress Unconstrained Authority to Impose Other Mandates.

Petitioners contend that the individual mandate is permissible under the Necessary and Proper Clause because it is needed to help effectuate the PPACA's requirement that insurance companies accept customers with preexisting health conditions, which in turn is a valid exercise of Congress's authority under the Commerce Clause. Pet. Br. at 21-33. But the Necessary and Proper Clause cannot bear the constitutional weight that Petitioners seek to heap upon it without granting Congress *carte blanche* to impose other mandates. Even the most recent court of appeals decision upholding the mandate acknowledges "the Government's failure to advance any clear doctrinal principles limiting congressional mandates that any American purchase any product or service in interstate commerce." *Seven-Sky v. Holder*, 661 F.3d 1,18 (D.C. Cir. 2011).

1. Petitioners' interpretation of the Necessary and Proper Clause lacks meaningful constraints and reads the word "proper" out of the Constitution.

Petitioners' interpretation of the Necessary and Proper Clause would give Congress virtually unlimited power to impose a mandate or implement almost any other regulation. It gives an "unlimited discretion to Congress" of exactly the kind that James Madison warned against. *See* James

Madison, *Speech on the Bank Bill*, House of Representatives, Feb. 2, 1791, in James Madison, *Writings* 480, 484 (Jack N. Rakove, ed. 1999).

Remarkably, the Government completely ignores the issue of whether the mandate is "proper" and instead asserts that any statute is permissible under the Necessary and Proper Clause so long as it is "useful" or "convenient" for the implementation of an enumerated power. Pet. Br. at 22-23 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 413, 418). But virtually *any* imaginable regulatory measure is useful or convenient for implementing some enumerated power in some way. For example, a federal statute requiring citizens to exercise every day is "rationally related" (*Comstock*, 130 S. Ct. at 1956) to Congress's power to raise and support armies. *See* U.S. Const. art. I, § 8, cl. 12. Citizens who exercise regularly will likely make much more effective soldiers. Similarly, a statute requiring individuals to awaken at dawn might increase their economic productivity by ensuring that they accomplish more each day, and would therefore be "rationally related" to Congress's power to regulate interstate commerce. But no one can seriously doubt that such statutes would nevertheless be "improper" given the Constitution's emphasis on a limited federal government of enumerated powers.

In the same way, Congress has used its commerce power to forbid the sale of human organs. *See* 42 U.S.C. § 274e. Yet it does not follow that Congress therefore has the authority to mandate kidney donations, even though such a mandate would clearly have an impact on illegal organ markets and other commerce in health care services.

Ultimately, there is no logical limit to the range of mandates that would be permitted under the government's approach. *See* Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives From Law*, Nomos (forthcoming) at 30, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1902971 (describing many other mandates that the government's logic would authorize and explaining that interest groups would be likely to lobby successfully for at least some).

The lack of meaningful constraints in Petitioners' interpretation of the Necessary and Proper Clause is especially glaring when considered in the light of this Court's relatively broad interpretation of the Commerce Clause. The Court has held that the Commerce Clause gives Congress nearly unlimited power to regulate "economic activity," defined as any activity that involves "'the production, distribution, and consumption of commodities.'" *Raich*, 545 U.S. at 25-26 (quoting *Webster's Third New International Dictionary* 720 (1966)). Virtually any mandate might be useful, convenient, or rationally related to a regulation of economic activity defined in this way—if we ignore the requirement of propriety, as Petitioners urge.

As the district court recognized below, under the Government's logic "Congress could require that people buy and consume broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because people who eat healthier tend to be healthier, and . . . put less of a strain on the health care system." Pet. App. at 329a. Mandating the purchase of broccoli would surely be a useful or

convenient means of regulating the interstate market in food. And it might also increase interstate commerce by ensuring that the work force has a healthier diet and is therefore more productive. Yet the constitutional inquiry cannot simply end there.

In sum, Petitioners' interpretation of the Necessary and Proper Clause essentially reads the word "proper" out of the Constitution. By concluding that a statute is authorized so long as it is "necessary" under a very broad definition of that word, Petitioners would transform the Necessary and Proper Clause into simply the "Necessary Clause," thereby ignoring the "elementary canon of construction which requires that effect be given to each word of the Constitution." *Knowlton*, 178 U.S. at 87.

This Court recently emphasized that "[f]ederalism secures the freedom of the individual" as well as the prerogatives of state governments. *Bond*, 131 S.Ct. at 2364. Little will remain of that protection for freedom, however, if the Court endorses the Petitioners' view that Congress has virtually unlimited power to impose mandates under the Necessary and Proper Clause.

Petitioners curiously claim that such a sweeping interpretation was adopted by this Court in *Comstock*. *See* Pet. Br. at 22-23 (quoting *Comstock*, 130 S. Ct. at 1956). But while *Comstock* indicated that "in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the

implementation of a constitutionally enumerated power," *Comstock*, 130 S. Ct. at 1956-57, the mere fact that courts must "look to" the presence or absence of a "rational relationship" does not mean that this is both the beginning and end of the constitutional inquiry. Indeed, this Court also indicated that assertions of federal power under the Necessary and Proper Clause are subject to a five-factor test that is best understood as an interpretation of the requirement of propriety. *See* Part IV, *infra*. If a rational relationship were sufficient in and of itself, Congress would have "a plenary police power that would authorize enactment of every type of legislation." *Lopez*, 514 U.S. at 566. As this Court recognized in *Lopez*, however, the Constitution does not create such an untethered power.

2. Petitioners' position cannot be salvaged by claiming that health insurance presents a special case.

During the course of this litigation, Petitioners have presented a variety of creative arguments claiming that health insurance is a special case, thereby suggesting that upholding the individual mandate would not give Congress unconstrained authority to impose other mandates. *See* Pet. App. at 120a (noting that "the government submits that health care and health insurance are factually unique and not susceptible of replication due to: (1) the inevitability of health care need; (2) the unpredictability of need; (3) the high costs of health care; (4) the federal requirement that hospitals treat, until stabilized, individuals with

emergency medical conditions, regardless of their ability to pay; (5) and associated cost-shifting"). Unfortunately, all of these claims break down under close inspection.[7]

The most common argument for the supposed uniqueness of the PPACA's individual mandate is the claim that everyone eventually uses health care in some form. This point has been made in virtually every lower court decision upholding the mandate.[8]

---

[7] For a more detailed critique of these arguments, see Ilya Somin, *A Mandate for Mandates: Is the Individual Health Insurance Mandate Case a Slippery Slope*, Law & Contemporary Problems (forthcoming), at 14-23, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1960641.

[8] *See Seven-Sky v. Holder*, 661 F.3d 1, 18 (D.C. Cir. 2011) (emphasizing that "the health insurance market is a rather unique one, both because virtually everyone will enter or affect it, and because the uninsured inflict a disproportionate harm on the rest of the market as a result of their later consumption of health care services"); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 544 (6th Cir. 2011) (emphasizing that "[v]irtually everyone requires health care services at some point"); *Mead v. Holder*, 766 F. Supp. 2d 16, 37 (D.D.C. 2011), *aff'd Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011) (emphasizing "the inevitability of individuals' entrance into th[e health care] market"); *Liberty Univ. v. Geithner*, 753 F. Supp. 2d 611, 633-34 (W.D. Va., 2010), *vacated* __ F.3d __, 2011 WL 3962915 (4th Cir. Sep. 8, 2011) ("Nearly everyone will require health care services at some point in their lifetimes, and it is not always possible to predict when one will be afflicted by illness or injury and require care."); *Thomas More Law Ctr. v. Obama* , 720 F. Supp. 2d 882, 94 (E.D. Mich. 2010), *aff'd* 651 F.3d 529 (6th Cir. 2011) ("The health care market is unlike other markets. No one can guarantee his or her health, or ensure that he or she will never participate in the health care market . . . . The plaintiffs have not opted out of the

Yet the claim that most people eventually use health care does nothing to differentiate health insurance from almost any other market. If one defines the relevant "market" broadly enough, it is easy to characterize any decision not to purchase a good or service exactly the same way. Tellingly, the Government does not argue that everyone will inevitably use health *insurance*. Instead, Petitioners define the relevant market as "health *care*." The same frame-shifting works for virtually any other mandate. As Judge Henry Hudson correctly pointed out, "the same reasoning could apply to transportation, housing, or nutritional decisions." *Virginia v. Sebelius*, 728 F. Supp. 2d 768, 781 (E.D. Va. 2010), *vacated on other grounds*, 656 F.3d 253 (4th Cir. 2011); *see also* Pet. App. at 329a (noting that "there are lots of markets—especially if defined broadly enough—that people cannot 'opt out' of. For example, everyone must participate in the food market."); *Seven-Sky*, 661 F.3d at 51-52 (Kavanaugh, J., dissenting) (noting that this theory "extend[s] as well to mandatory purchases of retirement accounts, housing accounts, college savings accounts, disaster insurance, disability insurance, and life insurance, for example").

Consider the memorable example of the broccoli mandate raised by the district court below. *See* Pet. App. at 329a. Not everyone eats broccoli. But everyone inevitably participates in the market for food. Therefore, a mandate requiring everyone to

---

health care services market because, as living, breathing beings . . . they cannot opt out of this market.")

purchase and eat broccoli would be permissible under the federal government's argument. The same holds true for a mandate requiring everyone to purchase General Motors cars in order to help the auto industry. Of course, there are many people who do not participate in the market for cars. But nearly everyone does participate in the market for "transportation."

The government's logic could also easily be used to justify numerous other mandates within the health care field itself. Every time a healthy person fails to donate a kidney there is an adverse health effect on those dying of kidney failure, and a foregone economic opportunity for health care providers. It may be useful or convenient to the regulation of health care, therefore, to impose a federal kidney-donation mandate. Yet it would still be improper to do so.

Petitioners also contend that the present case is special because medical providers are required to render emergency services to the uninsured, which is not true of most other markets. *See* Pet. Br. at 40; *Mead*, 766 F. Supp. 2d at 36-37 (emphasizing this point). But it is difficult to see why this distinction is constitutionally relevant. The suggestion seems to be that failure to purchase a given good or service has an adverse economic effect on the producers. Pet. Br. at 40. In that respect, however, failure to purchase health insurance turns out to be no different from failure to purchase any other product. Every time someone fails to purchase a product—be it cars, movie tickets, or broccoli—the producers of these goods and services are made economically worse off than they would be if the potential buyer

had made a different decision. This is true regardless whether the producers must provide goods and services to some consumers for free. At most, the latter condition exacerbates the negative impact on producers. Numerous other market conditions and government regulations can negatively affect producers as well. But it is far from clear why a free service mandate has a special constitutional status denied to other conditions that also reduce producer profits.

Petitioners' other reasons for claiming that this is a special case are equally unpersuasive. For example, they emphasize the fact that health care is a large part of the American economy, that the need for health care is difficult to predict in advance, and that the use of health care by the uninsured imposes costs on others. *See* Pet. Br. at 34-36. But almost any product can be described as part of a larger market that constitutes a major sector of the economy. For example, a broccoli-purchase mandate could be defended on the basis that broccoli is part of the food market, and food is a major part of the economy.

Unpredictability of need is also common in a market economy. It applies, for example, to virtually every other type of insurance, including homeowners' insurance, life insurance, property insurance, and auto insurance. Even with respect to most ordinary consumer products, there are occasional needs that arise suddenly. For example, an individual's car might break down unexpectedly, necessitating an unforeseen purchase of a new car. Health care needs may be unpredictable more often than some of these other examples. But courts

cannot attach constitutional distinctions to such matters of degree because there is no non-arbitrary way to determine how much unpredictability is enough to make any given market a special case.

Likewise, in an interdependent economy, failure to purchase almost any product has economic ripple effects that impact other sectors. For example, failure to purchase healthy foods such as broccoli might reduce the health of the work force, thereby reducing overall economic productivity. *See* Pet. App. at 389a.

Petitioners also cannot prevail on the basis that some combination of these and other factors makes health care a unique case. Any sector of the economy has certain unique attributes. But, as the Court of Appeals noted, Petitioners fail to explain why this particular combination is "constitutional[ly] relevan[t]" in a way that does not apply to a host of other markets, all of which have unique combinations of attributes of their own. Pet. App. at 120a.[9]

Finally, even if the health insurance market is unique in some ways, such factual considerations cannot provide meaningful constraints on the scope of federal power. In Commerce Clause and Necessary and Proper cases, this Court applies a highly deferential "rational basis" test to most of the federal government's factual claims. *See Comstock,*

---

[9] For a more complete critique of the claim that the mandate is a unique case because of a combination of factors, see Somin, *A Mandate for Mandates, supra*, at 16-18.

130 S. Ct. at 1956 (exercise of the Necessary and Proper Clause power need only be "rationally related to the implementation of a constitutionally enumerated power"); *Raich*, 545 U.S. at 22 (applying the rational basis test in the Commerce Clause context to claims that activities have a substantial aggregate effect on interstate commerce). Whenever it wishes to impose a future mandate, the federal government could always claim that the situation was factually similar to the health insurance market, and the rational basis standard would require courts to defer to such assertions.

III. THE INDIVIDUAL MANDATE IS "IMPROPER," AS UPHOLDING IT WOULD RENDER MANY OF CONGRESS'S OTHER ARTICLE I POWERS REDUNDANT.

A decision upholding the individual mandate would unavoidably render many of Congress's other Article I powers redundant. This in turn would violate the requirements of propriety because a proper statute must "consist with the letter and spirit of the constitution." *McCulloch*, 17 U.S. at 421. The "letter and spirit of the Constitution" surely include respect for the Constitution's "careful enumeration of federal powers," which would be undermined by a decision rendering many of them superfluous. *See Morrison*, 529 U.S. at 618 n.8.

A decision upholding the mandate would give the federal government the power to impose personal mandates of virtually any kind, so long as they were useful or convenient for the purpose of regulating economic activity, defined broadly as any activity

that involves "'the production, distribution, and consumption of commodities.'" *Raich*, 545 U.S. at 25-26 (quoting *Webster's Third New International Dictionary* 720 (1966)). Thus, the combination of the Commerce Clause and the Necessary and Proper Clause would be sufficient to justify any mandate or regulation that has some sort of effect on the economy. *See* § II.B.1, *supra* (developing this point).

This result would render many of Congress's other powers completely superfluous. For example, the very same Clause that gives Congress the authority to regulate interstate commerce also gives it the power to regulate commerce with "Foreign nations" and "with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3. But foreign trade and Indian commerce clearly have effects on interstate commerce and the overall economy more generally. Regulating these forms of commerce is surely a useful or convenient way to affect interstate commerce. So these powers become redundant under the Petitioners' approach.

Similarly, Congress would no longer have any need of its powers to organize and regulate the state Militia, nor to "make rules for the Government and regulation of the land and naval Forces." U.S. Const. Art. I, § 8, cl. 14, 16. After all, the militia and the armed forces clearly affect economic activity in numerous ways, and virtually any regulations imposed on them would have at least some impact on the economy. The same reasoning applies even to the power to "declare War," since a state of war necessarily affects economic activity enormously. Thus, a declaration of war could be justified under Petitioners' reasoning as a useful or convenient

mechanism for regulating the flow of commerce.

Obviously, some overlap between powers is inevitable. But allowing Congress to impose mandates based on "the mere fact [that] an individual's existence substantially affects interstate commerce" would render many of Congress's powers completely redundant, as opposed to merely overlapping. Pet. App. at 119a.

IV. THE INDIVIDUAL MANDATE FAILS THE TEST APPLIED BY THIS COURT IN *UNITED STATES V. COMSTOCK.*

In *United States v. Comstock*, this Court held that Section 4248 of the Adam Walsh Act was valid under the Necessary and Proper Clause. *See Comstock*, 130 S. Ct. at 1956-67. That provision gave federal prison officials the power to detain "sexually dangerous" federal prisoners after the completion of their sentences. *See* 42 U.S.C. § 4248. The Court cited five factors justifying its decision to uphold Section 4248: "(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope." *Id.* at 1965. Although the Court did not specify whether these criteria relate to necessity or propriety, at least the last four are best interpreted as elements of propriety.

A majority of these criteria weigh against the

individual mandate: the lack of a deep history of federal involvement, the failure of the PPACA to accommodate state interests, and the statute's extraordinarily broad scope. A fourth factor (the possible lack of "sound reasons" for the statute's enactment) is potentially ambiguous. The fifth—"the breadth of the Necessary and Proper Clause"—is a constant that does not vary from case to case. *See* Ilya Somin, *Taking Stock of* Comstock: *The Necessary and Proper Clause and the Limits of Federal Power*, 2009-10 Cato Sup. Ct. Rev. 239, 260-67 (assessing implications of *Comstock* for the present case).

A. The *Comstock* Factors Are Elements of Propriety.

Comstock does not indicate whether the five factors the Court announced are elements of necessity or propriety. But it is more logical to consider them as related to the latter. Whether a long history of federal involvement exists in the relevant area, whether "sound reasons" support a statute's enactment, whether the statute has a "narrow scope," and whether a federal law accommodates state interests all have little to do with the issue of necessity. Indeed, a statute that intrudes into a new area, that fails to accommodate state interests, or has a relatively broad scope can still be a "useful" or "convenient" means of executing one of Congress's enumerated powers. Even a statute that lacks "sound reasons" for its enactment could still be useful or convenient in the sense that it is "rationally related to the implementation of a constitutionally enumerated power." *Comstock*, 130 S. Ct. at 1956. On the other hand, each of these

factors *is* relevant to propriety, in the sense that a "proper" statute must show respect for principles of federalism. *See* § II.A, *supra*. Accordingly, a statute that extends federal power into a new area, fails to accommodate state interests, and has an overly broad scope is more likely to run afoul of federalism principles than one that does not.

B. The Individual Mandate Runs Afoul of at Least Three of the *Comstock* Criteria.

1. The individual mandate is not backed by a long history of federal involvement.

As the district court emphasized below, "the notion of Congress having power under the Commerce Clause to directly impose an individual mandate to purchase health insurance is 'novel' and 'unprecedented.'" Pet. App. at 319a. There is no history of comparable federal regulation. Although in recent years the federal government has adopted numerous statutes regulating health care, it has never compelled ordinary citizens to purchase health insurance or other health care products, nor has it mandated donations of kidneys or blood. It has never forced citizens to purchase products of any kind merely as a consequence of their status as residents of the United States. *See id.* ("Never before has Congress required everyone to buy a product from a private company (essentially for life) just for being alive and residing in the United States."). Prior to the litigation inspired by the PPACA, no court had ever sustained such a power.

Comstock relied on a 155-year history of federal involvement in the relevant field. *See Comstock*, 130 S. Ct. at 1958-59 (tracing the relevant history of federal involvement in establishing a prison system back to 1855). In contrast, there is no similarly extensive history of previous federal regulation remotely comparable to the individual mandate. Indeed, the Supreme Court denied Congress the power to regulate insurance policies (for health care or otherwise) until 1944, when it overruled longstanding precedents forbidding such regulation. *See United States v. S.E. Underwriters*, 322 U.S. 533 (1944).

Until the last few decades, there was very little federal regulation of health care of any kind. Unlike the lengthy history of federal involvement at issue in *Comstock*, "[f]ederal involvement in health is *a fairly new occurrence in U.S. history*." Jennie Jacobs Kronenfeld, *The Changing Federal Role in U.S. Health Care Policy* 67 (1997) (emphasis added). "While a few laws and special concerns were passed prior to the twentieth century, the bulk of the federal health legislation that has health impact . . . has actually been passed in the past 50 or so years." *Id.* Indeed, modern health care in the United States "occupies a completely different place in the economy, in the mind of the public, and in its impact on the government at all levels than it did 100 years ago, at the beginning of the twentieth century, or at the beginning of the country in the late 1700s, when the U.S. Constitution was adopted." *Id.* at 1.

2. The individual mandate does not accommodate state interests.

As this Court explained, Section 4248 of the Adam Walsh Act accommodated state interests by giving states the option of confining the "sexually dangerous" former prisoners themselves. *Comstock*, 130 S. Ct. at 1962-63. Indeed, it even allowed the states themselves to assume custody of the former prisoners. *Id.* at 1963. The federal government could confine a "sexually dangerous" former federal inmate only if the state government consented to it. And the state could, if it wished, assume custody of the inmate in question and immediately set him free. *Id.*

In stark contrast, the PPACA's individual mandate applies throughout the country, even in the many areas where elected state governments oppose it and would prefer a different system of health insurance regulation. Moreover, states are not given any right to avoid the mandate or exempt any of their citizens from it. Significantly, twenty-eight states[10] have challenged the constitutionality of the individual mandate, a strong indication that many state governments believe that the PPACA runs directly counter to their interests. Far from "requir[ing] *accommodation* of state interests," the individual mandate runs roughshod over them. *Comstock*, 130 S. Ct. at 1962 (emphasis in the original).

---

[10] These include the twenty-six state plaintiffs in the instant case, as well as the Commonwealth of Virginia and the State of Oklahoma, both of which have filed separate lawsuits challenging the mandate. See *Virginia v. Sebelius*, 656 F.3d 253 (4th Cir. 2011); *Pruitt v. Sebelius*, No. 6:11-cv-30-RAW (E.D. Okla. Jan. 21, 2011).

3. The individual mandate is extremely broad in scope.

Comstock upheld Section 4248 of the Adam Walsh Act in large part because of its "narrow scope." *Id.* at 1965. It emphasized the fact that the statute "has been applied to only a small fraction of federal prisoners." *Id.* at 1964. By comparison, the individual mandate is extraordinarily broad. It forces millions of people to purchase insurance products against their will. As the text of the PPACA indicates, "[t]he requirement, together with the other provisions of this Act, will add millions of new consumers to the health insurance market." PPACA § 1501(a)(2)(C).

The individual mandate clearly fails at least three prongs of the five-part test laid out in *Comstock*. The other two do little to strengthen it. Whether Congress had legitimately "sound reasons" for enacting the mandate is at best debatable. Many economists believe that it is possible to provide coverage for preexisting conditions without resorting to compulsion on the massive scale undertaken by the PPACA. *See, e.g.*, John H. Cochrane, *What to Do About Preexisting Conditions*, Wall St. J., Aug. 14, 2009. At the very least, the "sound reasons" underlying the mandate are not nearly as strong as those supporting Section 4248 in *Comstock*.

The final consideration outlined in *Comstock* is the "breadth of the Necessary and Proper Clause." *Comstock*, 130 S. Ct. at 1965. This factor, however, is identical in every case. It cannot by itself justify upholding a statute. If it could, the other four considerations would be superfluous.

In sum, a majority of the factors embodied in the five-part *Comstock* test weigh heavily against the mandate. A fourth is ambiguous at best. And the final factor never varies from case to case, and therefore cannot be the basis for upholding legislation on its own. Taken together, these factors are best understood as elements of propriety under the Necessary and Proper Clause that support the conclusion that the individual mandate is not "proper."

CONCLUSION

For the foregoing reasons, the Court should affirm the holding of the Eleventh Circuit that the individual mandate is unconstitutional.

Respectfully submitted,

DANIEL J. POPEO
CORY L. ANDREWS
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave., NW
Washington, DC 20036
(202) 599-0302
candrews@wlf.org

ILYA SOMIN
Counsel of Record
GEORGE MASON UNIVERSITY SCHOOL OF LAW
3301 Fairfax Drive
Arlington, VA 22201
(703) 993-8069
isomin@gmu.edu

February 13, 2012

AMICUS CURIAE BRIEF

No. 11-398

IN THE

United States Supreme Court

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
PETITIONERS

v.

STATE OF FLORIDA, ET AL.,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the 11th Circuit

BRIEF OF YOUNG INVINCIBLES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MINIMUM COVERAGE PROVISION

Paolo Annino, J.D., Ph.D

Counsel of Record
Attorney for Amicus Curiae
Young Invincibles
Public Interest Law Center
FSU College of Law
425 W. Jefferson St.
Tallahassee, FL 32306
pannino@law.fsu.edu
Phone: 850-644-9928
Fax: 850-644-0879

QUESTION PRESENTED

Whether Congress had the power under Article I of the Constitution to enact the minimum coverage provision.

PARTIES TO THE PROCEEDING

All the parties to the proceeding are listed on the cover of the brief.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 9

I. YOUNG ADULTS ARE DISPROPORTIONATELY UNINSURED BECAUSE OF ECONOMIC CIRCUMSTANCES. 9

A. Young adults are less likely to have access to employer-sponsored coverage. 9

B. Quality insurance on the individual market is too expensive for young adults, particularly for those with pre-existing conditions. 11

C. Because young adults are priced out of the health insurance market, the pre-ACA status quo left this segment of the population disproportionately uninsured. 13

D. When young adults do have access to affordable coverage, they enroll. 15

II. THOUGH HEALTHIER THAN THE REST OF THE POPULATION, YOUNG ADULTS FACE SERIOUS HEALTH AND ECONOMIC CONSEQUENCES AS A RESULT OF UNINSURANCE OR LACK OF ACCESS TO CARE. 18

A. Young adults need medical care to treat chronic conditions, respond to sudden accidents or illnesses, and provide critical preventive services. 19

B. Young adults need medical care for pregnancy 20

C. The inability to afford quality insurance results in many health needs either going unmet and ultimately causing a decline in health, or causing young adults to face serious financial difficulties when attempting to pay for care out of pocket. 23

D. The lack of adequate health insurance is an economic barrier to young adults. 26

III. THE ACA WILL OFFER AFFORDABLE INSURANCE TO MOST UNINSURED YOUNG ADULTS. 27

A. The ACA allows young adults to avoid debilitating uninsurance through non-discrimination provisions, the availability of tax credits to purchase insurance on an exchange, and the expansion of medicaid coverage 27

IV. THE MINIMUM COVERAGE PROVISION IS AN ESSENTIAL PART OF A REFORM REGULATORY SCHEME THAT SIGNIFICANTLY BENEFITS THE HEALTH AND ECONOMIC PROSPECTS OF YOUNG ADULTS. 319

CONCLUSION 30

CERTIFICATE OF COMPLIANCE WITH LENGTH 32

CERTIFICATE OF SERVICE 33

TABLE OF AUTHORITIES

Statutes

26 U.S.C. § 36B (2010) 28

26 U.S.C. § 5000A(e)(1)(B) 7, 30

26 U.S.C. § 5000A(e)(1)(A) 7, 8, 30

29 U.S.C. § 207 23

42 U.S.C. § 300gg (2010) 28

42 U.S.C. § 1396d. 23

42 U.S.C § 18022 ..... 22, 23

42 U.S.C. § 18091(a)(2)... ..... 7, 10

Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 ..... 2, 4

Miscellaneous Materials

AHIP Center for Policy Research, *Individual Health Insurance 2009: A Comprehensive Survey of Premiums, Availability and Benefits* (2009) 12

American Pregnancy Association, *Health Insurance for Pregnant Women* (2011), *available at* http://www.americanpregnancy.org/planningandpreparing/affordablehealthcare.html. 21

Commonwealth Fund, *Affordable Care Act Has Potential to Extend Health Insurance to Up to 13.7 Million Uninsured Young Adults, Protect Young Adults from Medical Debt* (2010) 6

Michelle Doty, Commonwealth Fund, *Seeing Red: Americans Driven Into Debt By Medical Bills* (2005) 25

Families USA, *Barebones Insurance Would Do Little to Help Uninsured Working Families* (1999) 14

Families USA, *Health Reform: Help for Americans with Preexisting Conditions* (2010) 19

Robert Fortuna, et. al, *Dependence on Emergency Contracts among Young Adults in the United States*, J. Gen. Intern Med. 642-43 (2010) 20

Jonathan Gruber, Center For American Progress, *Health Care Reform is a 'Three-Legged Stool': The Cost of Partially Repealing the Affordable Care Act* (2010) 29

Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Dependent Coverage of Children to Age 26 Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 27,122 (May 13, 2010) 17, 18

Jeffrey M. Jones, *Income Trumps Health Status in Young Adults' Coverage*, GALLUP (February 26, 2010). 7, 16, 17

Kaiser Commission on Medicaid and the Uninsured, *Underinsured in America: Is Health Coverage Adequate?* (2002) 4

Kaiser Family Foundation, *Impact of Health Reform on Women's Access to Coverage and Care* (2010) 22, 23

Kaiser Family Foundation, *Maternity Care and Consumer-Driven Health Plans* (2007) 21

Kaiser Family Foundation, *Women's Health Policy Facts* (2010) 21

Joyce A. Martin, M.P.H et al., Division of Vital Statistics, National Vital Statistics Report, *Births: Final Data, 2009* (2011) 21

The National Campaign to Prevent Teen and Unplanned Pregnancy, *The DCR Report*, http://www.thenationalcampaign.org/resourcre/dcr/SectionA/DCR_SectionA.pdf 20

Jennifer Nicholson, et al., Commonwealth Fund, *Rite of Passage: Young Adults And the Affordable Care Act of 2010* (2010)5, 23, 24, 25

Jennifer Nicholson, et al., Commonwealth Fund, *Rite of Passage? Why Young Adults Become Uninsured and How New Policies Can Help* (2009).....9, 15, 19

M. Jane Park, et al., *The Health Status of Young Adults in the United States*, Journal of Adolescent Health 39 (2006)..... 20

M. Planty, et al., National Center for Education Statistics, U.S. Department of Education, *The Condition of Education 2008* (2008)..... 26

Patrick Purcell, Congressional Research Service, *Retirement Savings and Household Wealth in 2007*, (April 2009) 24

Lydia Saad, *Verdict on Healthcare Reform Bill Still Divided*, Gallup (June 22, 2010), *available at* http://www.gallup.com/poll/140981/Verdict-Health care-Reform-Bill-Divided.aspx..... 6, 18

The State of Young America, *Databook* (2011), http://www.demos.org/sites/default/files/imce/soya_HealthcareandCoverage.pdf..... 11, 14

The State of Young America, *Health Care and Coverage* (2011), http://www.demos.org/sites/default/files/imce/soya_HealthcareandCoverage.pdf..... 10

The State of Young America, *Poll Results* (2011), http://www.demos.org/sites/default/files/publications/SOYA_PollResults_2.pdf. ...5, 17, 25

U.S. Census, *Current Population Survey: Annual Social and Economic Supplement* (2010)..... 1, 2, 3, 4, 5, 7, 8, 12, 13, 16, 24, 28

U.S. Census, *Current Population Survey: Annual Social and Economic Supplement* (2011)..... 13

U.S. Department of Health and Human Services, ASPE Issue Brief, *2.5 Million Young Adults Gain Health Insurance Due to the Affordable Care Act* (2011)..... 18

U.S. Department of Health and Human Services, Medical Expenditure Panel Survey, http://meps.ahrq.gov/mepsweb/..... 6, 24

Andrew Wilper, et al., *A National Study of Chronic Disease Prevalence and Access to Care in Uninsured U.S. Adults* 149 Annals of Internal Medicine 3 (2008) 25

YI Want Change, *Comprehensive Insurance: Not Insurance In Name Only: YIWC Analysis of Catastrophic Plan and Dependent Coverage* (2009)..... 14

Cindy Zeldin & Mark Rukavina, Demos and the Access Project, *Borrowing to Stay Healthy: How Credit Card Debt is Related to Medical Expenses* (2007)..... 25

INTEREST OF THE AMICUS CURIAE[1]

Founded in 2009 by a group of students during the health care reform debate, Young Invincibles provides a voice for young adults in a policy process that too-often excluded young adults. No advocacy organization provides a comparable voice for young adults in health care policy. Young adults are under-represented in this policy process because of the lack of economic resources and opportunity needed to influence the political debate. Over 12.2 million young adults live below the poverty line. The unemployment rate for people ages 18 to 34 is currently about 12%, compared to between 8 to 9% for the population as a whole. U.S. Census, *Current Population Survey: Annual Social and Economic Supplement* (2010) ("U.S. Census (2010)"). Because of this lack of resources, young adults are not a powerful constituency and thus have not been the focus of attention in health care legislation.

---

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, counsel for *amicus* represents that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Additionally, all parties have filed notices with this Court consenting to the filing of amicus curiae briefs.

Young Invincibles recognized this void and built a coalition of over twenty national youth-focused organizations with a combined membership of more than 1.5 million young adults. This coalition developed a perspective and a policy platform on the evolving health care legislation to ensure that the needs of young adults – 20 million of whom are uninsured - were addressed in the process. U.S. Census (2010).

Young Invincibles has continued its work to give young adults a voice in legislative, regulatory and legal arenas by informing policymakers about the unique needs of young adults and organizing grassroots campaigns to educate its constituency. For example, Young Invincibles serves as a consumer representative to the National Association of Insurance Commissioners, which acts as a forum for the creation of model laws and regulations, presenting research findings on the impact of reform implementation on young adults. Interactions with thousands of young adult members, polling, and extensive research on the challenges they face drive Young Invincibles' advocacy.

Now, of all parties and *amici* to this lawsuit, no one else will present the desperate

situation young adults faced before the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 ("Affordable Care Act" or "ACA") passed. As an organization that has dedicated the entirety of its health care research capacity to reform's impact on young adults, Young Invincibles will provide the data necessary to analyze the commercial activity impacted by the entire regulatory scheme. No other party will describe exclusively the tremendous impact on the lives, improved economic prospects, and career choices that the ACA will create for young adults.

The *amicus* will show by empirical data and detailed analysis that the ACA is vital to the health status of young adults. *Amicus* will dispute any claims seeking to portray young adults as victims of reform, when, in fact, the ACA will benefit this age group more than any other population segment. Accordingly, *amicus* will show that the minimum coverage provision serves as an integral part of a federal regulatory scheme that drastically improves the health and lives of millions of young adults.

SUMMARY OF THE ARGUMENT

There are approximately 20 million uninsured young adults between the ages of 18

and 34. U.S. Census (2010). Young adults both want and need health insurance, and their interests are substantially affected by the decisions made and arguments presented in this case. The disproportionately high uninsurance rate for young adults under the pre-ACA status quo has severe health and economic consequences for this population. As a result, the ACA offers tremendous opportunities for improvements in the health and financial status of young adults, particularly provisions made possible by the minimum coverage requirement. The ACA will – and has already begun to – provide access to affordable health care for most uninsured young adults struggling in the current insurance market, and the possibility of quality care for millions of underinsured young adults.[2] *See* Kaiser Commission on Medicaid and the Uninsured, *Underinsured in America: Is Health Coverage Adequate?* (2002); *see also* Affordable Care Act.

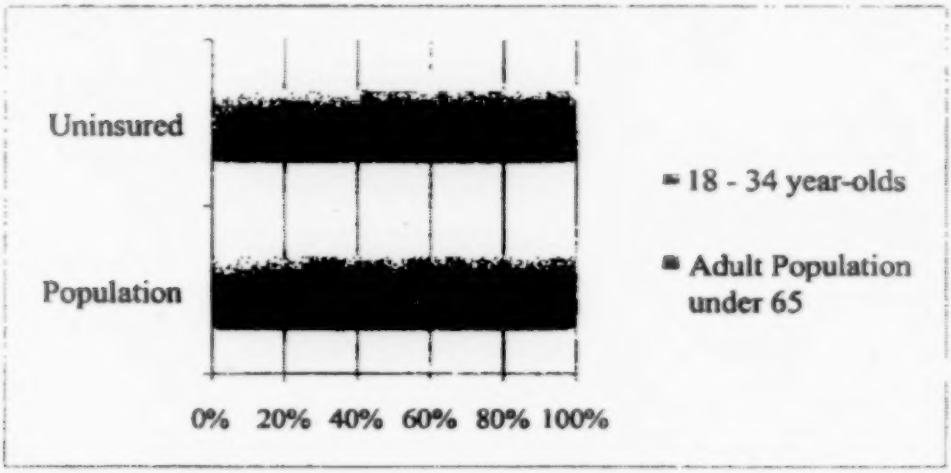
The minimum coverage provision at issue does not impose a significant burden on young

---

[2] Underinsured are defined as those who "have health insurance but face significant cost sharing or limits on benefits that may affect its usefulness in accessing or paying for needed health services." Kaiser Commission on Medicaid and the Uninsured, *Underinsured in America: Is Health Coverage Adequate?* (2002).

adults. On the other hand, eliminating this and other pillars of the ACA would undermine the regulatory scheme and harm the health and economic well-being of millions of young Americans by denying them access to affordable health care.

In 2010, young adults made up 26% of the population under the age of 65, but account for 42% of that population's uninsured. U.S. Census (2010).



Source: U.S. Census (2010).

This high rate of uninsured young adults does not reflect a free choice by young Americans to go without insurance, but rather the lack of affordable coverage options. When health insurance is affordable and available,

young adults enroll at rates similar to older Americans. Jennifer Nicholson, et al., Commonwealth Fund, *Rite of Passage: Young Adults And the Affordable Care Act of 2010* at 11 (2010), ("Commonwealth Fund, Rite of Passage 2010"). In fact, few young Americans – just 5% - actually choose to go uninsured. The State of Young America, *Poll Results*, http://www.demos.org/sites/default/files/publications/SOYA_PollResults_2.pdf. Instead, the vast majority of young people say they lack insurance because of a lack of affordable options or because they have a pre-existing condition. *Id.* The majority of young adults favor the ACA, in part because of these pervasive barriers to coverage for young adults. Lydia Saad, *Verdict on Healthcare Reform Bill Still Divided*, Gallup (June 22, 2010), *available at* http://www.gallup.com/poll/140981/Verdict-Health care-Reform-Bill-Divided.aspx (showing that 57% of 18-29 year olds favor the ACA).

Despite the relatively good health of young adults, they suffer significant economic and health consequences from their uninsurance and underinsurance. Young adults without insurance are likely to avoid seeking medical care due to cost; in a recent study, nearly one-third of

uninsured young adults said their health situation had worsened because they did not have insurance. Commonwealth Fund, *Affordable Care Act Has Potential to Extend Health Insurance to Up to 13.7 Million Uninsured Young Adults, Protect Young Adults from Medical Debt* at 2 (2010). When they do seek care – about half of uninsured young adults access the health care market – they struggle to pay for it, add to the burdensome uncompensated care costs felt by others, and face skyrocketing medical debt and even bankruptcy. *See* U.S. Department of Health and Human Services, Medical Expenditure Panel Survey, http://meps.ahrq.gov/mepsweb/. Young adults need affordable, accessible insurance to maintain good health and prevent them from burdening the medical system when their health deteriorates because they are unable to access the system early enough.

By requiring that all Americans get insurance, the ACA will lower prices to a level young adults can afford, and cover young adults with pre-existing conditions. *See* Jeffrey M. Jones, *Income Trumps Health Status in Young Adults' Coverage*, GALLUP (February 26, 2010) ("Gallup, *Income Trumps*"). Creating affordable individual insurance will also provide young adults, often looking to go back to school,

change jobs, make an interstate move, or generally build their careers and their families, with the financial flexibility and variety of options to switch from the coverage they might currently have. The availability of reasonably-priced, portable coverage will have a strong positive effect on commerce as it will allow young adults to move freely to more productive jobs. *See* 42 U.S.C. § 18091(a)(2).

Moreover, in practice, the minimum coverage provision will not require young adults to purchase coverage unless they can afford to do so at a reasonable price. The Act's tax for failing to maintain minimum coverage will not be assessed against anyone whose family is below the poverty line. 26 U.S.C. § 5000A(e)(1)(B). Nor will it be assessed against anyone who cannot purchase coverage for less than 8% of his or her income. *Id.* at § 5000A(e)(1)(A). Also, the ACA provides subsidies in the form of government tax credits for anyone whose family income is less than 400% of the poverty line; approximately two-thirds of young adults will qualify for subsidies or Medicaid. U.S. Census. Millions of uninsured young adults will also be eligible for the Medicaid expansion, which now will cover childless adults with family incomes up to 133% of poverty. *Id.* As a result, in reality,

everyone required to purchase insurance will be able to afford to do so. The minimum coverage provision simply eliminates the incentive for individuals who can pay for coverage to choose instead to take their chances, passing the costs of medical care on to people who pay for insurance.

The ACA's minimum coverage provision, end to discrimination based on preexisting conditions, the expansion of Medicaid coverage, and the establishment of exchanges with tax credits are all essential pieces of a regulatory scheme that provides young adults with access to affordable care. These provisions collectively provide an opportunity for young adults to get the medical treatment they need without depleting their finances or limiting life opportunities. The minimum coverage provision is an essential piece of the regulatory scheme through which to provide these improvements, and without which the system cannot function.

ARGUMENT

I. YOUNG ADULTS ARE DISPROPORTIONATELY UNINSURED BECAUSE OF ECONOMIC CIRCUMSTANCES.

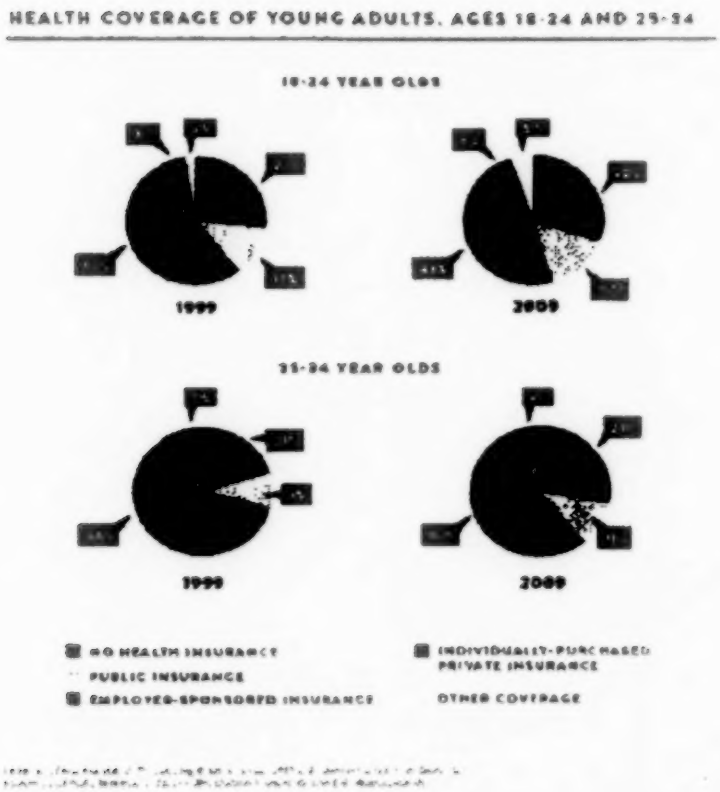
The cultural myth of the "young invincibles" rests on the mistaken inference that young adults do not have health insurance by choice. The public and the media often assume that the high rate of uninsurance among young people is because young adults do not think they need coverage. This assumption is incorrect. Young adults have limited access to the most common form of coverage, employer-provided insurance, and are frequently priced out of individual insurance. As a result, young adults remain uninsured in much higher numbers than older Americans not by choice, but due to economic circumstances.

A. Young adults are less likely to have access to employer-sponsored coverage.

Young adults more often lack access to employer-sponsored health insurance, which is the source of insurance for the vast majority of Americans. Only 53% of young adults, ages 19 to 29, have access to employer-sponsored

insurance, compared to 76% of adults over the age of 30. Jennifer Nicholson, et al., Commonwealth Fund, *Rite of Passage? Why Young Adults Become Uninsured and How New Policies Can Help* at 6 (2009) ("Commonwealth Fund, *Rite of Passage?* 2009"). In the past 10 years, employer-sponsored insurance has dropped by 12.8 percentage points for 18 to 24 year-olds, and by 8.5 percentage points for 25 to 34 year-olds. The State of Young America, *Health Care and Coverage*, http://www.demos.org/sites/default/files/imce/soya_HealthcareandCoverage.pdf. These drops are far greater in comparison to the overall drop in employer-sponsored coverage, which went down 4.4 percentage points in the same time period. *Id.*

Without the option of insurance from employment, and with limited access to Medicaid or tax credits before the ACA takes full effect, this low-income population is forced into the unsubsidized, largely unaffordable individual market, expensive in part due to the $43 billion in uncompensated care that drives up premium costs. *See* 42 U.S.C. § 18091(a)(2)(F).



Source: State of Young America, *Databook* (2011), http://www.demos.org/sites/default/files/publications/SOYA_TheDatabook_1.pdf.

B. Quality insurance on the individual market is too expensive for young adults, particularly for those with pre-existing conditions.

Purchasing insurance on an unsubsidized individual market is too costly for young adults.

The average annual premium of an individual plan offered to a healthy 27-year old is $1,723.[3] AHIP Center for Policy Research, *Individual Health Insurance 2009: A Comprehensive Survey of Premiums, Availability and Benefits* (2009) ("AHIP Center for Policy Research, *Individual Health Insurance 2009*"). To put this in perspective, the average young adult with no access to employer-sponsored insurance earns $14,746 per year, making individual plans effectively unattainable. U.S. Census (2010).

Premiums for those with a pre-existing medical condition are even higher. AHIP Center for Policy Research, Individual Health Insurance 2009. Young people with pre-existing conditions get offered coverage (or refused coverage) on the individual market at about the same rate as members of the generation older than them who also have pre-existing conditions. In other words, the frequency with which the consumer is offered coverage by an individual market insurer for a young adult between 18 and 34 with a preexisting condition is roughly equal to someone with a preexisting condition between the ages of

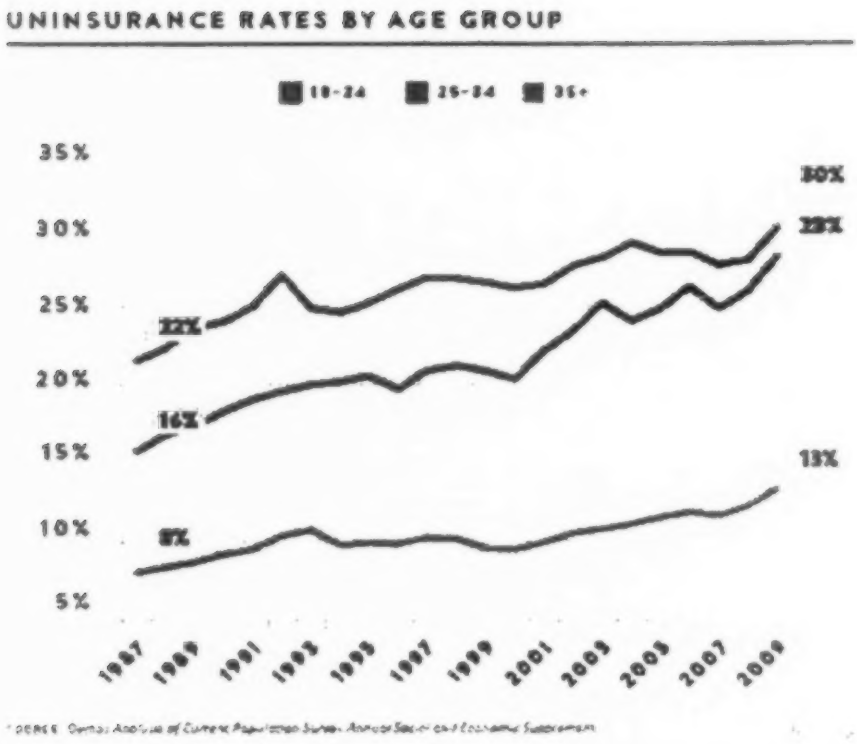
---

[3] This estimate only covers those who actually decide to take up individual coverage, and does not include higher premium offers for those with conditions making coverage more expensive, forcing them out of the individual market altogether.

35 and 49. But the individual between the ages of 35 and 49 is 15% more likely to have coverage through an employer. *Id.*; U.S. Census (2010). Thus, a greater percentage of younger adults with pre-existing conditions have to turn to the individual market, and even if they obtain an offer of coverage, the premiums are higher than the already unaffordable, unsubsidized rates that 18 to 34 year-olds without preexisting conditions must pay. Simply put, less healthy young adults have even fewer healthcare options than older adults in poor health.

C. Because young adults are priced out of the health insurance market, the pre-ACA status quo left this segment of the population disproportionately uninsured.

Without the tax credits or access to Medicaid promised by the ACA, young adults have few coverage options. People ages 18 to 34 make up 26% of the under-65 population, but account for 42% of the uninsured in that age range. U.S. Census (2010). About 19.8 million of the over 70 million young adults between 18 and 34 are uninsured. U.S. Census, *Current Population Survey: Annual Social and Economic Supplement* (2011) ("U.S. Census (2011)").



Source: State of Young America, *Databook* (2011), http://www.demos.org/sites/default/files/publications/SOYA_TheDatabook_1.pdf

Millions more remain underinsured, enrolling in barebones coverage that leaves them without access to everyday care. Families USA, *Barebones Insurance Would Do Little to Help Uninsured Working Families* (1999); *see also* YI Want Change, *Comprehensive Insurance: Not*

Insurance In Name Only: YIWC Analysis of Catastrophic Plan and Dependent Coverage (2009).

The high rate of uninsurance is not voluntary; it is caused by the lack of affordable, available health insurance. This striking rate of non-coverage has serious consequences for young adults, and ultimately for the health care system and the health of the population as a whole.

D. When young adults do have access to affordable coverage, they enroll.

Studies show that when health insurance is affordable and available, young adults enroll. When young adults ages 19 to 29 are offered affordable health insurance through employers, 78% enroll, compared to 84% of adults over age thirty. Commonwealth Fund, *Rite of Passage? 2009*. The similar enrollment rates when presented with affordable options demonstrate that the uninsurance rate is not due to cultural opposition or considered refusal, but cost.

Source: U.S. Census (2010).

Moreover, young adults with higher income levels are far more likely to have insurance. The uninsured rate is just 14% for young adults living over 400% of the federal poverty level ("FPL"), but rises to 46% for young adults making less than 200% of the FPL. U.S. Census (2010); Gallup, *Income Trumps*. With 37% of young adults living below 200% of the FPL, it is no surprise that young adults are the most uninsured age group.

The link between income and coverage refutes the story often told that healthy young people choose not to buy insurance because they do not want or think that they need it. In fact, healthy, higher-income young adults are more likely to have insurance than lower income, often less healthy young adults, completely dispelling unfounded assumptions to the contrary. Gallup, *Income Trumps*.

A recent bipartisan, national poll conducted in the fall of 2011, found that the vast majority of young adults who were uninsured lacked coverage because it was too expensive, their jobs did not offer coverage, or they had a preexisting condition. The State of Young America, *Poll Results*, http://www.demos.org/sites/default/files/publications/SOYA_PollResults_2.pdf. In fact, just 5% of young adults stated that they did not purchase health insurance because they did not want to be insured. *Id.*

Moreover, when the first major new offer of affordable coverage under the Affordable Care Act took effect, young adults quickly took advantage of the option. The provision mandating that family plans offer coverage to young adults up to the age of 26 provided a new

affordable option for high school and college graduates. This enrollment exceeded the original estimations. Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Dependent Coverage of Children to Age 26 Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 27,122 (May 13, 2010). In 2010, the Department of Health and Human Services estimated that 3.4 million 19 to 25 year-olds were currently uninsured, and had parents who had insurance with the possibility of family coverage. *Id.* They estimated that anywhere from 190,000 to 1.6 million uninsured young adults would enroll in 2011. *Id.* They underestimated the dire need for coverage; 2.5 million young adults enrolled on their parents plan in 2011 – a take-up rate of nearly 75% in one year. U.S. Department of Health and Human Services, ASPE Issue Brief, *2.5 Million Young Adults Gain Health Insurance Due to the Affordable Care Act*, (2011).

It is no wonder that polls show that young adults want insurance and are in fact the most supportive of the reform law. Lydia Saad, *Verdict on Healthcare Reform Bill Still Divided*, Gallup (June 22, 2010), *available at* http://www.gallup.com/poll/140981/Verdict-Health care-Reform-Bill-Divided.aspx.

II. Though healthier than the rest of the population, young adults face serious health and economic consequences as a result of uninsurance or lack of access to care.

Not having health insurance or access to care can have negative health and financial consequences, and artificially restrain the career and educational choices facing young adults during this period of their lives. Young adults have chronic illnesses, catastrophic accidents, unpredictable health crises, and need preventive care. Their low incomes lead to serious financial troubles when forced to pay out of pocket. This financial difficulty limits career and educational flexibility for those saddled with expenses or stuck in a less productive job in order to maintain existing coverage. As a result, uninsurance has long-lasting consequences to the health and economic opportunity of young adults.

A. Young adults need medical care to treat chronic conditions, respond to sudden accidents or illnesses, and provide critical preventive services.

Many young adults have chronic conditions requiring ongoing care. Approximately 15% of young adults live with a chronic health condition

such as asthma, diabetes, or cancer. Commonwealth Fund, *Rite of Passage? 2009*. Another 9% grapple with depression or anxiety disorders. *Id.* Moreover, almost 16% of young adults ages 18 to 24 have what is classified as a "preexisting condition," and without the ACA are often excluded from the current market altogether. Families USA, *Health Reform: Help for Americans with Preexisting Conditions* at 3 (2010).

Additionally, young adults need a range of care, from the sudden accidents and unexpected illnesses, to the routine preventive care. Rates of motor vehicle accidents, sexually transmitted diseases, and substance abuse peak in young adulthood. Robert Fortuna, et. al, *Dependence on Emergency Contracts among Young Adults in the United States*, J. Gen. Intern Med. 642-3 (2010). More accidents mean that young adults ages 19 to 29 find themselves in the emergency room more than any other age group under the age of 75. M. Jane Park, et al., *The Health Status of Young Adults in the United States*, Journal of Adolescent Health 39 (2006). Additionally, almost half of pregnancies are unplanned, and three-quarters of unplanned pregnancies are from women under the age of 30. The National Campaign to Prevent to Prevent Teen and

Unplanned Pregnancy, *The DCR Report*, http://www.thenationalcampaign.org/resources/dcr/SectionA/DCR_SectionA.pdf. Even the healthiest young adult, then, is never more than an instant from entering the health care market where they will need insurance to afford proper care. Even if a young adult is lucky enough to avoid injury, he or she still needs preventive care. Prevention, care for chronic illnesses, and emergency care make coverage essential to the short- and long-term health of young adults.

B. Young Adults Need Medical Care For Pregnancy

Young adult pregnant women between the ages of 20 to 34 have had the highest birth rates for their age group than any other age group from 1990 to 2009. Joyce A. Martin, M.P.H et al., Division of Vital Statistics, National Vital Statistics Report, *Births: Final Data, 2009* (2011) at 39.

Women presently face many obstacles in obtaining healthcare. The cost of having a baby can easily reach thousands of dollars, making insurance coverage critical for pregnant women. Kaiser Family Foundation, *Maternity Care and Consumer-Driven Health Plans* (2007),

http://www.kff.org/womenshealth/upload/7636ES.pdf. The cost of delivery alone is between $6,000 and $8,000. American Pregnancy Association, *Health Insurance for Pregnant Women* (2011).

In addition, women are more vulnerable to losing their insurance compared to men, as they are more likely to be covered as dependents. This subsequently places them at greater risk of losing coverage if they become widowed or divorced, their spouse loses his job, his employer drops family coverage or increases premium and out-of-pocket costs to unaffordable levels. Kaiser Family Foundation, *Women's Health Policy Facts* (2010).

Before the Affordable Care Act, only six percent of women purchased coverage through individual insurance markets. These plans have traditionally been able to deny coverage to individuals with a "preexisting condition" such as a pregnancy. Furthermore, plans sold on the individual market often do not cover many important services for women, such as maternity care. Kaiser Family Foundation, *Impact of Health Reform on Women's Access to Coverage and Care* (2010).

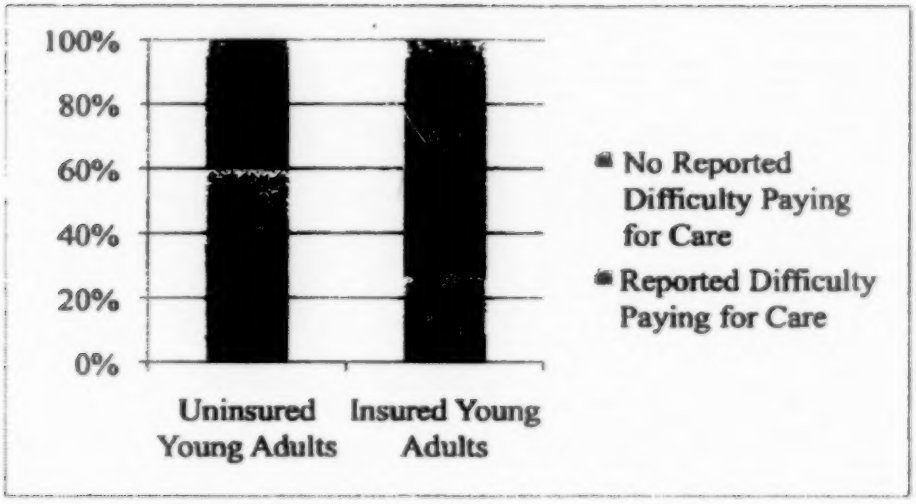
The ACA makes many changes to this market, and subjects all individual insurance plans, not just plans sold in state-based exchanges, to the same regulations regarding discrimination. Therefore, it will ban the practices of gender rating (charging higher premiums to women than men solely based on gender) and preexisting condition exclusions starting in 2014. Furthermore, all plans sold on the individual market will have to cover a minimum level of services, which includes maternity care. *Id.*

The ACA provides additional services that disproportionately benefit young adults. Some of the benefits afforded as a result of the ACA include the requirement for new insurance plans to offer minimum coverage, referred to as essential health benefits, effective 2014. 42 U.S.C § 18022. This benefit package will include categories of services that will benefit pregnant women such as: ambulatory care, emergency services, hospitalization, maternity and newborn care, mental health and substance abuse disorder services. *Id.* In addition, states will receive new grants for home visiting and postpartum depression services. Nursing mothers will receive new workplace protections: break time and private space to express milk. 29 U.S.C. § 207; 42 U.S.C. § 1396d; Kaiser Family Foundation,

Impact of Health Reform on Women's Access to Coverage and Care (2010).

C. The inability to afford quality insurance often results in many health needs either going unmet and ultimately causing a decline in health, or causing young adults to face serious financial difficulties when attempting to pay for care out of pocket.

Unfortunately, the various health care needs of young adults often go unmet, because most young adults without health insurance avoid getting necessary care due to the price. More than three-quarters of uninsured young adults reported not seeking medical care because of high costs, compared to just 37% of young adults with insurance. Commonwealth Fund, *Rite of Passage* 2010. Of those uninsured young adults who sought medical attention, 60% reported difficulty paying for their treatment, compared to just 27% of insured young adults. *Id.*



Source: Commonwealth Fund, *Rite of Passage* 2010.

Paying for necessary medical expenses while uninsured or underinsured can have drastic consequences. Two-thirds of young adults earn below 400% of the FPL, or approximately $43,320. U.S. Census (2010). This limited-income population has little opportunity to build up savings.[4] At the same time, about half of uninsured young adults incur medical costs. U.S. Department of Health and Human Services,

[4] The average net worth of a young adults household under the age of 35 actually decreased by almost 25% between 2004 and 2007 (almost all other age groups either increased in that period; only 55 to 64 had a slight decrease). Patrick Purcell, Congressional Research Service, Retirement Savings and Household Wealth in 2007, (April 2009), *available at* http://www.policyarchive.org/handle/10207/bitstreams/19203.pdf.

Medical Expenditure Panel Survey, http://meps.ahrq.gov/mepsweb/. As a result, when young adults do face a medical crisis, they face medical bankruptcies and burdensome debt at higher rates than their older counterparts. Michelle Doty, Commonwealth Fund, *Seeing Red: Americans Driven Into Debt By Medical Bills* (2005) at 2. For those young adults with medical debt, the mean debt level is $13,303 – higher than any other age group, and credit card debt is 79% higher for those with medical debt – again a much higher difference than for any other age. Cindy Zeldin & Mark Rukavina, Demos and the Access Project, *Borrowing to Stay Healthy: How Credit Card Debt is Related to Medical Expenses* (2007). In a recent national, bipartisan survey, of the 40% of young adults who saw their debt increase over the past four years, 27% said they saw an increase in their medical debt. The State of Young America, *Poll Results*, http://www.demos.org/sites/default/files/publications/SOYA_PollResults_2.pdf.

The inability to afford care adversely affects the health of young adults, sometimes permanently. Nearly one-third of uninsured young adults reported their health worsening because they did not access health care soon

enough, and almost half of uninsured young adults with a chronic health condition reported their condition worsened when they avoided medical treatment due to cost. Commonwealth Fund, *Rite of Passage: 2010,* at 2. Failure to treat these conditions often increases young adults' risk later in life. Andrew Wilper, et al., *A National Study of Chronic Disease Prevalence and Access to Care in Uninsured U.S. Adults* 3 Annals of Internal Medicine 149, 170 (2008).

D. The lack of adequate health insurance is an economic barrier to young adults.

The threat of uninsurance to a young adults' health and finances provides a serious incentive for young adults lucky enough to have coverage to stay tethered to jobs or geographic locations. Some college students can often stay covered by their parent's plan back home and access emergency care while at school. Others need to move for school and purchase their own insurance. *See* M. Planty, et al., National Center for Education Statistics, U.S. Department of Education, *The Condition of Education 2008* (2008). But when they graduate or leave their parent's geographic location, or if they never enroll in college, or if their parent's do not have insurance, the need to stay covered by an

employer limits career prospects and education opportunities of young adults. This has negative economic consequences. To reach their potential, workers must have the option to change jobs, go back to school, or move across country in search of the best opportunities. The lack of health care options stifles economic growth.

These facts point to the same conclusion: the pre-ACA status quo was unhealthy for young adults, strained already difficult financial circumstances, and limited economic and educational opportunities.

III. THE ACA WILL OFFER AFFORDABLE INSURANCE TO MOST UNINSURED YOUNG ADULTS.

The ACA has the potential to provide affordable health insurance to the majority of young adults, giving the millions of young adults who want and need coverage a stake in the outcome of the present case. Each aspect of the regulatory scheme – the minimum coverage provision, the Medicaid expansion, and tax credits – is essential to give this age group a chance at a healthy and financially stable future.

A. The ACA allows young adults to avoid debilitating uninsurance

through non-discrimination provisions, the availability of tax credits to purchase insurance on an exchange, and the expansion of medicaid coverage.

The minimum coverage provision is inextricably interwoven with two other provisions that benefit young adults: the creation of tax credits and exchanges, and the end to discrimination against those with preexisting conditions. Without the minimum coverage provision, sustaining affordable coverage becomes impossible.

The ACA provides insurance tax credits to individuals earning up to 400% of FPL, making health care affordable for millions of young Americans. 26 U.S.C. § 36B (2010). Almost 9 million young adults ages 18 to 34 are limited-income, earning between 133% and 400% of FPL, and will qualify for tax credits. U.S. Census (2010). The tax credits are a huge benefit for limited-income young adults, but could become unsustainable if private insurance premiums are not kept under control through the risk sharing that results from minimum coverage. Similarly, eliminating discrimination against preexisting conditions, including the almost 16% of young

adults with chronic conditions, requires broad sharing of risk to keep coverage affordable.

These reforms will also have a significant impact on the health care system as a whole. Young adults enroll in affordable coverage when available, evidenced by the huge popularity of the new dependent coverage extension. They are also likely to take advantage of the new options. By enrolling in insurance through these reforms, these young adults will be less likely to avoid seeking medical treatment and, as a result, stay healthier and improve the risk pool. This allows the health care system to carry the cost brought by the end to discrimination against those with preexisting conditions, ensuring that all young adults gain fair access to the health care system. 42 U.S.C. § 300gg (2010).

IV. THE MINIMUM COVERAGE PROVISION IS AN ESSENTIAL PART OF A REFORM REGULATORY SCHEME THAT SIGNIFICANTLY BENEFITS THE HEALTH AND ECONOMIC PROSPECTS OF YOUNG ADULTS.

The benefits to young adults of the insurance tax credits and exchange participation cannot be realized without the inclusion of the minimum coverage provision. The status quo creates an indirect tax on premiums to cover

necessary treatment of uninsured individuals, making individual coverage unaffordable for young adults – a predicament discussed previously. Indeed, the uncompensated care that uninsured people received drove up health costs for those who purchased insurance. By including a minimum coverage provision, the ACA ensures that everyone purchases insurance and removes the indirect tax to individual plans, which contributes to the current high cost of premiums.

Additionally, including the important ban on preexisting condition discrimination, and tax credits, but no minimum coverage provision, would mean that the sickest individuals would seek coverage first. This could increase premiums by up to 27% and make insurance coverage even less affordable for young adults. Jonathan Gruber, Center For American Progress, *Health Care Reform is a 'Three-Legged Stool': The Cost of Partially Repealing the Affordable Care Act* (2010), at 5. Relatedly, many uninsured individuals might wait until they are sick to enter the market or receive care from community health centers, a cost that ultimately the insured population must bear – again making premiums unaffordable.

Without the minimum coverage provision, young adults are more likely to be priced out of the exchanges than older, wealthier, age groups. The minimum coverage provision is thus essential to covering limited-income young adults through tax credits and coverage for those with pre-existing conditions, particularly those who are a part of the throng of millions of young adults changing locations. And importantly, it is essential to lowering premiums for all young adults. At the same time, the Act's tax penalties for failing to maintain minimum coverage will not be assessed against any young adult below the poverty line, nor against anyone who cannot purchase coverage that costs him or her less than 8% of his or her income. 26 U.S.C. § 5000A(e)(1)(A-B).

Young adults both want and need health insurance. The minimum coverage provision is an integral part of the regulatory scheme that alleviates the high rate of uninsurance for young adults by reducing the implicit uncompensated care tax on premiums, ensuring coverage of those with pre-existing conditions, and providing much-needed tax credits, thereby providing affordable options as young adults move, go to school, and seek employment.

CONCLUSION

For the foregoing reasons, this Court should uphold the minimum coverage provision of the Affordable Care Act.

Dated: January 13, 2012

Respectfully submitted,

Paolo Annino, J.D., Ph.D
FloridaBar No. 0379166
Attorney for Amicus Curiae
Young Invincibles
Public Interest Law Center
FSU College of Law
425 W. Jefferson St.
Tallahassee, FL 32306
pannino@law.fsu.edu
Phone: 850-644-9928
Fax: 850-644-0879

CERTIFICATE OF COMPLIANCE WITH LENGTH

This brief complies with the type-volume limitation of Rule 33.1(g) of the Rules of the Supreme Court because this brief contains 5,409 words, excluding the parts of the brief exempted by Rule 33.1(d) of the Rules of the Supreme Court.

Dated: January 13, 2012

Respectfully submitted,

Paolo Annino, J.D., Ph.D
FloridaBar No. 0379166
Attorney for Amicus Curiae
Young Invincibles
Public Interest Law Center
FSU College of Law
425 W. Jefferson St.
Tallahassee, FL 32306
pannino@law.fsu.edu
Phone: 850-644-9928
Fax: 850-644-0879

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2012, forty copies of the foregoing were hand delivered to the Clerk of the court for the United States and three copies of the foregoing have been served, via first class mail on all counsel of record as follows:

Donald B. Verrilli Jr.
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
Counsel for Petitioners Department of Health and Human Services, et al.

Michael A. Carvin
Jones Day
51 Louisiana Avenue, N.W.
Washington, DC 20001
Counsel for Private Respondents, NFIB, Ahlburg, and Brown

Paul D. Clement
Bancroft PLLC
1919 M Street, N.W., Suite 470
Washington, DC 20036
Counsel for Respondents Florida, et al.

Dated: January 13, 2012

Respectfully submitted,

Paolo Annino, J.D., Ph.D
FloridaBar No. 0379166
Attorney for Amicus Curiae
Young Invincibles
Public Interest Law Center
FSU College of Law
425 W. Jefferson St.
Tallahassee, FL 32306
pannino@law.fsu.edu
Phone: 850-644-9928
Fax: 850-644-0879